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Contributors to the March Issue/Notes

Joseph F. Nigro

Francis E. Bright

Edward F. Grogan

James H. Graham

CONTRIBUTORS TO THE MARCH ISSUE

JUDSON ADAMS CRANE, A.B., Brown University; LL.B., S.J.D., Harvard University; professor of Law, University of Pittsburgh Law School since 1917; secretary of Pittsburgh Law School; Co-editor, CRANE AND MAGRUDER, CASES ON PARTNERSHIP; *Editor* 3rd Ed. CLARK AND MARSHALL, CRIMINAL LAW; CRANE'S CASES ON DAMAGES; CRANE ON PARTNERSHIP. Contributor to various periodicals.

REVEREND CHARLES C. MILTNER, C.S.C., Ph.B., 1911, University of Notre Dame; Ph.D., 1915, Gregorian University, Rome; S.T.D., 1917, Laval University, Quebec. Dean of the College of Arts and Letters, University of Notre Dame. Author of ELEMENTS OF ETHICS; INTRODUCTION TO METAPHYSICS (In collaboration with Prof. Daniel C. O'Grady); PROGRESSIVE IGNORANCE; CONFLICT BETWEEN ETHICS AND SOCIOLOGY, translated from the French of S. Deploige; and author of numerous articles in legal and other periodicals.

MOST REVEREND JOHN F. O'HARA, C.S.C., D.D. Former President of the University of Notre Dame; now Titular Bishop of Milasa and Auxiliary Bishop of the United States Army and Navy Diocese.

NOTES

CEMETERIES UNDER THE SOCIAL SECURITY ACT.—The pertinent provisions of the Social Security Act are as follows:

"Every employer (as defined in Section 1107 of this Chapter) shall pay for each calendar year an excise tax . . ." [1]

"The term employer does not include any person unless on each of some twenty days during the taxable year each day being in a different calendar week, the total number of individuals who were in his employ for some portion of the day whether or not at the same moment of time, was eight or more."

"Section (C). The term employment means any service of whatever nature performed within the United States by an employee for his employer, except:

(7) Services performed in the employ of a corporation, community chest fund, or foundation organized and operated exclusively for

[1] 42 U. S. C. A. § 1107 (Supp.) 1935.

religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of a private shareholder or individual." [2]

There have been several decisions relating to the power of Congress to levy such taxes. One case held that the exactions of an employer contained in the Act,[3] outlined above, with respect to having individuals in his employ equal to a certain percentage of total wages, was not a direct tax but an excise which Congress had the power to impose upon an employment relationship, which, though an inalienable right, is a business relationship subject to the taxing powers of Congress.[4] It has also been held that the freedom to grant exemptions from taxation is inherent in the exercise of said taxing power.[5]

There is also a similar provision relating to taxation of the employer which is found under the Unemployment Features of the Act,[6] but because of its similarity it will be unnecessary to refer to any but the cited sections of the act.

It is the purpose of this article to determine the application of the various provisions of the Social Security Act, cited above, to cemetery corporations; consequently it will be necessary to observe the various forms of cemetery corporations and the meaning of a charity in order to ascertain whether they come within the designated exemptions. The aim is to present the problem and indicate the solutions in a general way, not to cover every specific situation.

This writing, of course, will be limited to those employing eight or more on the specified days of the year,[7] for obviously, those corporations whose activities do not correspond to these provisions are not within the scope of this article. The only problem, therefore, is whether Section 1107 and its exceptions [8] will apply in order to exempt the cemeteries.

CHARITIES

A cemetery to be within the exemptions must be either religious or charitable. For our purposes here we consider the charitable first.

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2 *Ibid.* (Sub-sec. 7).

3 *Ibid.* §§ 1101-1110.

4 Charles C. Steward Machine Co. v. Davis, 301 U. S. 548, 57 Sup. Ct. 883 (1937).

5 Carmichael v. Southern Coal and Coke Co., 301 U.S. 495; 57 Sup. Ct. 868 (1937).

6 42 U.S.C.A. § 1011 (Supp.) 1935.

7 *Ibid.* § 1107.

8 *Ibid.*

A charity is broadly defined as a gift dedicated to a public use.[9] A more complete definition and probably the most widely applied is that a charity is a "gift to be applied consistently with existing laws for the benefit of an indefinite number of persons either by bringing their minds or hearts under the influence of religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government." [10] Thus we note that this definition includes religious, hospitals and such other allied institutions, the relief of poverty or promotion of education and any other function that might properly devolve on the government. Following this broad definition then, a corporate body or establishment instituted and organized for public use would be considered a charitable corporation.[11]

There are some cases, however, that draw a distinction between organizations that are empowered to receive charitable bequests and those exempt from taxation; [12] this distinction rests on the theory that an organization can be charitable for one purpose and not for another, that is, a corporation could be charitable in nature for the purposes of the Rule against Perpetuities, still if it devoted some of its activity to enterprises not strictly for the use and aid of the public, it would not be tax free, for only those organizations whose sole purpose is eleemosynary, that is, connected with aid to the needy, or benevolent, are entitled to exemptioons from taxation.[13]

The test of a charitable institution is whether it exists to carry out a purpose, recognized in the law as charitable, or whether it is maintained for gain, profit, or private advantage. This definitely establishes the principle that an institution organized for profit lacks one of the essential elements of a charitable or public use.[14]

Even though a corporation is founded for a charitable purpose it is not such if in its activities it departs from the eleemosynary

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9 *In re* Schleir's Estate, 91 Colo. 172; 13 P. 2d 273 (1932). See also New Castle Common v. Megginson, 24 Del. 361; 77 A. 565 (1910); People v. Young Men's Christian Association, 365 Ill. 118; 6 N.E. 2d 166 (1936). Nuns of Third order of St. Dominic v. Younkins, 118 Kan. 554; 235 P. 869 (1925); Gossett v. Swinney 53 Fed. 2d 772 (1931).

10 Continental Illinois Bank & Trust Co. v. Harris, 359 Ill. 86; 194 N.E. 250 (1934); also Jackson v. PPhillips, 14 Allen 539 (Mass. 1867).

11 Samuelson v. Horn, 221 Iowa 208; 265 N.W. 168 (1936). A charity might also include convenience, see Wilson v. First National Bank, 164 Iowa 402; 145 N.W. 948 (1914).

12 Young Men's Christian Association v. Paterson, 39 A. 655 (N. J. 1898).

13 Southern Methodist Hospital and Sanatarium of Tucson v. Wilson, 77 P. 2d 458 (Ariz. 1938).

14 Hall v. College of Physicians and Surgeons, 254 Mass. 95; 149 N.E. 675 (1925); People v. Young Men's Christian Association of Chicago 365 Ill. 118; 6 N.E. 2d 166 (1936).

character,[15] but the mere fact that the corporation, organized as a charitable institution receives compensation for its services will not detract from its charitable nature,[16] provided the amounts so received are applied in furthering the charitable purpose of the institution. We believe this proposition is pertinent since it should dissipate the popular misconception that "losing money" is an essential element of a corporation that seeks designation as a charitable institution for the purposes of tax exemption. Some authorities hold that ability to pay must not be regarded as a condition precedent to the reception of benefits,[17] but even though a patient may be required to pay, still if the amounts so obtained are expended for the charity and not for the private gain of the individual so operating the institution, it will be regarded as a charitable institution.[18] The full impact of these theories was developed when the Supreme Court of the state of Washington determined that the acts of the corporation were the essential factors in ascertaining their character.[19]

To summarize, therefore, a charitable institution would be one that is devoted to religion, the advancement of education, relief of poverty, aid to the sick and infirm, or some other civic enterprise. There have sometimes been other features added, however, such as: no capital stock, no provisions for dividends or profits, and even deriving all funds from a public or private charity.[20]

Organizations For Profit

Depending on applicable statutory provisions in the various jurisdictions a cemetery corporation may[21] or may not[22] be organized for pecuniary profit. However, in instances, where the corporation was organized for profit it was held subject to taxation,[23] whereas if it was not organized for profit and established for a charitable purpose it was exempt from taxation.[24] Where a special statute for

15 Hamburger v. Cornell University, 240 N. Y. 382; 148 N.E. 539 (1925).

16 St. Mary's Academy of Denver v. Solomon, 77 Colo. 463; 238 P. 22 (1925); Ettlinger v. Trustees of Randolph-Macon college, 31 Fed. 2d 869 (1929); Harrison v. Barker Annuity Fund, 90 Fed. 2d 286 (1937).

17 New England Sanitarium v. Stoneham, 205 Mass. 335; 91 N.E. 385 (1910).

18 Southern Methodist Hospital and Sanatarium of Tucson v. Wilson, 77 P. 2d 458 (Ariz. 1938).

19 *In re* Wilson's Estate, 111 Wash. 491; 191 P. 615 (1920).

20 Farm & Home Savings & Loan Association of Missouri v. Armstrong, 337 Mo. 349; 85 S.W. 2d 461 (1935).

21 United Cemetery v. Storther, 332 Mo. 971; 61 S.W. 2d 907 (1933). See also Hillier v. Lake View Memorial Park, 208 Wis. 614; 243 N.W. 406 (1932).

22 State v. Meyer, 19 Ohio App. 436.

23 Glen Oak Cemetery Co. v. Board of Appeals of Cook County, 358 Ill. 48; 192 N.E. 673 (1934).

24 Green Bush Cemetery Association v. Van Natta, 49 Ind. App. 192; 94 N.E. 899 (1911).

non-profit corporations does exist and the cemetery is organized under the general laws as a business corporation rather than a non-profit cemetery corporation it is not entitled to the rights of a charitable corporation, one of which was exemption from taxation.[25] This rule applies, however, only in those states where there are two distinct statutes—one designed to authorize the incorporation of all lawful enterprises for profit, the other, a special statute especially providing for non-profit or charitable corporations. In all events, however, the charter should be looked to in order to determine whether the corporation has gone beyond the power limited to it, since all subsequently acquired property, *ultra vires* the powers of the corporation, may be subject to taxation.[26]

The case of *United Cemetery v. Strothers*[27] held that only the general laws are applicable and the statute permits the organization of any lawful business and does not exclude a cemetery corporation; it is considered to be a reasonable inference that cemetery corporations can be organized for profit. The same case, however, held that the cemetery could not be sold for taxes, on the theory that the rights of other property owners, who had buried their dead there, intervened, and not that the cemetery should be by nature tax free.[28] The significance of this holding is that the jurisdiction collecting the tax under the Social Security Act could never enforce it by selling the cemetery lots that had already been utilized for burial purposes in order to collect the tax.

In certain specific instances, cemeteries have been regarded as charities when a gift to a cemetery was held to be a gift for a charitable purpose.[29] A grant for the maintenance of a churchyard or burial ground in connection with a church or religious society or of a public burial ground, or a burial ground of all persons of a certain race, class or neighborhood may also be considered as in the nature of a dedication for a pious and charitable use.[30] Contrary decisions have held that cemetery associations are not charitable institutions within the statute exempting bequests for use of charitable institutions from inheritance tax,[31] but this decision is based chiefly on statutory construction that the legislature had made provisions for charitable institutions and then in a completely different section of the statute had provided for cemeteries. The court's conclusion

25 Grace v. Repose, 139 N.Y. Supp. 300 (1912).

26 Brattleboro Retreat v. Town of Brattleboro, 106 Vt. 228; 173 A. 209 (1918).

27 United Cemetery v. Strother, 332 Mo. 971; 61 S.W. 2d 907 (1933).

28 *Ibid.*

29 *In re* Upham's Will, 289 N.Y. Supp. 518 (1936).

30 Hopkins v. Grimshaw, 165 U.S. 342; 17 Sup. Ct. 301. Also Beatty v. Kuntz, 7 L. Ed. 521.

31 *In re* Hill's Estate, 160 A. 916 (Maine 1932).

was that in view of this it was obvious that the legislature did not regard a cemetery as a charity; the court seemed to indicate in the dicta, however, that had it not been for this attitude of the legislature the cemetery would have been declared a charity. A cemetery which sold lots to the general public with no provisions that the income should be devoted to charitable purposes was also held not a charity,[32] but this decision also was founded on statutory construction that exemption statutes are extraordinary and should be strictly construed.

There are several instances where the Federal courts have refused to levy taxes on charitable institutions,[33] but in these cases the tax was on the property of the corporation itself, whereas the tax imposed under the Social Security Act is a tax on the relationship of employment, but adopting the reasoning of the court in *St. Anna's Asylum v. New Orleans* where funds used for charitable purposes regardless of where they were invested, were exempt, certainly an activity such as employment in a cemetery, should be exempt, since, as in the St. Anna's case, such work is for a charitable purpose in a more direct manner than invested money.

Religious Purpose

The exemption of religious institutions in the Act provides a second consideration of cemetery corporations as tax exempt institutions. The proposition is encouraged by the fact that a cemetery corporation was so held in Missouri.[34] The question of whether the corporation is a religious institution depends on the nature of its work which must be of a religious character.[35] A reference to particular state statutes for definitions of a "religious purpose," and whether the corporation can be organized under the corporation laws relating to religious institutions aid in determining "religious purpose." An early New York case even went as far as holding that a corporation organized for a benevolent, charitable or missionary character falls within the ordinary meaning of the term religious,[36] but the trend has been away from such liberality, especially in tax

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32 Town of Milford v. Commissioners of Worcester Co. 213 Mass. 162; 100 N.E. 60 (1912). See also Donnelly v. Boston Catholic Cemetery Association, 146 Mass. 163; 15 N.E. 505 (1888); East Hill Cemetery Co. of Rushville v. Thompson, 97 N.E. 1036, (Ind. 1912).

33 St. Anna's Asylum v. New Orleans, 105 U. S. 362 (1882). Gibbons v. District of Columbia, 116 U.S. 404 (1885). Compare Mason v. Zimmerman 81 Kan. 779; 106 P. 1005 (1910).

34 Society of Helpers of Holy Soul v. Law, 267 Mo. 667; 186 S.W. 718 (1916).

35 *In re* Fay's Estate, 76 N.Y. Supp. 62 (1902).

36 Hebrew Free School Association v. City of New York, 4 Hun. 446 (N.Y. 1875).

cases, and the decision was finally directly overruled,[37] seeming to indicate an attitude that the cemetery must be closely associated with religious purpose.

Thus it seems apparent that cemeteries may be exempt from the tax in the Social Security Act as a charitable corporation if they were organized under non-profit statutes, (applies only to those states having separate statute) or if they are not organized for profit. The status of the cemetery as a religious corporation is more uncertain, and is probably determined chiefly by local statutes.

Joseph F. Nigro.

CONSTITUTIONAL LAW—FINAL DETERMINATION OF DOMICIL—Recent decisions of the Supreme Court have focused attention on a problem at once controversial and complicated. In order to avoid, either in whole or part, some of the many ramifications of this problem, it will be necessary to define rather carefully the limits and scope of this note. This note will not be concerned, first of all, with the facts establishing domicil within a particular jurisdiction.[1] It will be concerned rather with the possibility of securing a final ruling on domicil, establishing it within a certain sovereignty, with particular reference to avoiding double taxation of inheritance transfers. For this reason, cases have been selected which refer primarily to the jurisdiction to determine the domicil of decedents.

The common law doctrine of a single domicil is still with us in spite of the fact that the doctrine has recently been characterized by Mr. Justice Frankfurter as a "social anachronism." [2] Our first problem, therefore, is to determine what conclusive effect an adjudication of domicil in one state has. This problem is in turn divided into two parts: the effect as to parties to the judgment and the effect as to those not parties, both within the jurisdiction of the court rendering it and in another forum. The state that taxes property which is not

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[37] *In re* Watson's Estate, 171 N. Y. 256; 63 N.E. 1109; Accord: Hailey v. McLauren Estate, 112 Miss. 705; 73 So. 727 (1917); Wyatt v. Stillman Institute, 303 Mo. 90; 260 S.W. 73 (1924); President & Council of Mt. St. Mary's College v. Williams, 32 Md. 184; 103 A. 479 (1918). Indicating a similar trend.

[1] For discussions of this problem see: Williams v. Osenton, 232 U.S. 619 (1913); Torlonia v. Torlonia, 108 Conn. 292, 142 Atl. 843 (1928); *In re* Estate of Jones, 192 Iowa 78, 182 N.W. 227 (1921); Harral v. Harral, 39 N.J. Eq. 279 (1884); *In re* Dorrance, 115 N.J. Eq. 268, 170 Atl. 601 (1934); *In re* Dorrance's Estate, 309 Pa. 151, 163 Atl. 303 (1932); White v. Tennant, 31 W. Va. 790, 8 S.E. 596 (1888).

[2] Texas v. Florida, 306 U.S. 398, 429 (1939), (dissenting opinion).

within its jurisdiction takes property without due process;[3] this raises our second problem. Third, conflicting determinations of domicil, to some extent at least, may form the basis for a suit started as a controversy between the states.[4] Mr. Justice Frankfurter said in the case of *Texas v. Florida*: "It is not to be assumed that the state courts will make findings dictated solely by fiscal advantages to their states." [5] Perhaps the Supreme Court should not make this assumption; however, an examination of the cases adjudicated shows that the states, with minor exceptions,[6] do just that; or at least, that courts generally make decisions that are coincidentally favorable to their respective state's right to tax. For this reason, the personal representative must usually seek a federal adjudication of domicil in order to avoid double taxation. Therefore, the main problem of the entire note will be to define grounds for federal jurisdiction such as those suggested, *i. e.*, the full faith and credit clause,[7] the Fourteenth Amendment,[8] and a suit between states.[9]

In order to dispose of the preliminary question which is referred to in the last paragraph, it is necessary to consider but one case, *In Re Trowbridge*,[10] which is interesting because it is singularly unique. In that case, Connecticut intervened in a suit involving the domicil of a decedent, and agreed to be bound by the decision of the New York Court. In a decision unprecedented for the most part, the Court held that the decedent was domiciled in Connecticut and hence that state should have control of administration. As said above, the decision provides no solution to the problem, because most courts will not act with such altruistic forebearance, and most interested parties refuse to run the risk of an unfavorable adjudication by intervening in a suit in another forum.

The jurisdiction of a court to control the administration of an estate and of a state to tax intangibles is based generally on the fact of domicil.[11] The doctrine is familiarly summed up in the maxim,

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3 Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905).

4 U. S. CONST. Art. III, § 2: "The judicial power shall extend . . . to controversies between two or more states; . . . ."

5 306 U. S. 398, 431, (dissenting opinion).

6 *In re* Trowbridge, 266 N. Y. 283, 194 N. E. 756 (1935); *cf. In re* Paris's Estate, 107 Misc. 463, 176 N. Y. Supp. 879 (1919).

7 U. S. CONST. Art. IV, § 1: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

8 U. S. CONST. Art. XIV, § 1.

9 U. S. CONST. Art. III, § 2.

10 266 N. Y. 283, 194 N. E. 756 (1935). In the case the court held that the State of Connecticut was bound by the decision of the lower court and hence had the right to appeal.

11 In *Bullen v. Wisconsin*, 240 U. S. 625, 631 (1916), Mr. Justice Holmes thus stated the rule: "If this fund had passed by intestate succession, it would be recognized that by the traditions of our law the property is regarded as a *universitas* the succession to which is incident to the succession to the *persona*

mobilia sequuntur personam. The doctrine is ancient in origin and began when the value of intangible property was insignificant as compared with other property. Intangible property is regarded as being in the state of the owner under this rule, and for this reason that state has the right to tax his intangible estate as well as control the administration thereof. In *Dewey v. Des Moines*[12] the Court said, approving the doctrine, and quoting from Cooley on TAXATION, "...'a State can no more subject to its power a single person or a single article of property whose residence or legal situs is in another State, than it can subject all the citizens or all the property of such other State to its power.'" [13]

The courts have variously modified these rules to take into account special circumstances. Although these rules are linked with the Fourteenth Amendment, it is necessary to discuss the more important exceptions here in order to understand the problem of jurisdiction. In the case of *Savings and Loan Society v. Multnomah County,*[14] the court held that a state may impose a tax on a mortgage interest in realty which is situate within the state although the mortgagee and the mortgage instrument are not within the state. In *City of New Orleans v. Stempel,*[15] the Supreme Court held that loans and credits might be subject to taxation at the domicil of the debtor, where the evidences of the debt were there in the hands of an agent for collection. In *Bristol v. Washington County,*[16] the Supreme Court held that intangible property might be subject to tax in the jurisdiction where the property had acquired a business situs although the owner was not a resident within that jurisdiction. In *Corry v. Baltimore,*[17] it was held that the state of incorporation may impose a condition at the time of organization that stock shall be taxable within that state no

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of the deceased. As the states where the property is situated, if governed by the common law, generally recognize the law of the domicil as determining the succession, it may be said that, in a practical sense at least, the law of the domicil is needed to establish the domicil."

12 173 U.S. 193 (1898).

13 *Cf.* Maxwell v. Bugbee, 250 U.S. 525 (1919). In that case a tax imposed on property within the state at a rate based on property both within the state and outside of it was held constitutional. In accord with Dewey v. Des Moines, Blodgett v. Silbermann, 277 U.S. 1 (1928); Frick v. Pennsylvania, 268 U.S. 473 (1925); Rhode Island Hospital Trust Co. v. Doughton, 270 U.S. 69 (1926); Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83 (1929); Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930); Baldwin v. Missouri, 281 U.S. 586 (1930).

14 169 U.S. 421 (1897).

15 175 U.S. 309 (1899); *cf.* Buck v. Beach, 206 U.S. 392 (1907).

16 177 U.S. 133 (1900); Accord: Metropolitan Life Ins. Co. v. New Orleans, 205 U.S. 395 (1907); Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936); First Bank Stock Corp. v. Minnesota, 301 U.S. 234 (1937) and cases cited therein at p. 238.

17 196 U.S. 466 (1905); Accord: Hawley v. Madden, 232 U.S. 1 (1914).

matter where the owner is domiciled. In the case of *Scottish Union v. National Insurance Company* and in *Wheeler v. Sohmer,*[18] the Supreme Court upheld the right of a state to tax the bonds and stocks of a non-resident where they were within the jurisdiction. The status of the right of a state to tax debts at the domicil of the debtor is in some doubt. The case of *Blackstone v. Miller,*[19] giving that right, has been expressly overruled in the case of *Farmers Loan & Trust Co. v. Minnesota,*[20] but it is not entirely clear what effect this decision has on other cases which would logically seem to be overruled by implication.[21] The position of these cases is still further confused by more recent decisions. In *Curry v. McCanless,*[22] the Supreme Court seemed to favor the benefit-protection theory of taxation announced in *Union Refrigerator Transit Co. v. Kentucky,*[23] and used as a basis for dissent in the *Farmers Loan Case* by Mr. Justice Holmes. Under this theory property is taxable within the state where found, which is therefore giving it the protection of its laws. Furthermore, in *Burnet v. Brooks,*[24] a case decided in 1933 and arising under the Fifth Amendment which involved stocks and bonds situate within the United States and owned by a British subject in Cuba, the Court held that the United States had a right to tax.[25] In the *Curry Case,* the Supreme Court held that a transfer of a trust estate held by an Alabama trustee might be taxed in both Alabama and Tennessee where the settlor died domiciled in Tennessee and exercised a reserved general power of appointment in his will.[26] With this brief review, showing that jurisdiction to tax does not necessarily depend on the domicil of the owner, it will be possible to continue with our problem since the jurisdiction to tax here will be that based solely on domicil and related problems of other bases for taxation will affect this problem only indirectly. The inheritance tax is a tax on the transfer of property and is merely measured in amount by the value of the property transferred.[26a]

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18 196 U.S. 611 (1905); 233 U.S. 434 (1914); Accord: Iowa v. Slimmer, 248 U.S. 115 (1918); *cf* Baldwin v. Missouri, 281 U.S. 586 (1930).

19 188 U.S. 189 (1902).

20 280 U.S. 204 (1930).

21 See concurring dissenting opinion of Mr. Justice Stone in Baldwin v. Missouri, cited *supra* note 18.

22 307 U.S. 357 (1939).

23 199 U.S. 194 (1905).

24 288 U.S. 378 (1933); *cf.* De Ganay v. Lederer, 250 U.S. 376 (1919) (Fifth Amendment not considered).

25 There seems to be no reason why "due process" should mean something different in the Fifth Amendment than it does in the Fourteenth Amendment, so far as applied to the jurisdiction to tax.

26 Accord: Bullen v. Wisconsin, 240 U.S. 625 (1916); Graves v. Elliott, 307 U.S. 383 (1939); *cf.* Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83 (1929). Contra: Wachovia Bank & Trust Co. v. Doughton, 272 U.S. 567 (1926).

26a *In re* Inheritance Tax Macky Estate, 46 Colo. 79, 102 P. 1075 (1909) and cases cited therein.

Independently of the full faith and credit clause of the Federal Constitution, some courts have held that a determination of domicil in a sister state is conclusive as to the parties thereto. In other words when jurisdiction is litigated, it is treated as a closed question on the basis of the common law doctrine of *res judicata* or estoppel by judgment. The reason for this doctrine as applied here is stated by Mr. Justice Roberts in *Baldwin v. Iowa State Traveling Men's Association*:[27] "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." [28] In *American Surety Co. v. Baldwin* [29] the Supreme Court held that a decision in a state court in a proceeding begun by motion to set aside a judgment for lack of jurisdiction is *res judicata* and entitled to full faith and credit in the federal court where the defeated petitioner tried to enjoin the enforcement of the original judgment. In another unusual application of the rule the same Court held that in an action to enforce a foreign judgment, a state court might refuse to consider the question of the jurisdiction of the court of a sister state where jurisdiction had been litigated before judgment in the first forum and that such refusal was not a denial of due process.[30] In applying this general rule to our specific situation it is interesting to see what has been done in some of the states. In the case of *In re Fischer's Estate* [31] the court held that the question of domicil was *res judicata* in New Jersey when the New York administrator applied for ancillary administration where the parties seeking to litigate jurisdiction in New Jersey had been parties to the suit in New York appointing the administrator. However, *res judicata* as to jurisdiction will not apply in a sister state if the parties to the original suit could attack it in the state where it was rendered. In *Plant v. Harrison* [32] where the decedent was originally found domiciled in Connecticut, the New York court allowed the party who applied for probate in Connecticut to attack the jurisdiction because the adjudication was not final even in the latter state.

Where the jurisdiction based on domicil as a fact is attacked in another state by persons or a state who was not a party to the original contest, another problem is presented. Is such an attack repugnant to the full faith and credit clause?[33] Let us consider a few of the

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27 283 U.S. 522 (1931).

28 Accord: Fauntleroy v. Lum, 210 U.S. 230 (1908); Davis v. Davis, 305 U.S. 32 (1938); Chi., R. I. & Pac. Ry. Co. v. Schendel, 270 U.S. 611 (1926).

29 287 U.S. 156 (1932).

30 Cherry Life Ins. Co. v. Cherry, 244 U.S. 25 (1917).

31 118 N.J. Eq. 599, 180 Atl. 633 (1935). Accord: Willett's Appeal, 50 Conn. 330 (1882); Hopper v. Nicholas, 106 Ohio St. 292, 140 N.E. 186 (1922).

32 36 Misc. 649, 74 N.Y. Supp. 411 (1902).

33 For a general discussion of this clause see: SMITH, ADEQUACY OF THE CONSTITUTION (1939) *289 ff.

cases. The Supreme Court held in *Overby v. Gordon*[34] that proceedings *in rem* in Georgia to appoint an administrator did not bind the District of Columbia which was seeking to administer the estate on the basis of domicil of the decedent. The same Court held that proceedings held in Louisiana to annul a will based on domicil of the testator there did not deny full faith and credit to the probate of the same will in Texas.[35] Where a Tennessee court rendered judgment that property in Kentucky belonged to movant in Tennessee without personal jurisdiction over the other claimant in Kentucky, the courts of Kentucky were not constitutionally bound to give full faith and credit to the judgment because it was *ex parte*.[36] Many states have decided that the Federal Constitution does not require that they give full faith and credit to adjudications of domicil of a decedent made in another forum where that domicil did not exist and the party challenging it was not a party to the prior litigation.[36a]

In the case of *Thormann v. Frame*,[37] the Supreme Court, affirming the decision of the Wisconsin Supreme Court, held that where Louisiana granted administration without determining domicil, the Wisconsin court might grant letters upon finding the decedent domiciled in Wisconsin, and that no question arose under the full faith and credit clause. The same rule was recently stated thus: "When the matter of fact or law on which jurisdiction depends was not litigated in the original suit, it is a matter to be adjudicated in the suit founded upon the judgment." [38] *In re Wise's Estate* [39] held that probate of a will in New Jersey would not affect similar proceedings in New York where there was no proof that domicil was required as a basis for probate in New Jersey.

Holland v. Jackson[40] held that original probate in another state followed by ancillary proceedings being allowed in Texas did not prevent Texas from later allowing original proceedings there. The Florida court held that similar facts did not prevent Florida from assessing

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34 177 U.S. 214 (1899).

35 Burbank v. Ernst, 232 U.S. 162 (1914). See also: Andrews v. Andrews, 188 U.S. 14 (1903); German Savings and Loan Society v. Dormitzer, 192 U.S. 125 (1904).

36 Baker v. Baker, Eccles & Co., 242 U.S. 394 (1916).

36a Smith v. Normart, 51 Ariz. 134, 75 P. 2d 38; Reynold's Estate, 217 Cal. 557, 20 P. 2d 23; Scripps v. Wayne Probate Judge, 131 Mich. 265, 90 N.W. 1061 (1902); *In re* Crane, 205 Mich. 673, 172 N.W. 584 (1919); *In re* Horton, 169 App. Div. 292, 154 N.Y. Supp. 827 (1915), *rev'd on other grounds*, 217 N.Y. 363, 111 N.E. 1066 (1916).

37 176 U.S. 350 (1899). See also *In re* Gifford's Estate, 279 N.Y. 470, 18 N.E. 2d 663 (1939).

38 Adams v. Suenger, 303 U.S. 59, 62.

39 84 Misc. 663, 146 N.Y. Supp. 789 (1914), *rev'd on other grounds*, 165 App. Div. 420, 150 N.Y. Supp. 782 (1914).

40 121 Tex. 1, 37 S.W. 2d 726 (1931).

the estate with succession taxes based on domicil there.[41] Maryland on the other hand held that the granting of ancillary letters acted as a sort of estoppel to allowing the question of domicil to be litigated there.[42] However, in the same case the court also relied on the full faith and credit clause, and the facts showed that the decedent was not a resident of Maryland. In New York, it was held that a determination by a California court during the lifetime of the decedent that she was domiciled in California where the decedent had been a party to the action in California prevented the New York court from allowing administration proceedings in that state.[43] Where one state has determined that a decedent died domiciled there, these proceedings are *prima facie* valid in another state; and unless the jurisdiction is attacked in another state on application for probate or administration, the original judgment is entitled to full faith and credit.[44]

To sum up then: it is apparent that a party to a proceeding in one state where jurisdiction is litigated is bound by the determination of the court of that state as to that question on the general doctrine of estoppel by judgment. A refusal to examine the jurisdiction of the first court in a proceeding in another state is not denial of due process of law; and no question of giving full faith and credit is involved. Furthermore where the question of jurisdiction is not litigated in the first state assuming jurisdiction, no question under the full faith and credit clause is presented when another state determines it has jurisdiction. Evidently the jurisdiction of a probate court is not presumed; it must be affirmatively established. Most states hold that granting ancillary proceedings at the instance of a representative appointed in another state cannot estop persons who are not parties to either proceeding from seeking to show that the decedent died domiciled in that state. Although the jurisdiction of a probate court must be litigated in the first state to try the case in order to bind other courts at all, once this preliminary is accomplished, the other states are bound unless the litigant therein attacks such adjudication. Lastly one state court is not bound to give full faith and credit to an adjudication in another state that the decedent died domiciled there, because the jurisdiction of a court in a sister state may always be attacked by one not concluded by the judgment determining that jurisdiction existed.

As concluded earlier, the general jurisdiction to administer an estate or to tax the inheritance transfer exists by reason of domicil of the

41 Loewenthal v. Mandell, 125 Fla. 685, 170 So. 169 (1936).

42 Kurtz v. Kurtz' Estate, 169 Md. 554, 182 Atl. 456 (1936). This case is apparently *contra* to the great weight of authority as far as the full faith and credit clause is concerned.

43 *In re* Balch's Estate, 93 Misc. 419, 156 N.Y. Supp. 1006, *aff'd without* opinion, 175 App. Div. 933, 161 N.Y. Supp. 1117 (1916).

44 Tilt v. Kelsey, 207 U. S. 43 (1907); accord: Horan v. Dore, 146 Kan. 883, 74 P. 2d 147 (1937).

owner at the time of death in the state assuming the jurisdiction. The transfer of the estate is assumed to take place at the domicil of the decedent. Other states may have jurisdiction to tax tangible property depending on its situs, or intangibles depending on the considerations mentioned at the beginning of the note. We are not concerned with the constitutionality of possible "double taxation" here arising from the situs of the property in one state and domicil of the decedent in another. That problem has been briefly considered as a preliminary to the question of jurisdiction. Our problem here is: Is the multiple taxation of the transfer of a decedent's property brought about through conflicting determinations of domicil a taking of property without due process of law? It is legally, if not actually, true that a person "lives" in only one place even though he has many residences. It seems manifestly unjust to allow two states to determine that a decedent was, at the same time, "living" within each of their respective borders, and on the basis of those determinations, to allow each of the states to levy a tax on the transfer of the estate of this "brooding omnipresence."

The injustice involved in this situation is more than well illustrated by the *Dorrance* litigation. In that case the decedent Dr. Dorrance was found domiciled in both Pennsylvania and New Jersey by the courts of the respective states.[45] He had during his lifetime amassed a large fortune and had residences in Cinnaminson, New Jersey, Radnor, Pennsylvania, and Bar Harbor, Maine. The decedent intended his domicil to be in New Jersey, but there was evidence that he in fact died domiciled in Pennsylvania. No fewer than six attempts were made to bring the case before a federal court so that the double taxation could be avoided.[46] All were unsuccessful. Most of the decisions merely denied a writ of certiorari by the Supreme Court, and are not of much value as authorities. In *Hill v. Martin*,[47] however, the court refused to restrain proceedings in New Jersey to collect the tax because the proceedings had passed the administrative stage, had not reached the highest court, and the federal courts have no power to stay proceedings in a state court.[48] This case seemed to suggest that a judgment imposing a tax on an estate where he might be domiciled elsewhere would be a denial of due process. However, the practical,

[45] *In re* Dorrance, 115 N.J. Eq. 268, 170 Atl. 601 (1934) and *In re* Dorrance's Estate, 309 Pa, 151, 163 Atl. 303 (1932).

[46] Dorrance v. Pennsylvania, 287 U.S. 660 (1932); *Id.*, 288 U.S. 617 (1933); New Jersey v. Comm. of Pennsylvania, 287 U.S. 580 (1933); Hill v. Martin, 296 U. S. 393 (1935); Dorrance v. Thayer-Martin, 298 U. S. 678, (1936); *Id.*, 298 U. S. 692 (1936).

[47] 296 U. S. 393 (1935), *aff'g* 12 F. Supp. 746 (Dist. N. J., 1935).

[48] 36 STAT. 1162 (1911), 28 U.S.C.A. § 379: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

procedural and economic value of such a solution is very doubtful. In order to protect its right, if any, the estate would have to appeal two judgments from two highest state courts at the same time and hope that the Court would unite the causes of action in order to bind both states in a determination of a single domicil.

The Dorrance litigation inspired a great deal of comment. Mr. Chafee in an article,[49] commenting on the Federal Interpleader Act of 1936, pointed out how the device of interpleader might be used to obviate taxation by two states under the act. By the act the distinction between bills of interpleader and bills in the nature of interpleader is largely destroyed. It was suggested that the representative of the decedent interplead the taxing officers of both states in a federal court. Mr. Chafee gave strong reasons for his conclusions as to this device and its constitutionality in the premises. He was unfortunately "reversed" by the Supreme Court in *Worcester County Trust v. Riley*[50] soon after the publication of his article. It must have been small consolation to the parties involved and to Mr. Chafee that the Court went to elaborate pains to refute the contentions of his article. The Court held that a taxing officer while assessing taxes was so closely identified with the state itself that a suit making him a defendant was prohibited by the Eleventh Amendment.[51] Mr. Chafee in his admirable discussion had anticipated this particular contention; but he relied on the holding in *Ex Parte Young*[52] to overthrow that astute loophole. In that case the Court held that a state officer doing an unconstitutional act was not identified with the state so as to prevent a suit against him. Mr. Chafee's argument really failed when the Court refused to say that double taxation of intangibles on the basis of domicil in two states was unconstitutional. For this reason, neither of the officers was engaged in an unconstitutional act and the Eleventh Amendment was a complete answer to the suit.[53] Thus we arrive at the conclusion—a very peculiar conclusion—that double taxation is not unlawful if both jurisdictions do it on the same theory although it may be if they do it on inconsistent theories.

Lastly, we come to the problem of suits between the states as a possible method of avoiding double taxation, though it really is no

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49 Chafee, *Federal Interpleader Act of 1936* (1936) 45 YALE L. J. 1161, 1169 *et seq.*

50 302 U.S. 292 (1937). *Cf.* City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24 (1934), 293 U.S. 112 (1934), (Eleventh Amendment not urged).

51 U. S. CONST. Art. XI.

52 209 U.S. 123 (1908).

53 302 U.S. 292 (1937) at p. 299: "Neither the Fourteenth Amendment nor the full faith and credit clause . . . requires uniformity in the decisions of the courts of different states as to place of domicil, where the exertion of state power is dependent upon domicil within its boundaries." (Citing cases). Accord: Nevin v. Martin, 22 F. Supp. 836 (Dist. N.J. 1938).

method at all, even if possible. In the first place, it is necessary for the estate to persuade the state to bring the suit, for no individual has the right. This fact limits this potential solution to a minor role. Further, the Supreme Court has been reluctant to exercise this ground of original jurisdiction because of its tendency to enliven interstate rivalry. In the case of *Connecticut v. Massachusetts* [54] the Court said: "The governing rule is that this court will not exert its extraordinary power to control the conduct of one state at the suit of another unless the threatened invasions of rights is of serious magnitude and established by clear and convincing evidence." [55] Because of this reluctance, it is obvious that the Supreme Court will be wary of the problem here involved thus throwing other difficulties into the path of the bewildered executor who seeks this way out of the dilemma.

In the case of *Iowa v. Slimmer* [56] the Court held that it had no jurisdiction of a suit by Iowa against Minnesota (which was a defendant) to prevent the latter from levying a tax on intangibles in Minnesota, even though the owner was a resident of Iowa. The basis of taxation in Minnesota was business situs there, and not domicil. In the course of the Dorrance litigation the Supreme Court in a memorandum decision refused to take jurisdiction of a suit by New Jersey against Pennsylvania.[57] No reason was given so the decision is of little value to us, although it indicates the trend. Recently, however, in the case of *Texas v. Florida*,[58] the Court took jurisdiction of a most unusual controversy. Mr. Green, who had residences in four states, died possessed of a large fortune. Texas filed a bill against Florida, Massachusetts and New York and alleged that the federal tax and the four inheritance taxes (if assessed by each state) would more than consume the estate. Texas, which had few of the assets within her borders, alleged that it would not be able to collect part of the tax it assessed. The Supreme Court examined into its own jurisdiction, determined that there was a justiciable controversy, and decided that the decedent was domiciled in Massachusetts and that therefore that state had the sole right to tax the inheritance transfer of the estate. The Court was careful to limit its jurisdiction over such a conflict to the facts of the case before it, but in a vigorous dissent, two of the justices criticized any such assumption. Not much hope for the persecuted estates can be garnered from this case, however, as far as the ordinary case is concerned, in spite of the fears of establishing a dangerous precedent expressed in the dissent. The Court was careful to reiterate the constitutionality of double taxation of estates where the

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54 282 U. S. 660, 669 (1931).

55 See also: New York v. New Jersey, 256 U.S. 296 (1921); Missouri v. Illinois, 200 U. S. 496 (1906).

56 248 U.S. 115 (1918).

57 New Jersey v. Comm. of Pennsylvania, 287 U.S. 580 (1933).

58 306 U.S. 398 (1939).

right was exerted in each state through the determination of domicil there. That the *Green Case* would not be a dangerous precedent was more than established by the case of *Massachusetts v. Missouri*[59] in which the Court held that it would not determine domicil where one state sought such a determination on the basis that it would be unable to collect the tax it assessed because the assets were in Missouri, which was also assessing an inheritance tax. There was no proof that the Missouri tax would not leave enough of the estate to pay the Massachusetts tax, and this fact is evidently essential to the jurisdiction.

It is evident from the recent decisions as well as from those decided prior to them that the Supreme Court is not likely to allow an estate to secure immunity from double taxation on the basis of conflicting determinations of domicil. Either a person must remain in one state while alive or his estate will have to take the consequences. The modern trend in taxation seems to be definitely toward the benefit-protection theory as a basis;[60] and it is probably true that the prevalent doctrine of a single domicil is outmoded, at least to some extent. An extension of the doctrine that a state may tax intangibles if the evidences of them are within the state would do much to clear up existing confusion. Domicil does not seem to be an adequate criterion under modern conditions. If the state where the intangibles were kept was allowed to tax them to the exclusion of all others, the illogical and patently unjust features of the present situation would be largely obviated. Evidently, however, the states will have to accomplish any reform by means of reciprocal arrangements. The Constitution and the Supreme Court will be of little aid.[61] Long ago Mr. Justice Holmes said:[62] "It is a sufficient answer to say that you cannot carry a constitution out with mathematical nicety to logical extremes. If you could, we never should have heard of the police power. And this is still more true of taxation, which, in most communities, is a long way off from a logical and coherent theory."

Francis E. Bright.

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59 84 L. ed. 38, 60 Sup. Ct. 39 (Nov. 6, 1939).

60 Curry v. McCanless, 307 U.S. 357 (1939); Graves v. Elliott, 307 U.S. 383 (1939).

61 Curry v. McCanless, 307 U.S. 357, 369: "Even if we could rightly regard these various and distinct legal interests, springing from distinct relationships, as a composite unitary interest and ascribe to it a single location in space, it is difficult to see how it could be said to be more in one state than in the other and upon what articulate principle the Fourteenth Amendment could be thought to have withdrawn from either state the taxing jurisdiction which it undoubtedly possessed before the adoption of the Amendment by conferring on one state, at the expense of the other, the exclusive jurisdiction to tax." See also: Pearson v. McGraw, 60 Sup. Ct. 211, 84 L. ed. 139 (1939).

62 211 U.S. 446, 448 (1908) cited with approval in Curry v. McCanless.

CREATION OF AN IMPLIED TRUST FOR A RELIGIOUS CHARITABLE PURPOSE — RESULT OF SEPARATION FROM DENOMINATION. — The scope of this work is confined to the creation of an implied trust in property belonging to a religious association and the disposition of the property of such trust in the event of a schism in the association.

Definition of Charitable Trust

A charitable trust has been defined as, "a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose." [1]

The cases and textbooks have declared a charitable purpose to be; first, for the relief of poverty; secondly, the advancement of education; thirdly, the advancement of religion; fourthly, the promotion of health; fifthly, governmental or municipal purposes; and finally, any other purposes the accomplishment of which is beneficial to the community.[2]

Creation of a Charitable Trust

Generally a charitable trust may be created in the same manner as a private trust is created, i. e., by a declaration of the owner to hold the property upon a charitable trust; a transfer *inter vivos;* a transfer by will; an appointment by one person having a power of appointment to hold the property so appointed upon a charitable trust; finally, by the operation of law.[3]

Creation of an Implied Charitable Trust for a Religious Purpose

In one of the earliest cases on the subject of a resulting trust for the benefit of a religious society the Kansas Supreme Court held that where property was purchased with funds obtained from the people of the congregation, the property improved, and possession retained by the congregation, such property was impressed with a trust even though the legal title was held by a Bishop of the Roman Catholic Church and there was no written agreement to the effect that the property was held by the Bishop in trust.[4] The court based its decision upon an

1 RESTATEMENT OF TRUSTS, § 348.

2 *Id* § 368. The following have been held to be charitable purposes; Protection of animals, Woodchock v. Wachovia Bank and Trust Co., 214 N.C. 224, 199 S.E. 20 (1939); Public Buildings, Klien v. City of Bridgeport ..... Conn. ....., 3 A. 2d. 675 (1939); Promotion of Religion, Andrews v. Young Men's Christian Association of Des Moines, ... Iowa ....., 284 N.W. 492 (1939); Masses, In Re Semenza's Will, 159 Misc. 487, 288 N.Y.S. 256 (1936); Minturn v. Conception Abbey, 227 Mo. App. 1179, 61 S.W. 2d. 352 (1933); Chelsea Nat. Bank v. Our Lady Star of the Sea, 105 N.J. Eq. 236, 147 A. 470 (1929).

3 RESTATEMENT OF TRUSTS, § 349.

4 Fink et al v. Umscheid, 40 Kan. 271, 19 Pac. 623, 2 L.R.A. 146 (1888).

earlier Kansas case [5] which adhered to the doctrine that the use follows the consideration and that such a trust is created not by the acts of the parties but rather by operation of the law. They point out that under such circumstances such a trust need not be in writing as required by the Statute of Frauds.[6] All the elements to create a resulting trust were present, the purchase price was paid by the group or congregation prior to the execution of the conveyance and the placing of the legal title in the Bishop. Therefore, the court had no other alternative but to declare this to be a resulting trust in favor of the congregation regardless of the fact that the Catholic Church had rules, canons or laws to the effect that the legal title and full control of the property was in the Bishop of the diocese in which the congregation was located.

The court of New Hampshire, however, held to the contrary and maintained that the only method of creating a trust for a religious society was by an instrument in writing.[7] This case was decided on two premises. First, that the congregation was unorganized and therefore could not take the property itself; secondly, that according to the rules of the Roman Catholic Church the legal title and control of all real property is in the Bishop of the diocese and therefore in order that a trust be imposed there must be a writing to show a contrary intention.

An early New York Statute, Act of 1813, was construed by the court to be a modification of the Statute of Frauds since the Act made no mention of the necessity of a declaration of a trust in favor of a religious society to be in writing.[8] This Act is similar in all repects to the present Religious Corporation Law of New York [9] and similar provisions have been copied by other states.

Most of the questions arising have to do with real property and the courts have gone to extremes in order to determine whether or not the property is held in trust for the members of congregation. However the rule has been developed that any conveyance or bequest made to a religious association, or to the trustees for such association, the

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5 Franklin v. Cooley, 10 Kan. 260 (1871).

6 Arizona does not require that a deed of trust be in writing. Connecticut, although not specifically requiring the deed of trust to be in writing does state that a parol trust is unenforceable. North Carolina, Ohio, Tennessee, Texas, Virginia, and Washington follow the rule that all conveyances of real estate must be in writing, therefore a deed of trust must also be in writing. Georgia statute specifically states that in order to establish a trust of both real and personal property there must be some form of writing.

7 Hennessey v. Walsh, 55 N. H. 515, (1875).

8 Voorhees v. Presbyterian Church of Amsterdam, 8 Barb. 135 (1849); Church of Redemption v. Grace Church, 6 Hun 166 (1875).

9 Chap. 52 (New York Consol. Laws).

property so conveyed or bequeathed is impressed with a trust for the members of the association by operation of law and it is not necessary that such trust be proven by an instrument in writing.[10]

Many states have passed statutes providing for the incorporation of religious societies and in these statutes the legislature has declared the powers and duties of the individual trustees. Pennsylvania passed such an act in 1855. This act provided in substance that church property shall not be otherwise held than subject to the control and disposition of the lay members of the church.[11] This was construed to mean that the trustee merely held the legal title and had no control whatever of the property, and in one case even though there was a resolution passed by the members of a Roman Catholic congregation vesting the title in the Bishop according to the rules of the Roman Catholic Church, which laws vest in the Bishop absolute control over the property, the court of equity refused to enforce the resolution.[12] This statute has since been repealed and the law now provides that all title and control is now in the trustees, Bishop, or other ecclesiastical authority, so long as such individual or individuals do not divert the property to another use.[13] This statute was applied in a recent case, *Malanchuk v. St. Mary's Greek Catholic Church.*[14] The court held that the church buildings and other property could not be used by the Greek Sect known as the Uniate Greek Church, since when the church was originally organized it was the intention of the founders that the property be used by an independent group for the benefit of all Greek religious sects and not any particular group. To have permitted the property to be used by the Uniate Catholic Church exclusively and grant title to the property to that sect would have been a violation of the statute since there would be a diversion from the purposes and uses to which the property was originally dedicated.

New Hampshire seems to be in accord with the earlier act of Pennsylvania and by statute has changed the rule of the case set out above

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10 Beneficial interest in the church is in pewholders where the money for the building of the church was paid by the pewholders, Small v. Cahoon, 207 Mass. 359, 93 N.E. 588 (1911). Beneficial interest in the members of the church, Classis of Reformed Religion In United States v. Holben, 286 Ill. 173, 122 N.E. 116 (1919); property held by member of a religious society is held in trust for that society; Maas v. Sisters of Mercy, 135 Miss. 505, 99 So. 468 (1924); Order of St. Benedict of New Jersey v. Steinhauser, 234 U. S. 640, 58 L.Ed., 1512, 54 Sup. Ct. Rep. 932, 52 L.R.A. (N.S.) 499, (1914). But see Reid v. Barry 93 Fla. 849, 112 So. 846 (1927).

11 Act of 1855, Apr. 26, P.L. 328 § 6.

12 Mazaika v. Krauczunas 233 Pa. 138, 81 A. 938 (1911). Accord: Carrick v. Canevin, 243 Pa. 283, 90 A. 147 (1914); Marien v. Evangelical Creed Congregation of Milwaukee, 132 Wis. 650, 113 N.W. 66 (1907).

13 Act of 1913, May 20, P.L. 242 § 2.

14 ..... Pa. ....., 9 A. 2d 350 (1940).

and holds that the Bishop of Manchester is a corporation to hold legal title to property for the benefit of the various parishes in his jurisdiction.[15]

The New York Religious Corporation Law [16] provides that the trustees shall have full control of all the property owned by a religious corporation and the revenue derived therefrom. In the particular instance of the Roman Catholic Church and the Ruthenian Catholic Church the property is under the control of the Bishop or Archbishop of the diocese in which the parish is situated. A very interesting case arose in New York in which a local corporation deeded its property to the parent corporation for the purpose of conforming to the denominational form of having the title of church property vested in such parent organization rather than in the local church organization, but such property so conveyed and later used was at all times used by the local organization. The court held that under the common law the superior corporation held the property in trust for the local corporation but under the statute the local corporation could not take the property from the superior organization's control.[17] This case is important since it involves the construction of the religious corporation law of New York. The court points out that under the statute a church upon becoming affiliated with another denomination having the same doctrines, such church is not entitled to have the property reconveyed to it upon seceding from the original denomination.

Effect of Division or Schism

One of the earliest and leading cases on the subject of the effect of a schism is *Watson v. Jones*,[18] decided in the United States Supreme Court. The rule laid down in this case is that where a church is strictly a congregational or independent organization and there is no special trust attached to the property except that it is for the use of the congregation as a religious society, and if subsequently a schism leads to a separation into distinct and conflicting bodies the rights of the use of the property is subject to the control of the numerical majority. The court under such circumstances refused to imply a trust since the rules that governed the body were to be determined by the majority according to the laws of the organization and therefore all the members were subject to them. It is rather difficult to reconcile the decision in *Watson v. Jones* with some of the later decisions but we must bear in mind that this part of the decision was based upon the particular

15 Akscyn v. Second Nat. Bank, 78 N.H. 196, 98 A. 519 (1916).

16 Chap. 52 § 5 (N. Y. Consol. Laws).

17 Harlem Church of Seventh Day Adventists v. Greater New York Corporation of Seventh Day Adventists, 145 Misc. 508, 260 N.Y.S. 517 (1932).

18 13 Wall. (U. S.) 679, 20 L. Ed. 666 (1872).

facts. The court, however, was general in its determination of the rights of the parties and many rules have been laid down that have decided that the will of the majority is to govern only in those cases where there has been a conflict of simple ecclesiastical matters but the majority may not divert the property away from the use to which it was originally dedicated.[19]

On the other hand where the property is impressed with a trust, either expressed or implied, by the deed originally conveying the property for church purposes the departure to warrant the exclusion of either the minority or the majority must be vital and substantial and any departure from the denominational purpose will be a breach of trust. Thus in *Mack v. Kime*,[20] the court stated, "if property is acquired by a Baptist church which, at the time of its organization, is teaching the doctrine of the Baptist faith as it is ordinarily understood, and thereafter a majority of the organization should determine to dissolve the organization and unite with an ecclesiastical body which is teaching doctrines utterly antagonistic to what are commonly understood as the doctrines of the Baptist church, the civil courts will protect the minority, who adhere to the doctrines of the original organization, in their right to hold the property, even though such minority consists of only one person. But if the question should arise in a Baptist congregation as to what is the doctrine of the Baptist church, and the difference should be such that it was manifest that there could be, in the light of history of the particular church and other churches of a similar faith, doubt as to what was to be the rule followed by the Baptist church, and the church tribunal, constituted according to the customs and usages of the Baptist churches, should decide these differences, the civil courts would not attempt to interfere with the judgment of this tribunal determining the doctrinal differences of the congregation." [21]

The case clearly points out the distinction between the right of the civil courts to take jurisdiction in actions where property rights are involved when a schism has taken place. The courts have no power to determine ecclesiastical problems, but they will protect the rights of a minority when there is a question of violation of the expressed or implied trust of real and personal property for the benefit of the members of a religious association. The courts have ruled that an implied trust arises when the property is conveyed to a group and dedicated to a specific religious purpose and that any attempt on the part of the

19 Woodrum v. Burton, 88 W. Va. 322, 107 S.E. 102 (1921); Dyer v. Superior Court, 94 Cal. App. 260, 271 Pac. 113 (1928).

20 129 Ga. 1, 58 S.E. 184, 24 L.R.A. (N.S.) 688 (1907).

21 Grupe v. Rudisell, 101 N.J. Eq. 145, 136 A. 911 (1927); Chrapko v. Kobasa, 271 Pa. 447, 1117 A. 254 (1921).

individuals to divert the property from the purpose for which it was dedicated amounts to a breach of the trust. At common law there was some confusion as to the status of the individuals as regards the property of the organization but at the present time most legislatures have enacted statutes placing all title and control over the property and its revenues in the trustees, Bishops, or other ecclesiastical authority, provided however, that such persons do not divert the property from the use to which it is dedicated.

Edward F. Grogan, Jr.

OIL AND GAS LAW — IMPLIED COVENANTS OF AN OIL AND GAS LEASE TO PROTECT THE LEASED LAND AGAINST DRAINAGE FROM OFFSET WELLS. — Oil and gas are of such a "fugitive" nature that they may be stolen or lost from the land under which they are first located in place. Thus it is possible by means of a single well on one's property to capture not only the oil and gas under that land but also that under the adjoining land belonging to others. To protect the landowner-lessor from such loss through offset wells on adjoining land, a rather well-defined body of law has grown up which implies a covenant on the part of the lessee to develop diligently the lessor's land. This body of law is well known to lawyers in oil and gas producing states, for they are well acquainted with the problems of Oil and Gas Law. But in other states, where oil and gas are only now becoming important subjects of litigation, the lawyers are not apt to be so well acquainted with the subject, and may become involved in the older theory of an oil and gas lease, that one well can hold the lease once production is obtained. Today when oil and gas are being found in many states of the Union, the importance of this body of law is becoming greater. Two federal courts have recently dealt with the question, and have reached similar conclusions. In *Cooper v. Ohio Oil Co.*,[1] the predecessors of the plaintiffs executed with the defendant oil company an oil and gas lease, for property located in the State of Wyoming, granting the defendant the right to explore for oil and gas on the land described in the contract. Although such covenants are not usually expressed in oil and gas leases, and the court commented on this fact, this contract did expressly provide that the defendant oil company "should employ all usual and lawful means to develop the premises for the discovery of oil and gas, and in the event of discovery, to produce the same with all usual and reasonable diligence during the continuance of the lease; that appellee (oil company) should prosecute the work of discovery with diligence suitable to the undertaking and

[1] 108 F. 2d 535 (1939).

adequate to realize the full benefits of the natural resources of the land, using due care to see that oil and gas should be produced from the wells within the limits of the land and not drained away through wells on neighboring land." The defendant company drilled a producing well on the plaintiffs' land, and continued a developing program on that land and on the rest of the entire oil field known as Rock River Field, in which the company was the sole owner, developer, and operator. Plaintiffs claimed that over 4,000,000 barrels of oil had been permitted to escape from underneath the plaintiffs' land, and the defendant had profited by this since it controlled the entire Rock River Field and thus had been able to capture the plaintiff's oil in other parts of the Field. The defendant answered that the property had been developed "in a prudent manner." The decision was awarded the defendant when the evidence proved that the defendant had prudently and properly developed the land and that there was no drainage. Other cases have often applied this "prudent producer" test.[2] But the interesting point of the case is not the result. It is the theory under which the plaintiffs brought the suit to begin with, and under which the court agreed they could have recovered, if the evidence had supported their contention of improper development and drainage. The court said: "It is elementary that a duty rests upon the operator of an oil property to protect it against drainage through adjoining wells and to develop the property in a prudent and proper manner. This duty is imposed upon an operator even in the absence of an expression to that effect in a contract. The law places this duty upon the operator. It is a duty that must be exercised with reasonable care and diligence. In practically all cases, courts have said that it is the lessee's duty to prevent substantial drainage through the exercise of reasonable care and diligence." [3] Thus the court intimated that the drilling of one producing well is not always enough to be called a diligent development of the land.

Ten days later in *Hay v. Shell Petroleum Corp.*,[3a] another federal court in Oklahoma reached the same conclusion, although the covenant was not expressed, but was merely implied as the plaintiffs con-

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2 Fox Petroleum Co. v. Booker, 123 Okla. 276, 253 P. 33 (1927). Wilcox v. Ryndak, 174 Okla. 24, 49 P. 2d 733 (1935). Rhoads Drilling Co. v. Allred, 123 Tex. 239, 70 S.W. 2d 576 (1934). Robinson v. Gordon Oil Co., 250 Mich. 643, 242 N.W. 795 (1932).

3 Brewster v. Lanyon Zinc Co., 140 F. 801 (1905). Allegheny Oil Co. v. Snyder, 106 F. 764 (1900). Humphreys Oil Co. v. Tatum, 26 F. 2d 882 (1928). Orr v. Comar Oil Co., 46 F. 2d 59 (1930). Shell Petroleum Corp. v. Shore, 72 F. 2d 193 (1934). Hartman Ranch Co. v. Assoc. Oil Co., 10 Cal. 2d 232, 73 P. 2d 1163 (1937). Howerton v. Kansas Natural Gas Co., 81 Kan. 553, 106 P. 47, 34 L.R.A., N.S., 34 (1910). Pelham Petroleum Co. v. North, 78 Okla. 39, 188 P. 1069 (1920).

3a 30 F. Supp. 663 (1939).

tended: "That the work of development and production would be continued with reasonable diligence along such lines as to be reasonably calculated to make the extraction of oil and gas from the leased land of mutual advantage and profit to both parties to said lease and that said lease furthermore contained an implied covenant that, if during the term of the lease, oil or gas or both were found on adjacent tracts of land within such a distance as to drain the oil or gas or both from the premises of these plaintiffs, then the lessee would drill wells on the said leasehold estate in order to protect the said leasehold estate from drainage of said oil or gas upon the said adjacent premises." But as in *Cooper v. Ohio Oil Co.,* the court found that the weight of the evidence tended to prove a diligent development and operation of the lease on the part of the defendant. The court held that: "The lease imposes no obligation upon the defendant to drill a well at the proposed location unless there is a reasonable basis for believing that it will be a commercial producer, that is, that the well over a given period, will produce a quantity of oil or gas which at the market price will yield a sum sufficient to meet all expenses of development and leave a reasonable profit for the operator." The plaintiffs introduced speculative evidence to the effect that a new well would bring in over a four year period a total of $9,250 in profit and thus would be quite profitable for both the plaintiffs and the defendant. But the defendant's figures showed a loss of $8,130, and were based on the actual cost of similar wells in the vicinity. The court held that the figures of actual cost of nearby similar wells must of necessity outweigh the speculative estimate of profit offered as evidence by the plaintiffs.

In *Wilcox v. Ryndak,*[4] the court said that the implied obligation does not exist on the part of an oil and gas lessee to drill an offset well to a well on the adjoining premises, or to drill an additional well on the leased premises after oil or gas has been discovered thereon, except where drilling of such a well would probably produce sufficient oil to repay the cost of drilling, equipping, and operating the well, and to produce reasonable profit. And whether the offset well should be drilled or the leased premises further developed depends upon what a reasonably prudent operator would do under similar circumstances. Applying this rule to the instant case it would seem that a prudent operator would not care to lose $8,130. *Stephenson v. Little* [5] stated that the test of a "commercially productive" gas well is whether it was reasonably possible to use gas producible at completion with some pecuniary profit. *Pine v. Webster* [6] held that "paying quantities" includes not only the cost of discovery, but also the cost of taking out of the ground, and thus the cost of operating the well. But the mere

[4] *Op. cit. supra* note 2.
[5] 12 S.W. 2d 196 (Tex. 1929).
[6] 118 Okla. 12, 246 P. 429 (1926).

assumption that the land involved is "probably" non-productive has been held not to excuse the lessee from drilling when there is an express covenant to drill.[7]

These cases are backed up by modern geological scientific knowledge and by practical experience. These factors dictate in the implied covenant cases whether the lessee must drill or not. And even after he has drilled one producing well on the lessor's property these factors continue to control as to whether he must drill other wells or not. In *Amerada Petroleum Corp. v. Sledge*,[8] the court said that there existed an implied covenant that the lessee should use reasonable diligence for further development, in spite of having brought in one producing well. Here it was objected that one well would not sufficiently protect the lessor of a 110-acre tract.

Thus as stated earlier herein, the doctrine of implied covenants is *contra* to the older theory that the bringing in of one producing well is a sufficient development of the lease to hold it for the lessee, and has completely replaced that older theory.

James H. Graham, Jr.

THE PROCEDURE FOR MARRIAGE CASES IN THE CANON AND CIVIL LAW.—Before considering this comparison of the adjective law in these two fields of justice, it must be understood that the Roman Catholic Church supports no belief in divorce. The marriage cases in the Canon law involve only an annulment, i.e., an adjudication of the question as to whether the marriage bond was void or null from its inception. It is not an attempt to break the marriage bond; it is only a determination as to its valid existence or non-existence. A divorce in civil law declares an already valid marital bond to be dissolved—thus presupposing the validity of the nuptial contract. No clearer words could indicate the problem and the Church's stand on the subject than a quotation from the *Instruction*:[1] "For the Church is often attacked insidiously and boldly by the enemies of the Christian Faith under the pretext that She prepares the way for divorce, whereas on

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7 Simms Oil Co. v. Colquitt, 289 S.W. 98 (Tex. 1927).

8 151 Okla. 160, 3 P. 2d 167 (1931).

1 DOHENY, PRACTICAL MANUAL FOR MARRIAGE CASES, p. 3. The INSTRUCTION is an interpretation of the Canons of the Roman Catholic Church—only those Canons, however, referring to the procedural law. It was issued by the Sacred Congregation of the Sacraments on August 15, 1936, appearing in the ACTA APOSTOLICAE SEDIS on September 10, 1936.

The INSTRUCTION is divided into Articles. Any further reference in this article to rules from the INSTRUCTION will be denoted by a citation of the Article.

the contrary the only question at issue is the actual validity or invalidity of the marriage at the time of its celebration."

In order to prevent complication and to accomplish brevity, the procedure in the courts of Indiana [2] will be used as a basis for comparison with the rules laid down in the *Instruction*. An extensive search into the statutes of the other jurisdictions appears to be fruitless, as the states are quite uniform in their procedural rules for annulment and divorce cases.

The circuit courts of Indiana have original exclusive jurisdiction in actions for annulment.[3] Although this court's decision may be appealed to a higher tribunal later, in its origin it is strictly local. Under the Canons, the Roman Pontiff is the only one who has the right to adjudge any and all cases, as he so chooses. In spite of the Pope's power to immediately assume jurisdiction over a case, he refers most questions concerning the validity of marriage to the Sacred Congregation of Sacraments. This latter body, in turn, delegates them to an even lower body, the collegiate tribunal,[4] which we are chiefly concerned with in this comparison. The collegiate tribunal, which tries the case, is the one "where the marriage was celebrated or where the defendant or, if one of the parties is a non-Catholic, where the Catholic party has a domicile or quasi-domicile." [5] It is to be noted that in both the civil and Canon law the court alone has jurisdiction, and any decision, agreement, or arbitration between the parties has no legal effect.[6]

In a civil marriage case there is but one judge, whose decision is final, unless reversed in a court of last resort. If issues of fact are submitted to a jury, the verdict is not binding on the judge.[7] This must be distinguished from the effect of findings of the jury in other civil cases,[8] wherein the jury's verdict controls the judgment. Evi-

2 BURNS' ANN. ST. 1933, § 44-106. It provides: "When either of the parties to a marriage shall be incapable, from want of age or understanding, of contracting such marriage, or when such marriage is procured through fraud of one of the parties, the same may be declared void, on application of the incapable party in the case of want of age or understanding and of the innocent party in the case of fraud, by any court having jurisdiction to decree divorces; but the children of such marriage begotten before the same, shall be legitimate; and, in such cases, the same proceedings shall be had as provided in applications for divorce."

With the exception of a few citations of court decisions, the ANNOTATED INDIANA STATUTES (Burns 1933) will be used as authority for the civil law stated herein. Any reference henceforward will be denoted merely by the section number of the statute; e.g., § 44-106.

3 § 4-1303.

4 Article 2.

5 Article 3.

6 Scott v. Scott, 17 Ind. 309 (1861) (Civil); Article 1. (Canon).

7 Powell v. Powell, 104 Ind. 18, 3 N. E. 639 (1885).

8 § 2-2501: "When a trial by jury has been had, and a general verdict rendered, the judgment must be in conformity to the verdict."

dently the state is reluctant to leave such a delicate question to a jury, which may be swayed more by its emotions and sympathies than by its reason. Except for the various clerks of the court, the judge is the only necessary member in the courtroom, besides, of course, the parties to the suit. (The civil courts allow judgments for divorce by default, however.)

In an Ecclesiastical court the collegiate tribunal is composed of three judges.[9] The presiding judge, the *Officialis,* has the duty of directing the trial and to order done whatever is necessary for the administration of justice.[10] However, in addition to the three judges and the parties to the suit, there are other necessary officers of the court.

The first and most important of these is the *Defensor Vinculi,* usually appointed by the Bishop of the jurisdiction. His is an absolute duty to defend the validity of the marriage.[11] His duties are not passive, such as the mere questioning of the plaintiff's proofs; he must do all in his power to secure information which will uphold the validity of the marriage. He represents the Church in championing the sacredness of the marriage vows. He must work relentlessly toward this end. He is automatically a counsel for the defendant,[12] regardless of the fact that the defendant has other attorneys. His presence at the trial is absolutely required—a judgment obtained or any act performed during the trial in his absence is invalid.[13] In the state of Indiana it is provided: ". . . whenever a petition for annulment remains undefended, it shall be the duty of the prosecuting attorney to appear and resist such act." [14] This is indeed wise legislation to protect the bond of marriage, but it is doubted by the writer that the prosecutor is as capable a defender of the marriage as the *Defensor Vinculi* who, in order to be qualified, must be highly learned on that one particular subject; whereas the prosecutor's duties demand that his knowledge of law must be very widespread, and consequently not as specialized, and the very title of his position demands that he condemn, not defend.

The *Promotor Iustitiae* is the officer of the court who must intervene when it is his duty to impugn the validity of the marriage bond, or when there is a question of procedural law involved.[15] It is to be observed that not only the consorts can protest the validity of the marriage, but also the *Promotor Iustitiae,* who may do so when and if there are impediments which are public in their nature, or when

9 Article 3.
10 Article 14.
11 Article 15.
12 Article 43.
13 Article 15.
14 § 3-1212.
15 Article 16.

the denunciator of the marriage is estopped from filing suit to obtain a declaration of nullity.[16] The Indiana law on this subject provides that the validity can be questioned on application of the innocent or incapable party,[17] and makes no provision for the intervention of a third party.

The parties to the Canonical suit may choose to be represented by attorneys, called *procurators,*[18] who prepare and present various bills during the trial, and by advocates who, with the *Defensor Vinculi* and *Promotor Iustitiae,* prepare the case.[19] As in Indiana, the *procurator* and advocate must fulfill certain requirements before they are qualified to represent their client. Both should be Catholic. The advocate must have his doctorate in Canon Law in addition to three years of forensic apprenticeship. The *procurator* should have a licentiate in Canon Law and one year of apprenticeship.[20] Both the Church and the State (which provides for a bar examination and moral character tests) [21] are very meticulous in this respect, for fear the law would be mishandled by a less learned and experienced attorney.

As to the steps, rules and procedure in the trial, the Canon and Civil law are substantially the same, though the Canon law allows for much more discretion and individual action on the part of the collegiate tribunal. Neither the collegiate tribunal nor the civil court judge can adjudge or decide a matrimonial case until a regular accusation or legally formed petition has preceded. This petition, in both courts, must be written by the party or his attorney (by the notary, in a Church case, if the party cannot write).[22] The petition, called such in Indiana, and called the *libellus* in Church trials, should contain the date, names of the parties plaintiff and defendant, the petition for nullity, along with a clear statement of the grounds for annulment, followed by a prayer for annulment, and signed by the plaintiff or his attorney. The *Instruction* provides that any documents, records, baptismal and marriage certificates, which are to be used in proof, should accompany the *libellus.* If proof is to be through witnesses, their names and addresses should be stated in the *libellus* with certainty.[23] The plaintiff, however, is not precluded from offering additional proof during the trial. The Indiana Statute requires an affidavit of residence of the plaintiff to accompany the petition,[24] which residence of the plaintiff is jurisdictional and cannot be waived

16 Article 35.
17 § 44-106.
18 Article 44.
19 Article 43.
20 Article 48.
21 § 4-3605 and note—providing for State Board of Law Examiners, which conducts the examination and passes on the good moral character of the applicant.
22 Article 56.
23 Articles 55 to 60.
24 § 3-1203.

by either party.[25] Under the Canons, the jurisdiction is the place "where the marriage was celebrated or where the defendant or, if one of the parties is a non-Catholic, where the Catholic party has a domicile or quasi-domicile." [26] However, concerning the legal necessity of stating and proving residence in or with the *libellus,* it is merely suggested that detailed information about the domicile of the consorts should be submitted to enable the court to determine its own competency to hear the case.[27] The Church does not make it mandatory to prove residence because the judges conduct their own personal investigation before the trial begins, and thus learns of the parties' residence.[28]

To impress one with the relentless efforts of the Church to exact justice, he is asked to notice that the tribunal, before formally examining the *libellus*, may conduct its own personal investigation about the plaintiff, the alleged grounds for the annulment, and the credibility of the parties to the suit and the witnesses named in the *libellus.*[28] Such is not the practice of the civil courts, nor is it possible in view of the fact that the various courts of the state are virtually swamped with litigation during each day, term and year.

Another affirmative act on the part of the tribunal to secure both justice and happiness between the parties is an attempt at reconciliation whenever the impediment can be dispensed from.[29] The tribunal generally sends a letter to the pastor of the party or parties asking him to attempt a reconciliation. If such efforts are successful, the renewal of consent is given.[30]

The question as to the acceptance or rejection of the *libellus* is decided on the tribunal's own motion without the aid of objections submitted by the defendant[31] whom, incidentally, is not summoned until after the *libellus* is accepted.[32] If it is rejected on technical grounds, it will be returned to the plaintiff indicating the corrections to be made.[33] This is quite different than the method for attacking the sufficiency of the petition in a civil case. The court does not act independent of any objection interposed by the defendant. The defendant may move to strike the petition, but until he does so, the petition stands.

A summons in a civil case is issued immediately after filing of the petition, and before the sufficiency of the petition is tested,[34] while in

25 Hetherington v. Hetherington, 200 Ind. 56, 59, 160 N.E. 345 (1927).
26 Article 3, Canon 1964.
27 Article 57.
28 DOHENY, PRACTICAL MANUAL FOR MARRIAGE CASES, p. 137.
29 *Ibid,* p. 139.
30 Article 65.
31 DOHENY, PRACTICAL MANUAL FOR MARRIAGE CASES, p. 142.
32 Article 74.
33 Articles 61 and 62.
34 § 2-802.

an ecclesiastical case the summons is not issued until the *libellus* has been accepted by the tribunal.[35]

The laws governing the issuance, service and return of the summons are substantially identical. Both provide for service by publication, in case personal service fails. This is done in civil law by insertion of the summons in some newspaper of general circulation and also in the county newspaper, once a week for three weeks.[36] This is also done in canonical cases, in addition to the affixing of the summons at the door of the *Curia*.[37] Although the defendant has been legally served and has failed to appear, the presiding judge may at any time during the trial, order a repetition of service.[38]

A civil marriage trial may not be heard until sixty days after the issuance of the summons, any proceeding held before being rendered void.[39] If the annulment is uncontested, the case is decided at that time. The plaintiff's allegations must be proved, for no decree will be rendered against a defendant in default without proof.[40] In the event of no contest the plaintiff must put two jurisdictional witnesses on the stand, who testify as to their acquaintance with the plaintiff and their knowledge of the time and place of his residence. Then the plaintiff and other necessary witnesses are introduced to prove the allegations in the petition. Of course, at any time, the prosecutor, who defends the defendant in case of default, may question the witnesses or interpose his own defense, supported by testimony he offers through witnesses and records. If the court is satisfied as to the plaintiff's allegations and proofs, the annulment is granted. Any action to set aside the decree of nullity must be brought within two years after the entry of the decree.[41] If the case is contested, the trial proceeds along the same lines as an ecclesiastical suit, except that the prosecuting attorney is not present, as is the *Defensor Vinculi*. The attorney appearing for the defendant must file a written authority executed by the defendant.[42] This is quite significant since in all other cases the authority of the attorney is presumed.[43] If it "appears" to the judge that there is collusion between the parties, he may, on his own motion, direct the prosecuting attorney to defend the case.[44] The defendant then files a motion to strike, a cross-petition, or an answer to the petition. From this point of the trial to the sentence, the

35 Article 74.
36 § 2-807.
37 Article 83.
38 Article 86.
39 § 3-1211.
40 §3-1208.
41 § 3-1207.
42 § 3-1215.
43 Castle v. Bell, 145 Ind. 8, 44 N.E. 2 (1896).
44 § 3-1215.

plaintiff and the defendant support their pleadings and allegations by witnesses, documents, or other material. Expert witnesses [45] may be called to testify; witnesses may be impeached [46] or their credibility [47] may be attacked, and their competency [48] questioned; and the genuineness of documents and handwriting [49] may be challenged If the petition stands on motion to strike, the defendant files an answer. Then the plaintiff files a reply, which may be met by the rejoinder of the defendant; then the surrejoinder of the plaintiff. Other pleadings are permissible if necessary. After submission of briefs and argument the judgment is rendered, which judgment is appealable.[50]

The Canon law marriage trial begins with the *litis contestatio,* the object or subject matter of the suit, i.e., the formal denial by the defendant of the plaintiff's grounds for the annulment, with the purpose of contesting it.[51] The *litis contestatio,* the issue in pleading, is actually affected by the *concordatio dubii,*[52] the legally defined doubt, which is formed by the parties in their pleadings if they agree on the doubt, or by the tribunal if they fail to agree.[53] There is a great effort on the part of the tribunal to inform a defaulting or contumacious defendant of the legally defined doubt. Even though he has deliberately refused to appear before the court upon receiving summons, the tribunal, in order to be cognizant of all the facts necessary to render a just decision, will order the defendant, in another message, to appear so that he might propose exceptions and exonerate himself from the charge of contumacy.[54] Thus one can readily see how earnest the Church is to secure the whole truth in order to effect justice. She will humble herself before a defiant and arrogant party, relieve him from punishment,—in order to secure justice.

The examination of the parties and witnesses is to be distinguished from such examination in a civil court. All questions to be directed at the witness are given to the judge, who then proposes the queries to the witness. This rule even prohibits the *Defensor Vinculi* and the *Promotor Iustitiae* from directly questioning the witness.[55] The reason for the rule, it seems, is to prevent the occasion of a witness being "trapped" or "led" into an answer by rapid-fire questioning and other forensic tactics calculated to elicit the wrong answer from the witness. Another safeguard against incorrect or false answers given by the witness is added by the rule that after the witness has com-

45 § 2-1722.
46 §§2-1724; 2-1726; 2-1727.
47 § 2-1725.
48 § 2-1714.
49 § 2-1723.
50 § 2-3201.
51 Article 87.
52 Article 88.
53 Article 92.
54 Article 89.
55 Article 96; Article 101; Canon 1773 § 2.

pleted his testimony, it must be read over to him and he may make any changes, corrections or additions.[56] There is no provision in the Indiana statutes nor any rule of law which empowers the judge to ask all the questions of the witness, nor which allows the witness to correct his testimony, after he has completed it.

As in civil law, a witness may be excluded as being incompetent;[57] he may be impeached.[58] As far as the credibility of the witnesses is concerned, the tribunal secures its own information from the pastor, priests and friends of the witnesses.[59] Experts may be employed by the courts.[60]

After the proofs are submitted, the parties and their attorneys may examine the testimony and documents.[61] If the case is not sufficiently well drawn up or if important questions are yet unsettled, the presiding judge may order the case to be completed.[62] Otherwise, the judge decrees the conclusion of the case. New witnesses and newly-discovered documents may be admitted after the formal conclusion of the case. If the judge refuses to admit such new proofs, the party denied may appeal the decision of the presiding judge to the higher tribunal.[63] Then the briefs of the parties are submitted, followed by the animadversions of the *Defensor Vinculi,* the reply of the plaintiff or *Promotor Iustitiae,* rejoinder of the *Defensor Vinculi,* and further rejoinders of either party, if necessary.[64] If requested, an oral discussion of the case will follow.[65] Then judgment is rendered according to the majority vote of the three judges.[66] Any party who feels aggrieved by the sentence may appeal,[67] but if not appealed, this sentence does not become *res judicata,* for the case may be tried before a higher tribunal, although no appeal was lodged.[68]

After proceeding through the steps of the marriage trial in both the Civil and Canon law, we see that the collegiate tribunal, the agent of the Church, is definitely an actor in the cause. Instead of the judges being obligated to base their decision on the facts and the law as they are put before them by the parties during the trial, they must assume the double role of judges and attorneys at the same time. They must make their own personal investigation; the results of such investigation, though secured outside of court, are just as conclusive

56 Article 104.
57 Article 119.
58 Canon 1783.
59 Article 138.
60 Articles 139 to 154.
61 Article 134.
62 Article 177.
63 Article 178.
64 Article 180.
65 Article 186.
66 Article 14.
67 Article 212.
68 Article 217.

as facts adduced from witnesses on the stand. The tribunal is not ordered by the Canons to dismiss the case if the plaintiff has not gathered enough proof; it must either order the plaintiff to secure such necessary proof or procure it itself. In civil law the duties of the judge are not as affirmative. His principal duty is to pronounce judgment in accord with the facts and law brought forth in the trial. If a plaintiff in a civil case, who is legally entitled to an annulment, fails to supply sufficient proofs or has submitted poor pleadings, due to the negligence or inability of himself or his attorney, the judge must pronounce sentence against him. But the Church says "No" to this judgment. In order to prevent such a sentence being rendered against a defendant or a plaintiff, purely because of his negligence or ignorance, the Church inserted these laws giving power to the judge to conduct his own investigations; and in addition has appointed the *Defensor Vinculi* and the *Promotor Iustitiae* as the agents of the Church to defend or contest the validity of the marriage bond. The Church has trained these judges, the *Defensor Vinculi* and the *Promotor Iustitiae* in all points of the Canon Law, both substantive and adjective, and in so doing has insured against an unjust decision. The Church does not seek to punish the poor pleader, nor does it seek to reward the good pleader. Instead it strives to determine justly the subject matter of the controversy—the granting or the refusing of the annulment. And the Canon law has empowered these aforementioned officers to get the right decision, even if it is necessary to go out and secure, not some, but all the evidence necessary to attain this end. It might be said that the civil law deprives one of an adjudication in his favor if he has failed to follow the adjective law. Such cannot be said of the Canon law. The rules of Canonical procedure exist as instruments to expedite and facilitate justice, but do not constitute a condition precedent to securing justice.

The words of an eminent Churchman and Canonist are quoted here in support of this opinion:[69] "Surely nothing is more praiseworthy than to labor in advancing the cause of justice. . . . . Nowhere in all literature on Law is there a greater attempt to safeguard justice than in the Laws of the Holy Church and Its interpretative Instructions. Through the centuries, She has had a great experience and all this experience She brings to us in Her legislation. Some may criticize Her for painstaking effort to arrive at a just conclusion, but no man, be he Her bitterest enemy, will dare to say that She has not thrown round about Her Tribunals every safeguard against unjust sentences. She boldly seeks only objective truth, and every human consideration in conflict with truth She casts aside."

John C. O'Connor.

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69 The quotation, drawn from the Preface to Father Doheny's PRACTICAL MANUAL FOR MARRIAGE CASES, was written by the Most Reverend Samuel A. Stritch, D.D., then Archbishop of Milwaukee; now Archbishop of Chicago.

THE RIGHT OF FREE SPEECH—The right of free speech has been variously called a natural right, a conferred right, an absolute right, a qualified right and an inalienable right. Whatever it be called, most judges and scholars agree that man can be happy only when the state recognizes the right. There is a natural tendency in all of us, as a result of our rational nature, to have the urge to communicate what we think about things to others. If we are restricted in doing so, we feel frustrated and restless. We feel that we are being deprived and oppressed. These feelings indicate that there is something about the human personality which requires freedom of expression.

Whether this right is natural or is merely conferred by the state is a question which may be of importance. In *Mitnick v. Furniture Workers Union*,[1] the judge says that freedom of speech is a qualified privilege, given by the New Jersey Constitution, and not one of the absolute rights "not given but declared by the constitution." As a result, the court held that pickets, claiming the right to picket as a part of the right of free speech, could not prevail against a property owner's interest, because that would be permitting a qualified right to prevail over and against an absolute right. This view of the right is generally minority, most authorities agreeing that the right is "inalienable," "absolute," and not merely conferred.[2] Courts which adopt the latter view are much more reluctant to permit a qualification or invasion of the right of free speech than are courts adopting the view taken by the New Jersey court. For, granted that the right is natural and absolute, a court could hardly hold that it should give way to some lesser interest. But if it be treated as a conferred and qualified right, a court may easily tamper with it.

Indispensable right that it is, free speech is not limitless. All courts recognize that there are situations where the exercise of the right may become a danger to the state, to the person, and to property. That law in regard to speech endangering person and property — libel, slander, trade libel — is well defined. But the law is not settled as to the limits which should be placed upon the right of free speech where the speech threatens peace and order. Here a controversy rages. This writing is limited to the right as it affects the existence of the state. The extent of the right, as determined at different times by various courts, will be shown and a suggestion will be made that the liberal view, to be stated later, be the one adopted in all courts.

The controversy over the extent of the right usually arises in a case testing the validity of a statute passed which limits the right. The

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1 124 N. J. Eq. 147, 200 Atl. 553 (1938).

2 Cooley, CONSTITUTIONAL LIMITATIONS (8th ed.) Vol. I, p. 95.

right itself is provided for in the Federal Constitution in two places: in the First and in the Fourteenth Amendments. The First Amendment reads:

> "Congress shall make no law respecting an establishment of religion, or of the free exercise thereof; OR ABRIDGING THE FREEDOM OF SPEECH, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The First Amendment obviously applies only to Congress. It is the Fourteenth Amendment which applies the right to the states, requiring them to refrain from meddling with it: ". . . nor shall any state deprive a person of life, liberty, or property without due process of law. . ." At one time there might have been doubt that the Fourteenth Amendment included the right of free speech, but the Supreme Court has settled the matter, ruling in the case of *Grosjean v. American Press Company* [3] that the right of free speech falls under the generic term, "liberty." The rule was repeated in *Lovell v. City of Griffin* [4] and in the *Hague Case*.[5]

A third constitutional assurance was suggested in the *Hague Case*: [6] it is a right enjoyed by virtue of United States citizenship, and therefore immune from state action abridging the privileges or immunites of citizens of the United States.[7] This assertion, made by Justice Roberts, was expressly denied in a concurring opinion by Justice Stone, who declared that the court had never held free speech to be a right inherent in United States citizenship. *The Slaughter House Cases* [8] were cited. Because of this split of opinion and because the question was not germane — the claimants of the right also referred to the undisputed guarantee of the due process clause — it could not be said that either statement laid down the law. In addition to these federal bases, the right is provided for in practically every state constitution.

As mentioned before, the controversy rages over the scope, the breadth, the extent of the right. Just how far may a man go in speaking against the existing order, for example, without exceeding his right? Surely his right is not limitless. It is universally agreed that the government may place some limits on the right. In the celebrated case of *Gitlow v. New York*,[9] the Supreme Court, through Justice Sanford, said:

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3 297 U. S. 233, 56 Sup. Ct. 444 (1936).

4 303 U. S. 444, 58 Sup. Ct. 666 (1938).

5 Hague, Mayor v. Committee for Industrial Organization, 307 U. S. 496, 59 Sup. Ct. 954 (1939).

6 *Supra*, note 5.

7 U. S. CONST. AMEND. XIV.

8 16 Wall. 79, 21 L. ed. 394 (U. S. 1873).

9 268 U. S. 652, 45 Sup. Ct. 625 (1925).

> It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted, unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom."

So we find both the state and federal governments enacting laws which limit the right of free speech. The most frequent form is the criminal syndicalism law. Another, found less often, is the sedition statute, which came into popularity during the World War. The syndicalism law is directed primarily at radical revolutionists, making it a crime to preach the doctrine of overthrowing the government by violent means. Preaching, advocating, writing, and speaking are the various acts which constitute the crime. Even when the crime is in its early stages, such as organizing a group advocating such a doctrine, the law may be applied, for the gist of the crime is conspiracy.[10] The sedition law is directed at treasonable speech and conduct. It forbids hostility to the flag and other disloyal actions. As worded it sometimes includes syndicalism. The federal government has one form of sedition statute in the Espionage Act, Act of Congress, June 15, 1917, as amended by the Act of May 16, 1918, forbidding the printing and circulation of disloyal remarks about the United States government and the war cause. It was held constitutional in the case of *Pierce v. United States*,[11] where it was said, in answer to the defendant's contention that the act violated the right of free speech, that statements calculated to interfere with military operations of the United States cannot be justified as an exercise of free speech. There are other forms of statutes narrowing the borders of free speech, some of which will be touched upon later. But the espionage, sydicalism, and sedition acts precipitate most of the controversies in which the acts, meaningless without interpretation, are construed in test cases, which cases set the actual limits of free speech.

Most important is the rule adhered to by the United States Supreme Court, for this is primarily a constitutional matter. A series of cases questioning the validity of the Espionage Act arose soon after it was enacted. The defendants, prosecuted for violating it, claimed that it violated their right of free speech. In the first case, *Schenck v. United States*,[12] Justice Holmes announced the *liberal* view of free speech, a view which was thereafter rejected by the court. The Justice laid down his "clear and present danger" rule: "The question in every case is whether the words are used in such circumstances and are of such

10 Whitney v. People, 274 U. S. 357, 47 Sup. Ct. 641 (1927).
11 252 U. S. 239, 40 Sup. Ct. 205 (1920).
12 249 U. S. 47, 39 Sup. Ct. 247 (1919).

a nature as to create a clear and present danger that they will bring about the substantive evils that the state has a right to prevent." The meaning of this rule, of course, is that before a speaker exceeds his right, his speech must have an immediate probability of causing violence. Otherwise his speech is perfectly lawful and constitutionally protected.

In the next two cases testing the Espionage Act, Justice Holmes shifted from his own liberal view to the rather conservative view announced in *Frowerk v. United States.*[13] The reason for this conservative rule, which places considerably greater limits on free speech than does the liberal view, was the emergency then existing. Holmes later proved that he would never have so held in normal times. The *conservative* rule makes the speech unlawful and unprotected merely if it has the *natural tendency* and probability of resulting in violence. In *Debs v. United States* [14] the labor leader was being prosecuted under the Act for certain sneering remarks he made about the government, and his defense was free speech and honest belief. The court laid down the rule that honest belief in the truth of what is being said is no defense against a prosecution for an illegal use of speech. In the *Debs Case,* Justice Holmes again followed the conservative rule in writing the opinion.

But the cleavage representing the two general views on free speech appears in the next case before the Supreme court, *Abrams v. United States.*[15] Five alien Russians were being prosecuted for violation of the Espionage Act by printing and distributing certain leaflets ranting against the American Cause. They claimed that their remarks were lawful by virtue of the right of free speech. The majority of the court held that if the speech has the natural tendency to create violence, it is unlawful and not that sort of speech guaranteed by the Constitution. This, the conservative rule, is the rule followed today. Holmes dissented, a practice which he followed in every subsequent case involving the right. He said that the speech should be tested by his liberal rule: if it had not the clear and present danger of resulting in violence, it is lawful. By the Holmes test, the absurd Russian leaflets would have been a lawful exercise of free speech for they surely had no clear and present danger of causing violence. But by the majority rule, these leaflets were unlawful, because they had the natural tendency to result in unlawfulness. Here, on the same set of facts, we have two possible results.

Behind Holmes' liberal rule was a policy. Holmes believed that free speech should be almost limitless. His reasons for this liberal

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13 249 U. S. 204, 39 Sup. Ct. 249 (1919).
14 249 U. S. 211, 39 Sup. Ct. 252 (1919).
15 250 U. S. 616, 40 Sup. Ct. 17 (1919).

view appear in the following excerpt from his dissenting opinion in the *Abrams Case*: [16]

> "But when men have realized that time has upset many faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by a free trade in ideas — that the best test of truth is the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our constitution. It is an experiment, as all life is an experiment. While that experiment is part of our system I think we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death unless they immediately interfere with lawful and pressing purposes of the law so that an immediate check is required to save the country."

Again in the final important case involving the Espionage Act, *Shaefer v. United States*,[17] the split as to which rule should be adopted appears. And again the liberal Holmes rule is the minority, the majority of the court adhering to the rule that "intent," "attempt," and tendency to result in violence were enough to make the speech unlawful, regardless of its danger then and there. "Their effect or the persons affected could not be shown, nor was it necessary. The *tendency* of the articles and their efficacy were enough for the offense."

In *Gitlow v. New York*,[18] the New York Criminal Anarchy statute, forbidding advocacy, by word of mouth, writing, advising, or teaching, of Criminal Anarchy (violent overthrow of government), was called into question as being violative of the right of free speech. The defendant was manager of the REVOLUTIONARY AGE, a left wing Socialist newspaper. He strongly suggested in the paper that strikes then in existence in the state of Washington be encouraged and lengthened so as to help the cause of forceful overthrow of the government. For these remarks the defendant was convicted of criminal anarchy and he appealed, asserting that the law was unconstitutional. The majority of the Supreme Court decided that the statute forbidding advocacy of such violence was valid. The court said that it was not necessary for the statute to be so worded that it fordids only imminently dangerous speech; that the state would not have to stop to decide whether each questionable exercise of the right created a clear danger of violent results. In other words, the court determined that a state statute was valid merely if it condemned speech which had the natural and probable effect of resulting in violence, regardless of the proximity or re-

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16 *Supra*, note 15.

17 251 U. S. 466, 40 Sup. Ct. 259 (1920).

18 268 U. S. 652, 45 Sup. Ct. 625 (1925).

moteness of the possibility. Justice Holmes dissented, thinking that the statute, both in itself and as applied, was an unconstitutional limitation on the right. He said that a mere spark which *might* result in a conflagration is not unlawful *unless* it is clearly foreseeable that the spark *will* result in a conflagration.

Justice Holmes made one more great statement of his liberal view, this time in *Whitney v. People*.[19] The majority of the court upheld the California Criminal Syndicalism Law, which the defendant had claimed impaired his right of free speech. The court took an unique view in achieving this result. It said that any step taken in advocating or furthering syndicalism could be made a crime, because such step was a conspiracy, a combination with others. Hence it was held that the defendant had no constitutional right to solicit members for the Communist Labor Party of California. Of course, Justice Holmes disliked the result and the statute. He wrote that the right of free speech should be expanded instead of curbed and jealously confined. He reasoned that a free exchange of ideas is the thing to be desired, for only in that way can truth be found. Any oppression might lead to more oppression of this truth-revealing device. Besides, said the Justice, why make martyrs of a few clowns by refusing them the right to air their ridiculous views? To quote from the *Shaefer Case*,[20] ". . . discussion affords ordinarily adequate protection against the dissemination of noxious doctrine."

Though the statute itself may be constitutional, it may be invalidly applied. This occurred in *Fiske v. State*,[21] where the Kansas Syndicalism Act was used to convict an Industrial Worker of the World organizer for circulating literature and soliciting members. There was little or no evidence of the fact that the I. W. W. stood for syndicalism. It was held that the conviction under these circumstances was a violation of the right: that before you can convict a man of syndicalism you must first show that he was advocating syndicalism. Otherwise the Act does not apply to his speech.

An important case recently arose in Oregon.[22] The Oregon authorities had arrested and prosecuted Dirk De Jonge for violation of the Criminal Syndicalism Law merely because he was presiding at a meeting sponsored by Communists. There was no claim that what was said at the meeting was dangerous, and provocative of violence. It was held that this was an unconstitutioanl conviction, violating the due process clause, and a clear-cut invasion of De Jonge's right of speech. What this case stands for is that a person has a right to

19 *Supra*, note 10.

20 *Supra*, note 17.

21 274 U. S. 380, 47 Sup. Ct. 655 (1927).

22 297 U. S. 353, 57 Sup. Ct. 255 (1937).

speak freely, no matter what his creed or associations happen to be. The *auspices* under which the speech is given is no test of its rightfulness. The mere fact that a man is a Communist does not deprive him of the right to speak. His topic may be perfectly lawful, such as a peaceful discussion of an economic problem, or a dispassionate comparison of forms of government. The effect of the speech is the test of its validity. As Chief Justice Hughes said,

> "The question, if the rights of free speech and assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the constitution protects."

These Supreme Court cases have been emphasized, not only because it is that venerable group speaking on a constitutional question, but also because they serve to illustrate the two different views toward the right of free speech. In normal times the more desirable law is the liberal view announced by Holmes, and precisely for the reasons listed in the *Abrams Case*. It is both dangerous and foolish to limit the right to the extent that it is limited by the conservative rule. Since further discussion on this controversy would not be fitting in a review of this kind, I proceed to a consideration of several other situations in which this problem as to the limits of the right of free speech frequently arises.

Closely allied with the problem of free speech is the question of speaking from public parks and streets, for the inability to speak from such a suitable site is virtually a deprivation of the right. The question naturally arising is, does a person have a right to speak on the street or in a public park? If so, what is the extent of that right?

A person has a right to use public places, including parks and streets, for the purpose of expressing his views, and this right is one of the liberties guaranteed by the Fourteenth Amendment.[23] It is not an absolute right, but relative and "must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order." [24] In the famous recent case on this point, Mayor Hague thought that certain gentlemen, such as the C. I. O. organizers and Norman Thomas, were unhealthy to the body of Jersey City people. Therefore he "prevented these plaintiffs, both singularly and in groups, from being, moving about, and communicating their thoughts within the city limits." [25] In order to accomplish one phase of this purpose,

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[23] Hague, Mayor v. Committee for Industrial Organization, 307 U. S. 496, 59 Sup. Ct. 954 (1939).

[24] *Supra*, note 10, 307 U. S. at p. 516.

[25] Quoting Dist. Judge Clark, C. I. O. v. Hague, 25 F. Supp. 127 (D. N. J. 1938).

the Mayor invoked a statute requiring a public park or street orator to obtain a permit from the Director of Public Safety. The Director was authorized to refuse to issue the permit if he believed the speech would result in riot and disorder. The frustrated organizers were granted an injunction restraining the city officials from enforcing this law on the ground that it was unconstitutional and violative of the Fourteenth Amendment.[26]

The Supreme Court upheld this ruling. The court branded the ordinance as void on its face because it enabled arbitrary deprivation of a constitutional right. It left the door wide open for infringements of the rights of free speech and assembly — as witness the Hague interpretation — under the guise of police regulation. Before such a law measures up to the fulness of the right of free speech, it must "make comfort or convenience in the use of the streets and parks the official standard of action." [27]

In reaching this rule, which was theretofore the minority view, the Supreme Court virtually reversed the position it took years before in the case of *Davis v. Massachusetts* [28] despite the polite attempt at distinguishing made in the opinion. The court upheld a Massachusetts law in the *Davis Case* which gave an administrative official unrestricted discretionary power in issuing permits. The court regarded the city as being in a position similar to that of a private owner, with consequent power to regulate arbitrarily.

Among the many courts following the former majority rule was the Illinois Supreme Court in the case of *Coughlin v. Chicago Park District*.[29] The court correctly interpreted the narrow Davis decision as giving the city fathers uncontrolled discretion in granting or withholding the permit. Reverend Father Coughlin was refused a permit that would have enabled him to deliver a speech in Soldiers' Field, though not one iota of evidence was introduced to support their fears that his speech might cause unrest.

With the entrance of the Hague decision, however, this is no longer the law. The Supreme Court now looks upon public parks and streets, not as the private property of the state in the absolute sense, but as property held in trust by the state for its citizens. And the people consequently have an inalienable right to use these public places so long as their use of them does not result in traffic congestion or some other form of disorder. This seems to be the more desirable rule, for it gives the same wide latitude to the exercise of speech as that provided by the Supreme Court decisions in cases involving the right as

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26 *Supra*, note 25.
27 *Supra*, note 23, 307 U. S. at p. 516.
28 167 U. S. 43, 17 Sup. Ct. 731 (1897).
29 364 Ill. 90, 4 N. E. (2d) 1 (1936).

such. The right of free speech is so closely related to the right to assemble in a public place for speech making purposes that a restriction of the latter, the right to use the park, is a blow to free speech. Free speech will thrive only in a community where the authorities are liberal with parks and streets.

The question as to the limits which should be placed on the right of free speech frequently arises in picketing cases. Does an injunction, for example, restraining picketing, constitute a violation of the right of free speech?

The answer is usually controlled by labor law. If, for example, there is no labor dispute, a man can't picket and claim protection under the right of free speech, because he is committing a tort. The right of free speech does not include the right to commit a wrong by the use of speech.[30]

But in California, the approach to the legality of picketing by placards and speech is from the viewpoint of the right of free speech. There the right to picket is not confined to labor disputes, and it is based upon the right of free speech. We find the rule to be, therefore, that, so long as the picketing is peaceful, that is, has no violent effects, it is in the exercise of the right of free speech and may not, for that reason, be enjoined.[31]

There are other situations, governed by statutes, where the right of free speech is called into question. For example, a Michigan statute forbidding the display of a red flag was held not to be a violation of the right by the Michigan Supreme Court on the ground that this was one form of criminal syndicalism.[32] Handbill statutes requiring permission to distribute handbills fall under freedom of the press, but are often discussed in conjunction with free speech. In so far as they aim at a police regulation and are so worded as to insure that kind of application, they are constitutional. But when they are so lax as to permit infringement of free speech and press they are unconstitutional.[33] Statutes forbidding fortune tellers to operate, atheists to

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30 Moreland Theatres Corp. v. Portland Moving Picture Machine Union, 140 Ore. 35, 12 P. (2d) 333 (1932); Meadowmore Dairies v. Milk Drivers' Union of Chicago, No. 753, 371 Ill. 377, 21 N. E. (2d) 308 (1939); Carey v. Dist. Ct. of Jasper County, 286 N. W. 236 (1939), where power to enjoin mass picketing held not to be violative of free speech.

31 *Ex parte* Lyons, 81 P. (2d) 190 (Cal. App. 1938); People v. Harris, 104 Colo. 386, 91 P. (2d) 989 (1939), where a statute forbidding peaceful picketing for the purpose of interfering with any lawful business was held to be infringement of free speech; City of Reno v. 2nd Dist. Ct. of Washoe County, 95 P. (2d) 994 (Nev. 1939), where city ordinance prohibiting picketing in any form held unconstitutional as violation of right of free speech.

32 People v. Immonen, 271 Mich. 384, 261 N. W. 59 (1935).

33 Hague Case, *supra*, note 23; Lovell v. City of Griffin, *supra*, note 4.