CATHOLIC QUESTION

IN

AMERICA.

Quos contra statuit æquos placitosque dimisit.—CICERO.

Whether a Roman Catholic Clergyman be in any case compellable to disclose the secrets of Auricular Confession.

Decided at the Court of General Sessions, in the City of New-York.

PRESENT,
The Honorable De Witt Clinton, *Mayor.*
The Honorable Josiah Ogden Hoffman, *Recorder.*
Richard Cunningham, Isaac S. Douglass, } *Esqrs. Sitting Aldermen.*

With the Arguments of Counsel, and the unanimous opinion of the Court, delivered by the Mayor, with his reasons in support of that opinion.

REPORTED BY
WILLIAM SAMPSON, Esq.
One of the Counsel in the case.

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1813.

PREFACE.

The general satisfaction given to every religious denomination, by the decision of this interesting question, is well calculated to dissipate antiquated prejudices, and religious jealousies, and the Reporter feels no common satisfaction in making it public. When this adjudication shall be compared with the baneful statutes and judgments in Europe, upon similar subjects, the superior equity and wisdom of American jurisprudence and civil probity will be felt, and it cannot fail to be well received by the enlightened and virtuous of every community, and will constitute a document of history, precious and instructive to the present and future generations.

Report.

This case, like many others of importance, had its origin in a trivial occasion: One Philips, together with his wife, was indicted for a misdemeanor in receiving stolen goods, the property of James Keating. The vigilant justices of the police discovered that after lodging his information before them he had received restitution, and thereupon had him brought up and interrogated him with a view to further discovery. He shewed so much unwillingness to answer, that suspicions fell upon him and he was threatened with a commitment to bridewell. He was admonished that it was his duty on his oath to reveal the whole truth, and the duty of magistrates to enquire into it, and to enforce obedience to the law. He then mentioned that he had received the restitution of his effects from the hands of his pastor, the Reverend Mr. Kohlmann, Rector of Saint Peter's. Thereupon, a summons was issued to that gentleman to appear at the police office, with which he instantly complied. But upon being questioned touching the persons from whom he received the restitution, he excused himself from making such disclosure, upon the grounds that will be fully stated in the sequel. He was then asked some questions of a less direct tendency, as to the sex or colour of the person who delivered the goods into his hands, and answered in like manner. Upon the case being sent to the Grand Jury he was subpœnaed to attend before them, and appeared in obedience to the

process, but, in respectful terms, declined answering. Bills of indictment were found, upon other testimony, against Charles Bradley and Benjamin Brinkerhoff, both coloured men, as principals, and against Philips and wife as receivers. These indictments were filed on the 3d of March, 1813, and on Friday, March 5, the parties having respectively pleaded not guilty, were put upon their trial. One jury was charged with both indictments.

The Court was composed of

The Honorable Piere C. Vanwyck, who sat in the absence of the Mayor, then attending the duties of his office as Lieutenant Governor, at Albany, together with Aldermen Morse and Vanderbilt.

The Jurors balloted and sworn were

Charles Gillard,	Augustus Colvin,
Wm. Sandford,	Philip Earle,
Wm. Englehart,	Elijah Fountain,
James M'Kay,	Samuel Keehards,
Wm. W. Todd,	Patrick M'Closky,
Caleb Street,	Laurence Powers.

Mr. Riker prosecuted as District Attorney, on behalf of the people.

Mr. George Wilson appeared as Counsel for the several Defendants.

Among the witnesses returned on the back of the indictment was the Reverend Anthony Kohlmann, who being called and sworn, was asked some questions touching the restitution of the goods. He in a very be-

coming manner entreated that he might be excused, and offered his reasons to the Court, which are here omitted to avoid repetition, but will be found at length in the sequel.

Mr. George Wilson objected also on behalf of his clients. The case was novel and without precedent, and Mr. Sampson, as amicus curiæ, interposed, and observed that in no country where he had been, whether Protestant or Catholic, not even in Ireland, where the Roman Catholic religion was under the ban of proscription, had he ever heard of an instance where the clergyman was called upon to reveal the solemn and inviolable secrecy of sacramental confession, and with the ready assent of Mr. Riker, obtained an adjournment of the trial until Counsel could be heard in deliberate argument. A juror was thereupon withdrawn and the following Monday was assigned for hearing the argument.

From various intervening circumstances the cause was deferred till the June session. In the interval, by a change of office Mr. Hoffman suceeeded to Mr. Vanwyck as Recorder, and Mr. Gardinier to Mr. Riker as District Attorney.

On Tuesday, June 8, the traversers were put to the bar, and the following jury sworn:

Frederick Everts,	William Rhinelander,
John P. Schermerhorn,	David Mumford,
Samuel Ferguson,	Elijah Secor,
William Walker,	Jacob Scheffelin,
Robert Provost,	Joseph Blackwell,
Benjamin Styles,	William Painter.

The Court was now composed of

The Honorable De Witt Clinton, *Mayor.*

The Honorable Josiah Ogden Hoffman, *Recorder,*

(Who, on account of the importance of the case, took his seat upon the Bench.)

Isaac S. Douglass, } *Esqrs. Sitting Aldermen.*
Richard Cunningham, }

Mr. Kohlman was then called and sworn, and examined by Mr. Gardinier.

He begged leave of the Court to state his reasons for declining to answer, which he did in the following terms:

"I must beg to be indulged in repeating to the Court the reasons which prevent me from giving any answer to the questions just proposed; trusting they are such as to prevail upon the Court to dispense with my appearing as an evidence in the present case.

"Were I summoned to give evidence as a private individual (in which capacity I declare most solemnly, I know nothing relatively to the case before the court) and to testify from those ordinary sources of information from which the witnesses present have derived theirs, I should not for a moment hesitate, and should even deem it a duty of conscience to declare whatever knowledge I might have; as, it cannot but be in the recollection of this same honorable Court, I did, not long since, on a different occasion, because my holy religion teaches and commands me to be subject to the higher powers in civil matters, and to respect and obey them.* But if called

* See St. Mat. c. 22—v. 21. "Render, therefore, to Cæsar the things that are Cæsar's, and to God the things that are God's." St. Paul to the Romans, c. 13—v. 1. 2. "Let every soul be sub-

upon to testify in quality of a minister of a sacrament, in which my God himself has enjoined on me a perpetual and inviolable secrecy, I must declare to this honorable Court, that I cannot, I must not answer any question that has a bearing upon the restitution in question; and that it would be my duty to prefer instantaneous death or any temporal misfortune, rather than disclose the name of the penitent in question. For, were I to act otherwise, I should become a traitor to my church, to my sacred ministry and to my God. In fine, I should render myself guilty of eternal damnation.

"Lest this open and free declaration of my religious principles should be construed into the slightest disrespect to this honorable Court, I must beg leave again to be indulged in stating as briefly as possible, the principles on which this line of conduct is founded. I shall do this with the greater confidence, as I am speaking before wise and enlightened judges, who, I am satisfied, are not less acquainted with the leading doctrines of the Catholic Church, than with the spirit of our mild and liberal Constitution.

"The question now before the Court is this: Whether a Roman Catholic Priest can in any case be justifiable in revealing the secrets of sacramental confession? I say, he cannot: the reason whereof must be obvious to every one acquainted with the tenets of the Catholic

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ject to higher powers: for there is no power but from God: and those that are, are ordained of God: and they that resist, purchase to themselves damnation." 1 Peter, c. 2—v. 13, 14. "Be ye subject, therefore, to every human creature, for God's sake; whether it be to the King, as excelling; or to Governors, as sent by him for the punishment of evil doers, and for the praise of the good."

Church respecting the sacraments. For it is, and ever was a tenet of the Catholic Church, that Jesus Christ, the divine Founder of Christianity, has instituted seven sacraments, neither more nor less.* It is likewise an article of our faith, that the sacrament of penance, of which sacramental confession is a component part, is one of the said seven sacraments.† It is, in fine, the doctrine of the Catholic Church that the same divine Author of the sacraments has laid the obligation of a perpetual and inviolable secrecy on the minister of the said sacrament.‡

"This obligation of inviolable secrecy enjoined on the minister of the sacrament of penance is of divine institution as well as confession itself: it naturally flows from the very nature of this sacrament, and is so essentially connected with it, that it cannot subsist without it. For, when the blessed Saviour of mankind instituted the sacrament of penance, as the necessary means for the reconciliation of the sinner, fallen from the grace of baptism by mortal sin, he unquestionably did it with the intention, that it should be frequented and resorted to by the repenting sinner. Now, it is self evident, that if Christ our Lord had not bound down his minister in the sacrament of penance to a strict and perpetual silence, it would be wholly neglected and abandoned; for, we want neither great learning nor deep sense to conceive, that, in that supposition, the last of the tempta-

* Concil. Florent. in Decreto Eugenii ad Armenos. Concil. Trid. Sess. 6. Can. 1.

† Concil. Trid. Sess. 14. Can. 1 et 6.

‡ Concil Cabilon. Cap. 33. Concil. Lateran. 4 in Canone: *Omnis utriusque sexus*, &c. &c.

tions of a sinner would be to reveal all his weaknesses and most hidden thoughts to a sinful man like himself, and one perhaps in many respects inferior to himself, and whom he knows to be at full liberty to divulge and disclose whatever may be intrusted to him. In short, the thing speaks for itself: Christ the incarnate Wisdom of God would have manifestly demolished with one hand, what he was erecting with the other; unless we believe that he has affixed by a divine and most sacred law the seal of inviolable secrecy, to all and every part and circumstance of what is communicated to his minister through the channel of confession.*

"If, therefore, I or any other Roman Catholic Priest (which God forbid, and of which Church History during the long lapse of eighteen centuries scarce ever furnished an example) if, I say, I should so far forget my sacred ministry, and become so abandoned as to reveal either directly or indirectly, any part of what has been entrusted to me in the sacred tribunal of penance, the penalties to which I should thereby subject myself, would be these: 1st. I should forever degrade myself in the eye of the Catholic Church, and I hesitate not to say, in the eye of every man of sound principle: the world would justly esteem me as a base and unworthy wretch, guilty of the most henious prevarication a priest can possibly perpetrate, in breaking through the most sacred laws of his God, of nature, and of his Church.

"2dly. According to the canons of the Catholic Church, I should be divested of my sacerdotal charac-

* Vide Concil. Cabilon. cap. eod. Vide Tournelly tract. de Sacram. Pœnit.

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ter, replaced in the condition of a Layman, and forever disabled from exercising any of the Ecclesiastical functions.*

"3dly. Conformably to the same canons, I should deserve to be lodged in close confinement, shut up between four walls to do penance during the remainder of my life.†

"4thly. Agreeably to the dictates of my conscience, I should render myself guilty, by such a disclosure, of everlasting punishment in the life to come.

"Having thus briefly stated to this honorable Court, my reasons for not answering the questions of the Attorney General, in the present instance, I trust they will not be found trivial and unsatisfactory."

Mr. Gardinier, then put some leading questions to the witness, amongst others, whether he ever had the goods in his possession. Both the Mayor and Recorder stopped the examination, saying that the law either allowed him the exemption he claimed or it did not, but the Court would not permit that privilege to be frittered away, nor a discovery to be extorted by indirect means, which could not be directly enforced.

Mr. Sampson then said, that Mr. Riker and he stood ready as the Counsel for the witness, to argue the point, and the Court, with consent of parties, adjourned the jury till the following Monday, June 14, that the Court might have time not only to hear the argument, but to give an advised judgment.

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* Vid. St. Greg. Cap. Sacerdos de Pœnit d. 6. Concil. Lateran. 4. in Canone mox citato.

† Ibid.

N.B. Mr. Riker, from the examination he had given to the cause, had become convinced that the exemption was legal, and now offered his services to maintain that opinion. Mr. Wilson was prevented from appearing by a domestic misfortune, the loss of a child, and Mr. Emmet, who would have taken a part in the argument, was prevented by indispensable engagements in another Court.

The day being already far spent, the cause was adjourned till the following day, Tuesday, June the 8th, when Mr. Riker opened the argument as follows:—

May it please the Court,

If in the discussion of the present question, I should discover more than ordinary solicitude, a sufficient apology, I trust, will be found in the novelty and in the magnitude of the cause. On the one hand, the exemption claimed by the Reverend Pastor, is now, for the first time, in this country, brought judicially under examination; and on the other, every enlightened and pious Catholic considers, the free toleration of his religion, involved in the decision that shall be made in this case.

Under these considerations, we respectfully ask of the Court, a patient and a dispassionate hearing: and, we confidently expect to satisfy your Honors, that the law and the constitution are on our side.

To render the argument definite and perspicuous, we shall advance, and endeavour to maintain, two propositions, either of which sustains the witness in the privilege which he claims.

Proposition 1st. That, under the explanation made by Dr. Kohlmann, the 38th Article of the Constitution

of our state, fully protects him in the exemption which he claims, *independent of every other consideration.*

Proposition 2d. That the exemption is supported *by the known principles of the common law,* which will not compel any man, to answer a question, that subjects him to a *penalty* or *forfeiture,* impairs his *civil* rights, or may *degrade—disgrace*—or *disparage* him.

Before, however, I proceed to a vindication of those two propositions, it is proper, and may conduce to a more perfect understanding of the subject, to state some general and leading principles which must be conceded on both sides, and notice some British decisions, which may be supposed to have a bearing upon the case now under examination.

It will not be denied on our part, that the *general* rule is, that every person is bound, when called upon in a court of justice, to testify whatever he may know touching the matter in issue; nor will it be disputed by the Attorney General, that there are exceptions to this general rule, some of which are coeval with the rule itself.—As for example—That no man is bound to accuse himself. That a husband and wife cannot be witnesses against each other, except for personal injuries. That a Counsel or Attorney can never testify against his client. And in this country, the exception has been recognized, as applicable to the Secretary of the United States in certain cases.*

It is obvious, that these exceptions, are founded either upon the positive rights of the party claiming them, upon the maxims of policy, or the general fitness of things.

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* Marbury, v. Madison. I. Cranch. 144.

They have been extended, or rather called forth, as the occasion has required, and a wise tribunal will always engraft them upon the rule, whenever it shall be demanded by the suggestions of reason and good sense.

But, it is contended that no professional character, other than a Counsel or Attorney, is exempted from testifying in a court of justice; and that therefore a Physician, a Surgeon, or a Priest, is bound to disclose all that has been entrusted to him, no matter under what circumstances it may have been confided.

It is, a little remarkable, that the modern elementary writers on the law of evidence* seem to take it for granted that a physician or a surgeon, is in all cases whatsoever bound to testify. They lay down the rule in the most unqualified terms, as if no doubt could exist on the subject, yet, when they refer the reader to authority for what they thus state, they rely solely upon the case of the Dutchess of Kingston.

It is proper to mention the facts in that cause, that we may duly appreciate its weight. The Dutchess of Kingston was tried in April 1776, in the house of Lords, for bigamy. She was indicted for marrying Evelyn Pierrepont, Duke of Kingston, in the life time of Augustus John Hervey, her former husband.

Mr. Cæsar Hawkins (a surgeon) was asked, "do you know from the parties of any marriage between them?" (referring to the first marriage):—To which he observed "I do not know how far any thing that has come before me in a confidential trust in my profession should be disclosed, consistent with my professional honor."†

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* Peake 180.—M'Mally 247.—Swift 95.

† 11 State Trials 243. Fol. 6.

Upon the Lord High Stewart (the Earl of Bathurst then Lord Chancellor) stating the question proposed, Lord Mansfield observed, "I suppose Mr. Hawkins "means to demur to the question upon the ground, that it "came to his knowledge some way from his being em- "ployed as a surgeon for one or both of the parties; I "take it for granted if Mr. Hawkins understands that it "is your Lordships opinion that he has no privilege on "that account to excuse himself from giving the answer, "that then, under the authority of your Lordships judg- "ment, he will submit to answer it: therefore, to save "your Lordships the trouble of an adjournment, if no "Lord differs in opinion, but thinks that a surgeon has "no privilege to avoid giving evidence in a court of "justice; but is bound by the laws of the land to "do it; (if any of your lordships think he has such a "privilege, it will be matter to be debated elsewhere, "but) if all your Lordships acquiesce, Mr. Hawkins "will understand, that it is your judgment and opinion, "that a surgeon has no privilege, where it is a material "question in a civil or a criminal cause, to know wheth- "er the parties were married, or whether a child was "born, to say, that his introduction to the parties was "in the course of his profession, and in that way he "came to the knowledge of it. I take it for granted, "that if Mr. Hawkins understands that, it is a satisfac- "tion to him and a clear justification to all the world. "If a surgeon was voluntarily to reveal these secrets, "to be sure he would be guilty of a breach of honor, "and of great indiscretion; but, to give that information "in a court of justice, which by the law of the land he "is bound to do, will never be imputed to him as any

"indiscretion whatever." The question was then put and answered.*

Upon this single decision, made on the spur of the occasion—without discussion, has the whole body of legal authority, on that point, been erected.

If however, the principle in the case referred to, be true, it by no means follows that a clergyman is bound to reveal what a penitent hath confessed to him in the exercise of a religious rite. The one is under no restraint but that which is imposed by the sentiments of honor—the other may be controlled by the pious convictions of duty, or by the imperious mandates of his religious faith.

Yet, it must be admitted, that the same elementary writers to which I have referred the Court, seem to consider the law as equally applicable to a Priest† as to a Physician or Surgeon, and that a clergyman is bound to disclose a confession, though made to relieve an agonized conscience, or for the holy and all important purpose of seeking pardon of the Almighty!

And now may it please the court, to bear with me while I examine the decisions upon which this rule is attempted to be supported. At the outset I boldly affirm, without fear of contradiction, that the Attorney General can produce but *two* cases, in which the question has ever been raised in relation to a clergyman; neither of which can be of authority in the United States, both having been decided since our revolution.—I go farther—I say the cases would not be binding in Great Britain.

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*11 State Trials 243. Fol. 6.

† Peake 190. M'Nally 253. Swift 95.

The first instance to be found in the books, in which a minister of the gospel, has been called upon, to testify what had been communicated to him by a penitent, was in the case of one Sparkes, who was tried before Mr. Justice Buller. It is not reported, but is cited in a subsequent case, where an interpreter between a client and counsel was not permitted to testify, and which was decided by Lord Kenyon, July 17, 1791. It is stated as follows by Mr. Garrow: "a case much stronger than this, "he said, had been *lately* determined by Mr. Justice "Buller on the northern circuit. That was a case in "which the life of the prisoner was at stake.. The "name of it was the King, v. Sparkes. There the pri- "soner being a Papist had made a confession before a "Protestant clergyman of the crime for which he was "indicted, and the confession was permitted to be given "in evidence on the trial, and he was convicted and ex- "ecuted. The reason (urged Mr. Garrow) against ad- "mitting that evidence was much stronger than in the "present case; there the prisoner came to the Priest for "ghostly comfort and to ease his conscience oppressed "with guilt."*

On this decision of Mr. Justice Buller, Lord Kenyon makes the following observation "I should have paus- "ed before I admitted the evidence there admitted."†

Thus we have the chief justice of England, expressing strongly his dissent, to the adjudication as stated to have been made by judge Buller. This alone, is sufficient to shake its authority.

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* The Case of Du Barre. Peakes Cases. 78.

† Ibid. 79.

It must be recollected too, that it is the decision of a single judge, at the Circuit, which is never considered as binding.

There are other considerations which go far to destroy its influence, if those that have already been urged were not sufficient. The confession was made by a *Papist* to a *Protestant* Priest. It does not appear that the clergyman had any scruples to reveal what had been confessed to him, or that he made any objection thereto. On the contrary, it is expressly stated, that the evidence was *permitted* to be given; and Lord Kenyon remarks, that *he* should have hesitated before *he* should have admitted it to be given.

I may here appeal to every candid mind, and ask whether, the fact, of a clergyman never having before been called upon to testify in a court of justice, what had been thus communicated to him, for spiritual purposes, is not irresistible evidence that the law is otherwise? If the law had not been opposed to such examinations, would not the religious feuds which have agitated and afflicted Great Britain, have led long before to such inquiries? But allow me to call the attention of the Court to the only remaining case. It was decided in Ireland, in 1802, before Sir Michael Smith, bart. the master of the rolls.

In that case "a bill was filed praying to be decreed "the estates of the late Lord Dunboyne; the plaintiff "claimed the same as heir at law, and alledging the "will under which the defendant claimed as a nullity, "Lord Dunboyne having been a popish priest, and hav- "ing conformed and relapsed to popery, which de- "prived him of power to make a will."

"Issue was joined; and the plaintiff produced the "Reverend Mr. Gahan, a clergyman of the church of "Rome, to be examined, and interrogatories to the fol- "lowing effect were amongst others exhibited to him: "What religion did the late Lord Dunboyne profess "from the year 1783 to the year 1792? What religion "did he profess at the time of his death and a short "time before his death? The witness answered to the "first part, viz.—That Lord Dunboyne professed the "Protestant religion during the time &c. but demurred "to the latter part in this way, that his knowledge of "the matter enquired of (if any he had) arose from a "confidential communication made to him in the exercise "of his clerical functions, and which the principles of "his religion forbid him to disclose: nor was he bound "by the law of the land to answer."

"*Master* of the *Rolls* (Sir *Michael Smith* bart.) "thought there was no difficulty in the case, though it "had run into a great length of discussion, which he in- "dulged as being most likely to give satisfaction upon a "question which seemed to involve something of a pub- "lic feeling. But he was bound to overrule the de- "murrer. It was the undoubted legal constitutional "right of every subject of the realm, who has a cause "depending, to call upon a fellow subject, to testify "what he may know of the matters in issue; and every "man is bound to make the discovery unless specially "exempted and protected by law. It was candidly ad- "mitted that no special exemption could be shewn in "the present instance, and analogous cases and princi- "ples alone were relied upon: and, there was no "doubt, that analogous cases and principles were suf-

"ficient for judicial determination. But the principle "must be clear as light, and the analogy irresistibly "strong. That clearness of principle and strength of "analogy did not appear in this case and demurrers of "this nature being held strictly he was obliged to over-"rule it."* He cited a case which is evidently inapplicable to the one before him.†

Upon this adjudication of the *Master* of the *Rolls*, I need only to observe, that it is unsupported by the authority to which he refers. It is a decision of a single magistrate. It is made in a country more remarkable for nothing, than the religious intolerance and biggotry of its laws. Precedents in such a country, and in such cases ought to be admitted, by us, with the most scrupulous caution; and finally, the fact enquired into of Mr. Gahan, had not been communicated to him in the administration of a sacrament of his Church, which in its nature is to be kept inviolably secret. I can see no reason to conceal, nor in our country would any Catholic Clergyman conceal, the fact that an American citizen had died in the Catholic faith. Mr. Gahan may have supposed, that it was his duty, as a pious man, to refuse to disclose, where the disclosure would defeat a person's Will, and work a flagrant injustice, as it obviously would have done in that case.

It may now be demanded, whether the two decisions to which I have referred—the latter before the *Master of the Rolls*—the former impeached by the *Lord Chief Justice* of England, would be binding, even in Great

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* 1 M'Nally 254, 255.
† Vaillant, v. Dodemead 2 Atk. 524.

Britain. They clearly would not be binding. They have not the force of authority. Whoever has read their books of reports, knows, that the English judges do not feel themselves concluded by decisions much more solemn and imposing than those.

It may not be unapt, or time mispent, to recur to a few cases to shew the Court, the liberties which English judges have taken with each other, and how easily they overturn the law, which they themselves, after grave advisement have established! They cannot expect that we should shew them more deference or courtesy, than they shew to themselves.

In a cause before Lord Mansfield* a rule of law was urged. His Lordship said, "The law was certainly "understood to be so, and there are *an hundred cases so determined,*" but they struck him as "absurd and wrong," and he overturned them. Lord Kenyon was pleased to say, "I think that decision did him great honor."†

And we shortly afterwards find Lord Kenyon practising the example which had been set him, and actually overturning a decision of Lord Mansfield.‡ The opinion of that great man, formed after full argument, and sanctioned by the concurrence of all the other judges of the Court of King's Bench, yielded to the influence of Lord Kenyon. In this country, we have, in that instance, persevered in maintaining the law as settled by Lord Mansfield.

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* Harrison, v. Beecles, cited 3 Term Rep. 688.

† Ibid. 3 Term. 689.

‡ Jourdaine, v. Lashbrook. 7 Term Rep. 601. In which the case of Walton, v. Shelly, 1 Term Rep. 296, is overruled.

Lord Loughborough pronounces a decision of Lord Chancellor Parker, *to have been long exploded.**

Mr. Justice Ashurst says, "if there be several cases "which are not reconcilable with reason on one side, "and one sensible case to the contrary, we ought to de- "cide according to the latter."† Lord Mansfield and other distinguished judges of that country, have not hesitated to *make* the case.

But we all recollect what our own Courts have done—and done wisely.

It is only necessary to notice two prominent cases, in which our courts have unshackled themselves of former decisions, and put the law upon the footing of justice and sound sense.

The sentences of foreign Courts of Admiralty were long held as *conclusive* evidence of the facts decided by them, and are in Great Britain to this day, though now grievously complained of by some of its ablest judges. We had adopted the English rule in its full vigour.‡

In 1802, however, this principle was brought under review in the highest court in this state. It was upon that occasion, that one of the judges, whom I have now the honor of addressing,§ pursuing in his senatorial character the dictates of his own mind, overthrew, by the force of argument, the *conclusiveness* of foreign

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* Sumner, v. Brady. 1 Hen. Blac. 655—referying to the case of Lewis, v. Chase. 1 Pierre Williams 620.

† 2 Term 574.

‡ Ludlow & Ludlow, v. Dale, 1799, 1 Johns. Cas. 16. Gorix, v. Low, 1800. Ibid, 341. Vandenheuval, v. United Insurance Company, 2 Joh. Cas. 452.

§ De Witt Clinton.

sentences. He has the satisfaction to find, within the short space of a few years, his opinion every where gaining ground, and a high judicial personage, even in Great Britain, adding thereto the weight of his authority, coupled with that of Lord Thurlow!! "I shall die "(said Lord Ellenborough) like Lord Thurlow, in the "belief that they ought never to have been admitted."*

The other case in which we maintained our judicial independence, is stronger and more emphatic in its character than that which I have just noticed. The rule of law was undisputed by all *legal* writers:—It was to be found in every book upon criminal law:—It was in the mouth of every student. I mean the doctrine *That truth is no justification on an indictment for a libel.*†

Yet, when this rule, came to be drawn into discussion in this state—when the vast talents of a man, now no more! ‡ who was indeed the pride of our bar, were arrayed against it—and when the authorities were maturely weighed, the rule was pronounced to be a legal heresy.—It was exploded. The Legislature by the concurrence of every member of both Houses, vindicated the law. They declared truth to be a justification, "Provided that the matter charged as libellous, was "published with good motives and for justifiable ends." The principle contained in Mr. Fox's libel bill was also recognized and adopted, that the jury should de-

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* Donaldson, v. Thompson. 1 Camp. N. P. Cas. 432. 1808.

† 2 Hawk. P. C. 128. B 1. Ch. 73. S. 6, 4 Blac. Com. 150. 3 Term Rep. 428.

‡ Mr. Hamilton.

cide upon the whole matter, and determine the law and the fact. This *declaratory* act, which, pronounced what the law *was*, received the unanimous assent of the Council of Revision, composed, as is known, of the Chancellor and all the Judges of the Supreme Court.*

Having thus stripped the cause of embarrassment, and shewn, I trust, to the satisfaction of your Honours, that this Court is at perfect liberty, in the judgment that it shall finally pronounce in this cause, to follow the guidance of liberality and wisdom, unfettered by authority; I shall proceed to examine the first proposition which I undertook to maintain, that is, that the 38th Article of the Constitution, protects the Reverend Pastor in the exemption which he claims, *independent of every other consideration.*

The whole article is in the words following:

"And whereas we are required by the benevolent "principles of rational liberty, not only to expel civil "tyranny, but also to guard against that spiritual op- "pression and intollerance, wherewith the bigotry and "ambition of weak and wicked priests and princes have "scourged mankind: This convention doth further, in "the name and by the authority of the good people of "this state, ORDAIN, DETERMINE AND DECLARE, that "the free exercise and enjoyment of religious profession "and worship, without discrimination or preference, "shall forever hereafter be allowed within this state to "all mankind. *Provided*, that the liberty of conscience "hereby granted, shall not be so construed, as to ex-

* Act passed 5th April 1895. And see the case which gave rise to it:—The People, v. Croswell. 3 Johns. Cas. 237—413.

"cuse acts of licentiousness, or justify practices incon-
"sistent with the peace or safety of this State."*

Now we cannot easily conceive of more broad and comprehensive terms, than the convention have used. Religious liberty was the great object which they had in view. They felt, that it was the right of every human being, to worship God according to the dictates of his own conscience. They intended to secure, forever, to all mankind, without distinction or preference, the free exercise and enjoyment of religious profession and worship. They employed language commensurate with that object. It is what they have said.

Again, the Catholic religion is an ancient religion. It has existed for eighteen centuries. The sacrament of penance has existed with it. We cannot in legal decorum, suppose the convention to have been ignorant of that fact: nor were they so in truth. The convention was composed of some of the ablest men in this or in any other nation. Their names are known to the court. A few still live, and we revere the memories of those who are no more. They all knew the Catholic faith, and that auricular confession was a part of it. If they had intended any exception would they not have made it? If they had intended that the Catholics should freely enjoy their religion, excepting always, auricular confession, would they not have said so? By every fair rule of construction we are bound to conclude that they would have said so:—And as the convention did not make the exception neither ought we to make it.

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* Constitution of the State of New-York. Art. 38. 1 Vol. Rev. Laws, 16 17.

Again there is no doubt that the convention intended to secure the liberty of conscience.—Now, where is the liberty of conscience to the Catholic, if the priest and the penitent, be thus exposed? Has the priest, the liberty of conscience, if he be thus coerced? Has the penitent the liberty of conscience, if he is to be dragged into a court of justice, to answer for what has passed in confession? Have either the privilege of auricular confession? Do they freely enjoy the sacrament of penance? If this be the religious liberty, which the constitution intended to secure—it is as perplexing as the liberty which, in former times, a man had of being tried by the water ordeal, where, if he floated he was guilty —if he sunk he was innocent.*

Your Honors,

I can find but one case which bears any analogy to the present. It is an English case. It is that of *Sir Thomas Harrison* against *Allen Evans.* Mr Evans was a *Protestant Dissenter,* and a freeman of the city of London. He had been elected one of the sheriffs of that city, but by law could not take upon himself the office, because, he had not within one year before, received the sacrament of the Lords supper, *according to the rites of the Church of England.*† By a by-law of the corporation a penalty of 600*l* was imposed on all such as should refuse to serve. A prosecution was commenced by the Chamberlain of London against Mr. Evans for the penalty. He relied upon the toleration act.‡ He pleaded that he was a dissenter within the toleration act;

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* 4 Black. Com. 343.

† Act of Parliament 6 May 1661

‡ Passed 1 Feb. 1 year of Wm. and Mary.

that he had not taken the sacrament in the church of England within one year preceding the time of his supposed election, nor ever in his whole life; and that he could not in conscience take it. It was conceded on all hands, that if he took upon himself the office, without having previously received the sacrament according to law, he was punishable.

Though it was obvious to every ingenuous mind that Mr. Evans was, by necessary implication, within the spirit and protected by the true meaning of the toleration act, yet, judgment for the penalty was rendered against him in the sheriffs court: and afterwards affirmed by the Court of Hustings in the city of London. To the honor however, of the house of Lords this affirmance was reversed *nemine contradicente,* notwithstanding the opinion of *Mr. Baron Perrot.**

The observations of Lord Mansfield upon this case, before the British Peers, are too fine to be omitted by me. He exposed, in a masterly manner, that uncandid —Jesuitical—sophisticated attempt to defeat the toleration act. And here let me observe—that our constitution is our great toleration act, made by the people themselves, in their sovereign capacity; and as the end intended to be secured was *religious toleration,* every thing, essential to that end, not leading to licentiousness, nor to practices inconsistent with the peace or safety of the state, is by necessary implication guaranteed by the constitution.

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* 3 Brown Parl. cas. 465. 31 vol. journ. House of Lords p. 458, 470, 475.

When, says Lord Mansfield in the case of Mr. Evans, the Jesuits in France meditated the oppression, and the distruction of the protestants "there was no occasion to revoke the edict of Nantz; the Jesuits* needed only to have advised a plan similar to what is contended for in the present case. Make a law to render them incapable of office; make another to punish them for not serving. If they accept, punish them; if they refuse, punish them; if they say yes, punish them; if they say no, punish them. My Lords this is a most exquisite dilemma, from which there is no escaping; it is a trap a man cannot get out of; it is as bad persecution as that of Procrustes. If they are too short, stretch them; if they are too long, lop them. Small would have been their consolation to have been gravely told—the edict of Nantz is kept inviolable; you have the full benefit of that act of toleration, you may take the sacrament in your own way with im-

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* This religious order has been traduced both by ill informed Catholics and Protestants. The Jesuits have been proscribed throughout all Europe, except in Russia. It would be doing the highest injustice to the United States of America, to allow it to go abroad to the world that they have participated in the abuse which has been heaped upon that order. It cannot be doubted by any intelligent or well informed man, that policy and prejudice, have conspired more than any thing else, to pourtray that learned body in an odious light, and to hold them forth as faithless—designing and subtle. The fact is, that no class of men have manifested greater zeal for the Christian religion—none have taken more pains to diffuse its benefits to mankind—none have laboured more to carry it to the distant regions of the earth than the Jesuits. In learning they have been surpassed by none.—We beg leave to refer the reader to a note on this subject in the appendix.

"punity; you are not compelled to go to mass. Was "this case but told in the city of London as of a pro- "ceeding in France, how would they exclaim against "the Jesuitical distinction! and yet in truth it comes "from themselves; the Jesuits never thought of it;— "when they meant to persecute, their act of toleration, "the edict of Nantz, was repealed."*

Apply this to the case now before the Court. We tell the Catholics—yes, you shall have the full benefit of the constitution; you shall have the "free exercise "and enjoyment of religious profession and worship;" you shall have your seven sacraments; your Priest shall freely administer the sacrament of penance; you shall all enjoy the consolation of auricular confession; and as we know that your Priest cannot according to his religious faith, reveal to any person in the world, what passes in confession;—we will not compel him— we will only consign him to prison, and peradventure superadd a fine which he can never pay:—or, if your Priest should violate the seal of confession, and reveal what the penitent hath disclosed—far be it from us to violate the constitution; the penitent shall freely enjoy "his religious profession and worship."—He has the full benefit of it. We only shut him up in the State

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* See Lord Mansfield's opinion 41 vol. Gentlemans Magazine 65.

N. B. The Edict of Nantz, was in fact repealed by Lewis the 14th, and not by the Jesuits.—It could not be repealed by that order. Whether the revocation of the Edict of Nantz proceeded from a spirit of persecution on the part of the French government, or from a necessity of securing the throne against the incessant attemps made by the Hugenots, to subvert it, is a point of historical fact that cannot be rightly decided but by perusing the historians of both parties of that time.

Prison, or otherwise punish him according to law. Is there, in the republic, a man who does not see in this the most scandalous sophistry? Is there, on earth, a man who would not abhor it?

The decision of the Peers in the case of the dissenter is important as a rule of construction. The toleration bill "left the dissenters to act as their consciences shall "direct them, *in matters of religious worship.*"* It secured nothing more. Yet the Lords rightly held, that by necessary implication, it extended to the exemption claimed by Mr. Evans. Our constitution is much more broad and explicit. The object was to secure, "to all "mankind the free exercise and enjoyment of religious "profession and worship, without distinction or pre-"ference." Every thing essential to that object, is by necessary implication, secured by the constitution; unless it leads to acts of licentiousness, or to practices inconsistent with the peace or safety of the State.

We have no *statutory* regulation upon the subject now under consideration, and the principles of the *common law* are accurately and strongly laid down by Lord Mansfield. His words are these, "*My Lords, there* "*never was a single instance, from the Saxon times* "*down to our own, in which a man was ever punished* "*for erroneous opinions concerning rites or modes of* "*worship, but upon some* POSITIVE LAW."

Thus it is clear, in every possible view which we have taken of the question, that the exemption claimed by Dr. Kohlmann, is fully supported by the *enacting clause of the Constitution.* It only remains to be seen, who-

* 4 Blac. Com. 54.

ther this right be impaired by the *proviso* in the Constitution.

The words are, "Provided, that the liberty of conscience hereby granted, shall not be so construed, as "to excuse acts of licentiousness, or justify practices "inconsistent with the peace or safety of this State." Now, unless it can be shewn, that auricular confession tends to the excuse of licentiousness, or justifies practices inconsistent with the peace or safety of the State, we cannot be affected by the proviso.

But let us see how it stands. Does auricular confession excuse acts of licentiousness? If the Catholics held that the confessor could unconditionally forgive every, or any sin, which might be committed; or if they held that he could forgive *upon condition that they confessed such sin;* a sinner, on such terms, might go on and repeat his sins at pleasure; and then it might be said, that auricular confession is within the proviso of the constitution. But from a book* that contains the Catholic creed on this point, and which my Rev. client has put into my hands, I find the fact to be altogether otherwise. The Catholic holds that his priests can absolve no one, but the "*truly penitent sinner,*" that he must come to them "making a sincere and humble "confession of his sins, with a true repentance, and "firm purpose of amendment, and a hearty resolution "of turning from his evil ways; and that whosoever "comes without the due preparation; without a re-"pentance from the bottom of his heart, and a real in-

* The Council of Trent, Sess. 14.

"tention of forsaking his sins, *receives no benefit by the* "*absolution; but adds sin to sin by a high contempt of* "*God's mercy, and abuse of his sacraments.*"

*According to our faith,** give me leave to ask, whether a sinner, under such convictions and resolutions, looking to, and confiding implicitly in the Saviour of the world, would not, through the merits of that Saviour, be absolved from his sins? I answer he would. It is the faith of all Protestants.

It requires no observations of mine, to shew that nothing in the Catholic creed, in this point, excuses or encourages licentiousness. In the instance before us it has led to a restoration of the property to the true owner, and it is known to be attended in a multitude of cases with great good. The life of HENRY the FOURTH, of France, was undoubtedly saved by it, though he afterwards fell a victim to the fanaticism of Ravillac.(1) If we could legally and constitutionally compel the clergyman to reveal the name of the penitent, who would afterwards go to confession? What would be gained to the State?

Is auricular confession dangerous to the *peace* or *safety* of the State? We know that it exists and is practiced in Russia—In Spain—in France—in Portugal—in Italy—in Germany, and in most of the countries of Europe. Is *their* peace, or *their* safety disturbed by auricular confession?

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* The Protestant faith.

(1) See appendix.

If, however, it be necessary for me to add any thing further, to repel this objection to auricular confession; I will do it by reading the sentiments of an elegant writer and an able lawyer; and if it gives weight to the argument, it may be observed that he was not friendly (at least in his writings) to Catholics or Protestant Dissenters. I mean Sir William Blackstone.

After speaking of Protestant Dissenters, and remarking, that the experience of their "turbulent dispositions" in former times, occasioned several disabilities to be laid upon them, he proceeds to notice the Catholics. He says, "as to the papists, what has been said "of the protestant dissenters, would hold equally strong "*for a general toleration of them;* provided their "separation was founded only upon difference of *opi-* "*nion in religion,* and their principles did not also ex- "tend to a subversion of the *civil* government. If once "they could be brought to renounce the supremacy of "the Pope, *they might quietly enjoy their seven sacra-* "*ments, their purgatory, and* AURICULAR CONFESSION; "their worship of relics and images; nay, even their "transubstantiation. But while they acknowledge a "foreign power, superior to the sovereignty of the "kingdom, they cannot complain if the laws of that "kingdom will not treat them upon the footing of good "subjects."*

Here then, we have the explicit admission of Mr. Justice Blackstone, that auricular confession is innocent, that it, with all the other rites and ceremonies of the

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* 4 Black. Com. 53, 54, 55.

Catholics, might be quietly enjoyed by them; and but for their maintaining the supremacy of the Pope, he sees no reason why they should not be *universally tolerated.* With regard to the supremacy of the Pope, we know that to be merely spiritual. They consider him the head of the church; but politically, or as connected with government, or civil society, they acknowledge no supremacy whatsoever in the pope. History shews us, that Catholic princes have oftentimes gone to war against the Pope in his character of a temporal prince.*

The great body of the American people are protestants. Yet our catholic brethren have never hesitated to take up the sword with us, and to stand by us in the hour of danger. The Father of his country—the illustrious conductor of the Revolution, did not hesitate in the face of the nation to do justice to their revolutionary services—to their good conduct as citizens—and to the aid which they rendered us in the establishment of our free government. His sentiments are such as were to have been expected from that exalted character. "As mankind (says he) become more liberal, they will "be more apt to allow, that all those who conduct themselves as worthy members of the community, are "*equally entitled* to the protection of civil government. "I HOPE TO SEE AMERICA AMONG THE FOREMOST NATIONS IN EXAMPLES OF JUSTICE AND LIBERALITY." "He concludes with wishing them "every temporal and spiritual felicity."†

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* See appendix.

† General Washington's answer to the Congratulatory Address to him by the Catholics, in 1789.

Having said thus much upon the question as arising out of the constitution, I shall resign it to the very learned Counsel who is associated with me; in full confidence that if a doubt still exists, it will be dissipated by the force of his talents.

I now proceed to a discussion of the second proposition, that is, that the exemption claimed by Dr. Kohlmann, is supported *by the known principles of the common law*, which will not compel, any man, to answer a question, that subjects him to a *penalty* or *forfeiture* :— impairs his *civil* rights :—or may *degrade*, *disgrace*, or *disparage* him.

This is a subject of technical law. I shall treat it as such. I think I can say, with confidence, that I have fully examined all the authorities in relation to it.

I need not refer to books, to shew that a man is not bound to accuse himself of a crime. That he is not—is a maxim as old as the law itself. It is equally clear, that he is not bound to answer a question in a Court of justice, which subjects him to a penalty or forfeiture.*

It may however be contended that the other branches of the proposition, which is now under consideration are not so clear. 1st. Is a witness bound in a court of common law to impair his *civil* rights? I know that a doubt has lately been raised upon the question. I am aware of the case of Lord Melville in England, and of the *declaratory* statute which was passed in consequence

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* Raynes qui tam, v. Spicer. 7 Term Rep. 178. 2 Fonb. Equ. 492. 1 Atk. 539. Wallis, v. Duke of Portland. 3 Ves. Jun. 494. Mitford's treat. 157, 158, 231. Swift's Ev. 77.

of it. But the Court will be pleased to recollect that the judges were divided amongst themselves* and the opinion of the majority is contrary to the language of the books.† In the United States the decisions are all against it.‡ In a late case in Pennsylvania the principle adopted in Lord Melville is noticed and explicitely rejected. The judge saying. "I recollect the case of "Lord Melville; it never received my approbation, "and as it took place since the revolution, it is of no "authority over this court. It was a decision in violation of the rights of man, and in opposition to the laws "of nature. I have always overruled a question that "would affect a witness *civilly*, or subject him to a "criminal prosecution; I have gone farther and where "the answer to the question would cover the witness "with *infamy* or *shame*, I have refused to compel him "to answer it."§

In Great Britain it has been decided by Lord Kenyon‖ that a witness, under a subpœna *duces tecum*, cannot be compelled to produce a paper which constitutes part of his title, or would expose him to an action. The principle has been recognized by Lord Ellenborough in a

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* 1 vol. American Law Journ. 223 232.

† Peakes Ev. 194. 2 Raym. 1008. Hawkins, v. Perkins. 1 Stra. 406. 8 Term, 590.

‡ Stores, v. Wetmore. Kirby 203. Starr, v. Tracy. 2 Root 528 Clairbourn, v. Parish. 2 Washington. 146. Connor, v. Brady. Anthon's N. P. Cas. 71. Smith's Ev. 77.

§ The case of T. W. Bell. Brown's Rep. 376.

‖ Miles, v. Dawson. 1 Esp. Cas. 405. And see also Peake 194, Swift 197. 2 Fonb. 487.

subsequent case, in which he observed that it was "a "proposition too clear to be doubted."*

[Here the Attorney General interrupted Mr. Riker, and stated that he did not mean to deny the law, to be as the counsel had contended it was in his argument.]

It being thus conceded by the public Prosecutor, and supported by reason and authority, that a man cannot in a Court of common law, be compelled to give testimony which shall impair his civil rights; I shall proceed to examine the remaining branch of the proposition. 2d. Can a witness, by the principles of our law be forced to *degrade—disgrace*, or *disparage* himself?

And here too, some confusion prevails in Great Britain on this point. I know that it has there in a few instances, been held that a person is bound to answer where his answer may reflect upon himself: As where a bail was asked "If he had ever stood in the pilory for perjury."† I know too that a respectable writer on the law of evidence‡ declares that a witness who has been convicted of an *infamous* crime, and has suffered the execution of the judgment, may be questioned as to the fact; and may be asked "whether he ever was tried for, or *charged* with a particular offence," and is bound to answer the question. I know however that another learned writer who has treated of the same subject,§ and in the same country, has severely questioned the propriety of such examinations, and says "the highest and most enlightened characters in the profession are much divided

* Amey, v. Long. 9 East 485.
† Rex, v. Edwards. 4 Term. Rep. 440.
‡ M'Nally 258.
§ Peake 129.

on the point." He considers the law as unsettled.* Some of the judges he observes "have laid it down as "a rule that a witness shall not be rendered infamous, "or even *disgraced* by his own examination."†

Lord C. J. Treby is decisive against such a mode of examination.‡ So is Sir W. Blackstone§ and Lord Ellenborough has in a late case branded it with his disapprobation‖ so too has Lord Alvanley.¶ It is also shaken in the Kings Bench as late as the 47. Geo. 3.** The weight of authorities in Great Britain are, in my opinion unequivocally against it; and in this country the course and current of the decisions are clearly in opposition to it. So too is an American writer, on the law of evidence.†† I shall close this subject by referring the Court to a book in which all the cases are collected.‡‡

Apply then those rules to the case before us. Dr. Kohlmann informs us under the solempity of an oath, that besides violating his religious faith and committing the greatest impiety, he should if he revealed what passed in confession, be degraded in the Church—he would forfeit his office—he would be stripped of his sacerdotal character—he would lose his clerical rights—he would be disgraced in the eyes of all Catholics—in fine he would be rendered infamous, and according to his belief have to do penance for the residue of his life.

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* Peake 130. † Ibid. ‡ Ibid 135.
§ 3 Blac. Com. 370.
‖ Rex, v. Lewis. 4 Esp. cas. 225.
¶ M'Bride, v. M'Bride. 4 Esp. Cas. 242.
** Rex, v. Inhabitants of Castell Careinion. 8 East 77.
†† Swift's Evi. 52. 53.
‡‡ 2 Vol. Goulds Edit. Esp. part 2. p. 401—404.

Your Honors,

I confess I feel a deep interest in this cause. I am anxious that the decision of the Court should be marked with liberality and wisdom. I consider this a contest between toleration and persecution. A contest involving the rights of conscience. A great constitutional question, which as an American Lawyer, I might, with strict right and perfect propriety have discussed, independent of adjudged cases. To compel the Reverend Pastor to answer, or to be imprisoned, must either force his conscience or lead to persecution. I can conceive of nothing, more barbarous—more cruel—or more unjust than such an alternative. To compel him to answer, against his religious faith or to confine his person, would be the highest violation of right that I have ever witnessed. It would cast a shade upon the jurisprudence of our country. The virtuous and the wise, of all nations, would grieve that America should have so forgotten herself, as to add to the examples of religious despotism!

I cannot express my convictions on this important and delicate subject, better than in the language of that enlightened judge whose opinion I before quoted.* "Conscience is not controllable by human laws, nor "amenable to human tribunals. Persecution or at- "tempts to force conscience, will never produce convic- "tion, and are only calculated to make hypocrites, or— "Martyrs."

"There is nothing, certainly, more unreasonable, "more inconsistent with the rights of human nature,

* Lord Mansfield.

"more contrary to the spirit and precepts of the Chris-
"tian Religion, more iniquitous and unjust, more im-
"politic than PERSECUTION. It is against natural re-
"ligion, revealed religion, and sound policy."

Thus have I closed a subject of vast interest to the parties concerned. I could have wished that my argument had been more perfect, and more persuasive. The learned counsel however who is associated with me will more than supply its defects. It only remains for me to make my acknowledgments to the court for the very attentive hearing which it has been pleased to give me, and to express the entire confidence which my reverend client feels, in the wisdom and in the purity of those, to whose judgement he now cheerfully submits himself.

After Mr. Riker had finished, Mr. Blake, who had come into court with the clergymen and trustees of the church, rose and made a few grave and impressive observations. He said that he had come unprepared to speak, and with a determination rather to be silent. For though the question must be considered of high importance to every member of the Roman Catholic Church, and to him among the rest, yet he was more willing that it should be discussed by the gentlemen into whose hands it had fallen, and from whom it could not fail to receive every justice. He approved of the view which Mr. Riker had taken of the question, and affirmed that as well by the principles of the common law, as by the constitution; the privilege of the witness was secured. He animadverted upon the doctrines of the British, and still more on those of the Irish code, as respecting the Catholic religion, and said, as it was the first, so he hoped

it would be the last time that he should ever hear of such a question, being brought forward in a court of justice.

Mr. Gardinier, the District Attorney, began by saying, that, he had with great reluctance, consented to bring up the present question for discussion; because it was not of so much public importance that the offence charged against the accused (receiving stolen goods) should be punished, as that the repose of a respectable religious sect should remain undisturbed. And he had therefore, upon hearing of the question, given out, that he should enter a *nolle prosequi* in this case. And should have done so, if he had not received a very earnest request from the Roman Catholic Church, urging to bring the point now before the court to a decision. That having concluded to do so, he hoped that what he had to say, would give offence to none. It was a question delicate and tender in its nature, and he foresaw, that it would be scarcely possible to touch it, even argumentatively, without giving some degree of pain. But his duty now compelled him to proceed, and to examine whether the priests of the Roman Church were indeed entitled to a privilege to which no other persons asserted the least pretention: that of concealing their knowledge of matters which it concerned the public good and the public safety to have disclosed? He proposed to examine this question on the basis of the common law and of the constitution.

First. The common law. It is a principle of that law, that one of the primary duties of a citizen, is to disclose all his knowledge concerning matters connected

with the public good. On this point there can be no dispute. There is however, an exception to this principle. An attorney may not disclose his clients secrets. But then the exception only proves the rule; and unless the counsel for the defendant can shew that, the knowledge obtained by a priest in the course of confession, has also been established, as an exception, the general rule must prevail, and the priest of course must answer. He said the counsel for the defendant had produced no case in which the privilege of such a priest had been recognized; but that in all the cases cited, a contrary doctrine had been held. The counsel had indeed *endeavored* to shew that these cases did not go the full length of expressly establishing the rule, that the priest should answer; with what success the court would decide. He should not press those cases, because they were not necessary to his argument, for the right to examine this priest in this case, grew out of the general rule that every citizen must answer; and unless it could be shewn by some adjudged case that he is privileged, it is of no use to object either to the authority or argument of the cases cited. He should not therefore (he said) follow the counsel through those cases; it was enough for the purpose of this argument—*first;* that under the general rule, the priest is obliged, in common with every other member of the community to answer—*secondly;* that there is no case in which he was ever exempted; and, *thirdly;* that the decision in one, and strong bearing of every case that has been decided, or agitated in relation to this point, is in support of the general rule; and in exclusion of the exception attempted to be set up against

it. At common law, therefore, the priest has no privilege.

It remains to enquire therefore,

Secondly. Does the constitution of the state give this privilege in this case.

It would not be disputed he said, that the people of the state of New-York, were at the time of making their constitution, a *Christian, Protestant People.* But aware of the injustice and evils of religious intolerance, they wisely and magnanimously resolved, that not only every section of the great protestant church should be equal with every other, but that persons of other religions should also be equal to them—but it was never intended that any one should ever be *superior* to any other. To tolerate religious profession and worship is one thing; to allow any person whatever, to conceal matters upon the knowledge of which the public safety may depend, is another, for said he, it is palpable that the pretention here set up, is inconsistent with the safety, and he should say of course therefore, with the rights of society: If the priest remains silent, crime remains unpunished—and therefore the dilemma is this, shall the priest of a particular sect, or the society which is composed of all the sects, prevail?

Mr. Attorney then proceeded to prove that the punishment of crimes is essential to the public safety. That punishment cannot take place, if witnesses are excused from testifying to their knowledge of crimes. And by consequence that a tenet, which makes it a religious duty to conceal this knowledge, thus necessary to the public safety, however it may be seriously believed in, by its professors, comes within the spirit of the constitu-

tional proviso; which is in these words, "*Provided* "that the liberty of conscience hereby *granted*, shall "not be so construed as to excuse acts of licentiousness, "or justify *practices*, inconsistent with the peace or *safe-* "*ty* of this state." The liberty of conscience is *granted* let it be remarked, and by a *protestant* people to all *others*—but these cannot be entitled to do things, inconsistent with the peace and safety of the grantors. Yet if the priests of the Roman church are excused from answering, they are permitted to hold the safety of their benefactors in their hands—nay they are bound to disregard it. A protestant must answer all questions, and by those answers protect all the society, and the Roman with the rest. But the latter, according to the pretension set up, is to be indulged in endangering all the rest. And this is called liberty of conscience! This, the equality in religious freedom, to which they aspire! If it were merely claimed that they might be silent, when they should honestly deem it expedient—we should never be induced to yield the claim, because society can never acknowledge the expediency of concealing crime. But the pretension far exceeds this. They actually claim the liberty of unqualified and inviolable subjection to silence! The liberty of not being permitted to speak—the liberty of being compelled to be silent—and that in cases, when it may concern the safety of the whole state, that a disclosure should be made. Can society endanger its safety, by yielding to such a claim? Can it be supposed that the representatives of a *protestant* people, intented to be so very tolerating, as to deny to *Roman Catholic priests*, even the right of saving the state? It would have been a suicidal act. Suppose a religious

sect should sincerely believe it a duty to sacrifice the first born of every family, belonging to that sect—would it be permitted? Soppose a Roman Catholic priest knows the actors in a treasonable conspiracy, to deliver our city to the enemy, and if the persons can be known the plot may be defeated: Shall he be permitted to say, my religion forbids me from preventing the horrible effusion of blood, which must follow, for my knowledge is gained in confession!

Upon what principle is it, that *quakers* refusing to bear arms, are compelled to pay a fine or commutation! Fine is *punishment;* for what? For an *offence.* What is the *quakers offence?* that he refuses to yield his personal services, for the protection of the Commonwealth. *Why* does he refuse? because the word of God, does in his judgement, forbid man to shed man's blood. *The excuse is not received!* his personal services, are indeed dispensed with—but he is made to pay. The liberty of conscience is, in express terms, secured by the constitution of almost all the states. Yet in every one, is the quaker made to *pay* for his liberty of conscience. And why? because political lawyers can never acknowledge a principal in society, which exeuses any individual from the duty of giving his aid, for the protection and safety of the society. In this state, our constitution has indeed specially provided for them. But in the other states not. They are every where compelled to pay, for omitting to do military duty—and just so is every other citizen.—Where is the quakers liberty, of conscience then? Lost in the superior duty he owes society. Whether the quakers have been justly dealt with; whether their liberty of conscience has not been trifled with, is not *now*

to be discussed. The pratice of every state, has established the principle that, the safety of the state being the first duty, the quaker shall pay a fine as a punishment, for omitting to do what his religion forbids.

Why then, shall the Roman priest be excused from the same great duty? why shall society allow *him* to omit doing that which is essential to its safety?

But confession is a *sacrament*. How can secrecy be a *part* of that sacrament? The penitent has a right to confess. Let him confess; he is not punished for *that*, but for his *crime*. If it be his *duty* to confess, then that duty exists whether the confession be secret or not. And if he be a true worshipper he will confess at every hazard. If he be not, it matters little, whether he confess or not. Let confession be a duty—a sacrament. Let the texts of scripture speaking of it be considered decisive in its support. It is not from scripture that the right of secrecy is claimed to be derived. It is a compact or engagement of the priest with his church; and if you will, with the penitent. Secrecy is not of the essence of the sacrament; it is a privilege claimed because of its being reasonable—and of course is to be decided on the ground of reason and law, and those alone. The privilege claimed by the catholic penitent, in this case, then, is not, that he may ease his conscience by confession—but that such confession shall never rise up against him; the privilege claimed by the priest, is not, that he shall be allowed to hear, but that he shall be forbidden to tell. What has the constitution secured? "The free exercise and enjoyment of religious *profes-*
"*sion* and *worship*, without discrimination or *prefer-*
"*ence*." Now the priest discloses the confession.

How is the "*profession or worship*" of the catholic less free than if it were secret? Or how can it be maintained, that silence on the part of the priest, is part of the religious "*profession or worship*" of the catholic layman.

But, by the constitution, there shall be neither "*discrimination nor preference.*" Now, what a protestant layman should confess to a protestant minister, that minister would be compelled to disclose. The catholic not. Is not here, then, a "*discrimination,*" a "*preference,*" not only forbidden by the constitution, but dangerous to all the sects that compose the society.

Not only where life and limb, but where property is in controversy, the attorney is privileged from disclosing the secrets of his clients. This is not upon the mere ground that an attorney is necessary to the party—but because the law itself, has instituted this office, and made this privilege one of its inherent properties; and therefore is this privilege as immemorial as the law itself. If the principle were not as laid down, then would a physician, employed in the cure of a disreputable disease, be excused from answering, on the ground that the disease works a speedy dissolution, and the physician is *necessary* to prevent death. Yet in our own state the physician has been made to testify in such cases.

It has been insisted by the opposite counsel, that, as the Roman catholic church, might, and probably would take away this priest's office and salary, should he testify in this case, he ought therefore to be excused. But this reasoning is utterly fallacious. If the principle advanced be a sound one, then they might have made his office depend upon refusing to testify in any case, and

under any circumstances, against any person in society. If I do testify, says the priest, in such a case, I lose my salary. In one way or other every one might be excused from testifying. Suppose a witness declines to testify, because he belongs to a society, which is bound, under oath, to take the life of any member who shall in any case testify against a fellow member, and he verily believes his life will be taken if he does; would he be excused? Nay, would the law permit the priest to lose his salary, because he had displeased them by obeying the law? Or his office? Would not a mandamus restore him? But he would have no hearers—he would be "*infamous.*" How infamous? In whose estimation? His infamy would consist in obeying the laws, and in the estimation of those who deem such obedience a crime. To be hated, to be despised is not infamy. To do wrong, is infamy. To disobey the public law, is infamy. Obedience to authority is the first of virtues, and among the highest of the christian duties.

The right of exemption, on the score of infamy or interest, rests on this principle, giving it the broadest basis. That a witness shall be excused, where the *facts* he discloses, convict him of moral turpitude, or prove him unintitled to life, liberty, or property. But, to say that a society to which he belongs will deprive him of support, if he becomes a witness *at all,* and to appeal to the *law* to say, that this society may be indulged in preventing him from being a witness, by such means, would be, to make the law establish a power superior to itself. It is very evident, that a society of mere laymen, adopting such an article in their constitution, so far from finding protection under it, would, and

justly too, be considered as guilty of an original conspiracy against society. Is the case altered because a religious society has done this same thing? The true principle, it is apprehended, in our happy state of religious equality is this: every man shall be allowed to reconcile himself to his maker in the way he may think most effectual; and seeing that none can pretend to greater certainty than his neighbour, so, to no one of the various sects shall be given the privilege of dictating to others their course of religious worship. Thus, all stand equal; no one pretending to the right of dictating to the others. But whenever any one shall claim to do what may justly offend the others, he claims an unequal, and so an unconstitutional "*preference*." Thus, the jew may keep his own sabbath, but he shall not violate that of the christian. Under a religious tenet, no sect would be permitted to indulge in what society deems cruelty, dishonesty, or public indecency, for it would offend the rest, though the worshippers might deem themselves engaged in a holy rite. Nor ought any be allowed to conceal, when called upon in courts of justice, matters pertaining to the safety of the rest—for if they are so, allowed, they make for themselves a rule of evidence, contrary to a pre-existing principle of law, involving the safety of the whole community. If they say, our religion teaches us this, society replies all religions are equal—none shall be disturbed—each one may seek heaven as seems fit to its votaries, this is the toleration society has "*granted*" to all—but still society is superior to them all, and not, nor ever could be supposed to have granted to any, the right of silence, when its own interest and safety may be jeopardized by that silence.

The common safety, is the common right—and any pretension, whether of a religious or social institution, which claims the right to withhold from society the knowledge of matters, relating to its safety, soars above the level of the common equality, and demands such an unreasonable "preference," as society would be false to itself to allow.

Finally the constitution has granted, religious "*profession and worship,*" to all denominations, "*without discrimination or preferance*:" but it has not granted exemption from previous legal duties. It has expelled the demon of persecution from our land: but it has not weakened the arm of public justice. Its equal and steady impartiality has soothed all the contending sects into the most harmonious equality, but to none of them has it yielded any of the rights of a well organized government.

When Mr. Gardenier closed it was near the usual hour of adjournment, and the Court assigned the following morning to hear the reply.

Wednesday, June, 9.-

[PRESENT AS BEFORE.]

MR. SAMPSON IN REPLY.

May it Please the Court,

Before I enter on debate, let me be permitted on behalf of the Clergy and Trustees of the Roman Catholic Church, to discharge a debt due to the District Attorney for his liberal and manly conduct in this cause. That it may proceed and end, as it has began, in the spirit of peace and good will. When Mr. Gardenier proposed to enter a nolle prosequi, his motives were no doubt highly commendable. He knew that religious discussions, often, too often, ended in bitterness, and were pernicious in their result. He did not then so fully know, in how mild a spirit this question was pressed upon him. And it was not till he was strongly solicited, by those I have the honor now to represent, that he consented to bring it forward. His right to follow the course he first proposed was not disputed. His motive for that he has pursued will best appear when I shall have laid before the Court the written request addressed to him.

Mr. Sampson then read the following paper.

New- York, Court of General Sessions,

The People, *vs.* Daniel Phillips and wife. } *On an indictment for receiving stolen goods.*

Whereas it has been represented to the board of Trustees of St. Peter's Church in the city of New-York, that

the Reverend Dr. Kohlmann, the pastor of said church has beeen called as a witness, to testify therein, and that thereupon he declared he knew nothing touching the matter enquired of him, but what had been communicated to him in the administration of the sacrament of penance or confession, in which he avowed himself to be bound both by the law of God and the canons of the Catholic Church to a perpetual and inviolable secrecy. That the knowledge thus obtained cannot, be revealed to any person in the world, without the greatest impiety, and a violation of the tenets of his religion. That it would be his duty, according to his religious principles, to suffer death, in preference to making the disclosure, and that this hath been the uniform faith and doctrine of the Catholic Church. That he was advised by counsel, that the enlightened and liberal provisions of the constitution of this state protected him in the silence which his faith enjoins upon him, and therefore he respectfully requested the court to protect him in the exemption which he claimed.

And whereas, for the purpose of maturely considering the question, the District Attorney consented to delay the trial of the cause, until a future sitting of the court.

And whereas the Board of Trustees, sincerely consider the free toleration of the Catholic Religion, involved in maintaining the exemption claimed by the reverend pastor, and cannot but feel the deepest solicitude that a doubt should exist upon the subject, they therefore, respectfully request the District Attorney to bring the cause to trial at the next sitting of the court, to the end that a judicial determination may be had which shall ensure

to all catholics, in common with the rest of mankind, and according to the words of the constitution, "the free exercise and enjoyment of their religious profession and worship."

The Trustees hope that the District Attorney, will be pleased to signify to them, at what time he will probably bring the question to a hearing.

By order of the Board of Trustees of St. Peter's Church.

DENNIS M'CARTHY, *Secretary.*

New-York, April 19th, 1813.

In complying with this request, the public prosecutor has done well. The gentlemen who presented it have done well. If the counsel for the witness shall have done justice to the cause, auguring from the liberal jugdgement of the Court upon the preliminary questions of evidence, I trust, the whole community will applaud the motives and rejoice in the event.

The decorous and prepossessing manner in which the reverend witness has expressed his reasons, is a good argument that this was not a challenge given in the spirit of bravado, and that if a victory is sought it is of that blessed kind, where every virtuous citizen is to share in the triumph, and none to suffer by the defeat.

Having much of necessity to say, upon a question so novel and important, I shall avoid repeating what my learned colleague has so ably urged. We have already agreed that each should take his part, as well to share the burthen of the argument, as to spare the Court the pain of a story twice told.

Mr. Riker has shewn by reason and authority, that no rigid rule of evidence can stand in the way of justice and convenience, so as to bear the exemption we lay claim to; that these rules are the handmaids, not the tyrants of a court of justice; and that when new cases occur within like reason as former ones, the same principles will govern them; and that the door of justice and propriety is never closed. The counsel did not, however rely entirely upon general reasoning, but shewed the current of authority to be so strong, that our ingenuous adversary was compelled to evade it, and driven to manœuvre with what dexterity he could, in the counter current and eddy of popular prejudices.

When this question first occurred, I humbly stated to the court, that in no country where I had been, whether Catholic or Protestant, I had ever heard of an instance of a similar kind. That in England, there was none to be produced; nor even in Ireland, where the people were catholic, and the law anti-catholic; where the few trample upon the many, and where no concessions were made to the feelings of the proscribed, or the dictates of humanity or piety. I spoke that with sincerity and truth, for the only case that ever has arisen, was decided since the epoch of my banishment, and not only since the independence of this country, but since the revolution that deprived Ireland of its independence and its parliament, and at a time when little good faith was observed by those whose opinions and sentiments are too apt to dictate, as conquerors do to the vanquished and subdued.

Two cases only have been cited, both adjudged since the period when they could be binding in this country

as authority, and these only I shall notice. That of Dubarre is directly in point with us, as far as the opinion of the chief justice of England, can be in our favor. The case of the reverend Mr. Gahan, decided by the master of the rolls in Ireland, is not so much against us as I could wish it was. I am sorroy it is not equally in point, that by a decision directly in the teeth of it, the superiority of our constitution, our laws, and jurisprudence, might be more fully felt, understood, loved, and revered. I care not from what country precedents be drawn, if they be wise, and applicable to our exigencies, for reason and good sense is of every country; but if there be any country on the habitable globe, where we should not go to look for a pure and sound decision, upon the rights of Roman Catholics, it is surley that one from which this precedent is brought. Let us first enquire what they do and say on this, and the other side the Ganges; let us consult with canibals, but take no counsel from that Island, where for centuries past, a code has existed, and been in full and vigorous activity, which shames humanity. Let us first rake up the embers of every latent evil, and cut scions from the root of every desolating persecution, before we introduce the germs of that poisonous growth, so prolific in mischief, and maliguity, that nothing like it can be found in the annals of the world. For every where else, though there may be madness, superstition, or idolatry, there may be some chance of impartiality; but in Ireland there can be none!

Abstract this Irish decision, from Irish politics, and Irish history, and mark upon what shallow reasons it was founded. What will the enlightened and unso-

phisticated judges, I have the honor to address, say to this argument, that because no case could be found, where a catholic clergyman had been exempted from an act of perfidy, and sacrilege, that therefore no such exemption could be lawful. Was that reasoning pure or solid? Was it not more obvious, that since no case had happened of the kind, it was because so unwarrantable a stretch of power had never been attempted, even in the angriest times? Was not the double argument of prescription and non-user in favor of the exemption? For who is so ignorant of human history, as not to know, that in catholic countries, it would be blasphemy, and in protestant countries, until that very hour where was the instance? of it. And who that ever cast his eye upon the penal code of Ireland, but must see at the first glance, that if ever it had been lawful, it would not have been without some example, or instance that could be quoted. It would have been an easier snare for the destruction and extirpation of the catholic religion, and the catholic clergy, than those that were devised! It would have spared the tyrants of a misgoverned country, the pain, and their corrupt instruments, the shame of enacting and enforcing so many profligate and monstrous statutes. There would have been no need of such fearful penalties against the catholic clergy, as those laid on them for the offences of instructing youth, or celebrating mass, or matrimony, the latter of which, was punished with hanging, if one party proved to be protestant, the other catholic. There would have been no need of laws, giving fifty pounds for the mere discovery of an arch-bishop, twenty for a secular clergyman, and ten for the discovery of a school-master; nor inflict-

ing pains, penalties, or præmunires, for charitably harbouring them. These, and hundreds of other wretched extravagancies, may be found by any one who will look into the statute books; and yet in the angriest times amidst all these frightful violations of nature, faith and honesty, this torture for the conscience and the heart was still unthought of, although it was well known that the sacrament of penance and confession, was an integral and vital part of the Roman catholic religion. It was known, as it has been proved in this cause, that the priest neither could, nor would reveal the secrets of that confession; and nothing more would have been necessary than to summon the priest, in the case of every person accused of a crime, which he might be supposed to have confessed, and by putting the question to the priest, and using no other arguments than the counsel has used, commit him to prison till he answered, or in other words till he died.

By one of the ferocious statutes, made in the reign of Queen Ann, two justices of the peace, might summon any of the laity, to discover when he last heard mass, who celebrated it, and who was present, and also touching the abode of any popish clergyman, regular or secular, or any school-master, and fully to answer to all circumstances, touching such popish person, and if he had not money to ransom him, commit him to prison for twelve months,* yet in all this minute de-

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*. For these and other legislative enormities, see appendix.—Title, Penal Code Abriged.

tail of elaborate persecution, it was never attempted to force the confessor, to disclose what his penitent had revealed. Whether this arose from some lurking remorse, if remorse could find place in hearts so depraved; or whether it was from some politic source of the benfits that might result from confession even to the oppressors themselves, I cannot say; but I can say that it never was before attempted; and prove it by this alone, that no instance of it could be shewn.

When Lord Kenyon was told by Mr. Garrow (speaking from hearsay and for his client) that Mr. Justice Buller had obliged a protestant clergyman to disclose what a catholic penitent had confessed to him, what did he say? That his brother's opinion was entitled to respect, but that he should have paused before he made such a decision! What would he have said if it had been a catholic priest, called upon, under pain of imprisonment, to violate his sacrament, abjure his faith, incur eternal infamy, and betray that holy trust, to which if he proved faithless, he cancelled every pious hope of heaven, and never could be true to any thing. Now it is not what any one of us may think upon this subject that should guide us, it is that christian charity that all should cherish. It is that precept that God has given, to pull the beam from our own eye, before we meddle with the mote that is in our neighbours. Strange then was the conclusion, that what in England was censured by so high authority, and what in Ireland never was attempted, though the rights, lives, liberties, and feelings of the catholics had been assailed through successive ages, in every wanton form that avarice, vengeance and malignity could devise, should yet be law, merely

because no instance could be found where it had been attempted.

Indeed the history of that Irish case is its best comment. It is thus. Lord Dunboyne, who had been a catholic bishop, happened to succeed to one of those estates, which, together with the shadowy title of nobility, had been sufferered, after the perfidious breach of the treaty of Limerick, to descend to the rightful inheritor. And having conformed to the established church, from what motive I know not, devised it to the catholic college of Maynooth. This was a seminary lately established by government, grown wiser, if not better, by its long and many blunders. Before this institution, the young student, destined for the catholic ministry, was doomed to wander, like a poor exile, to some foreign land for education and instruction, and to receive in distant universities that charitable boon, which bigotry and fanaticism had denied him in his native soil. It was hailed as a happy relaxation of past oppression and intolerance. But still this was a poor step-child, and needed patronage and protection. If ever endowment was lawful it was this one. The devisor having no children, left to his sister and heir at law, already like himself, advanced in years, a very considerable estate. Why then was his will to be avoided? Not because it was vicious, but because he had, in the jargon of the penal code, "relapsed into popery." How does this sound in our ears? How should any one of us like the thought of having our acts avoided, when we were no more, because we had relapsed into presbyterianism, episcopalianism, or methodism? Our constitution does not forfeit the estate, or annul the acts, or avoid the wills even

of convicted felons or outlaws. Nothing short of high treason can effect a forfeiture, nothing but fraud can avoid a grant or a devise. But in Lord Dunboyne's case, the question was not, whether there was guilt in the devisor, but simply, whether he took his leave of this and his flight to another life, pursuant to an Irish act of parliament, made in breach of a solemn treaty, and in the spirit of all uncharitableness. For who had he to cheat or to defraud? He had disposed of his worldly affairs. He had made his will. His last hour was approaching. The sleep of death sat heavy on his eyelids. He had no account but one to settle. It was that awful reckoning with his redeemer and his God. Forfeitures, premunires, prescriptions and pains lay on this side the grave; his way lay on the other. Still he perceives, as he looks back through the long misty dream of his past life, that he had upon that subject, which now concerned him most, been wavering and inconstant. He remembers that in the days of infancy and innocence he had been trained up in the religion for which his fathers suffered, and that when he grew up he had departed from it. He trembles to die in a faith which he had embraced from policy or from compulsion. He was a man, and the heart of man, like the hunted hare, still in its last extremities will double to its early layer. The world had no longer for him, bribe, terror, or persuasion. He offers to his almighty judge such prayers and sacrifices as he thinks most acceptable, and calls upon him as the God of mercy to pardon all his frailties. And who were those mortal inquisitors that sat to judge when God above should judge, and to condemn where he is merciful? What was

that inquisition after death, that was to find the forfeiture, not because the party died *felo de se*, but because he did not? Not because he stood out in rebellion against his creator, but because he followed the best and only lights that his frail and exhausted nature afforded him, and in what concerned him more than all the universe, made choice of that road which his conscience and inward feelings pointed out as the path of his salvation. In an hour like that does any man commit fraud? If he prays to his God to direct him, and throws himself upon his mercy, and submits devoutly to his judgment, how virulent, how audacious is it in man to dare to judge and to condemn him.

Mr. Recorder, here asked the counsel, how that case of Lord Dunboyne was ultimately decided.

The Counsel. I will conceal nothing of it from the court. I wish the case to be understood, and fully weighed, for the reason and honesty of our case, will outweigh it, though twenty judges had decided it. From what appears in M'Nally's treatise, and what I gather from other sources, it ended at the rolls, with overruling the demurrer. But afterwards on an ejectment under the will brought by the heir at law, and tried before lord Kilwarden, in the month of August following, the same witness was called. Some subtle questions were put to him, to discover in what faith the testator died. He answered, like the reverend gentleman here, with modesty and discretion, that whatever knowledge he had, was imparted in religious confidence, and that he could not finish a life of seventy years by an act of sacerdotal im-

piety. He was committed upon this for a contempt of court, and sentenced to a weeks imprisonment in the common jail of Trim. The jury found specially upon other evidence, that Lord Dunboyne had died a catholic. The judge then observed, as the party had not suffered from the want of his testimony, and the law had been vindicated, he did not consider the clergyman an object for punishment, and immediately ordered his discharge. Let us charitably suppose that this judge felt the cruelty of the proceeding, and wished in some degree to wash his hands of it.

I have been told, and sometimes believed, that it was not without a heavy heart, that as Attorney General, he often moved for judgements upon men, whom he knew to be at least, as virtuous as himself, and as a privy counsellor, signed proclamations, at which humanity shudders. I was banished before his appointment to the bench, and long before his death. If he had those feelings of compunction, I could pity him, though he had persecuted me, and at no time could the world have bribed me to change places with him. He was not of the worst that governed in those times, and many regretted that the popular vengeance that lighted on his head, had not rather fallen on some others.

Mr. Sampson was again asked by the court, touching the event of the cause, and also whether the master of the rolls, was the same person who was once baron of the exchequer.

He was the same person, the title of baron being mere title of office, ceased with that office, he afterwards

obtained the descendible title of baronet, and has since been known by that. As to the result of the cause, if I am not deceived, the will was finally established. But be that as it will, and let the personal merit of those judges be what it may, it affects not my argument. The system under which they acted; the barbarous code with which they were familiar, was enough to taint their judgement. No judge, no legislator, historian, poet or philosopher, but what has been tinctured, with the follies or superstitions of his age. Of this, one memorable instance may suffice. Sir Matthew Hale was virtuous, wise, and learned; the advocate of toleration, the enemy of cruelty. The revolutionary storms that shook the throne of monarchs, could not move him. Wealth could not corrupt, nor power intimidate him. When we find his great and philosophic mind, vilely enthralled in the grossest superstition of his time; treating of witchcraft, in the first and second degree, laying down quaint and specious rules, for the detection and conviction of those victims of barbarous folly, straining the plain rules of evidence, to meet these imaginary crimes, and because the practices of witches with the devil, and of conjurors with evil spirits, were *secret* and *dangerous*, holding that therefore, witches might be convicted without full proof. After this, may we not well suspect those Irish judges to have imbibed the poison of their cruel code, and to have eaten of the insane root that taketh the reason prisoner. And as a further lesson of circumspection, let us not forget, that after that ever memorable frenzy, which in a neighbouring state, hurled to destruction, so many innocent victims, when the actors in those bloody tragedies returned to their senses, over-

whelmed with shame and with confusion, their apology was, that they had been deluded by the writings of Glanvill, Hale and Baxter. What I now relate is history, that strange as it may seem, cannot be disputed, so dangerous it is to give the reigns to cruel prejudices. At that time no eloquence could dissuade; no advocate had courage to oppose the torrent. The trembling wretch overawed by the frown of the magistrate, the fear of the law, and the dread of death, was no sooner denounced than he confessed; and many accusing themselves were received into favor as penitent witches or wizards, and used to convict others less guilty, but not so politic. At that epoch the peaceful society of Friends was thought little less dangerous, and thus did those who fled from persecution in England, become through ignorance most intolerant persecutors in America. Such is the nature of that fiendlike spirit, which it requires but a moment to raise and centuries to lay. Thank heaven it is laid in this land, and I trust forever. The best proof of which is, that we can discuss this question, in peace and charity without stirring one angry passion, or one malignant feeling. For there is no man on this side the Atlantic, that does not regard these errors of past times, as examples to be shunned, not imitated; nor should I revive their memory, but for that purpose. It seems indeed, as if providence had decreed this land, to be the grave of persecution, and the cradle of tolerance. The illustrious Penn, was imprisoned for his *dangerous* opinions in England; he came to America, and being invested with legislative authority, founded a code upon the principles of pure and unequivocating toleration. The storms of the revolution scattered back

the precious seeds, and the British empire itself, after a long lapse of years, received practical lessons of that wisdom, it had banished from its shores. Even in Ireland the cheering ray pierced the gloomy night of oppression: the sympathetic charm awaked the sleeping genius of a reanimated people, and raised up those champions of civil and religious rights, within and without the walls of parliament, whose splendid eloquence, showed the native measure of many a thousand souls that bondage had degraded. How far that glorious spirit has since sunk into subjection; how far the unceasing workings of corruption and untoward events have again subdued the generous feelings of that season, I cannot, dare not say; but with respect to catholic persecution, it received its death blow from the American revolution, and the constitution of the free states that compose this great commonwealth. It might be amusing and instructive too, to trace the progress of catholic emancipation, did our time admit of it. To see in the first trembling supplications of the abject petitioner for rights, that slaves would scorn to ask, the horrible relation of the oppressor and the oppressed. To be allowed to swear allegiance and fidelity, was granted with reluctance, as a too generous boon. To disclaim upon oath, charges of which no man was guilty, was an indulgence almost too great to ask for. That the son should no longer by the mere act of conforming to another church, be free to violate the order of nature and disinherit his own father, was a mighty concession. To hold a lease for years, or take by devise—he was a bold projector that dared to ask for that. To be a school-master, or a school-master's assistant, was too much to expect. To "*commit matri-*

mony" with impunity, was against all due subordination. At length a new and more auspicious era came, *et magnus ab integro sæclorum nascitur ordo.*

And now the patriot, soaring on the wings of enthusiasm, recommends a *gradual* emancipation, in the generous hope that the catholics would in the course of some indefinite period, or in some undetermined series of succeeding generations, inherit a capacity to take freedom. But still to have a gun to scare the crows, a steeple or a bell, or a vote at a vestry, was too dangerous a confidence. To be a juror or a constable, an attorney or a barrister, or to hold any station, civil or military, was not yet to be hoped or looked for. The thing had already gone too far. The alarm was rung. Protestant corporations, grand juries, committees and hired presses, poured forth their malignant ribaldry. The truth was this. The hour of danger was passed by, and with it the season of concession was gone. Then came the organized banditti. Then the no popery and peep of day men. Then the recall of faithless promises. And that government that refused to tolerate catholics, tolerated, instigated and indemnified a faction, whose deeds will never be forgotten. Then came hangings, half hangings, conflagrations, plunder and torture. Rape, murder and indemnity went hand in hand. And then it was, that a spectacle new and appalling, for the first time, presented itself; and presbyterian, churchman, and catholic were seen to ascend the same scaffold, and die in the cause of an indissoluble union. The great cause of human emancipation in spite of events, has still proceeded, and were the question that we are now debating, given against us, we might find to our astonisment,

that on that very hour when an American tribunal had pronounced against the freedom of the catholic faith, the united parliament of Britain and Ireland had pronounced it free.

I am aware that the words I have spoken touching the penal laws of Ireland, must seem strange to many. It would be too cold and tedious to quote them from the statute book one by one, and perhaps too, foreign to the point. I have no principle to establish but this, that we should never look to Ireland for a precedent, where the rights of catholics were concerned. If what I have said be true, I think it is enough. And to shew that I have not exaggerated, I shall now refer to some of the expressions of the great Edmund Burke, upon the same subject. In the year 1782, when a bill for the *relief* of the Roman catholics was proposed by Mr. Gardner a member of the Irish house of commons, Mr. Burke in answer to a noble peer who had consulted him, used these words:

"To look at the bill in the abstract, it is neither more nor less, than a renewal act of universal, unmitigated, indispensable, exceptionless disqualification." Yet this of which he spoke, was a bill for the *relief* of the Roman catholics. If such was the character of the relief intended by their advocates, what must be the condition from which they sought relief?

Speaking of Mr. Hutchinson, then provost of the university, and a man distinguished in the Irish parliament and councils, who had proposed a few sizerships in Trinity College for the education of the catholic clergymen, Mr. Burke uses these emphatic terms: "Mr. Hutchinson certainly meant well; but coming

from such a man as him, it shews the danger of suffering any description of men to fall into entire contempt, for the very charities intended for them are not perceived to be fresh insults. Where every thing useful is withheld, and only what is servile is permitted, it is easy to conceive upon what footing they must be in such a place. Mr. Hutchinson must well know the regard and honor I have for him; my dissenting from him in this particular, only shews that I think *he has lived in Ireland!* To have any respect for the character or person of a popish priest there, Oh! 'tis an uphill work indeed!" And alluding to the penalty of death for marrying a protestant with a papist, he continues, "Mr. Gardner's humanity was shocked at it, as one of the worst parts of that barbarous system, if one could settle the preference where almost all the parts were outrages upon the rights of humanity and the laws of nature." Mr. Burke then concludes his admirable letter thus: "Thinking over this matter maturely, I see no reason for altering my opinion in any part. The act as far as it goes, is good undoubtedly. It amounts very nearly to toleration in religious ceremonies; but it puts a new bolt on civil rights, and rivets the old ones in such a manner, that neither, I fear, will be easily loosened. I could have wished the civil advantages to take the lead, the others of religious toleration would follow as a matter of course. From what I have observed, it is pride, arrogance, and a spirit of domination, and not a bigotted spirit of religion that has caused and kept up these oppressive statutes. I am sure I have known those who oppressed papists in their civil rights, exceedingly indulgent to them in their religious ceremo-

nics, and who really wished them to continue catholics in order to furnish pretences for oppression. These persons never saw a man, by converting, escape out of their power but with grudging and regret. I have known men, to whom I am not uncharitable in saying (though they are dead) that they would have become papists in order to oppress protestants, if being protestants it was not in their power to oppress papists. It is injustice, and not a mistaken conscience, that has been the principle of persecution, at least as far as has fallen under my observation."

The Court will excuse me for calling to my aid, the opinions of this eminent man, upon a subject where the truth is almost beyond credibility. Well might he say that injustice and not even a mistaken conscience had dictated these persecutions, for whoever reads the Irish history will see that these persecutions form two epochs. One before and one since the reformation. The one containing an era of about 400 years, the other about 300. Both equally fantastical and wicked. During the former, the natives of Ireland suffered for being Irish, or speaking Irish. They were pronounced aliens in their native land, and forced to sue out letters of denization. And in the reign of the third Edward they preferred a petition to be naturalized. It was refused. They rebelled—were defeated, and punished. It was no felony, and so enacted, to kill an Irishman in Ireland, and was forbidden under monstrous penalties, to speak Irish, to use the fashions of Ireland, to wear the beard upon the upper lip, or wear wide sleeves. If any one was curious enough to read the ancient statutes and rolls of parliament, from the days of Edward the third, to those

of Henry the eighth, he would find plainly enough, that mistaken conscience had nothing to do with the matter, nor religion nothing; but that the love of plunder, power, and confiscation was the sole and only motive. It was not until the axe was blunted by long use, till the mine was exhausted by the work of centuries, that religion served to whet the edge and rekindle the brand. Then streamed abroad the bloody banner of the church; then rose anew the yell of desolation; and then again the spoiler grew rich upon the soil, reeking and fattened with the natives blood. Thence the broad charters of desolated provinces, and *planting* of human beings, for so they termed it, amongst the bleaching bones of those destroyed by war and famine in the name of God!!! Were there rebellions? Were there massacres? Aye, to be sure, there were! They were the natural crop. For he that sows must reap! Away then with Irish cases and Irish authorities: for to adopt them here would be as mad as wicked. The Irish persecutors had their motives. It was their interest. They lived upon it. They had no living else than plots and forfeitures! They were not simple bigots, acting from mistaken conscience. They were pirates determined to hold what they had got, and rather than lose it scatter law and justice to the winds and waves. The cunning mariner will throw overboard the most precious of his effects, when his life and all is at stake. And so they did. But who except a maniac will do so in a season of tranquillity and calm? Indeed in later times the continuance of the catholic oppressions has taken the character of downright folly; and the wisest and keenest of British statesmen has so considered it.

and if so, every act and every decision that proceeds upon those antiquated errors, is at once a folly and a crime; shewing only how far "the evil that men do, lives after them." But to make a decision now which would be beyond all precedent, even in the worst of times, would be what I cannot give a name to.

What have our courts to do with these cases, or how do they apply to our condition? Unless it be to speculate upon such frightful histories, as the contemplative traveller ascends the vantage ground, and seating himself upon the border of some extinguished volcano, above the regions of mist or vapour, surveys above him the unclouded firmament, and below, the ravages of a convulsed world, the yawning crater, the sulphurous abyss, the scattered fragments of disjointed nature, the conjealed torrents of once streaming fire, under which lie buried and incrusted the treasures of civilization, wealth and arts; and moralizing on such awful objects, compares the benign laws of the creator with the efforts of the destroying spirit. To contrast these histories and barbarous codes with our happy constitution, and our enviable state, is to draw from them a moral, deep and wise. But though we use them, let us not be familiar with them. Let us apply all due precaution against their venomous contagion. I would hardly touch the volumes that contain them, till I had drawn on my gloves and said God bless me from all grammery. I would relegate them to some lonely desart, such as the barren Island. And there I would keep them fathoms under ground. Some wretch from the state prisons, who had ran the round of vice, and could not be inoculated with any new infection, should be their guar-

dian. Once in the period of a lustre or olympiad, when the wind blew off our coast, they should be dug up; fasting, ablutions, and exorcisms, first performed; and if telegraphic signs, could be devised to communicate their terrible contents, it would be safest. But, bring such things into a court of justice? O! never, never.—Fie! fie! they are too rank. I think I could smell out that volume that treats of the dead Lord's will, and the inquisition held upon him, after death, for "*relapsing into popery.*" Yes here it is! The whole system is already rotting above ground, let us hasten to inter its miserable remains. And now having done with Irish, let us turn to the English history. It is good to learn, even from an enemy. Mr. Pitt, who for years governed England by dint of ingenuity, was a good or a bad genius, I care not which. He was once a friend of parliamentry reform, but abandoned that; he was more than once desirous of reforming the penal code, and in that I believe he was more sincere, for he was sagacious enough to see the impolicy and gross absurdity of maintaining it any longer. In 1788, when a bill was proposed for the relief of the Roman catholics, a committee of the English catholics, waited upon him. He desired from them some authentic evidence of the catholic clergy, and universities abroad, that certain dangerous tenets imputed to them, were not avowed by the catholic church.

The three following queries were drawn up under his auspices.

1. Has the pope or cardinals, or any body of men, or any individual of the church of Rome, any civil au-

thority, power, jurisdiction or pre-eminence whatever within the realm of England ?

2. Can the pope or cardinals, or any body of men, or any individual of the church of Rome, absolve or dispense with his Majesty's subjects, from their oath of allegiance, on any pretence whatever ?

3. Is there any principle in the tenets of the catholic faith, by which catholics are justified in not keeping faith with heretics or other persons, differing with them in religious opinions, in any transaction either of a public or a private nature ?*

This was done no doubt, with a view to soften the King's conscience, which at that time was buckram against catholics. For his majesty had not then formed an alliance with the pope, nor sent his dragoons to guard his person, nor had England then spent as much blood and treasure, to put up the pope and the Bourbons as she had before expended to pull them down. These things fell out afterwards.

All great leaders of men have been addicted to oracles. In old times, they sent to Jupiter Amonon in Africa, or else to Diana at Ephesus, or else to the Delphic priestess, or to the old sybil. Mr. Pitt sent to none of these, nor did he consult the rioters of Moorfields, nor the priestly mob, nor the Orangemen. He did more wisely ; he did very wisely. Let us do him justice. He sent his queries to six of the principal catholic universities of Europe. The Sorbonne at Paris, to Douay, to Louvain, to Alcala, to Salamanca, and to Valladolid.

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* See the answers of the six universities at length in the appendix.

As politicians, mostly know the answer, before they ask the question, so I need not say that these universities all concurred in disclaiming, and firmly disavowing all these imputations, which no catholic ever thought of; unless it were in ancient times of war and contentions for kings and kingdoms, when the corruptions not of the church of Rome, but of some corrupt ministers of that church, had by forming leagues of "wicked priests and princes" dishonored that church. None but foolish ministers could have thought of visiting all those crimes of past ages upon the catholic church, because there had been weak or wicked priests, no more than of destroying all kings because there had been weak and wicked princes.

I should have venerated Mr. Pitt for this judicious step, if I could be quite sure that he was sincere. It would cover a multitude of his sins. And it is only to be lamented, that some minister, as sagacious, had not sent these queries to those six universities three centuries before. How much burning and ripping, would have been spared. I wish that Mr. Pitt had not, for his good name's sake, so soon after receiving this authentic testimony, tolerated that ferocious rabble of no popery, Orangemen, king's conscience men, and peep of day boys, whose atrocities are now as much history as his life and death. It is true, I will say it for him, he never loved them, he hated and despised them; but he knew them well, that they were always for evil, never for good, and having done all the mischief required, the sooner they were extinguished the safer and better it would be. But still he used them to carry his point, and overthrow the parliament of Ireland; which he had

before corrupted to his ends. Having gained his point, he tried to put them down, but it is easier to excite wickedness than it is to subdue it. The hounds once uncoupled and set upon the tract of blood, ran riot on the hot scent, and the huntsman himself could not call them off. When he would have whipped them again into their kennel, they were savage and bayed him.

Having the authentic evidence of the six universities, that it was no tenet of catholics to break faith with heritics, he resigned his office, as he said, because he could not keep faith with the catholics. He resumed his place and did not keep faith with them. He was crossed in this by the peep of day boys, and by his other enemies, in his other projects, and he died, in what faith I know not, lamenting his incapacity to do justice, and exclaiming, Oh my poor country !

The Mayor. From what book do you take those queries of Mr. Pitt.

Counsel. I read them if it please the court, as general history, from Mr. Plowden's historical survey of the state of Ireland. They are I presume, upon the journals of the parliament.

Recorder. They are so, I have seen them.

Counsel. It is time now to take leave of foreign history. And as to those precedents of foreign law, the only weight they can have, is that of so much paper and calf's skin, for our own constitution is so explicit upon

this important head of religious toleration, that nothing but the inveterate habit of running to foreign authorities, could have put it into the mind of any of us, to look elsewhere for instruction in so plain a case; unless we are to resemble that fabled race, that continued suckling till after their beards grew.

The constitution stands in need of no such illustrations. It is simple, and precise, and unequivocal. It may like other human institutions be perverted, but it cannot be easily mistaken. And judges who so well know its history will mistake it least of all. The people whose will it speaks, were not of any one church, as the learned attorney has said; but of many and various sects, all of whom had suffered more or less in Europe for their religious tenets, and many of whom had unrelentingly persecuted each other. All that came from England, and were not of the church established by act of parliament, of which the King of England was the head, all these were either catholics or protestant dissenters, and in one or the other character, liable to pretty heavy disabilities and penalties. The catholics it is true, bore the hardest burthen of all; but the others would be very sorry, I believe, to put aside our constitution and resume their ancient condition. And God forbid it should be so. For among the many losses that would light upon the community, we might be deprived of the respected magistrates that now sit to judge of our most precious rights. For if they dissented from the established church, then they could not hold any office in a corporation; and then they must come down from that bench which they fill so well, and pay a penalty moreover for having sat there, unless they could pro-

duce the certificate of a churchwarden, that they had taken a sacrament they did not acknowledge, in a church that was not their own; or unless they were through clemency, indemnified and pardoned as felons and outlaws are. I need not say more to the court, than refer to the test and toleration acts of England, and the indemnity bills passed for the relief of protestant dissenters. Mr. Attorney had forgot all this. I put him now in mind of it. Happy country, I again repeat it, where such things can be forgot. But I speak not only of what has been, but now is. At this day, a quaker, such is the term bestowed on the society of Friends, cannot be a witness in any criminal case, nor a juror in any case, nor can he vote at an election for members of parliament, nor can he hold any office in the government, unless he be sworn like other protestants. He cannot enforce the performance of an award, or the payment of costs, upon the credit of his affirmation. His religion forbids him to swear like other protestants, as that of the catholic clergyman forbids him to betray the secrets of confession, and therefore, in England, both are disqualified; but the constitution of New-York tolerates all religions, and neither is the Friend called upon by it to swear, nor the confessor to betray. The quakers are not committed to prison in this country by a justice for non-payment of tythes. Nor are they *fined* as in England for not serving in war. They enjoy in all these respects the full and equal measure of toleration, and a greater indulgence than others. All others must join the ranks of their country, and oppose its enemies. They are exempt. They are neither asked to go like their fellow citizens, nor yet to find a sub-

stitute, but for less than the hire of a mere labourer, they are defended. And this that the gentleman calls a fine, is a most signal benefit.— And from this fact I draw another conclusion, that the constitution has left nothing vague or undefined that was capable of being defined. And when it lays down the general rule, intending an exception, that exception is defined. And when it gave toleration to the religious professions and worship of all mankind, knowing that it was of the religion of the quaker not to fight, it pronounced the reasonable condition upon which that exemption was to be enjoyed. The catholic religion was surely as well known as that of the quaker. No christian could be ignorant of it: and for the same reason if the framers of the constitution intended any exception, they would have stated it. All catholics knew it because it was their religion. All protestants, because they must know that against which they protested or they know nothing. The catholic religion was as the genus, and the various species were composed of that and the essential difference. The subdivisions were but varieties. The catholic church contains at least two thirds of the christian population in the old world, and with respect to this article of auricular confession, it is still retained by the Greeks and oriental schismatics, after a seperation of 800 years. In this continent, looking to Canada on the north, and the vast and populous nations to the south, three fourths are surely catholic. If so, three fourths of the whole christian world are catholics. If the people who made this constitution were as the learned gentleman has said, a protestant people, they were then a christian people, and if they were a christian people,

is it likely that they made a constitution tolerating the religion of all mankind, and subjoined, by way of parenthesis, a proviso putting under the ban of a new and unprecedented proscription, three fourths of the christians that inhabit the globe? Would not this be a moral monster, incongruous and amorphous, like some frightful sport of nature, with a foot bigger than the whole body, and trampling on its own head? Can we slander the fathers of our constitution by supposing they did this either in ignorance or through equivocation? No! For it needed little learning indeed to know all that I have stated. They needed not to be deep learned in the writings of the fathers, nor in the histories of general councils, canons, decretals, convocations, synods, or consistories; nor in legends, traditions, creeds, or catechisms, litanies nor liturgies, manuels nor missels, breviaries nor homilies. In that familiar volume of the commentaries cited yesterday, they would have found it all, set down under the head of offences against God and religion. They would have found as many models of proscription against jew and gentile, protestant and papist, as there are fashions or vagaries in a millener's shop. Some of which, I think, are great offences in themselves against God and religion.

It was with full knowledge of all this, and to close the door forever against religious contention, that the 38th article of our constitution was framed, by which all religions are put upon the very same footing, without preference or discrimination. From thence forward no frail man is to set himself up to judge his fellow, for his faith and usurp the power of the almighty judge, by whom all must be judged, nor are we to lay hands

on one another, or punish either by death, by fine, or by prison, the free exercise of religious worship or profession. If there be any, who does not see the wisdom of this enactment, let him open the page of history, and read of the bloody religious wars of Europe, of which the wounds are still fresh and bleeding. Let him reflect who his own fathers were, and he will find the cogency and wisdom of the act. From the time of that constitution, the waters of strife were no more to be let loose; and as rights undefined, are wrongs concealed; as exceptions lead to contentions and equivocations; so the principle was established like a beacon on a rock, to be a light and guide to all the world.

Under this constitution, it is lawful for one to say, I hold of Christ, another, I hold of Paul, another, I of Cephas, another, I of Appollos. One only exception there is, and that is the proviso, that this liberty of conscience shall not be construed, to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state, and this brings me closer to the point.

The District Attorney has laid it down, as though it were conceded, that the general principle of law is with him, and that we who claim an exception, must shew ourselves entitled to it. I explicitly deny that proposition. The constitution here lays down the general rule, that all mankind shall be tolerated, without preference or discrimination, and we claim no exception from that rule. It is our adversary that would enforce the proviso, and take advantage of it against us; and it was for him to shew how we fell within it. It was for him to shew in what our acts were licentious, or our practices dangerous. The modest worth and unambitious courses of this pas-

tor, often to be found by the bed of sickness, or in the abode of sorrow, but never in the repairs of revel or disorder, repels all idea of licentiousness. It remained then to fall back upon the subject of danger. And truly, Mr. Attorney with all his invention, was much put to it to imagine a case of danger. It was a dangerous pass for him and his argument. My colleague had pointed out from Blackstone's commentaries, that the danger which served as an apology for the proscriptions of the catholics in the British empire, was that of the pope and the pretender. The gentleman could not bring himself to say he was afraid of those persons. And yet Mr. Justice Blackstone had laid down that when the family of the one, and the temporal power of the other was reduced, or at an end, the catholics might safely enjoy their seven sacraments, auricular confession, and all. But if the gentleman had gone still further and maintained that the pope and pretender were on board Sir John Borlase Warren's fleet, it would have been little less surprising than the danger he did suppose, namely, that should there be a conspiracy of catholics to deliver up this city to the enemy, and that they should confess to the priest, and the priest conceal it, and so the city be lost. If the catholic is to hold his rights, and have the equal benefit of the constitution, upon the hard condition of satisfying the doubts of all doubters, and the cavils of all cavillers; if all possible things, however insupposeable, are to be supposed against him, this argument may do. But then the 38th article of the constitution is a dead letter to him; for under the pretence of dangers, figured merely in the imagination, all the old crimes, plots and massacres may be acted over again. But for my part I take all this as

probably it is meant, in pleasantry; and in truth, I fear as little from this part of the learned gentleman's argument, as he probably does from the pope, the pretender, or the catholic plot he talks of. I shall therefore, knowing as we all do, who they are that compose the bulk of the Roman catholics in this city, content myself by *supposing* that they will not give the city to the English. No, not even if the troops of his holiness himself, should join in alliance with the British to invade it. And I maintain in the presence of my clients, and in their name, that doctrine boldly and firmly. That though the catholics must acknowledge the pope as supreme head of their church, yet they know, their duty as citizens would oblige them to resist him as a temporal prince, if in that character, he should make war upon that country, which is theirs, and theirs by choice, the strongest of all ties. Yes, and if the government was too slow in providing them with arms, they would with their pick-axe, or their spade, or their cart-rung, or paradventure, some old sanctified shillelah, the trophy of days that are past, drive the enemy from his cannon, as it has happened before. This is my supposition. And I suppose further, that there is one only way to make such persons dangerous; that is, to put their clergyman in prison for not betraying the most holy of all engagements towards God or man.

When my learned adversary advanced that this was a protestant country, and that a grant had been made by the protestants to the catholics, one would suppose that they stood in this relation, that the protestant was the liege lord, and the catholic the vassal. We came here to argue this question with good temper, and our good

and reverend client, whose evidence is our text, has set us a good example of moderation and gentleness, which with due allowance for my humour, I will endeavour to follow. That the majority of the inhabitants and citizens of this state, were protestants when the constitution was formed, I do not dispute. But in establishing a constitutional code, different from that of England, they did nothing but unshackle themselves and the catholics together. I have read the case of a long and angry persecution of two Dutch calvinist clergymen in this very city, under the acts of conformity and uniformity, and for that I refer the gentleman to Smith's history of New-York, where it is fully detailed. But I will tell him further that if he should prevail so far as to do away the strong and wholesome provision of our constitution, he might himself that instant become a member not of a protestant, but of a catholic country. For when Lord Kenyon in Dubarre's case observed, the catholic religion is not *now* known to the laws of England, it was because the statute books had established another in its place. But all English statutes are abrogated in this state, and I should be glad to know what else prevents the catholic religion from being the common law of this land, as it was of England before those statutes? We know that it was the common law, and that the fathers of the law as well as the fathers of the church, were catholics! Alfred and Edward, Briton, Bracton, Glanvill, Heugham, the authors of the Mirror and Fleta, and many more such, were all catholics; and to crown the list, the revered Sir Thomas Moore, at once both witty, wise and great, the patron of judges, the elegant correspondent of Erasmus, lost his head

upon the block, for adhering to his religion, and opposing the lust of a King.

But let no man be alarmed. We claim no supremacy. We seek nothing but pure and perfect equality. From the bottom of our hearts we sincerely tolerate you all. We will lay hands on none of you, for your worship or profession; and for ourselves, we claim neither more nor less. Hands off on all sides. And if any of you are aggrieved we will invoke the constitution in your favour, as we do in our own. We will join with all good citizens in loving, respecting, and defending it. For it is our own. If the protestant dissenters, as the English term goes, are not so foolish, so neither are we so simple, as not to know the difference between the toleration act of England and the toleration of the constitution of New-York. The one may ease the load, but the other takes it off. The former is from one set of subjects to another; the latter is a compact between freemen. Let us have our rights to-day, that when it falls to our turn to judge, as it may to morrow, we may know of "no preference or discrimination." Every citizen here is in his own country. To the protestant it is a protestant country; to the catholic, a catholic country; and the jew, if he pleases, may establish in it his New Jerusalem. Not only so, but this very plank upon which I stand, as long as I continue to occupy it in arguing this cause, is my catholic plank; and if this gentleman be a calvinist, that, he stands upon, is his calvinist plank. These sayings are homely! No matter; they are plain. I wish to be plain; very plain—past all mistaking. As I am a friend to catholics, I would not have them vexed; were I their

enemy, and thought them dangerous, I should not give them such advantage.

As to this idea of danger to the state, from the secrecy enjoined on the confessor by the catholic church, it is quite strange at this time of day, to call it in question, as dangerous to any state, seeing it has existed since christianity, under all the various forms and modulations of civilized society. Indeed, if this tenet could be assailed upon the pretence of danger, there is no part of the catholic religion that could stand; for it is that one of all their sacraments, that never has been attacked upon such score by the sharpest assailants; and those who have spared no other have been tender of this.—In a collection of German writings, by Martin Luther, p. 273, that author pronounces in its favour so strongly as this, "that he would rather fall back under the papal tyranny than have it abolished."

* The protestant ministers of Strasburg, also, after the reformation was fully established, regretted so much the abolition of auricular confession, that they petitioned the magistracy to have it restored, but were answered that it was then too late; for to restore that and not the rest would be like putting on a wooden leg. And in those queries of Mr. Pitt, it is not even glanced at as dangerous.

Having disposed of the argument of danger to the state, I must now proceed to shew the innocence and the excellence of this institution. For it would be hard that because I am not a Roman catholic I should not do justice to the sentiments of my much respected clients. They have put into the hands of their coun-

* Schaeffmacher, p. 282.

sel a little book, full of good matter, written by the Reverend John Gother. It has been cited by Mr. Riker. It is entitled, 'The papist misrepresented and represented. It contains a two-fold character of popery: giving on one hand a sum of the superstitions, idolatries, cruelties, treacheries, and wicked principles laid to their charge; and on the other it lays open that religion, which those termed papists own and profess; the chief articles of their faith, and the principal grounds and reasons which attach them to it. I shall read but one page of this little work, which I think will be satisfactory to the court. It is page 24, of the first American, from the nineteenth London edition.

"OF CONFESSION."

"The papist, *misrepresented*, believes it part of his religion to make gods of men; foolishly thinking that these have power to forgive sins. And therefore as often as he finds his conscience oppressed with the guilt of his offences, he calls for one of his priests; and having run over a catalogue of his sins, he asks of him pardon and forgiveness. And what is most absurd of all, he is so stupid as to believe, that if his Ghostly Father, after he has heard all his villainies in his ear, does but pronounce three or four Latin words over his head, his sins are forgiven him, although he had never had any thoughts of amendment, or intention to forsake his wickedness."

There spake bigotry!

"The papist *truly represented*, believes it damnable in any religion to make gods of men. However he

firmly holds, that when Christ speaking to his apostles, said, *John* xx. 22. *Receive ye the Holy Ghost; whose sins you shall forgive, they are forgiven; and whose sins you shall retain, they are retained;* he gave them, and their successors, the bishops and priests of the catholic church, authority to absolve any truly penitent sinner from his sins. And God having thus *given them the ministry of reconciliation,* and made *them Christ's legates,* 2 *Cor.* v. 18, 19, 20. *Christ's ministers and the dispensers of the mysteries of Christ.* 1 *Cor.* iv. And given *them power that whosoever they loosed on earth shall be loosed in heaven. Matt.* xviii. 18. He undoubtedly believes, that whosoever comes to them making a sincere and humble confession of his sins, with a true repentance and a firm purpose of amendment, and a hearty resolution of turning from his evil ways, may from them receive absolution, by the authority given them from heaven; and no doubt but God ratifies above the sentence pronounced in that tribunal; *loosing in heaven whatsoever is thus loosed by them on earth.* And that, whosoever comes without the due preparation, without a repentance from the bottom of his heart, and real intention of forsaking his sins, receives no benefit by the absolution; but adds sin to sin, by a high contempt of God's mercy, and abuse of his sacraments."

There spake charity!—Let us chuse between them.

No wonder then, this latter being the true character of confession, if the bitterest enemies of the catholic faith have still respected it; and that discerning minds have acknowledged the many benefits society might

practically reap from it, abstracted from its religious character. It has, I dare say, been oftener attacked by sarcasm than by good sense. The gentleman who argued against us, has respected himself too much to employ that weapon, and I believe he has said all that good sense could urge against it, which we take in very good part.

But while this ordinance has been openly exposed to scoff and ridicule, its excellence has been concealed by the very secrecy it enjoins. If it led to licentiousness or danger, that licentiousness, or that danger, would have come to light, and there would be tongues enough to tell it. Whilst on the other hand, its utility can never be proved by instances, because it cannot be shewn how many have been saved by it; how many of the young of both sexes, have been in the most critical juncture of their lives, admonished from the commission of some fatal crime, that would have brought the parents hoary hairs with sorrow to the grave. These are secrets that can not be revealed.

Since however, the avenues that lead to vice are many and alluring; is it not well that some one should be open to the repenting sinner, where the fear of punishment and of the world's scorn, may not deter the yet wavering convert? If the road to destruction, is easy and smooth, *si facilis descensus averni*, may it not consist with wisdom and policy, that there be one silent, secret path, where the doubting penitent may be invited to turn aside and escape the throng that hurries him along? Some retreat, where, as in the bosom of a holy hermit, within the shade of innocence and peace, the pilgrim of this checquered life, may draw new inspirations of virtue

and repose. If the thousand ways of error, are tricked with flowers, is it so wrong that somewhere there should be a sure and gentle friend, who has no interest to betray, no care, but that of ministering to the incipient cure? The syren songs and blandishments of pleasure, may lead the young and tender heart astray, and the repulsive frown of stern authority, forbid return. One step then gained or lost, is victory or death. Let me then ask you that are parents, which would you prefer, that the child of your hopes should pursue the course of ruin, and continue with the companions of debauch and crime, or turn to the confessional, where if compunction could once bring him, one gentle word, one well timed admonition, one friendly turn by the hand might save your child from ruin, and your heart from unavailing sorrow? And if the hardened sinner, the murderer, the robber, or conspirator, can once be brought to bow his stubborn spirit, and kneel before his frail fellow man, invite him to pronounce a penance suited to his crimes, and seek salvation through a full repentance, there is more gained, than by the bloodiest spectacle of terror, than though his mangled limbs were broken on the wheel, his body gibbetted or given to the fowls of the air. If these reflections have any weight at all; if this picture be but true in any part, better forbear and leave things as they are, than too rashly sacrifice to jealous doubts, or shallow ridicule, an ordinance sanctioned by antiquity, and founded on experience of man's nature. For if it were possible for even faith, that removes mountains, as they say, to alter this, and with it to abolish the whole fabrick, of which it is a vital part, what next would follow? Hundreds of millions of chris-

tians would be set adrift from all religious fastening! Would it be better to have so many atheists than so many christians? Or if not, what church is fitted to receive into its bosom, this great majority of all the christian world. Is it determined whether they shall become jews or philanthropists, Chinese or Mahommedans, lutherans or calvinists, baptists or brownists, materialists, universalists or destructionists, arians, trinitarians, presbyterians, baxterians, sabbatarians, or millenarians, moravians, antinomians or sandemanians, jumpers or dunkers, shakers or quakers, burgers, kirkers, independents, covenanters, puritans, Hutchinsonians, Johnsonians, or muggletonians. I doubt not, that in every sect that I have named, there are good men, and if there be, I trust they will all find mercy, but chiefly so as they are charitable each to his neighbour. And why should they be otherwise? The gospel enjoins it; the constitution ordains it. Intolerance in this country could proceed from nothing but a diseased affection of the *pia mater*, or the spleen.

The constitution is remediate of many mischiefs, and must be liberally construed. It is also declaratory, and pronounces toleration. What toleration? Not that exotic and sickly plant, that in other countries subsists by culture, bearing few blossoms and no fruit. No, but that indigenous tree, whose spreading branches stretch towards the heavens—in which the native eagle builds his nest. It is holy as the Druid's oak and sacrilege to wound it. If its authors are yet alive, or if looking down from a happier abode, they have now any care of mortal things, how must they rejoice to see it flourish, to see that all these churches, are but so many temples of one

only living God, from whence his worshippers no longer sally forth with tusk and horn to gore each other, but meet like sheep, that are of one shepherd, but of another fold. If my neighbour cleaves to his own wife, shall I quarrel that he does not prefer mine, and love her better; and if he loves his own religion better, is that a ground of enmity? I think it should not. The presbyterian may assert the independent tenets of his church, yet greet his catholic brother in gentleness and charity, fearing no evil, thinking no evil. Let the peaceful friend enjoy without molestation his silent devotion, his solemn meditation and his inward prayer, his simple communication, by yea and nay, by thee and thou. In like manner, let the methodist indulge the enthusiastic extacies of his devotion, without unkindness to his fellow citizen. Let the episcopalian, more like the catholic, add music, shew, and ceremony, to charm the senses and fix the wandering attention. I have been educated in that church. I am no bigot, I see in it no certain token of *exclusive grace*, and yet I claim the right to love it above all others, if so I am disposed; and I turn to it with the more affection, because those nearest and dearest to me, by every mortal tie, have been, and are its ministers, and have been good and virtuous men. I challenge for the catholic, the self same right, and I should despise him as I should myself, if force or violence should make him swerve from any tenet of a religion which he held as sacred. It is not however, nor never shall be, an offence to me, that the pious catholic glories in his faith, that he boasts of the long and uninterrupted succession of Christ's vicars, the sanctity of its apostles, the learning of its doctors, the holiness of its countless martyrs, its unity, integrity,

catholicity, and apostolic origin; in the universality of its doctrines, dogmatical and moral; in the unanimity of its councils, in its miracles, victories, and sublime antiquity. What right have I to cavil at all this? It is enough for me, that amongst the friends I have had, none have been more true, more loyal, or more noble hearted, than catholics have proved. Without being a confessor, I have had occasions of knowing their inmost thoughts, in the hour of trial and sincerity, and I am convinced that a more intemperate or unreasonable construction could not be given to the proviso in question, than to apply the terms of either *dangerous* or *licentious* to any part of their religion or their practice!

We are not called upon to shew how the words of this proviso, may, or may not be satisfied. It lies upon the adversary to shew that they necessarily attach upon us. But I have no hesitation to meet the question, and I solve it thus: In as much as the constitution permits to all mankind, the free exercise of their religious worship, and the makers of it were aware that there were many heathen or pagan nations, whose devotional practices were repugnant to every acknowledged principle of law and morality; and yet that all these might in the course of time, become inhabitants and citizens of this country; it became necessary, therefore, to hold out some defence against the universal introduction of untried practices. To define them all, in like manner, as the exceptions in favour of the quaker was not possible; and however they might feel the necessity of clear and explicit definitions, the thing was here impossible.—They might have said, indeed, that Hindoo women should not burn themselves; that savage tribes should not make human sacrifices, or feed on human

flesh, or drink blood by way of religious festival or triumph; that bacchanalian orgies, or obscenities should not be tolerated under the name of liberty of conscience. They might have pointed out strange and freakish excentricities of self-professing christians, such as the denouncers of false judgments, and false pretenders to commissions from heaven, where they went so far as to break the peace by terrifying the innocent, and causing abortions and convulsions. They might have mentioned by name, the sect of the Adamites, that go naked in their devotion. But then, besides the difficulty of describing with certainty, things so remote and obscure, and little within their experience or observation, they had minds too extensive, and conceptions too congenial to the mighty subject entrusted to them, not to know that there might be people yet undiscovered by us, and to whom we are yet unheard of, who might, nevertheless, in the course of a few years, become our fellow citizens. Thence the necessity of this general proviso; but to suppose that it meant, by a sidewind or indirect equivocation, to proscribe a vital part of the religion of three fourths of the christian world, and that of all others the most known, is a monstrous calumny upon those, whose memory should live in never-fading honor.

But I have been too long. The peculiar reasons I have had to dread and abhor every colour and shade of religious persecution, has communicated to my argument, perhaps, an over earnestness. Those who have not seen and felt as I have done, may think it common place. I think indeed, without so many words, the point was gained. In that case, I am more beholden to the patience of the court. So that our cause be gained

I go contented, I can do no more than those great doctors who pleaded half a day before the magnanimous giant, that he would replace their bells of notre dame, which he had taken down. He heard them graciously, and then informed them, that they had spoken right persuasively, so much so that all the bells were up before they came.

The sum of all is this: The constitution has spoken plain, the gospel plainer to our purpose. When Christ had put the Sadducees to silence, he was still tempted by a cunning lawyer of the Pharisees, asking, which was the great commandment. Mark his answer:

"*Thou shalt love the Lord thy God with all thy heart, with all thy soul, and with all thy mind. This is the first and great commandment which I give unto thee, and the second is like unto the first,* THOU SHALT LOVE THY NEIGHBOUR AS THY SELF."

On Monday, the 14th of June, the Jury were called, and all appeared; the Honorable **DE WITT CLINTON**, *Mayor*, then proceeded to deliver the **DECISION OF THE COURT**, premising, that the Bench were unanimous in their opinion, but had left him to pronounce the reasons of that opinion, and that responsibility he had taken upon himself.

In order to criminate the defendants, the reverend Anthony Kohlmann, a minister of the Roman catholic church of this city, has been called upon as a witness, to declare what he knows on the subject of this prosecution. To this question he has declined answering, and

has stated in the most respectful manner the reasons which govern his conduct. That all his knowledge respecting this investigation, is derived from his functions as a minister of the Roman catholic church, in the administration of penance, one of their seven sacraments; and that he is bound by the canons of his church, and by the obligations of his clerical office, to the most inviolable secrecy—which he cannot infringe, without exposing himself to degradation from office—to the violation of his own conscience, and to the contempt of the catholic world.

In corroboration of this statement, a book entitled "The Catholic Christian instructed in the sacraments, sacrifices, ceremonies, and observances of the church, by the late right reverend R. Chalhoun, D. D." has been quoted, which declares, "That by the law of God and his church, whatever is declared in confession, can never be discovered, directly or indirectly, to any one, upon any account whatsoever, but remain an eternal secret between God and the penitent soul—of which the confessor cannot, even to save his own life, make any use at all to the penitent's discredit, disadvantage, or any other grievance whatsoever." Vide Decretum Innocentie XI. die 18 November, Anno. 1682 (page 120) and the same book also says, that penance is a sacrament, and consists, on the part of the penitent, of three things, to wit—contrition, confession, and satisfaction on the part of the minister in the absolution pronounced by the authority of Jesus Christ.

The question then is, whether a Roman catholic priest shall be compelled to disclose what he has received in confession—in violation of his conscience, of his

clerical engagements, and of the canons of his church, and with a certainty of being stripped of his sacred functions, and cut off from religious communion and social intercourse with the denomination to which he belongs.

This is an important enquiry; It is important to the church upon which it has a particular bearing. It is important to all religious denominations, because it involves a principle which may in its practical operation affect them all; we have therefore, devoted the few moments which we could spare, to an exposition of the reasons that have governed our unanimous opinion: But before we enter upon this investigation, we think it but an act of justice to all concerned in it, to state, that it has been managed with fairness, candour, and a liberal spirit, and that the counsel on both sides have displayed great learning and ability; and it is due particularly to the public prosecutors, to say, that neither in the initiation nor conducting of this prosecution, has there been manifested the least disposition to trespass upon the rights of conscience—and it is equally due to the reverend Mr. Kohlmann to mention, that the articles stolen, were delivered by him to the police, for the benefit of the owners, in consequence of the efficacy of his admonitions to the offenders, when they would otherwise, in all probability, have been retained, and that his conduct has been marked by a laudable regard for the laws of the country, and the duties of his holy office.

It is a general rule, that every man when legally called upon to testify as a witness, must relate all he knows. This is essential to the administration of civil and criminal justice.

But to this rule there are several exceptions—a husband and wife cannot testify against each other, except for personal aggressions—nor can an attorney or counsellor, be forced to reveal the communications of his client—nor is a man obliged to answer any question, the answering of which may oblige him to accuse himself of a crime, or subject him to penalties or punishment.

In the case of Lord Melville, upon a witness declining to testify, lest he might render himself liable to a civil action, the question was referred to the twelve judges; and eight, together with the lord high chancellor, against four, were of opinion, that he was bound to answer. To remove the doubt which grew out of this collision, an act of parliament was passed, declaring "that a witness cannot by law, refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself, or to expose him to a penalty or forfeiture of any nature whatever, by reason only, or on the sole ground that the answering of such question, may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty or of any other person or persons." This statute has settled the law in Great Britain. The point in this state, may be considered as res non adjudicata—but I have little doubt that when determined, the exemption from answering of a witness so circumstanced will be established.

Whether a witness is bound to answer a question, which may disgrace or degrade him, or stigmatize him by the acknowledgment of offences, which have been pardoned or punished, or by the confession of sins or vices, which may affect the purity of his character, and

the respectability of his standing in society, without rendering him obnoxious to punishment, is a question involved in much obscurity, and about which there is a variety of doctrine, and a collision of adjudications.

After carefully examining this subject, we are of opinion that such a witness, ought not to be compelled to answer. The benevolent and just principles of the common law, guard with the most scrupulous circumspection, against temptations to perjury, and against a violation of moral feeling; and what greater inducement can there be for the perpetration of this offence, than placing a man between Scylla and Charybdis, and in such an awful dilemma that he must either violate his oath, or proclaim his infamy in the face of day, and in the presence of a scoffing multitude? And is there not something due to the feelings of human nature, which revolt with horror at an avowal that must exclude the witness from the pale of decent society, and subject him to that degradation which is as frequently the cause as the consequence of crimes?

One of the earliest cases we meet with on this subject, is that of Cooke (4 St. Tr. 748. Salkreld, 153——) who being indicted for treason, in order to found a challenge for cause, asked a juror whether he had not said he believed him guilty. The whole Court determined he was not obliged to answer the question—and Lord Chief Justice Treby said, "Men have been asked whether they have been convicted and pardoned for felony, or whether they have been whipped for petit larceny, and they have not been obliged to answer: for though their answer in the affirmative will not make them criminal nor subject to punishment, yet they

are matters of infamy, and if it be an infamous thing, that's enough to preserve a man from being bound to answer. A pardoned man is not guilty; his crime is purged; but merely for the reproach of it, it shall not be put upon him to answer a question whereupon he will be forced to forswear or disgrace him."

In the case of Rex, vs. Lewis and others (4 Espinasses nisi prius cases, 225) the witness was asked if he had not been in the house of correction, in Sussex. Lord Ellenborough, relying upon the opinion just quoted, declared, that a witness was not bound to answer any question, the object of which was to degrade or render him infamous. In the case of Mac Bride, vs. Mac Bride (same book 243) Lord Alvanly, on a witness being asked whether she lived in a state of concubinage with the plaintiff, overruled the question, saying, that he thought questions as to general conduct, might be asked, but not such as went immediately to degrade the witness, and concluded by saying, "I think those questions only should not be asked, which have a direct and immediate effect to disgrace, or disparage the witness."

In the supreme court of New-Jersey (Pennington's Reports, the State, vs. Bailey, 415) the following question was proposed to a witness. Have you been convicted of petit larceny and punished? The Court after argument decided, that a witness could be asked no question, which in its answer might tend to disgrace or dishonor him, and therefore, in the particular case the witness was not bound to answer the question.

In the case of *Bell*, an insolvent debtor, which occurred in the Court of Common Pleas, for the first Judicial

District of Pennsylvania (Browne's Reports, 376) a question was asked the father of the insolvent, which went to impeach and invalidate a judgement he had against the insolvent, which question the Court overruled. *Rush*, the President, saying, "I have always overruled a question that would affect a witness *civilly*, or subject him to a *criminal prosecution*; I have gone farther, and where the answer to a question would cover the witness with *infamy or shame*, I have refused to compel him to answer it."

In the case of Jackson ex dem Wyckoff, vs. Humphrey (1 Johnson's Reports 498) a deed was attempted to be invalidated at the circuit, by the testimony of the judge, taking the proof on the ground that the proof it was taken in Canada, and also, that the subscribing witness could not have known the facts respecting the identity of the grantor, as testified by him before the judge who took the proof, and also to impeach the general character of the witness. The testimony was overruled by the judge, and a verdict found for the plaintiff, and a motion for a new trial prevailed. The Court declaring, that "The judge, before whom the proof of the deed was made, was a competent witness to prove that it was done in Canada, and if that fact be established, the proof was illegal and void. Though the judge was a competent witness, *he would not have been bound to answer any questions impeaching the integrity of his conduct as a public officer*;" and we believe it to be the general if not established practice of our Courts to excuse a witness from answering questions which relate to sexual intercourse, in actions brought for a breach of promise of marriage, or by parents for seduction.

We have gone more particularly into this branch of the subject, because it has a very intimate connexion with the point in question. None of these propositions—*that a witness is not obliged to confess a crime, or subject himself to a penalty, or to impair or injure his civil rights by his testimony—or to proclaim his turpitude or immorality,* can be considered as including within its purview, the precise case before us. They all, however, touch upon it, in a greater or less degree. With the exception of the second position, there is this strong difference, they are retrospective and refer to past conduct, whereas in the case now pending, if we decide that the witness shall testify, we prescribe a course of conduct by which he will violate his spiritual duties, subject himself to temporal loss, and perpetrate a deed of infamy. If he commits an offence against religion; if he is deprived of his office and of his bread, and thrown forlorn and naked upon the wide world, an object for the hand of scorn, to point its slow and moving finger at, we must consider that this cannot be done without our participation and coercion.

There can be no doubt but that the witness does consider, that his answering on this occasion, would be such a high handed offence against religion, that it would expose him to punishment in a future state—and it must be conceded by all, that it would subject him to privations and disgrace in this world. It is true, that he would not be obnoxious to criminal punishment, but the reason why he is excused where he would be liable to such punishment, applies with greater force to this case, where his sufferings would be aggravated by the compunctious visitings of a wounded conscience,

and the gloomy perspective of a dreadful *hereafter*; although he would not lose an estate, or compromit a civil right, yet he would be deprived of his only means of support and subsistence—and although he would not confess a crime, or acknowledge his infamy, yet he would act an offence against high heaven, and seal his disgrace in the presence of his assembled friends, and to the affliction of a bereaved church and a weeping congregation.

It cannot therefore, for a moment be believed, that the mild and just principles of the common Law would place the witness in such a dreadful predicament; in such a horrible dilemma, between perjury and false swearing: If he tells the truth he violates his ecclesiastical oath—If he prevaricates he violates his judicial oath —Whether he lies, or whether he testifies the truth he is wicked, and it is impossible for him to act without acting against the laws of rectitude and the light of conscience.

The only course is, for the court to declare that he shall not testify or act at all. And a court prescribing a different course must be governed by feelings and views very different from those which enter into the composition of a just and enlightened tribunal, that looks with a propitious eye upon the religious feelings of mankind, and which dispenses with an equal hand the universal and immutable elements of justice.

There are no express adjudications in the British courts applied to similar or analogous cases, which contradict the inferences to be drawn from the general principles which have been discussed and established in the course of this investigation: Two only have been poin-

ted out as in any respect analogous, which we shall now proceed to consider.

In the case of Du Barre &c. (Peake's cases at nisi prius 77) the following question was agitated, whether as the Defendant was a Frenchman who did not understand the English language and his attorney not understanding French was obliged to communicate with him by an interpreter, the interpreter ought to be permitted to give evidence, the Defendant's Counsel contending that this was a confidence which ought not to be broken, Lord Kenyon decided that the interpreter should only reveal such conversation as he had with the Defendant in the absence of the attorney. *Garrow* for the Plaintiff, said that a case much stronger than this had been lately determined by Mr. Justice Buller, on the Northern Circuit. That was a case in which the life of the prisoner was at stake. The name of it was, The King, vs. Sparkes. There the prisoner being a Papist had made a confession before a Protestant Clergyman of the crime, for which he was indicted and that confession was permitted to be given in evidence on the trial, and he was convicted and executed. Lord Kenyon upon this remarked, "I should have paused before I admitted the evidence here admitted."

The case referred to by Garrow, is liable to several criticisms and objections. In the first place it was stated by a Counsel in the cause, and is therefore liable to those errors and perversions which grow out of that situation. Secondly, it is the determination of a single Judge, in the hurry of a circuit, when a decision must be made promptly, without time for deliberation, or consultation, and without an opportunity for recurrence to books.

Thirdly, it is virtually overturned by Lord Kenyon, who certainly censures it with as much explicitness as one Judge can impeach the decision of his colleague, without departing from judicial decorum. Fourthly, the depositary of the secret was a Protestant Clergyman, who did not receive it under the seal of a sacrament, and under religious obligations of secrecy, and would not, therefore, be exposed to ecclesiastical degradation and universal obloquy by promulgating it.—And lastly, the decision of Mr. Justice Buller, was, to say the least, erroneous; for when a man under the agonies of an afflicted conscience and the disquietudes of a perturbed mind, applies to a minister of the Almighty, lays bare his bosom filled with guilt, and opens his heart black with crime, and solicits from him advice and consolation, in this hour of penitence and remorse, and when this confession and disclosure may be followed by the most salutary effects upon the religious principles and future conduct of the penitent, and may open to him prospects which may bless the remnant of his life, with the soul's calm sunshine and the heart-felt joy, without interfering with the interests of society, surely the establishment of a rule throwing all these pleasing prospects into shade, and prostrating the relation between the penitent and the comforter, between the votary and the minister of religion, must be pronounced a heresy in our legal code.

The other case was decided by Sir Michael Smith, Master of the Rolls of Ireland. On the 24th Febuary, 1802, (2 M'Nally, 153) a bill was filed praying to be decreed the estates of the late Lord Dunboyne, by the heir at law, who alleged that the will, under which the Defendant claimed, was a nullity, as Lord Dunboyne hav-

ing been a Popish Priest, and having conformed and relapsed to Popery, had no power to make a will. Issue was joined, and the Plaintiff produced the Reverend Mr. Gahan, a Clergyman of the church of Rome, to be examined, and interrogatories to the following effect, were among others, exhibited to him: "What Religion did the late Lord Dunboyne profess from the year 1783 to the year 1792? What Religion did he profess at the time of his death, and a short time before his death?" The witness answered to the first part, viz. that "Lord Dunboyne professed the Protestant religion during the time, &c. but *demurred* to the latter part in this way, "That his knowledge of the matter enquired of (if any he had) arose from a confidential communication to him, in the exercise of his clerical functions, and which the principles of his religion forbid him to disclose, nor was he bound by the laws of the land to answer."

The Master of the Rolls determined against the demurrer; the reasons he assigns are loose and general, and very unsatisfactory, and the only authority cited by him in support of his decision, was that of Vaillant vs. Dodermead, reported in 2 Atkyns 524, which I shall now consider with a view of showing that there is no point of resemblance or analogy between that and the adjudication of the Master of the Rolls.

The Defendant in this case having examined Mr. Bristow, *his Clerk in the Court,* the Plaintiff exhibited interrogatories for cross-examining him, to which he demurred, for that he knew nothing of the several matters enquired of in the interrogatories, besides what came to his knowledge as clerk in court, *or agent for the Defendant* in relation to the matters in question in this cause. The

Lord High Chancellor overruled the demurrer, and compelled him to answer for the following irresistible reasons. Because the matters enquired of were antecedent transactions to the commencement of the suit, the knowledge whereof, could not come to Bristow as clerk in court, or solicitor: because this was a cross-examination, and whenever a party calls upon his own attorney to testify, the other side may examine him: and because he states that he knew nothing but as clerk or agent. Now the word *agent* includes non-privileged as well as privileged persons. The only privileged persons are Counsellors, Solicitors and Attorneys; *an agent* may be a Steward or Servant.

What analogy can be traced between the cases? Did the Catholic Priest cloak himself under any generality or indefiniteness, of expression? Did he obtain any information from Lord Dunboyne previous to his acting as his confessor, or in any other capacity than as confessor? Was he called upon by the Defendant to testify, and in consequence thereof exposed to the cross-examination of the Plaintiff? Surely not. The case then relied upon, does in no respect, in no similitude of principle or resemblance of fact quadrate with the case adjudicated, or in any degree, or to any extent support it.

With those who have turned their attention to the history of Ireland, the decisions of Irish courts, respecting Roman Catholics, can have little or no weight.

That unfortunate country has been divided into two great parties, the oppressors and oppressed. The Catholic has been disfranchised of his civil rights, deprived of his inheritance, and excluded from the common rights of man; statute has been passed upon statute, and ad-

judication has been piled upon adjudication in prejudice of his religious freedom. The benign spirit of toleration, and the maxims of an enlightened policy, have recently ameliorated his condition, and will undoubtedly, in process of time, place him on the same footing with his Protestant brethren; but until he stands upon the broad pedestal of equal rights, emancipated from the most unjust thraldom, we cannot but look with a jealous eye upon all decisions which fetter him or rivet his chains.

But there is a very marked distinction between that case, and the case now under consideration. The Reverend Mr. Gahan did not pretend that he derived his information from Lord Dunboyne, in the way of a sacrament, but only as a confidential communication: he would not therefore be exposed by a promulgation, to degradation, breach of oaths, and a violation of his clerical duties. But the only imputation would be on his personal honor as a gentleman.

Penance implies contrition for a sin, confession of a sin, and satisfaction or reformation for a sin. Now can conversion to the church of Rome, in the eye of a Roman Catholic Layman, or a Roman Catholic Priest, require contrition, or confession, or reformation? And if it does not, a declaration of such conversion cannot be the sacrament of penance. In Gahan's case there was no sacrament, or religious obligation of secrecy. In the case of Mr. Kohlmann there is the strongest that religion can impose, involving every thing sacred in this world and precious in that to come.

But this is a great constitutional question, which must not be solely decided by the maxims of the common law, but by the principles of our government: We

have considered it in a restricted shape, let us now look at it upon more elevated ground; upon the ground of the constitution, of the social compact, and of civil and religious liberty.

Religion is an affair between God and man, and not between man and man. The laws which regulate it must emanate from the Supreme Being, not from human institutions. Established religons, deriving their authority from man, oppressing other denominations, prescribing creeds of orthodoxy, and punishing non-conformity, are repugnant to the first principles of civil and political liberty, and in direct collision with the divine spirit of christianity. Although no human legislator has a right to meddle with religion, yet the history of the world, is a history of oppression and tyranny over the consciences of men. And the sages who formed our constitution, with this instructive lesson before their eyes, perceived the indispensable necessity of applying a preventitive, that would forever exclude the introduction of calamities, that have deluged the world with tears and with blood, and the following section was accordingly engrafted in our state constitution:

"And whereas we are required by the benevolent principles of rational liberty, not only to expel civil tyranny, but also to guard against that spiritual oppression and intolerance, wherewith the bigotry and ambition of weak and wicked princes have scourged mankind, This convention doth further in the name, and by the authority of the good people of this state, ordain, determine, and declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed

within this state, to all mankind. Provided, that the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."

Considering that we had just emerged from a colonial state, and were infected with the narrow views and bigotted feelings, which prevailed at that time so strongly against the Roman Catholics, that a priest was liable to the punishment of death if he came into the colony, this declaration of religious freedom, is a wonderful monument of the wisdom, liberality, and philanthropy of its authors. Next to William Penn, the framers of our constitution were the first legislators who had just views of the nature of religious liberty, and who established it upon the broad and imperishable basis of justice, truth, and charity: While we are compelled to remark that this excellent provision was adopted by a majority of one, it is but proper to say, that the colonial statute against Roman Catholic Priests, originated more from political than religious considerations. The influence which the French had over the six nations, the Iroquois, and which was exercised to the great detriment of the British colonies, was ascribed to the arts and management of the Jesuits, and it was therefore, in violation of all respect for the rights of conscience, deemed of essential importance to interpose the penalty of death against their migration into the colony.

A provision conceived in a spirit of the most profound wisdom, and the most exalted charity, ought to receive the most liberal construction. Although by the constitution of the United States, the powers of congress do

not extend beyond certain enumerated objects; yet to prevent the danger of constructive assumptions, the following amendment was adopted: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In this country there is no alliance between church and state; no established religion; no tolerated religion—for toleration results from establishment—but religious freedom guaranteed by the constitution, and consecrated by the social compact.

It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements. We have but two in the Protestant Church—Baptism and the Lord's Supper—and they are considered the seals of the covenant of grace. Suppose that a decision of this court, or a law of the state should prevent the administration of one or both of these sacraments, would not the constitution be violated, and the freedom of religion be infringed? Every man who hears me will answer in the affirmative. Will not the same result follow, if we deprive the Roman catholic of one of his ordinances? Secrecy is of the essence of penance. The sinner will not confess, nor will the priest receive his confession, if the veil of secrecy is removed: To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic religion would be thus annihilated.

It has been contended that the provision of the constitution which speaks of practices inconsistent with the

peace or safety of the state, excludes this case from the protection of the constitution, and authorizes the interference of this tribunal to coerce the witness. In order to sustain this position, it must be clearly made out that the concealment observed in the sacrament of penance, is a practice inconsistent with the peace or safety of the state.

The Roman catholic religion has existed from an early period of christianity—at one time it embraced almost all Christendom, and it now covers the greater part. The objections which have been made to penance, have been theological, not political. The apprehensions which have been entertained of this religion, have reference to the supremacy, and dispensing power, attributed to the bishop of Rome, as head of the catholic church—but we are yet to learn, that the confession of sins has ever been considered as of pernicious tendency, in any other respect than its being a theological error—or its having been sometimes in the hands of bad men, perverted to the purposes of peculation, an abuse inseperable from all human agencies.

The doctirine contended for, by putting hypothetical cases, in which the concealment of a crime communicated in penance, might have a pernicious effect, is founded on false reasoning, if not on false assumptions: To attempt to establish a general rule, or to lay down a general proposition from accidential circumstances, which occur but rarely, or from extreme cases, which may sometimes happen in the infinite variety of human actions, is totally repugnant to the rules of logic and the maxims of law. The question is not, whether penance may sometimes communicate the existence of an offence

to a priest, which he is bound by his religion to conceal, and the concealment of which, may be a public injury, but whether the natural tendency of it is to produce practices inconsistent with the public safety or tranquillity. There is in fact, no secret known to the priest, which would be communicated otherwise, than by confession—and no evil results from this communication—on the contrary, it may be made the instrument of great good. The sinner may be admonished and converted from the evil of his ways: Whereas if his offence was locked up in his own bosom, there would be no friendly voice to recal him from his sins, and no paternal hand to point out to him the road to virtue.

The language of the constitution is emphatic and striking, it speaks of *acts of licentiousness*, of *practices inconsistent* with the *tranquillity and safety of the state*; it has reference to something actually, not negatively injurious. To acts committed, not to acts omitted—offences of a deep dye, and of an extensively injurious nature: It would be stretching it on the rack so say, that it can possibly contemplate the forbearance of a Roman catholic priest, to testify what he has received in confession, or that it could ever consider the safety of the community involved in this question. To assert this as the genuine meaning of the constitution, would be to mock the understanding, and to render the liberty of conscience a mere illusion. It would be to destroy the enacting clause of the proviso—and to render the exception broader than the rule, to subvert all the principles of sound reasoning, and overthrow all the convictions of common sense.

If a religious sect should rise up and violate the decencies of life, by practicing their religious rites, in a

state of nakedness; by following incest, and a community of wives. If the Hindoo should attempt to introduce the burning of widows on the funeral piles of their deceased husbands, or the Mahometan his plurality of wives, or the Pagan his bacchanalian orgies or human sacrifices. If a fanatical sect should spring up, as formerly in the city of Munster, and pull up the pillars of society, or if any attempt should be made to establish the inquisition, then the licentious acts and dangerous practices, contemplated by the constitution, would exist, and the hand of the magistrate would be rightfully raised to chastise the guilty agents.

But until men under pretence of religion, act counter to the fundamental principles of morality, and endanger the well being of the state, they are to be protected in the free exercise of their religion. If they are in error, or if they are wicked, they are to answer to the *Supreme Being*, not to the unhallowed intrusion of frail fallible mortals.

We speak of this question, not in a theological sense, but in its legal and constitutional bearings. Although we differ from the witness and his brethren, in our religious creed, yet we have no reason to question the purity of their motives, or to impeach their good conduct as citizens. They are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize the application of insult to their faith, or of torture to their consciences.

There being no evidence against the Defendants, they were acquitted.