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Bibles, Wall of Separation and Rationality

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to outright suppression. However, purveyors of filth should not be permitted to wrap themselves in the U. S. Constitution. The Constitution does not compel us to sit by idly while the morals, safety, and the very Constitution itself is threatened by a real and substantial evil. The Constitution permits us, and morality compels us to eradicate these substantive evils before materialization.

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Bibles, Wall of Separation and Rationality

On December 7, 1953, the Supreme Court of New Jersey added new height to the "wall of separation between Church and State,"[1] when it decided the case of *Tudor v. Board of Education.*[2] Whether or not this action by the New Jersey court, in the light of the First Amendment to the Federal Constitution,[3] judicial precedents, and sound legal thinking, is a reasonable one, and whether or not the effect of such action upon a desired policy of uninterrupted cooperation between Church and State may become a detrimental one, is the subject of this writing.

In the *Tudor Case,* the Gideons International[4] submitted an offer to furnish bibles to New Jersey public school students free upon request. The offer extended to students from 5th grade through high school and the Board of Education of Rutherford County was to be the medium for such distribution. The Board drew up a request form to be signed by the parents. The Board also requested that: (1) only the names of pupils whose parents had previously signed for the bibles should be used in any announcement; (2) pupils whose parents had signed for bibles were to report to the home room at the close of the session and no other pupils were to be in the room when the bibles were distributed; and (3)

[1] In the words of Jefferson, the clause in the First Amendment, against establishment of religion by law, was intended to erect a "wall of separation between Church and State." *Reynolds v. United States,* 98 U. S. 164 (1878). This metaphor has been freely thrust about the courts and secularistic circles since its first utterance. Evidence of its use as a ruling principle can be found in such a noted case as *Everson v. Board of Education,* 330 U. S. 1 (1947), where the Court said: "The Constitution requires, not comprehensive identification of State with religion, but complete separation." However, recognition is warranted in the following observation by the learned Mr. Justice Cardozo: "A fertile source of perversion in constitutional theory is the tyranny of labels." *Snyder v. Massachusetts,* 291 U. S. 87 (1934)

[2] 14 N. J. 31, 100 A. 2d. 857 (1953).

[3] U. S. CONST. FIRST AMEND. "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof."

[4] Gideons International—a religious sect founded in 1898 in Boscobel, Wisconsin. Formerly known as the Christian Commercial Men's Association of America, its purpose is to place copies of the bibles in hotels and institutions.

any announcement of names for the purpose of reporting after school should not include a reference as to the purpose of reporting.

Plaintiff, an adherent of the Jewish religion, citizen of New Jersey, and parent of a pupil in a public school of New Jersey, brought an action in the Superior Court, Law Division, to determine the validity of such distribution of Gideon Bibles in the public school and to enjoin such practice. A temporary injunction was granted. The court found in favor of Defendant-Board and vacated the restraint and the plaintiff appealed. While an appeal was pending before the Appellate Division of the Superior Court, the Supreme Court of New Jersey reversed the lower court's decision, with Chief Justice Vanderbilt holding that: (1) The Gideon Bible,[5] which is the King James version of the New Testament, is sectarian and hence, in conflict with doctrines of the religion of the Plaintiff and his child, and (2) such distribution violates the guaranty of religious freedom of both the New Jersey and the Federal Constitutions, in that it amounts to a preference of one religious sect over another.

As in all other cases concerned with Church and State and sectarianism and secularism, the court was faced with the ultimate question as to whether or not the act of the particular state or of its instrumentality (here public schools) was in violation of the guaranty of the First Amendment to the Federal Constitution: "Congress shall make no law respecting an establishment of religion,[6] or prohibiting the free exercise thereof . . ."[7] The First Amendment applies only to the Federal Government, but upon the adoption of the Fourteenth Amendment applies only to the Federal Government, but upon the adoption of the Fourteenth Amendment, the prohibitions of the First Amendment were made applicable to state action.[8]

There are many decisions which deal with questions arising from the use of the bible in devotional exercises, for religious instruction, or as a text book in

[5] The Gideon Bible is comprised of all of the New Testament, all the Book of Psalms of the Old Testament, all the Book of Proverbs of the Old Testament, all without note or comment, conformable to the edition of 1611, commonly known as the Authorized or King James version of the Holy Bible. The King James version consists of a translation made at the direction of James I of England, and published at London in 1611. The work was done by a commission of 47 scholars drawn from the universities of Oxford and Cambridge. The work of its revision by English and American committees was begun in 1870 and the revised New Testament was published in 1881 and the revised Old Testament in 1884. The Douay version consists of a translation of the New Testament made in the English College at Rheims, published there in 1582, and of the Old Testament published at Douay in 1609. It is based upon the text of the Latin Vulgate; whereas the King James version is based on the Hebrew and Greek texts. There are variances in the rendering of certain phrases and passages. The Douay incorporates the Apocrypha, which are omitted from the texts of the Testaments in the King James version. The Douay is the work of Catholics and is the translation used by the Roman Catholic Church in English-speaking countries. The King James version is the work of Protestants. This and its revisions are used in Protestant churches.

[6] The word *religion* as used in the constitutional sense, means a particular system of faith and worship, recognized in practice by a particular church, sect, or denomination. *Reynolds v. United States, supra* note 1.

[7] See note 3 *supra.*

[8] *Cantwell v. Connecticut,* 301 U. S. 296 (1940).

the public schools. Many of these cases have based their decisions upon the issue of whether or not the bible is sectarian.[9] In 1924 the Supreme Court of California was faced with a case of first impression—*Evans v. Selma Union High School District.*[10] This case did not involve the reading of bibles in public schools, but the placing of the bibles in a public school library. The California court considered the issue of sectarianism. The instant New Jersey case is also a case of first instance for it refers to the distribution of bibles in the public schools. Here, again, the court was faced with the issue of whether or not the bible was sectarian. Upon such issue, the court decided the case and denounced the action on the part of the Rutherford Board of Education.

There have been many cases from the 1840's down to the present time relating to the bible and the public school system, which have been adjudicated on the state level. A number of the cases deal factually with the *reading* of the bible in public schools, either as permitted or required by state statute or by singular action on the part of the particular public school or school board. Not a single case of bible reading in public school, however, is recorded as ever having gone to the Supreme Court of the United States for a decision on its merits.[11]

There are three methods of judicial approach used in arriving at the solution of the problem of sectarianism and the bible. The first is a consideration of whether or not the bible is a King James or a Douay version, or the Old Testament. The second method disregards the first consideration, holding that the bible, in any version, is sectarian, since it is solely a religious writing, concerning a Supreme Being, whether he be called Christ, God or Allah. The third approach is that, notwithstanding the first two considerations, the bible is non-sectarian because it is a writing of moral, social, and historical value, having no direct application to one religion.

A majority of the cases have been decided by utilizing a combination of the first and third methods maintaining, therefore, that any one or all versions of the bible are non-sectarian because such versions are writings of a moral, social, or historical value and, hence, their use in the public schools is not a violation of the First Amendment.

One of the earliest bible cases concerning the reading and teaching of the bible is *Vidal v. Girard's Executor.*[12] The school was a privately endowed institution and the case was the first to reach the highest court concerning the issue of sectarianism and the bible. The U. S. Supreme Court held that the bible, whether it be the Old Testament with its glorious principles of morality, or the New Testament, without note or comment, was non-sectarian, and, therefore,

[9] Sectarian: describes activities of the followers of one faith as related to those of adherents of another.

[10] 193 Cal. 54, 222 Pac. 801, 802 (1924).

[11] "The question whether bible reading to public school pupils violates the U. S. Constitution must remain in abeyance until the nation's highest court should decide to consider the issue on its merits." 1953 Wisc. L. Rev. 181, 255.

[12] 2 How. 127 (1844).

the use of the bible in the school did not contravene the bequest in the will which prohibited *sectarianism* in the college.[13] There are many other early cases which hold that the King James version of the bible is non-sectarian and its reading in public schools is not in violation of the First Amendment.[14] Many other cases were decided in the same manner in the Twentieth Century.[15]

Freeman v. Scheve,[16] and *Hackett v. Brooksville District,*[17] held both the King James version and the Old Testament were non-sectarian and the reading of such in public schools was not in violation of the First Amendment. Other cases have held that not only is the King James version and the Old Testament non-sectarian, but the Douay version used by the Catholic Church is also non-sectarian.[18] Likewise, in the *Vidal v. Girard's Executor's Case,*[19] the Court, in ruling that *both* the Old and New Testaments were non-sectarian, also included all other versions, stating that: ". . . excerpts from the bible read without comment, are examples of the purest principles of morality." In *Billard v. Board of Education,*[20] the court, ruling that the Old Testament is non-sectarian, stated that the great majority of cases have held that the bible and all of its versions was not a sectarian writing, but was a mere affirmation of the fundamental Judaeo-Christian ethics of our society. A more recent case in accord with the *Billard Case* is *Doremus v. Hawthorne,*[21] wherein the New Jersey Supreme Court held:

> The Old Testament is tolerantly viewed by the three predominant religions in this country, and that it is not a sectarian, and hence, the reading thereof is not inimical to the remonstrances of the First Amendment.

There have been very few bible-reading cases which hold that the bible, whether it be the Old Testament, the King James, or Douay version, is sectarian. The decision in *State ex rel Weiss v. District Board of Edgerton,*[22] is the authority on bible reading in public schools in Wisconsin. Because bibles are by statute classified as sectarian, they may neither be read nor used in the public schools. Bible reading, even without comment, to Wisconsin public school pupils is illegal

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[13] Mr. Justice Story, speaking for the Court, held: "Why may not the bible and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college; its general precepts expounded, its evidence explained, and its glorious principles of morality inculcated? What is there to prevent a work, *non-sectarian,* upon the general evidence of Christianity, from being read and taught in the college by lay teachers?" (Italics added).

[14] *Donahue v. Richards,* 38 Maine 379 (1854); *Spiller v. Woburn,* 94 Mass. 127 (1866); *McCormick v. Burt,* 95 Ill. 263 (1880); *Moore v. Monroe,* 64 Iowa 367, 20 N. W. 475 (1884); *Hart v. School District,* 1 Lanc. Law Rev. 346 (1885); *Nessle v. Hum,* 1 Ohio N. P. 140 (1894); *Pfeiffer v. Board of Education,* 118 Mich. 560, 77 N. W. 250 (1898).

[15] *Church v. Bullock,* 104 Texas 1, 109 S. W. 115 (1908); *Kaplan v. Indiana School District,* 171 Minn. 142, 214 N. W. 18 (1927); *Lewis v. Board of Education,* 276 N. Y. 490, 12 N. E. 2d. 173 (1937).

[16] 65 Neb. 853, 91 N. W. 846 (1902).

[17] 120 Ky. 608, 87 S. W. 792 (1905).

[18] 81 Colo. 276, 255 Pac. 610 (1927).

[19] See note 12 *supra.*

[20] 69 Kan. 53, 76 Pac. 442 (1904).

[21] 5 N. J. 435, 75 A. 2d. 880 (1950).

[22] 76 Wisc. 197, 44 N. W. 967 (1890).

as a violation of the state constitution. In an Illinois case, *Ring v. Board of Education,*[23] the court held that the King James version of the bible, used in school exercises, was contrary to the teachings of the plaintiff's religion and, hence, represented an "inculcation of a particular hostile doctrine."

Although the majority of cases have held that the bible in any version is non-sectarian, only those cases[24] which have held that the bible is sectarian are confronted with the further question of constitutionality: whether it be by permissive or mandatory statutes, or an action on the part of a state instrumentality, i.e. the public school or its board, as in the *Tudor Case.* This is so, because if the bible is considered non-sectarian, then there is no question of an establishment of one religion over another or the preference of one religious sect over another.[25] The First Amendment and the inevitable doctrine of separation of Church and State, is in issue only if the court decides that the bible is sectarian. The ultimate question in all such cases, therefore, is whether or not the bible, in any or all versions, is sectarian.

The Supreme Court of the United States has not ruled upon this issue of sectarianism and the bible since the *Vidal Case.* However, the Court has considered sectarianism in other cases, even though it was collateral to the main issue. In the concurring opinion in the *McCollum Case,* the Supreme Court stated, in reference to the relation between the state and the bible:

> Traditionally, organized education in the Western World was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis of education was largely the bible, and its chief purpose, inculcation of piety. To the extent that the State intervened, it used its authority to further aims of the Church.[26]

Pursuant to their police power, twelve states have enacted statutes requiring the bible to be read without comment in public schools.[27] Twenty-five others permit bible reading, and only eight states have no bible reading in public schools.[28] The Board of Education of the District of Columbia in 1926 adopted a rule requiring a reading of the bible in the public schools.[29] No state has any constitutional provision specifically prohibiting bible reading in public schools.[30] The bible is read in a large number of schools where state statutes are silent on bible reading.[31] Such a trend in judicial decisions, statutory development,

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[23] 245 Ill. 334, 92 N. E. 251 (1910).

[24] *Evans v. Selma Union High School District, supra* note 10.

[25] "A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people." *Evans Case, supra* note 10.

[26] *McCollum v. Board of Education,* 333 U. S. 203, 213 (1947).

[27] Alabama (1919), Arkansas (1930), Delaware (1915), Florida (1925), Georgia (1921), Idaho (1925), Kentucky (1924), Maine (1923), Massachusetts (1926), New Jersey (1937), Pennsylvania (1913) and Tennessee (1915).

[28] cf. *The State and Sectarian Education,* N.E.A. RESEARCH BULLETIN, 1946 p. 36.

[29] By-Laws, District of Columbia Board of Education, Ch. 6, Sec. 4.

[30] JOHNSON AND WOST, SEPARATION OF CHURCH AND STATE (1948) p. 35.

[31] A. W. JOHNSON, CHURCH-STATE RELATIONSHIPS (University of Minnesota Press, 1934), p. 289 *et. seq.*

and state practices, indicates that many states consider the bible as non-sectarian and therefore a determination of the validity of its use under the First Amendment, is unwarranted. It may be reasonably argued, that if it is permissible to *read* the bible in public schools without comment, no matter the version, and such does not amount to a preference of one religion over another, then there is nothing unconstitutional in passively allowing its *distribution* in private and upon request.

In *Billard v. Board of Education,* the court said: ". . . there is nothing in the Constitution which can be construed as an intention to exclude bibles from public schools."[32] The Gideon distribution can be said to be an incentive to all other religions to provide for their own adherents.[33] Such bible cases as the *Billard Case* have reminded the state of a certain duty in the protection of the health, safety, and morals of its citizens, by being instrumental in presenting to the youth of the state in state schools an opportunity to realize their spiritual aspirations and to nourish and arouse, a laxed or dormant inner life. Those students who want no part of such deistic submission would still be free to follow the dictates of their conscience. The court in the *Billard Case* adequately presented the state's duty when it said, at page 423:

> Every pupil who enters a public school has a right to expect, and the public has a right to demand of the teacher, that such pupil shall come out with a more acute sense of right and wrong, higher ideals of life, a more independent and manly character; a higher and truer moral sense of his duty as a citizen, and a more laudable ambition in life than when he entered. The noblest ideals of moral character are found in the *bible.* To emulate these is the supreme conception of citizenship. It could not therefore have been the intention of the framers of our constitution to impose the *duty* upon the legislature of establishing a system of common schools where morals were to be inculcated, and exclude therefrom the lives of those persons who possessed the highest moral attainments. (Italics added)

In what better way could the state exercise such a duty, than by allowing distribution of bibles, through its public schools, without directly aiding or preferring one religion over another? The New Jersey court in the instant case said it would be most impractical if all religions were to submit their versions of the bible to public schools for distribution. The court also said that an inference would be conveyed to the students and the parents that the Board of Education has placed its stamp of approval upon the particular bible permitted to be distributed, and an implication that the school preferred such bible. The argument of impracticality should not enter the realm of impossibility in the light of the duty upon the state, the benefit to the student and his parents, and in

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[32] See note 20 *supra.*

[33] There are many rural districts in this country in which there are no sectarian schools; churches and houses of faith are in the distance and there is, in general, very little opportunity for being versed in one's particular religious sect. The bible distributed through the public schools in such areas, is needed and would be most welcomed. The various religions would not be able to perform such a charitable action, if such bible-distribution is to remain unconstitutional. Each religion, with effort and careful planning, could provide the bible of their adoption for their particular student-adherents.

effect the preservation of a working democracy, permeated with the highest moral principles. The argument of inevitable inferences and implications should not presume the action of the Board of Education to be unconstitutional, when such act of passive *accommodation* does not amount to actual *aid* to, or preference of one religious sect over another.

Proceeding upon the ground that the bible, in any one or all versions, is *de facto* sectarian, notwithstanding the decisions and legislation of the past, then to what extent a state (or its instrumentality) may prefer, favor, aid or accommodate a religious sect, would be the next consideration. In the case of *Everson v. Board of Education,*[34] the U. S. Supreme Court upheld a state statute providing for the transportation of Catholic school students to Catholic Schools. The Court called this aid or benefit to a religious sect general welfare legislation, and stated, at page 18:

> The First and Fourteenth Amendments require the states to remain neutral in matters of religion. They do not require the states to be the *adversary* of religion. Although there may be some indirect benefits gained by the church in this instance, it is not such as was banned by the Amendments. (Italics added)

The New Jersey Court in the instant case called the action of the Board of Education favoritism and preference of one religious sect over another. It can be said that permission alone to use the public school system as a channel for the distribution of bibles of any religion, done privately and by request is a mere *accommodation* in the light of the actual *aid* given to a religious sect in the *Everson Case.* Such accommodation is available to any and all religions that wish to distribute their versions of the bible without charge.

Two noted cases concerning release-time programs went to the Supreme Court of the United States on the subject of accommodation or preference of one religion over another. In *McCollum v. Board of Education,*[35] the Supreme Court held that the released-time program was in violation of the First and Fourteenth Amendments because of the divisive effects of segregation according to faiths of the students. Religious instruction took place on public school property; pupils were segregated according to their faiths; pupils were solicited in school buildings for religious instruction; and registration cards were issued and distributed by the school itself. The Court considered this a *direct aid* to *some* religious sects.[36] In *Zorach v. Clauson,*[37] however, the Supreme Court upheld the New York release-

[34] 330 U. S. 1 (1947).

[35] See note 26 *supra.*

[36] It is interesting to note that the Supreme Court of Illinois, in *People v. Board of Education,* 71 N. E. 2d. 161 (1947), ruled in favor of the Illinois released-time program saying: "Freedom of religion as intended by those who wrote the State and Federal Constitutions means the right of an individual to entertain any desired religious belief without interference from the State . . . the government does not recognize a particular faith, but this does not mean that it is *indifferent* to religious faith. To deny the existence of religious motivation is to deny the inspiration and authority of the Constitution itself." (Italics added)

[37] 343 U. S. 306 (1952).

time program as constitutional because it was only an *accommodation* by the state and its instrumentality, the public school. The allowance of certain free time to all students for religious instruction outside school buildings, in their particular religion was rightly held to be an *accommodation* to *all* religions, and even an *accommodation* to atheists who prefer not to believe. The learned Court, in the *Zorach Case,* said, at page 312:

> It must be remembered that the First Amendment forbids laws respecting an establishment of religion but also laws prohibiting the free exercise thereof. We must not destroy one in an effort to preserve the other.

Prior to the *Zorach Case,* a similar program was also held to be an *accommodation* to religious groups in *Latimer v. Board of Education of Chicago.*[38] In that case, the court held that the Board should not help to support any school controlled by a church or sectarian denomination, or *aid* any church or sectarian purpose, but that neither should the board be hostile or antagonistic to religion and churches, nor interfere with free exercise and enjoyment of religious freedom. Hence, the courts in the *Zorach Case* and in the *Latimer Case* had specifically come forth with rulings which should have found decisive application in the *Tudor Case.* They interpreted the terms *accommodation* and *aid* and arrived at their sole and reasonable distinction in reference to the First Amendment and the separation of Church and State doctrine.[39] The proposition that a state or its instrumentality may not *aid* religion is recognized, but with qualifications. In reference to the First Amendment, *aid* by a state to religion presumes either an actual financial assistance, or an appropriation of state funds to religion, or such a positive action on the part of the state that it results in an establishment of one religion only, or a prohibition of the free exercise of all others, or a preference of one religion over another.

In the *Tudor Case,* the State of New Jersey, through its board, did not aid the Gideon organization financially and did not refuse to accommodate any other religion which would have also desired to distribute bibles. In the words of the First Amendment, the state permitted the "free exercise of religion." In the words of the *Zorach Case,* the state, through the Board, merely "accommodated" a religion. In the words of the *Latimer Case,* it acted "within the duty of a school board in not being hostile or antagonistic to religion or sectarian purposes" and in the words of the *Everson Case,* it was not an "adversary to religion" and "such action should not be banned by the First Amendment because some indirect benefits are gained" by the church or religion.

It seems to the writer, that the answers to the vital questions concerning the bible and the problem it presents legally, are left suspended. It should be remembered however, that: (1) the Supreme Court in *Vidal v. Executor's Will* has ruled that the bible, the Old or New Testament, is non-sectarian, (2) the majority of the decisions on the state level have held that the bible, in either the

[38] 68 N. E. 2d. 308 (1946).
[39] See note 1 *supra.*

Douay or the King James version, or the Old Testament by itself, is non-sectarian, and (3) thirty-seven states either require or permit the bible to be read because the legislators have outweighed any consideration of sectarianism with an evaluation of the benefit to students and the duty they must exercise. With some state courts still ruling, however, that the bible in any or all versions is sectarian, the problem warrants a uniform solution.

If the bible is *de facto* non-sectarian, or if it is considered to be non-sectarian, or if it is to be decided in the future once and for all that it is non-sectarian, then no question concerning the First Amendment or the separation of Church and State doctrine should be presented in a determination of its valid use. Under the recognition of the bible's pre-eminence as a work of a historical, moral, and social value, it now can be read without note or comment in a public school; it can be placed in a public school library and it can be taught as a special course in a public school. Because the bible is permitted such extensive use, and because it is given such broad recognition, then it reasonably follows that the bible should be permitted distribution through the public school system.

If the bible is *de facto* sectarian, or if it is considered to be sectarian, or if it is to be decided in the future once and for all that it is sectarian, then the First Amendment and the Separation Doctrine is the ruler in determining the validity of the bible's use in the public schools. It is the criterion which will decide whether such action on the part of a state or a school board constitutes an *aid* or an *accommodation* to religion. Although *aid* to religion is neither undesirable nor unwelcomed, it is unlikely that in the near future the legislatures and courts will ignore the presence of Jefferson's ghost and climb the "wall". *Accommodation,* however, is not unconstitutional and the Church has a right to expect it. Hence, if the state accommodates a religious sect, or a sectarian purpose, as it did in the *Tudor Case,* then this problem of sectarianism takes a back seat and it is immaterial whether or not a religion is really sectarian or whether the bible of its adoption is sectarian. *Accommodation* is mere cooperation, and not aid or support. For 160 years Church and State have been following a policy of cooperation with no ill effects to either. Each is independent in its own sphere, each in a vibrant condition.[40] Such cooperation, in the words of Mr. Justice Douglas, merely "respects the religious nature of our people and accommodates the public service of their spiritual needs."[41]

Enmity between Church and State has been erroneously read into the "establishment of religion clause" of the First Amendment, without much rationality. It was never the intention of the framers of our Constitution that every friendly gesture between Church and State should be discountenanced. The higher and the

[40] cf. 14 Law & Contem. Problems 1949, and in particular, Fahy, *Religion, Education and the Supreme Court,* at 73.

[41] See note 37 *supra,* at p. 314.

wider the "wall" grows, the greater the impairment to both Church and State. It must be remembered that this is a religious nation, founded upon religious principles, and it is precisely because of this, that this so-called "wall of separation should be transformed into a reasonable line of demarcation between friends, and into an iron curtain as between enemies."[42]

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[42] See note 37 *supra.*