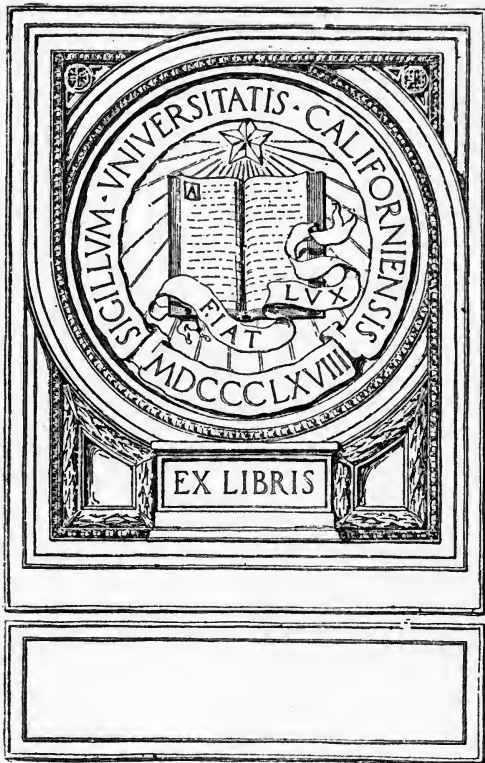
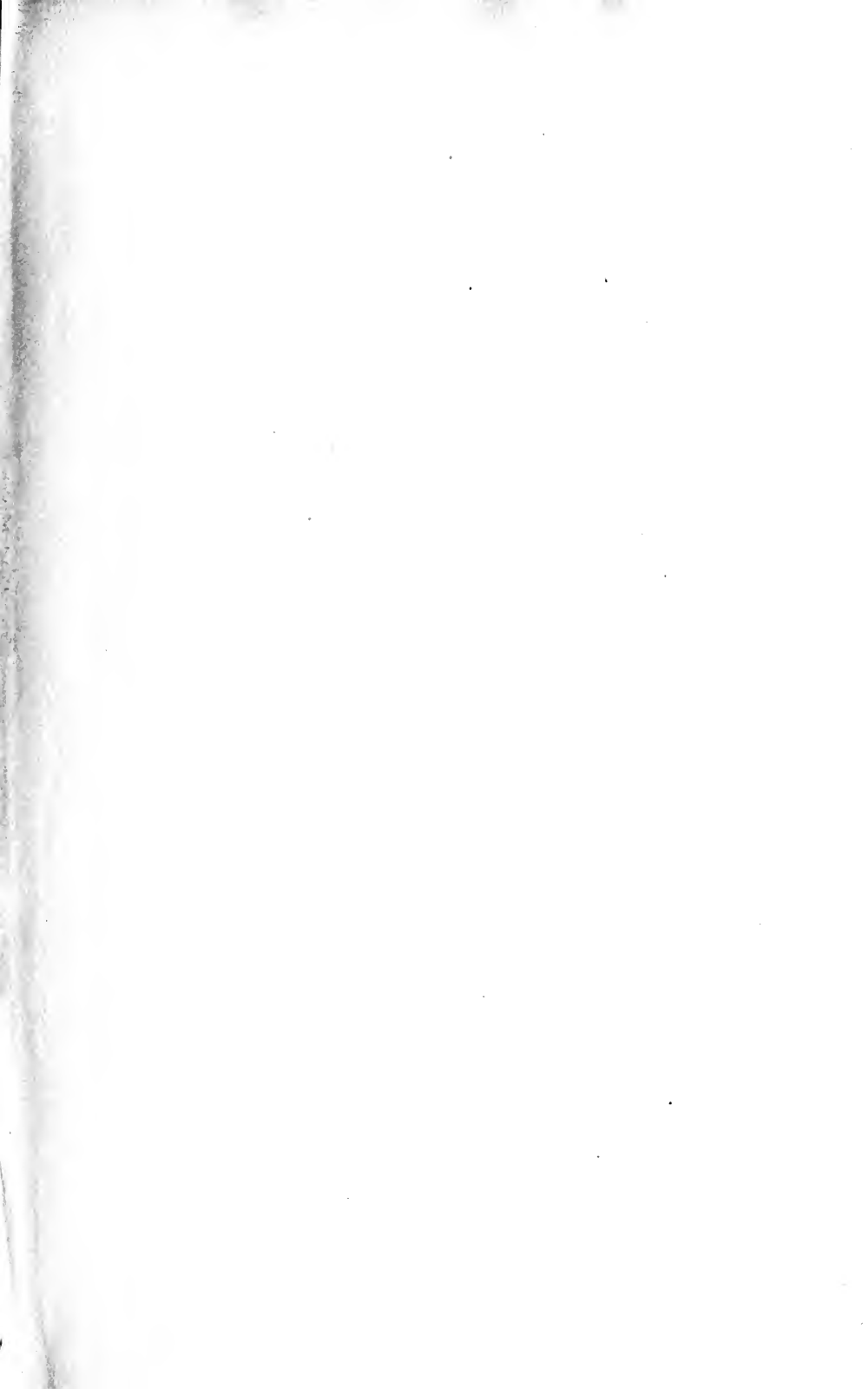


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**STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW**

EDITED BY THE FACULTY OF POLITICAL SCIENCE  
OF COLUMBIA UNIVERSITY

Volume LXXVII]

[Whole Number 181

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**AMERICAN CIVIL CHURCH  
LAW**

BY

**CARL ZOLLMANN, LL.B.**

MEMBER OF THE BARS OF ILLINOIS AND WISCONSIN



UNIVERSITY OF  
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COLUMBIA UNIVERSITY  
LONGMANS, GREEN & CO., AGENTS  
LONDON: P. S. KING & SON, LTD.

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## PREFACE

THE well known fact that state and church are separated in the United States does not imply that the American governments, state or national, have no functions to perform in relation to the various denominations within their territorial jurisdictions. While by the letter and spirit of their respective constitutions they are stringently prohibited from establishing any church, they are also, by the express and implied terms of the same instruments, solemnly obligated equally to protect all the churches. Their relations with all the various denominations are therefore strictly analogous to those which exist between the governments and non-religious private organizations and are without a parallel in Christendom. These relations do not rest on antagonism or indifference but on cordial coöperation. While the state by its legislative, judicial, and executive powers creates, guards, and enforces the civil, contract, and property rights of all the various denominations, these in turn, by their charitable, religious, and moral influences, save, protect, and preserve the state from an overgrowth of pauperism, delinquency, and crime. These mutually advantageous relations have grown out of the very life of the American people as a nation and have crystallized one of the fundamental principles of their political philosophy into concrete form.

The present volume is the first attempt compactly and logically to set forth the legal aspects of these relations as they have been developed, defined, and illustrated by the federal and state constitutions, by hundreds of statutes,

and by thousands of decisions. It rests on a direct study of the primary sources of information which was begun more than eight years ago. As the starting point of this investigation a list of the decided cases on the subject was obtained from the digests and arranged in chronological order. The reading of these authorities was then performed in the same order thus automatically tracing the historical development of the various legal doctrines in the most natural manner. When the author in 1911 removed to northern Wisconsin, to take up the practice of law, the work of necessity was interrupted, but was taken up anew after his return to Chicago in January, 1915, was pursued in the splendid library of the Chicago Law Institute, and until July, 1916, occupied practically all of his time.

The aim constantly kept in mind has been to produce a work for lawyers and students of our American institutions as well as for clergymen and officers of religious organizations. Neither academic nor denominational viewpoints have therefore been allowed to guide the author in his task. While the importance of full citations has constantly been kept in mind, the emphasis has been laid on the text in an attempt concisely to state and clearly to illustrate the various rules of law which apply to church relations. Where a knowledge of the historical development of any doctrine appeared necessary such development has been traced in as much detail as the situation was deemed to demand. Where this process has taken the author into a discussion of the conventional law of any particular church as contained in its canons, constitution, by-laws and resolutions, or as evidenced by its customs and usages, such ecclesiastical law has been garnered from the reported cases and treated as the courts treat it, not as law, but as fact. In like manner

the occasional discussion of historical occurrences is based exclusively on the statements of fact found in the reported cases. No responsibility is therefore assumed for their truth as a part of church history proper. For convenience of reference a summary has been added at the end of each chapter from which its scope and contents can be learned at the minimum expense of time.

The scope of the book as a whole can be gathered from its table of contents and is indicated in its title. It deals with *American* law and not, except incidentally, with English statutes and cases. It is confined to the *Civil* law applicable to churches as distinguished from any merely ecclesiastical rules of conduct. It is concerned with *Church* law in the sense that it sets forth the various matters as to which church and state come into contact. Last but not least, it seeks to state the *Law*, its present condition and underlying reason, and is not content to be a mere digest of the reported cases.

It was at first intended to include in the book all questions of charitable trusts, so far as they affect the various denominations. This plan has proved to be impracticable. Just as charity covers a multitude of sins so questions of charitable trusts are concerned with a veritable throng of diverse institutions. The questions thus arising cannot, in a legal discussion, be disentangled one from the other and those relating to churches put to one side. An attempt to discuss them in this volume could not but result either in an insufficient treatment of them or in a discourse that would go far beyond the proper scope of the book. While the subject has of necessity been occasionally referred to, its complete elucidation, in its religious as well as eleemosynary, educational and purely public aspects, has therefore been reserved for a separate volume.

In pursuing his aim the author has received much encouragement through the interest taken in his work by Professor J. P. Hall, Professor Shailer Mathews and Professor Floyd R. Mechem, all of Chicago University, and much active help from Professor Underhill Moore, his esteemed teacher, formerly at the University of Wisconsin now of Columbia University. For the encouragement and assistance thus given him he deems it a privilege as well as a pleasure publicly to express his appreciation.

As the book gradually took definite form a number of its chapters were published in various journals and are herewith reprinted, with slight changes, by the courtesy of these publications. Their names and the chapters thus given to the public as separate articles are as follows: *Michigan Law Review*, chapters two, three, four, sixteen and part of chapter nine; *Yale Law Journal*, chapters fourteen and fifteen; *American Law Review*, chapters ten and thirteen; *Biblical World*, chapter twelve; *Illinois Law Review*, chapter one.

CARL ZOLLMANN.

CHICAGO, ILLINOIS, *October 1, 1917.*

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## CHAPTER I

### RELIGIOUS LIBERTY

WHEN in 1787 the United States constitution was submitted to the people for ratification, it contained a prohibition of religious tests "as a qualification to any office or public trust under the United States,"<sup>1</sup> but was otherwise silent on the question of religious liberty. This did not satisfy the friends of religious freedom. They began an agitation, resulting in the first amendment, which reads as follows: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." This amendment

was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose, as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship, as he may think proper and not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets or the modes of worship of any sect.<sup>2</sup>

It means exactly what it says and no more. It is a restraint on the action of *Congress*, and is not a restriction on the action of the various *State Legislatures*. "The constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws. Nor is there any in-

<sup>1</sup> U. S. Const., art. vi, sec. iii.

<sup>2</sup> *Davis v. Beason*, 133 U. S., 333, 342.

hibition imposed by the constitution of the United States in this respect on the states.”<sup>1</sup>

The states may, therefore, so far as the federal constitution is concerned, establish some religion and prohibit the free exercise of all others.<sup>2</sup> As a matter of fact, many of the original states retained an established religion for a longer or shorter period after the adoption of the federal constitution. Virginia was the most expeditious in severing the union of church and state, while in Massachusetts the process of establishing freedom of religion was very slow, complete religious liberty not being achieved till 1833.

Since the federal constitution does not restrain the power of the states over religion, any restriction on the states must be looked for in the various state constitutions. These vary greatly in detail. It is impossible in this chapter to cite even the more common provisions in full. Their main features are summarized by Thomas M. Cooley<sup>3</sup> as prohibiting: 1, any law respecting an establishment of religion; 2, compulsory support of religious instruction; 3, compulsory attendance upon religious worship; 4, restraints upon the free exercise of religion; 5, restraints upon the expression of religious belief. Thus the American citizen, in his dual capacity as a citizen of the United States and of the state in which he lives, is protected in his religious liberty by the constitution of the United States and by the constitution of the state of his residence. The constitution of the United States shields him from any adverse action by Congress, while the constitution of his state protects him from a similar outrage on the part of his state Legislature. He is thus fully protected to the extent of the two constitutions under which he lives.

<sup>1</sup> *Permodi v. Municipality No. 1*, 3 How., 589, 609.

<sup>2</sup> *People v. Board of Education*, 245 Ill., 334; 92 N. E., 251

<sup>3</sup> *Constitutional Limitations*, 6 ed., p. 575.



But while religious liberty is thus guaranteed and protected, it must not be supposed that everything which anyone may so classify will be protected, either by the states or by the United States. "Religious liberty does not consist in the right of any sect to oppose its views to the policy of a government. Such a claim would end in simple intolerance of all not in accord with the sentiments of the particular sect."<sup>1</sup> It does not include "the right to introduce and carry out every scheme or purpose which persons see fit to claim as part of their religious system."<sup>2</sup> "It would be subversive of good government to subordinate the power of restraining acts prejudicial to the public welfare and productive of social injury to the convictions of each individual as to the acts which religious sentiment may demand."<sup>3</sup> Nor can religious rights by one or more persons "be so extended as to interfere with the exercise of similar rights by other persons."<sup>4</sup> The individual holds his religious faith and all his ideas, notions and preferences as to religious worship and practice, in reasonable subseruiency to the equal rights of others and to the paramount interest of the public as depending on and to be served by general laws and uniform administration.<sup>5</sup>

The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.<sup>6</sup>

<sup>1</sup> *State v. Powell*, 58 Ohio St., 324, 341; 50 N. E., 900; 41 L. R. A., 854.

<sup>2</sup> *Matter of Frazee*, 63 Mich., 396, 405; 30 N. W., 72; 6 Am. St. Rep., 310.

<sup>3</sup> *Frolickstein v. Mobile*, 40 Ala., 725.

<sup>4</sup> *State ex rel. Weiss v. District Board*, 76 Wis., 177.

<sup>5</sup> *Ferritur v. Tyler*, 48 Vt., 444, 467.

<sup>6</sup> *Watson v. Jones*, 13 Wall., 679, 728.

Absolute religious freedom is thus guaranteed, unrestrained as to religious practices, subject only to the conditions that the public peace must not be disturbed nor others obstructed in their religious worship or the general obligations of good citizenship violated.<sup>1</sup>

The law thus is and remains supreme. "The decrees of a council or the decisions of the Ulema are alike powerless before its will. It acknowledges no government external to itself."<sup>2</sup>

Before enlarging upon the protection given to mere opinion, it will be well to treat of certain acts which are restrained by the power of the state, though they may be done from a religious motive. In defining these acts the fact that the prevailing religion in this country is Christian cannot but exercise a potent influence. Certain acts deemed to be indifferent or even praiseworthy in a pagan country will be considered as a grave breach of the peace in a country whose morality is based on the Christian religion. This fact has led to the formulation of the maxim that "Christianity is part of the law of the land." This principle as announced in English decisions by such eminent judges as Holt and Mansfield has been branded by Thomas Jefferson as a "judicial forgery" which "engulfed Bible Testament and all into the common law."<sup>3</sup>

It is respectfully submitted that Jefferson has entirely misunderstood the scope of this maxim. It does not necessarily refer to any church established by the state.

Christianity is not the legal religion of the state as established by law. If it were it would be a civil or political institution, which it is not; but this is not inconsistent with the idea that it

<sup>1</sup> *In re* Opinion of the Justices, 214 Mass., 599, 601; 102 N. E., 464.

<sup>2</sup> *Donahue v. Richards*, 38 Me., 379, 410; 61 Am. Dec., 256.

<sup>3</sup> Letter of June 5, 1824, Jefferson's *Posthumous Works*.

is in fact and ever has been the religion of the people. This fact is everywhere prominent in all our civil and political history and has been from the first recognized and acted upon by the people as well as by constitutional conventions, by legislatures and by courts of justice.<sup>1</sup>

A distinction must therefore be made between a religion preferred by law and a religion preferred by the people without the coercion of the law, between a legal establishment and a religious creed freely chosen by the people themselves.<sup>2</sup> In this sense our nation and the states composing it are Christian in policy to the extent of embracing and adopting the moral tenets of Christianity as furnishing a sound basis upon which the moral obligations of the citizens to society and the state may be established. Law can raise no higher standard of morals for the government of the individual than society itself in the aggregate has attained.<sup>3</sup>

It must, however, not be supposed that every command of the Bible will be enforced by the civil power. No court would punish a man because he did not love his neighbor as much as himself or refused to do to others what he would have others do to him. Such commands are too sublime to be enforced by an earthly tribunal. The law does not light the fires of Smithfield on the one hand nor prefer the doctrines of infidelity on the other. It adapts itself to the religion of the country just as far as is necessary for the peace and safety of civil institutions and takes cognizance of offenses against God only when by their inevitable effects they become offenses against man and his temporal security.<sup>4</sup> Punishment is thus inflicted, "not for the purpose of propping up the Christian religion, but be-

<sup>1</sup> *Lindenmueller v. People*, 33 Barb., 548, 561.

<sup>2</sup> *State v. Chandler*, 2 Harring. (Del.), 553.

<sup>3</sup> *District of Columbia v. Robinson*, 30 App. D. C., 283.

<sup>4</sup> *State v. Chandler*, *supra*.

cause these breaches are offenses against the laws of the state.”<sup>1</sup> If the prevailing religion of the country was Jewish or Mohammedan, a similar recognition would be accorded to it as is now accorded to the Christian religion. Some acts now deemed criminal would in that case become innocuous and *vice versa*.

When, therefore, the real scope of this principle is considered, it will be found not to be dangerous to religious freedom. Christianity is part of the law in the same sense in which the almanac or parliamentary law is said to be a part of it. Courts will recognize it,<sup>2</sup> even in the construction of statutes<sup>3</sup> and private contracts<sup>4</sup> and by the oath which is daily administered. And in this courts do not stand alone. Other branches of the government freely and solemnly acknowledge the superintending providence of the God of the Bible in public transactions and exercises. “No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the scriptures.”<sup>5</sup> A tribute to God is therefore contained in the American National Hymn,<sup>6</sup> while the words, “In God we trust,” are familiar to all who have handled our national coinage.

<sup>1</sup> *Barnes v. First Parish*, 6 Mass., 401, 410.

<sup>2</sup> *Holy Trinity Church v. United States*, 143 U. S., 457; *Reformed Dutch Church v. Veeder*, 4 Wend., 493, 496; *State v. Chandler*, 2 Harring., 553, 562; *Board of Education v. Minor*, 23 Ohio St., 211; 13 Am. Rep., 233.

<sup>3</sup> *Holy Trinity Church v. United States*, *supra*.

<sup>4</sup> *Reformed Dutch Church v. Veeder*, *supra*.

<sup>5</sup> Cooley, *Constitutional Limitations*, 6 ed., 578; *Church v. Bullock* (Texas), 109 S. W., 115, 118.

<sup>6</sup> “Our fathers’ God, to Thee,  
Author of liberty,  
To Thee we sing;  
.....  
Protect us by Thy might,  
Great God, our King.”

In the words of the Supreme Court of the United States, Christianity is thus a part of the common law in "this qualified sense that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers or the injury of the public."<sup>1</sup>

It remains to examine the application of this principle to particular offenses. Statutes have been passed against blasphemy and offenders have been prosecuted under them. This, as said in a Massachusetts case, has not been done "to prevent or restrain the formation of any opinions or the profession of any religious sentiments whatever, but to restrain and punish acts which have a tendency to disturb the public peace."<sup>2</sup>

To prohibit the open public and explicit denial of the popular religion of a country is a necessary measure to preserve the tranquillity of the government. Of this no person in a Christian country can complain; for admitting him to be an infidel he must acknowledge that no benefit can be derived from the subversion of a religion which enforces the purest morality.<sup>3</sup>

It follows that

the infidel who madly rejects all belief in a Divine Essence may safely do so, in reference to civil punishment, so long as he refrains from the wanton and malicious proclamation of his opinions with intent to outrage the moral and religious convictions of a community, the vast majority of whom are Christians. But beyond this, conscientious doctrines and practices can claim no immunity.<sup>4</sup>

No person of discretion in a Mohammedan country

<sup>1</sup> *Vidal v. Girard's Executors*, 2 How., 127, 198.

<sup>2</sup> *Commonwealth v. Kneeland*, 37 Mass., 206, 221.

<sup>3</sup> *Swift, System of Laws*, vol. ii, p. 825, cited in 11 S. & R., 404.

<sup>4</sup> *Specht v. Commonwealth*, 8 Pa. St., 312.

would, whatever his convictions might be, indulge in a tirade which Mohammedans would regard as blasphemous. He would know too well what the consequences with the average Mussulman would be. He would know that his life would be in danger. And while such danger of bloodshed is far less pronounced in a Christian country, it cannot be said that it is entirely absent. Gross acts of blasphemy not only deeply wound the sentiments of Christians, but may in a rash hour lead to a riot or other breach of peace. The law, recognizing this fact, therefore forbids blasphemy on the ground that it is likely to provoke a breach of the peace. It punishes persons who vilely attack the legitimacy of Christ and the virginity of his mother.<sup>1</sup> To hold that such an attack is protected by the constitutional guarantee of religious liberty would be an enormous perversion of the meaning of the constitution.

Nor is the fact that the blasphemous words were spoken in a debating club a defense. While serious discussion of religious topics is not and cannot be a crime, a malicious and mischievous attack on the principles of Christianity will be duly punished, even if made in a debating club. If the fact that the malicious words were spoken in a debating club were a defense, "impiety and profanity must reach their acme with impunity, and every debating club might dedicate the club room to the worship of the Goddess of Reason and adore the deity in the person of a naked prostitute."<sup>2</sup>

Similarly the dissemination of lewd, obscene and lascivious matter through the mails is an offense which may be made punishable by Congress though the offender claims that his liberty of conscience is thereby violated.<sup>3</sup>

<sup>1</sup> *People v. Ruggles*, 8 Johns, 290; *State v. Chandler*, 2 Harrings (Del.), 553.

<sup>2</sup> *Updegraph v. Commonwealth*, 11 S. & R., 394, 404.

<sup>3</sup> *Knowles v. United States*, 170 Fed., 409; 95 C. C. A., 579.

But offenders against the policy of the state as shaped by the influence of the Christian religion will be found not only among such individuals as are embittered against that religion but also among the conscientious adherents of certain sects. Acts done with a religious motive may equally fall under the ban of the law. "Acts evil in their nature or dangerous to the public welfare may be forbidden and punished though sanctioned by one religion or prohibited by another."<sup>1</sup> Thus our law in harmony with Christian morality extols monogamous marriages as the very basis of society and considers polygamy as "contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western World."<sup>2</sup> The Mormon church in its earlier day publicly advocated polygamy as a religious tenet. It made it the duty of every man of sufficient means to contract more than one marriage. A Mormon who put this doctrine into practice was arrested and prosecuted. He offered his religious belief as a defense. The court held that religious belief cannot be accepted as a justification of an overt act made criminal by the law of the land and upheld the conviction of the polygamist.<sup>3</sup> When thereafter the Mormon church, despite this decision, continued its teaching and encouragement of polygamy, it was dissolved by the United States and its property forfeited<sup>4</sup> and the suffrage taken away from its adherents.<sup>5</sup>

<sup>1</sup> *Bloom v. Richards*, 2 Ohio St., 387, 391.

<sup>2</sup> *Late Corporation of Latter Day Saints v. United States*, 136 U. S., 1, 49.

<sup>3</sup> *Reynolds v. United States*, 98 U. S., 145, affirming 1 Utah, 226.

<sup>4</sup> *Late Corporation of Latter Day Saints v. United States*, 136 U. S., 1; *United States v. Mormon Church*, 150 U. S., 145.

<sup>5</sup> *United States v. Late Corporation of Latter Day Saints*, 8 Utah, 310; 31 Pac., 436; *Wooley v. Watkins*, 2 Idaho, 590; 22 Pac., 102; *Davis v. Beason*, 133 U. S., 333.

But while the practice of polygamy was thus suppressed and punished, the law is fully indifferent to any theological doctrine of a polygamous marriage "for eternity." It seems that Mormons make a distinction between marriages "for time" and marriages "for eternity." It is obvious that the law has no concern with the latter variety. A marriage for eternity is "something of which the law takes no cognizance and by which neither party was legally bound."<sup>1</sup> It amounts to a mere abstract belief in a form of polygamy with which the civil powers have no concern.<sup>2</sup> "Constitution and statutes care nothing about what men believe with reference to a future existence. Indeed they are intended in the American Union to protect a man in believing anything he wants with reference to the future. They do not deal with beliefs but with acts and practices."<sup>3</sup> It follows that a believer in the Mormon religion can, so far as the government is concerned, by "celestial" marriages or marriages "for eternity" stock a harem for the other world, provided he is able to sidestep more than one terrestrial marriage at any one time.

Another illustration of the policy of the law in preventing religious opinion from resulting in overt acts is afforded by the Christian Scientists. This denomination believes that all the ills of the body can be cured by prayer. With this belief the law finds no fault. Christian Scientists, like all other sectarians, have the full and untrammelled right to believe in such doctrines as they choose and to propagate them even after their death.<sup>4</sup> But where they add the unauthorized practice of medicine to their forms of worship

<sup>1</sup> *Hilton v. Roylance*, 25 Utah, 129, 142; 69 Pac., 660; 58 L. R. A., 723.

<sup>2</sup> *Zane, J.*, in *United States v. Late Corporation of the Church of Jesus Christ*, 8 Utah, 310, 348; 31 Pac., 436, affirmed 150 U. S., 145.

<sup>3</sup> *Toncray v. Budge*, 14 Ida., 621, 652; 95 Pac., 26.

<sup>4</sup> *Glover v. Baker*, 76 N. H., 393; 83 Atl., 916.



and thus come in conflict with the statutes in regard to the practice of medicine, the courts will frown upon them and refuse them a charter of incorporation.<sup>1</sup> They will not allow them to set up their religious belief as a defense to a criminal action by the state,<sup>2</sup> but will punish them for an infraction of the statutes.<sup>3</sup> Thus a father who, in consequence of his belief in Christian Science, had allowed his sick infant child to die without medical attendance has not been allowed to set up his belief as a defense in a criminal action by the state, but has been punished for his infraction of the statute.<sup>4</sup>

The practice of the Salvation Army of beating drums or playing other musical instruments in the streets is well known and appears to be, in their opinion, a religious duty. In the opinion of other good people, however, it is a nuisance and has been forbidden by laws and ordinances. These have been upheld as a police regulation not trenching on religious liberty.

Religious liberty as recognized and secured by the constitution does not mean a license to engage in acts having a tendency to disturb the public peace under the form of religious worship, nor does it include the right to disregard those regulations which the legislature has deemed reasonably necessary for the security of public order.<sup>5</sup>

Hence, a religious body, however earnest and sincere it may be, will not be allowed to avail itself of the religious freedom provisions of the constitution as an authority to

<sup>1</sup> *In re Church of Christ Scientists*, 20 Pa. Co. Ct., 241.

<sup>2</sup> *State v. Marble*, 72 Ohio St., 21; 73 N. E., 1063; 70 L. R. A., 835; *Smith v. People* (Colo.), 117 Pac., 612. But see *State v. Mylod*, 20 R. I., 632; 40 Atl., 753; 41 L. R. A., 428.

<sup>3</sup> *State v. Buswell*, 40 Neb., 158.

<sup>4</sup> *People v. Pierson*, 176 N. Y., 201; 68 N. E., 243; 63 L. R. A., 187.

<sup>5</sup> *State v. White*, 64 N. H., 48; 5 Atl., 828, 830.

take possession of a street in a city in violation of such reasonable rules for its use as may have been enacted by the proper authorities.<sup>1</sup> The question whether such an ordinance is reasonable or not must be decided on other than religious grounds.<sup>2</sup>

Fortune-tellers have been very justly regarded as vagrants and punished accordingly. An ordained minister of the "National Astrological Society" has raised the novel contention that fortune-telling was part of his religion, and hence could not be interfered with. The court, however, promptly overruled this contention and affirmed the conviction of the vagrant.<sup>3</sup>

It is apparent from the foregoing that while evil acts may be punished, no attempt is made to reach or shape religious convictions. These in the very nature of things are beyond the power of the civil government. "The judicial eye of the civil authority of this land of religious liberty cannot penetrate the veil of the church."<sup>4</sup> Religious opinions cannot be produced or extirpated by fines and penalties. They are a concern between each man and his Maker. Attempts on the part of the state to meddle with them cannot but produce either martyrs or hypocrites. "Of all the tyrannies on human kind, the worst is that which persecutes the mind."<sup>5</sup> Religious belief is therefore entirely relegated to the domain of the individual conscience. It is not a question to be determined by a court in a country of religious

<sup>1</sup> *Commonwealth v. Plaisted*, 148 Mass., 375; 19 N. E., 224; 2 L. R. A., 142; 12 Am. St. Rep., 566; *Mashburn v. Bloomington*, 32 Ill. App., 245; *Wilkes-Barre v. Garabel*, 11 Pa. Super. Ct., 355.

<sup>2</sup> *In re Frazee*, 63 Mich., 396; 6 Am. St. Rep., 310.

<sup>3</sup> *State v. Neitzel*, 69 Wash., 567.

<sup>4</sup> *Shannon v. Frost*, 42 Ky. (3 B. Mon.), 253, 259.

<sup>5</sup> 1 Dryden, 246.

freedom what religion or what sect is right. All stand equal before the law,<sup>1</sup> which regards the Pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quaker as all possessing equal right.<sup>2</sup>

When, therefore, the guardianship of children comes in question, the question of the religion of the proposed guardian will not be a prevailing consideration. The paramount question will simply be the fitness of the proposed guardian, and this independently of any religious convictions which he may have. "A man may think as he pleases upon any subject, religious, philosophical or political, and is not for that under any civil or political disability."<sup>3</sup> Hence, children have been apprenticed to Quakers and Shakers,<sup>4</sup> and Catholic children have even been placed in Protestant homes.<sup>5</sup>

The policy of the state in matters of religious opinion is that of masterly inactivity, of hands off, of *laissez faire*, of fair play and no favors.<sup>6</sup> No distinction between a pious and a superstitious use is recognized.<sup>7</sup> Whatever a judge's individual opinions of a communistic society like the Shakers may be, he has therefore no right to act upon them in

<sup>1</sup> *People v. Board of Education*, 245 Ill., 334, 346; 92 N. E., 251.

<sup>2</sup> *Donahue v. Richards*, 38 Me., 379, 410; 61 Am. Dec., 256.

<sup>3</sup> *Maxey v. Bell*, 41 Ga., 183; *Jones v. Bowman*, 13 Wyo., 79; 77 Pac., 439; 67 L. R. A., 860; *In re Dixon*, 163 S. W., 827.

<sup>4</sup> *Matter of McDowle*, 8 Johns, 328; *People ex rel Barbour v. Gates*, 43 N. Y., 40.

<sup>5</sup> *Whalen v. Olmstead*, 61 Conn., 263; 23 Atl., 964; 15 L. R. A., 593; *Purinton v. Jamrock*, 195 Mass., 187; 80 N. E., 802.

<sup>6</sup> *People v. Steele*, 2 Barb., 397; *State ex rel Freeman v. Scheve*, 65 Neb., 853; 93 N. W., 169.

<sup>7</sup> *Gass v. Willite*, 2 Dana, 170; *Newman v. Smith*, 77 Cal., 22; 18 Pac., 791.

administering justice, so long as their practices do not infringe upon the municipal law."<sup>1</sup>

While the religious opinion of the citizen is respected, so also is every action of his which does not conflict with the policy of the state or the rights of others, no matter how curious and quixotic it may appear to be. He may or may not profess a belief in the Pope and the succession of the clergy.<sup>2</sup> He may change his religious profession as often as he pleases,<sup>3</sup> and may worship or he may not worship.<sup>4</sup> He may join any church and leave it for any reason whatsoever.<sup>5</sup> He may be unreasonable in religious matters.<sup>6</sup> He may preach and practice as he pleases,<sup>7</sup> and may tell his hearers that if they join a certain communistic society their names will be written in the lamb's book of life, otherwise they will go to hell.<sup>8</sup> He may acquire property though he has taken a vow of poverty.<sup>9</sup> He may bury his child with or without religious ceremony.<sup>10</sup> He may accept the provision in a deed, will or other instrument, imposing the observance of some religious rite as a condition of enjoy-

<sup>1</sup> People *ex rel* Fowler v. Pillow, 1 Sandf., 672, 678; Lawrence v. Fletcher, 49 Mass., 153; Schriber v. Rapp, 5 Watts, 351; 30 Am. Dec., 327; Gass v. Wilhite, 2 Dana, 170.

<sup>2</sup> Case of St. Mary's Church, 7 S. & R., 517.

<sup>3</sup> Smith v. Pedigo, 145 Ind., 361, 378; 33 N. E., 777; 44 N. E., 363; 19 L. R. A., 433; 32 L. R. A., 838.

<sup>4</sup> People v. Board of Education, 245 Ill., 334, 346; 92 N. E., 251.

<sup>5</sup> Feizel v. Trustees, 9 Kans., 592, 596; Barkley v. Hayes, 208 Fed., 319, 323; Riddle v. Stevens, 2 S. & R., 537, 543.

<sup>6</sup> State *ex rel* Freeman v. Scheve, 65 Neb., 853; 93 N. W., 169.

<sup>7</sup> Schlichter v. Keiter, 156 Pa., 119; 27 Atl., 45; 22 L. R. A., 161.

<sup>8</sup> Schriber v. Rapp, *supra*.

<sup>9</sup> Lynch v. Loretta, 4 Dem. Sur., 312; White v. Price, 108 N. Y., 661; 15 N. E., 427; Steinhauser v. Order of St. Benedict, 194 Fed., 289; 114 C. C. A., 249.

<sup>10</sup> Seaton v. Commonwealth, 149 Ky., 498; 149 S. W., 871.

ment, and will thereupon enjoy the benefit as long as he bears the burden. But he cannot accept the benefit and evade the burden.<sup>1</sup> He may join a mutual-benefit association which makes the observance of certain religious ceremonies a condition of his membership. But he cannot, without infringing the very religious freedom of his associates, force them to carry out their part of the contract after he has broken his part.<sup>2</sup> He

cannot be coerced into observing the sacrament of any church and even if he should enter into a solemn contract to do so, he is free to break the contract and for breaking it he cannot be deprived of any right that he has independent of it. But if by the contract a special benefit is created for him he cannot break the contract and have the benefit too.

The law will not guard a man "in that freedom of conscience which would permit him to enter into a contract and keep it to the extent that it suits him and repudiate it otherwise."<sup>3</sup>

But the duty of the state to protect religious liberty is not merely negative, it is also positive. The state does not merely allow religious associations to shift for themselves as best they can, but acts affirmatively to secure to them the fullest possible liberty. The situation of an unincorporated church in regard to property rights is highly unsatisfactory.

<sup>1</sup> Chase v. Dickey, 212 Mass., 555; 99 N. E., 410; *In re Paulson's Will*, 127 Wis., 612; 107 N. W., 484; 5 L. R. A. (N. S.), 804; Magee v. O'Neill 19 S. C., 170; 45 Am. Rep., 765; Board of Church Erection Fund v. First Pres. Ch., 19 Wash., 455; 53 Pac., 671; *Contra Maddox v. Maddox*, 11 Gratt., 804.

<sup>2</sup> Hitler v. German Roman Cath. Soc., 4 Ky. Law Rep., 728; Barry v. Order of Catholic Knights, 119 Wis., 362; 96 N. W., 797; Waite v. Merrill, 4 Greenl., 102; 16 Am. Dec., 238; Curry v. First Pres. Cong., 2 Pitts., 40.

<sup>3</sup> Franta v. Bohemian Roman Catholic Union, 164 Mo., 304, 314; 63 S. W., 1100; 54 L. R. A., 723; 86 Am. St. Rep., 611.

Hence special statutes have been passed, incorporating certain churches. When general incorporation laws were enacted the conditions to be complied with by the churches have been generally made extremely simple, consisting of the mere filing of an affidavit or certificate with some specified officer. When it was found that even this did not fulfil all expectations, as different denominations have different forms of government, making it highly inconvenient for them to adopt any one form of corporate identity, statutes have been passed providing for as many forms of religious corporations as were required by the denominations themselves, and their validity has been sustained by the courts.<sup>1</sup> It has been the policy of the states to so frame their legislation "that each denomination of Christians may have an equal right to exercise religious profession and worship, and to support and maintain its ministers, teachers and institutions in accordance with its own practice, rules and discipline."<sup>2</sup>

No attempt has been made to change the ecclesiastical status of congregations. The object was merely to give them a more advantageous civil status,<sup>3</sup> and secure to them "that religious freedom which American constitutions guarantee."<sup>4</sup> By thus "aiding with equal attention the votaries of every sect to perform their own religious duties,"<sup>5</sup> religious liberty is not confined but is equally extended to every religious sect, whether Christian or otherwise.<sup>6</sup> Re-

<sup>1</sup> *Smith v. Bonhoof*, 2 Mich., 115; *St. Hyacinth Congregation v. Borucki*, 124 N. W., 284; *Keith and Perry Coal Company v. Bingham*, 97 Mo., 196; 10 S. W., 32; *Roberts v. Bradfield*, 12 App. D. C., 453.

<sup>2</sup> *State v. Getty*, 69 Conn., 286; 37 Atl., 687.

<sup>3</sup> *Weinbrenner v. Colder*, 43 Pa. St., 244, 252.

<sup>4</sup> *Klix v. Polish Roman Catholic St. Stanislaus Church (Mo. App.)*, 118 S. W., 1171.

<sup>5</sup> *Terrett v. Taylor*, 13 U. S., 43, p. 49.

<sup>6</sup> *Hale v. Everett*, 53 N. H., 9; 16 Am. Rep., 82.

ligious liberty is not violated by laws enacted to "enable all sects effectually to accomplish the great objects of religion, by giving them corporate rights for the management of their property and the regulation of their temporal as well as spiritual concerns."<sup>1</sup>

To this, however, two states are an exception. Though the Supreme Court of the United States, in a case coming up from Virginia, has said that neither public nor constitutional principles require the abolition of all religious corporations,<sup>2</sup> Virginia and West Virginia have absolutely prohibited in their constitutions the grant of any "charter of incorporation . . . to any church or religious denomination."<sup>3</sup> This provision continues the mortmain policy of England in the Virginias, being enacted to prevent the "dead hand" of the church from seeking vast domains and gradually monopolizing the soil. The reason for this policy is certainly "not so apparent now as it was at the time when enacted."<sup>4</sup> There being no established church in the Virginias supported by the state, but instead a vast number of different denominations, all more or less struggling to meet their obligations, any such mortmain policy would appear to be absolutely uncalled for. It is ridiculous to deny to a body of workmen the right to form a church corporation for fear that they may rob everybody else of his land. The mere existence of the multiplicity of denominations in the state is a sufficient guarantee against such a tendency. The Virginia policy denies a substantial right to unoffending citizens because of an academic theory. It forces church associations to hold their property by trustees with all the vexatious consequences which may and do

<sup>1</sup> Story, J., in *Terrett v. Taylor*, 13 U. S., 43, 49. See chs. 2, 3 and 4.

<sup>2</sup> *Terrett v. Taylor*, *supra*.

<sup>3</sup> Constitution, W. Va., art. vi, secs. 47 Va. Sec., 59.

<sup>4</sup> *Miller v. Ahrens*, 150 Fed., 644, 652.

flow from this relation.<sup>1</sup> It has prevented certain persons from forming a corporation by the name of the "Baptist Missionary Society of West Virginia."<sup>2</sup> It is not a marvel that the force of this provision has been evaded to a certain extent. It has, therefore, been held that while churches cannot incorporate, "agencies" of the churches may do so.<sup>3</sup> Therefore an incorporation of the "Executive Committee of Publication of the General Assembly of the Presbyterian Church in the United States," consisting of eleven members elected yearly by the General Assembly, has been held good by the West Virginia court.<sup>4</sup>

Religious liberty would be but a shadow if religious exercises could be disturbed with impunity by persons so inclined. For this reason statutes providing for the punishment of such offenders have been quite generally passed by the various states. It is impossible in this chapter to review these statutes and the many decisions upholding and construing them. It may be said, however, that they cover pagan as well as Christian worship,<sup>5</sup> so that all denominations of worshippers whose doctrine and mode of worship is not subversive of morality are fully protected.<sup>6</sup> Under them every congregation assembled for the public social worship of God is at least a lawful meeting, and as much under the protection of the law as a political meeting for the exercise of the right of election.<sup>7</sup> "Every American has the unquestioned and untrammled right to worship

<sup>1</sup> *Heiskell v. Trout*, 31 W. Va., 810; 8 S. E., 557.

<sup>2</sup> *Powell v. Dawson*, 45 W. Va., 780; 32 S. E., 214.

<sup>3</sup> *General Assembly of the Presbyterian Church v. Guthrie*, 86 Va., 125; 10 S. E., 318; 6 L. R. A., 321.

<sup>4</sup> *Wilson v. Perry*, 29 W. Va., 169; 1 S. E., 302.

<sup>5</sup> *Rogers v. Brown*, 20 N. J. L., 119.

<sup>6</sup> *Commonwealth v. Arndt*, 2 Wheeler Cr. Cas., 236.

<sup>7</sup> *United States v. Brooks*, Fed. Cas., No. 14, 655.



God according to the dictates of his own conscience without let or hindrance from any person or from any source.”<sup>1</sup>

There is one form of religious worship known as camp meetings which, being held in the open air, are very liable to interruption both from the frivolity of attendants and the greater opportunity of coming and going. To protect such meetings from interruption, necessarily leading to disturbance of worship, statutes have been passed and upheld prohibiting any unusual traffic within a mile or two of the meeting.<sup>2</sup> The object of such statutes is “the protection of the citizen in the unmolested and undisturbed enjoyment of the rights of worship, and the restriction of the defendant in his absolute rights of property is carried so far only as in the judgment of the legislature was necessary to secure this end.”<sup>3</sup>

The Sunday legislation is another illustration of the protection afforded to religiously inclined persons. There is no disharmony in the decision of the courts on this important subject. Another “such strong concurrence of opinion on one leading question affecting the general community cannot be found in the history of American jurisprudence.”<sup>4</sup> While the cases usually uphold Sunday legislation on the ground that it is promotive of physical and moral power and health,<sup>5</sup> it should not be forgotten that without such legislation the observance of Sunday as a religious duty would be difficult to all and impossible to some.

<sup>1</sup> *Cline v. State* (Okla.), 130 Pac., 510, 512. See ch. x.

<sup>2</sup> *Commonwealth v. Bearse*, 132 Mass., 542; 42 Am. Rep., 450; *Meyer v. Baker*, 120 Ill., 567.

<sup>3</sup> *State v. Cate*, 58 N. H., 240.

<sup>4</sup> *Ex parte Andrews*, 18 Cal., 678, 681. The court in this case overrules its former decision, *Ex Parte Newman*, 9 Cal., 502, which decision was out of line with all the authorities.

<sup>5</sup> *State v. Petit*, 74 Minn., 376; 77 N. W., 225; affirmed 177 U. S., 164.

The din and confusion of secular employments would disturb all in this worship and absolutely prevent the worship of many. While the rich and powerful would not suffer very seriously, the man dependent upon the labor of his hand would largely be prevented from attending divine service at any time. Sunday has thus become auxiliary to the rights of conscience. Christianity

is recognized as constituting a part and parcel of the common law and as such all of the institutions growing out of it or in any way connected with it, in case they shall not be found to interfere with the rights of conscience, are entitled to the most profound respect and can rightfully claim the protection of the law-making power of the state.<sup>1</sup>

Without Sunday laws Christianity might be

exposed to the danger of being reduced to the condition in which it was before the Roman world was governed by Christian princes. Though it might not be persecuted by the arm of the civil power, it would be driven by the annoyances and interruptions of the world to corners and byplaces, in which to find retreat for its undisturbed exercise.<sup>2</sup>

That inconvenience may be caused to some cannot be recognized as a legitimate argument against these laws. If this argument were to prevail all laws could be abrogated and anarchy would rule supreme. If, therefore, believers in Saturday as a day of rest are by the law and their religious conviction forced to abstain from work on two days of the week their religious freedom is not violated. They are as little compelled to worship on a Sunday as any other citizens. The Sunday is theirs "for social intercourse, for moral culture, and if they choose for divine worship."<sup>3</sup>

<sup>1</sup> *Shover v. State*, 10 Ark., 259, 263.

<sup>2</sup> *State v. Clubs*, 20 Mo., 214, 219.

<sup>3</sup> Field, J., in *Ex parte Newman*, 9 Cal., 502.

Sunday laws have therefore been upheld against the objections of Jews<sup>1</sup> and Seventh Day Adventists.<sup>2</sup>

When churches were territorial parishes and on an exact equality with counties, towns, villages and other public corporations, it was but natural that they should be exempt from taxation. An attempt to tax them would not have relieved the individual taxpayer but would have only complicated the bookkeeping of the tax officials. This old system was retained after the reason for it had ceased. A new reason was sought and has been stated as follows: "The fundamental grounds upon which all such exemptions are based is a benefit conferred on the public by such institutions and a consequent relief, to some extent, of the burden upon the state to care for and advance the interests of its citizens."<sup>3</sup> It has, therefore, been the policy of the various states by tax-exemption laws "to encourage, foster and protect corporate institutions of religious and literary character because the religious, moral and intellectual culture afforded by them were deemed, as they are in fact, beneficial to the public, necessary to the advancement of civilization, and the promotion of the welfare of society."<sup>4</sup>

It will readily be seen that "it is easier to admire the motives for such exemption than to justify it by any sound argument."<sup>5</sup> The question of the constitutionality of exemption laws, however, is quite generally foreclosed by provisions contained in the various state constitutions em-

<sup>1</sup> *Commonwealth v. Wolf*, 3 S. & R., 48; *Frolichstein v. Mobile*, 40 Ala., 725; *State v. Weiss*, 97 Minn., 125; 105 N. W., 1127; *Silverberg Bros. v. Douglas*, 114 N. Y. S., 824; 62 Misc., 340.

<sup>2</sup> *Commonwealth v. Has*, 122 Mass., 40; *Specht v. Commonwealth*, 8 Pa. St., 312; *Waldo v. Commonwealth*, 9 W. N. C., 200.

<sup>3</sup> *Book Agents of M. E. Ch. v. Hinton*, 21 S. W., 321; 19 L. R. A., 289, 290; 92 Tenn., 188.

<sup>4</sup> *People v. Barber*, 42 Hun., 27, 30.

<sup>5</sup> *Orr v. Baker*, 4 Ind., 86, 88.

powering the legislature to exempt property used exclusively for public worship or religious purposes. Therefore the Kentucky court, while saying that "an exemption in favor of property devoted to the advancement of any particular religious belief is indirectly, at least, a tax upon all the other property owners of the commonwealth to support that belief," sustained the practice so far as it was authorized by the constitution.<sup>1</sup> In Iowa, however, there seems to be no such constitutional provision, but the exemption laws passed by the legislature were sustained nevertheless, the court saying:

The argument is that exemption from taxation of church property is the same thing as compelling contribution to churches to the extent of the exemption. We think the constitutional prohibition extends only to the levying of tithes, taxes or other rates for church purposes, and that it does not include the exemption from taxation of such property as the legislature may think proper.<sup>2</sup>

It is generally recognized, however, that tax-exemption laws must be construed strictly,<sup>3</sup> as they are against common right and practically amount to the same thing as levying an assessment for church purposes.<sup>4</sup> It is not practical to review in this chapter the numerous decisions illustrating the strict construction applied to these statutes. One prominent example only will be noted. Where churches are in

<sup>1</sup> *Kentucky v. W. J. Thomas* (Ky.), 83 S. W., 572; 6 L. R. A., 320.

<sup>2</sup> *Trustees of Griswold College v. State*, 46 Iowa, 275, 282.

<sup>3</sup> *U. S. Nat. Bank v. Poor Handmaids*, 148 Wis., 613; 135 N. W., 121; *People v. Deutsche Ev. Luth. Jehovah Gemeinde*, 249 Ill., 132; 94 N. E., 162; *Inhabitants of Gorham v. Trustees of Ministerial Fund in Gorham*, (Me.) 82 Atl., 290.

<sup>4</sup> *Orr v. Baker*, 4 Ind., 86, 88.

terms exempted from taxation they will not be exempted from special assessments.<sup>1</sup>

The question of religious liberty has been repeatedly raised in connection with our public-school system. From the earliest days of our common schools it has been a practice, more or less generally observed, to sing hymns, recite prayers and read portions of the Bible as part of the school curriculum. The practice has gone unchallenged in most instances. This is not remarkable, as our school laws are "believed to be based on the Christian religion as the foundation of their moral obligation,"<sup>2</sup> and as an inhibition of the teaching of the precepts of Christianity would "extend in its consequences to prohibit the state from providing for public instruction in many branches of useful knowledge which naturally tend to defeat the arguments of infidelity, to illustrate the doctrines of the Christian religion and to confirm the faith of its professors."<sup>3</sup>

When, however, we approach the question of Bible-reading in the public schools we are met with a conflict in the decisions. It has been held in Wisconsin, Nebraska and Illinois that the reading of the Bible in the public schools is "sectarian instruction" and "public worship," and as such forbidden by the state constitution.<sup>4</sup>

In the Nebraska case, however, the court on rehearing eliminates the contention that Bible-reading is an act of public worship. In the Wisconsin case one of the judges

<sup>1</sup> *Lefebre v. Detroit*, 2 Mich., 586; *Chicago v. Baptist Theological Union*, 115 Ill., 245; *Lockwood v. St. Louis*, 24 Mo., 20. See ch. ix.

<sup>2</sup> *First Congregational Society v. Atwater*, 23 Conn., 34, 42.

<sup>3</sup> *Barnes v. First Parish in Falmouth*, 6 Mass., 401, 411.

<sup>4</sup> *State ex rel Weiss v. Edgerton School District*, 76 Wis., 177; 44 N. W., 967; 7 L. R. A., 330; 20 Am. St. Rep., 41; *People v. Board of Education*, 245 Ill., 334; 92 N. E., 251; *State ex rel Freeman v. Scheve*, 65 Neb. 853; 91 N. W., 846; 93 N. W., 169; 59 L. R. A., 927.

even went so far as to hold that by such reading the common schools were converted into "theological seminaries."<sup>1</sup> The Illinois court, though its previous decisions seemed to point to a recognition of Bible-reading in the public schools,<sup>2</sup> has excluded the Bible entirely, while the Nebraska and Wisconsin courts bar it only so far as it is sectarian, and not so far as it teaches "the fundamental principle of moral ethics." They have, however, not laid down any definite tests as to just where moral instruction ends and sectarian instruction begins, thus leaving school boards who should attempt to authorize Bible-reading in the schools in a difficult and embarrassing position. In all the other states in which the question has been raised the practice has been upheld. In some of these states the constitutional provisions are different, and this may explain the difference in the result.<sup>3</sup> In others, however, they are substantially the same as in Wisconsin, Nebraska and Illinois, but the courts take a different view of their meaning.<sup>4</sup> The key to these latter decisions is given in the Texas case, where the court says that

Christianity is so interwoven with the web and woof of the state government that to sustain the contention that the consti-

<sup>1</sup> State *ex rel* Weiss *v.* Edgerton School District, 76 Wis., 177; 44 N. W., 967; 7 L. R. A., 330; 20 Am. St. Rep., 41.

<sup>2</sup> Nichols *v.* School Directors, 93 Ill., 61; 34 Am. Rep., 160; McCormick *v.* Burt, 95 Ill., 263; 35 Am. Rep., 163; North *v.* University of Illinois, 137 Ill., 296; 27 N. E., 54.

<sup>3</sup> Donahue *v.* Richards, 38 Md., 379; 61 Am. Dec., 256; Spiller *v.* Woburn, 94 Mass., 127; Nestle *v.* Hun, 1 N. P., 140; 2 O. Dec., 60.

<sup>4</sup> Pfeiffer *v.* Detroit Board of Education, 118 Mich., 560; 77 N. W., 250; 42 L. R. A., 536; Moore *v.* Monroe, 64 Iowa, 367; 20 N. W., 475; 52 Am. Rep., 444; Church *v.* Bullock (Tex.) 100 S. W., 1025; 109 S. W., 115; 16 L. R. A., 860; Billard *v.* Topeka Board of Education, 69 Kans., 53; 76 Pa., 422; 66 L. R. A., 166; 105 Am. St. Rep., 148; Hackett *v.* Brooksville Graded School District, 120 Ky., 608; 87 S. W., 792; 69 L. R. A., 592; 117 Am. St. Rep., 599. See note in 16 L. R. A., 860.

tution prohibits reading of the Bible, offering prayer and singing songs of a religious character in any public building of the government would produce a condition bordering upon moral anarchy," and "starve the moral and spiritual natures of the many out of deference to the few."<sup>1</sup>

The position of the Illinois court, and to a less extent that of the Wisconsin and Nebraska courts, is probably well expressed in the following extract from an Ohio case:

To teach the doctrine of infidelity and thereby teach that Christianity is false is one thing; and to give no instruction on the subject is quite another thing. The only fair and impartial method, where serious objection is made, is to let each sect give its own instruction elsewhere than in the public state schools where of necessity all are to meet.<sup>2</sup>

On the whole, however, it must be concluded that the decisions of those courts which uphold Bible-reading in the public schools are in harmony with the general doctrines of religious liberty as the same have been explained by the decided cases, while the contrary doctrine upheld by the Illinois court, and to a less degree by the Nebraska and Wisconsin courts, harks back to a conception of religious liberty which is Jacobinical rather than American.

It has also been a general practice, particularly in new and sparsely-settled country districts, to hold religious services and Sunday schools in the public-school houses at such hours as not to conflict with the conduct of the schools.<sup>3</sup> The question has arisen whether this is proper. Some courts in passing on this question have held that the school authorities have no power to appropriate the school build-

<sup>1</sup> *Church v. Bullock* (Tex.), 100 S. W., 1025; 109 S. W., 115; 16 L. R. A., 860, at the end of the opinion.

<sup>2</sup> *Board of Education v. Minor*, 23 Ohio St., 211, 252.

<sup>3</sup> *Sheldon v. Centre School District*, 25 Conn., 224.

ing to any use not strictly educational, and therefore have enjoined its use for religious services.<sup>1</sup> Other courts have held the determination of the electors or school officials conclusive, whether the same was favorable or unfavorable to such use.<sup>2</sup> In none of these cases was the question discussed whether or not such use was in harmony with the constitution of the state. The Indiana Appellate Court merely raised the question whether a constitutional provision that "no man shall be compelled to attend, erect or support any place of worship," was violated by such use.<sup>3</sup> The Kansas court has indicated strongly that such use amounts to taxation for private purposes and should be enjoined.<sup>4</sup> The Illinois Supreme Court has upheld such use against the objection that it compelled the taxpayers of the district to support a place of worship against their consent, saying: "Religion and religious worship are not so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the state."<sup>5</sup> The Iowa Court, after declaring that the propriety of such use "ought not to be questioned in a Christian state,"<sup>6</sup> met the same argument with which the Illinois Court had been confronted, as follows:

<sup>1</sup> *Scofield v. Eighth School District*, 27 Conn., 499; *Baggerly v. Lee*, 37 Ind. App., 139; 73 N. E., 921; *Dorton v. Hearn*, 67 Mo., 301; *Bender v. Strebish*, 182 Pa., 151; 37 Atl., 853; *Spring v. Harmar Township*, 31 Pitts. L. J. N. S., 194.

<sup>2</sup> *Boyd v. Mitchell*, 69 Ark., 202; 62 S. W., 61; *School Directors v. Toll*, 149 Ill. App., 541; *Hurd v. Walters*, 48 Ind., 148; *Eckhardt v. Darby*, 118 Mich., 199; 76 N. W., 761.

<sup>3</sup> *Baggerly v. Lee*, *supra*.

<sup>4</sup> *Spencer v. Joint School District*, 15 Kans., 259; 22 Am. Rep., 268.

<sup>5</sup> *Nichols v. School Directors*, 93 Ill., 61, 64.

<sup>6</sup> *Townsend v. Hagen*, 35 Iowa, 194, 198.



The use of a public school building for Sabbath schools, religious meetings . . . which of necessity must be occasional and temporary is not so palpably a violation of the fundamental law as to justify the courts in interfering. Especially is this so where, as in the case at bar, abundant provision is made for securing any damages which the taxpayers may suffer by reason of the use of the house for the purposes named. With such precaution the amount of taxes anyone would be compelled to pay by reason of such use would never amount to any appreciable sum. . . . Such occasional use does not convert the school house into a building of worship within the meaning of the constitution.<sup>1</sup>

While thus a church may use a school-house for religious purposes, the public school authorities similarly may rent a church for school purposes without extending such aid to the church as is forbidden by the constitution. "Religious institutions are not under such bans that they may not deal at arm's length with the public in selling or leasing their property, when required for public use, in good faith."<sup>2</sup>

The question has also arisen whether the employment in the public schools of nuns in their religious garb with crucifixes and rosaries is proper. The Pennsylvania Supreme Court in 1894 upheld the practice, over the dissent of one of its members, remarking that "in a popular government by the majority, public institutions will be tinged more or less by the religious proclivities of the majority."<sup>3</sup> The decision proved to be so unpopular that recourse was had to the legislature, which in 1895 passed an act to prevent the wearing of such dresses in the public schools by any of the teachers. The constitutionality of this act

<sup>1</sup> *Davis v. Boget*, 50 Iowa, 11, 15, 16.

<sup>2</sup> *Millardo v. Board of Education*, 19 Ill. App., 48, 54. See *Perry v. McEwen*, 22 Ind., 440.

<sup>3</sup> *Hysong v. School District*, 164 Pa., 629, 656.

has been upheld by the Superior Court on the ground that it was directed against acts and does not interfere with religious sentiment.<sup>1</sup> In 1906 the same question came before the New York Court of Appeals. It was held that a regulation of the State Superintendent forbidding Catholic Sisters employed as teachers in the public schools from wearing any distinctive garb was reasonable and proper on the ground that such costumes necessarily inspire respect if not sympathy for the religious denomination to which the teacher belongs.<sup>2</sup>

The further question has been raised whether a school board must yield to the religious convictions of certain school children to the extent of excusing them from school on certain holidays, such as Corpus Christi day. The contention of the school board that this non-consent did not touch any conscientious belief nor the free exercise of religious worship has been upheld and their action in excluding such pupils as absented themselves on that day has been sustained by the courts.<sup>3</sup>

To sum up: The American citizen is protected in his religious liberty against any act of the federal government by the United States constitution and against any act of his state government by his state constitution. Under both he is entirely free to formulate any opinion whatsoever in regard to religion, to practice and teach it to others, provided he respects their rights and does not incite to crime or a breach of the peace. In defining forbidden acts the law recognizes the Christian religion as the prevailing religion in this country and punishes blasphemers, Mormons, Christian Scientists, fortune-tellers, members of the Sal-

<sup>1</sup> Commonwealth *v.* Herr, 39 Pa. Super. Ct., 454.

<sup>2</sup> O'Connor *v.* Hendrick, 184 N. Y., 421; 77 N. E., 612; 7 L. R. A (N. S.), 402.

<sup>3</sup> Ferritur *v.* Tyler, 48 Vt., 444.

vation Army and others, though the acts which have brought them into conflict with the law have been performed with a religious motive. It fosters religion by affording churches the right to become corporations, by protecting their worship against disturbance, by exempting their property from taxation and by providing for a cessation from work on Sunday. It permits (Illinois excepted) the Bible, or portions of it, to be read in the public schools. It allows the use of public-school buildings for Sunday schools and other forms of religious worship where such use does not conflict with the school laws or regulations and permits churches to lease their buildings to school districts for a consideration. It frowns upon the wearing of denominational garments in the public schools by teachers and does not suffer pupils to break up the school discipline by absenting themselves from public school on purely religious holidays.

## CHAPTER II

### FORMS OF CORPORATIONS

THE right of church societies to incorporate has been universally conceded in the United States, except in Virginia and West Virginia, under whose constitutions the legislature is forbidden to grant any "charter of incorporation" to "any church or religious denomination."<sup>1</sup> Nor is such concession a recent one. Church societies have exercised corporate rights from the earliest period of the American law. The forms under which this has been done, however, have been quite dissimilar. Five distinct classes of corporations are discernible, the first of which is entirely extinct, the second survives only in an altered form, the third is limited in area, while the fourth and fifth divide the states between them. These five forms in the order mentioned are: (1) The Territorial Parish; (2) The Corporation Sole; (3) The Roman Catholic Church; (4) The Trustee Corporation; (5) The Corporation Aggregate. In addition to these classes some states recognize all organized voluntary church societies as quasi corporations. It is now in order to consider the various forms of church corporations separately.

#### I. THE TERRITORIAL PARISH

When the United States Constitution was adopted, most of the original thirteen states had established churches, known by different names, but generally called territorial

<sup>1</sup> Constitution of Virginia, art. iv, sec. 59. Constitution of West Virginia, art. vi, sec. 47.

parishes. Massachusetts is an extreme example of this. Here the congregational form of worship was established and so deeply rooted that a half-century went by after the Revolution before the church was finally disestablished. Complete records of the slow process by which this end was achieved are preserved in the early Massachusetts reports. The development in Maine was quite similar to that in Massachusetts, though the records of it are not so complete. In other states, such as Connecticut, the reports afford but glimpses of the process of disestablishment.

Originally the various towns in colonies organized on the township basis had ecclesiastical powers and duties. The same officers, as town officers, administered ecclesiastical and mundane affairs. They provided for religious instruction and vindicated both ecclesiastical and town rights in one action.<sup>1</sup>

This system was soon found to be inconvenient. Towns were often of a size too large for one church and too small for two. It might be practically impossible for all of its inhabitants to worship at one place. The best point for the location of a church might be at or near the boundary line of two towns. Under these circumstances territorial parishes became a necessity. These might be coextensive with a town, or they might consist of a part of the territory of a town, or they might even comprise portions taken from two or more towns.<sup>2</sup> They might be larger or smaller than a town. But whatever their form or size they were corporations distinct from the parent town or towns. Town and parish would subsist together and act apart under the management of different officers.<sup>3</sup> Land formerly held by

<sup>1</sup> *Alna v. Plummer*, 3 Me., 88.

<sup>2</sup> *Dillingham v. Snow*, 5 Mass., 547.

<sup>3</sup> *Dillingham v. Snow*, 3 Mass., 276, 282.

the towns in their parochial character would pass to the parishes as soon as they were formed.<sup>1</sup>

These parishes were as much public corporations as towns and school societies.<sup>2</sup>

Provision for the support and maintenance of religious instruction and worship was considered to be a duty resting on the state, as much as the promotion of general education, the support of the poor, or the maintenance of roads and bridges; and that provision was made and carried into effect through the instrumentality of local ecclesiastical societies established by the state through its legislative power, as those other objects respectively were accomplished through the agency of school societies, and districts, and of towns. Each of these societies, or communities, were considered to be, and were in fact, municipal, public, political corporations. They were governmental instrumentalities, composed of individuals, as component parts of the great community, for the promotion of the general welfare of that community and in which no person had an interest, or was to derive a benefit of a character particular or individual to himself merely, but only in connection with, and as he participated in, the welfare of the community generally.<sup>3</sup>

It follows that the legislature had complete control over them. It might divide, merge or extinguish the various parishes at its mere pleasure without petition or preliminary action on the part of anybody.<sup>4</sup> No person, who happened

<sup>1</sup> *Milton v. First Parish in Milton*, 27 Mass. (10 Pick.), 447; *Medford v. Pratt*, 21 Mass. (4 Pick.), 222; *Medford v. Medford*, 38 Mass. (21 Pick.), 199; *Tobey v. Wareham Bank*, 54 Mass. (13 Met.), 440; *First Parish in Sudbury v. Jones*, 62 Mass. (8 Cush.), 184; *Lakin v. Ames*, 64 Mass. (10 Cush.), 198; *Sewall v. Cargill*, 15 Me., 414.

<sup>2</sup> *First Society of Waterbury v. Platt*, 12 Conn., 180.

<sup>3</sup> *Second Ecclesiastical Society of Portland v. First Ecclesiastical Society of Portland*, 23 Conn., 255, 272.

<sup>4</sup> *Thaxter v. Jones*, 4 Mass., 570; *Colburn v. Ellis*, 7 Mass., 89; *First Society of Waterbury v. Platt*, *supra*.

to be a resident of the territory covered by such a parish, could be anything but a member of it. Membership attached to residence in a parish the same as citizenship attaches to residence in a city.<sup>1</sup> "It was a fundamental principle that every person should contribute toward the support of public worship somewhere, be a member of some religious society, and that he never could leave one but by joining another."<sup>2</sup> When independent societies developed and a person was allowed to separate his connection with the territorial parish, such right of separation was considered as a privilege, and all the forms of law had to be strictly observed.<sup>3</sup> Even if he had actually in due form of law separated his connection with the parish by joining an independent society, he would, on leaving that society again, without more ado, become a member of the territorial parish.<sup>4</sup> Nor had the territorial parish any power to excommunicate a member, however much such a result might be desired. While it could investigate and ascertain who was a member, such investigation was an inquiry into an existing fact. It could not under the guise of such an inquiry, change its membership.<sup>5</sup>

Such membership carried with it all the consequences, agreeable and disagreeable, which residence in a town or county implied. Residents of a county or town under the law were liable for its debts. A person who recovered judgment against these public corporations could levy execution against the property of any of their citizens. A strong inducement was thus presented to every citizen to

<sup>1</sup> *Osgood v. Bradley*, 7 Me., 441; *Kingsbery v. Slack*, 8 Mass., 154.

<sup>2</sup> *First Parish of Sudbury v. Stearn*, 38 Mass. (21 Pick.), 148, 152.

<sup>3</sup> *Jones v. Carry*, 6 Me., 448.

<sup>4</sup> *Oakes v. Hill*, 27 Mass. (10 Pick.), 333; *Lord v. Chamberlain*, 2 Me., 67.

<sup>5</sup> *Keith v. Howard*, 41 Mass. (24 Pick.), 292.

keep his county or town out of debt. This doctrine, harsh as it was, applied also to territorial parishes.<sup>1</sup>

Since these parishes were thus in every sense public corporations, it follows that their officers were public officers<sup>2</sup> capable as such of administering oaths.<sup>3</sup> It further follows that the corporation could take property by eminent domain,<sup>4</sup> and tax those who had property within its limits, whether they were residents or non-residents, natural or artificial persons, believers or unbelievers.<sup>5</sup> Thus a manufacturing corporation was forced to pay parish taxes though it contended that since it had no soul, it could have no benefit from an institution established *pro salute animae*.<sup>6</sup>

While this power of taxation was not unlimited,<sup>7</sup> it nevertheless constituted the death germ of the territorial parish. More and more exceptions to it were made until eventually the exceptions became the rule. When this stage had been reached statutes or constitutional amendments were enacted abolishing the territorial parish altogether. The process by which, through constitutional amendments, statutes and court decision, church and state, were divorced, territorial parishes abrogated and "poll parishes" substi-

<sup>1</sup> Chase *v.* Merrimack Bank, 36 Mass. (19 Pick.), 564; 31 Am. Dec., 163; Richardson *v.* Butterfield, 60 Mass. (6 Cush.), 191; Fernald *v.* Lewis, 6 Me., 264.

<sup>2</sup> First Parish of Sherburne *v.* Fiske, 62 Mass. (18 Cush.), 264; 54 Am. Dec., 755.

<sup>3</sup> Chapman *v.* Gillet, 2 Conn., 40.

<sup>4</sup> Taylor *v.* Public Hall Co., 35 Conn., 430.

<sup>5</sup> Lord *v.* Marvin, 1 Root, 330; Hosford *v.* Lord, 1 Root, 325; Turner *v.* Burlington, 16 Mass., 208. Hundreds of cases could be cited in support of the general power of taxation possessed by these parishes. None of these cases, however, decided the question directly. The general power to tax was regarded as such an elementary proposition that no one ever seems to have denied it.

<sup>6</sup> Amesbury Nail Factory Co. *v.* Weed, 17 Mass., 53.

<sup>7</sup> Bangs *v.* Snow, 1 Mass., 181.



tuted in their place is a very interesting one and would furnish a splendid subject for an historical essay. It is not, however, within the purview of this chapter. Suffice it to say, that at the present time no such territorial parish appears to have any existence in the United States.

## 2. THE CORPORATION SOLE

Closely connected with and dependent on the territorial parish in some states, and independent of it in others, we find another form of religious corporation, namely the corporation sole. This legal entity consists of one person at a time. When that person dies, his successor in the particular office or station in relation to which the corporation was created assumes his duties and privileges. The King of England is an example of such a sole corporation. So also was a minister of a parish in some of the original colonies which had adopted the congregational form of worship, such as Massachusetts. Says the court in an early Massachusetts case: "When a minister of a town or parish is seized of any lands in right of the town or parish . . . the minister for this purpose is a sole corporation and holds the same to himself and his successors."<sup>1</sup>

This corporation was thus constituted solely for the purpose of holding property in right of the parish. On the death of the corporator the fee would be in abeyance till his successor was elected. This successor would thereupon relieve the parish from the custody and usufruct of the property which it had enjoyed during the interim. While the minister alone could make a valid conveyance, good for such time as he remained in office, if more was desired the consent of the parish must be obtained. An attempt by the parish only to alienate was absolutely futile; for if there

<sup>1</sup> *Inhabitants of the First Parish of Brunswick v. Dunning*, 7 Mass., 435, 447.

was a minister, the fee was in him, and if there was a vacancy, the fee was in abeyance, and a corporation could not acquire a freehold by a disseisin committed by itself.<sup>1</sup> It follows that the parish could not even convey the ministerial lands to the minister himself, so as to make a title derived through the will of such minister good against his successor.<sup>2</sup>

This Massachusetts doctrine was followed in other congregational states such as Maine.<sup>3</sup> In states which had adopted the Episcopal form of worship, such as Virginia<sup>4</sup> and Georgia,<sup>5</sup> the corporation sole appears to have been the only corporate body in control of the church property. Still other states, such as New Hampshire, never recognized the corporation sole.<sup>6</sup>

It is obvious that this form of corporation, when it depended on the territorial parish, as in Massachusetts and Maine, became useless when the territorial parish was succeeded by the voluntary religious society. In these states it disappeared without any struggle, though the territorial parish itself died hard.

In Episcopal states, however, particularly Virginia, the process of elimination was not so simple. After a great many contradictory statutes relative to religion had been enacted in this state, a law was passed in 1802 which vested all the lands then held by Episcopal ministers under the old order in the overseers of the poor, after the "present incumbent" had died or had been removed in some other way. This law was upheld in a test case by the court of

<sup>1</sup> *Weston v. Hunt*, 2 Mass., 500; see also *Brown v. Porter*, 10 Mass., 93.

<sup>2</sup> *Austin v. Thomas*, 14 Mass., 333.

<sup>3</sup> *Bucksport v. Spofford*, 12 Me., 487.

<sup>4</sup> *Terrett v. Taylor*, 13 U. S. (9 Cranch), 43.

<sup>5</sup> *Christ Church v. Savannah*, 82 Ga., 656.

<sup>6</sup> *Baptist Society in Wilton v. Wilton*, 2 N. H., 508.

original jurisdiction. When the case came before the Supreme Court, the court stood three to two for a reversal of the judgment. The night before the decision was to be announced one of the three judges in the majority died, so that now the court stood evenly divided and the judgment of the lower court and the constitutionality of the statute were upheld.<sup>1</sup> Though this decision was an accident, it stood as the law of Virginia for thirty-six years without any attempt to reverse it. Not till 1840 was the question again raised in the Supreme Court. The court, however, now preferred to follow its former decision because of the long acquiescence of all concerned in it, the recognition it had received from all the branches of the government, and the fact that most of the church land had now been alienated under it.<sup>2</sup>

Of course the statute did not dissolve the corporation sole till the death of the present incumbent. Attempts on the part of overseers of the poor to seize church property before that event had taken place were therefore very properly enjoined.<sup>3</sup> After the incumbent's death, however, the corporation was absolutely at an end, the only reason for its existence having been removed. It is obvious that however lovingly parishioners might cherish their minister in order to obtain the benefits of the glebe lands as long as possible, they could not keep him alive forever. Automatically, one after another, the ancient church lands were taken over by the state at the death of the respective ministers. The last were probably taken over at or about the time of the Civil War. None certainly remain at the present time.

<sup>1</sup> *Turpin v. Locket*, 6 Call (Va.), 113.

<sup>2</sup> *Selden v. Overseers of Poor*, 11 Leigh, 127.

<sup>3</sup> *Young v. Pollock*, 2 Munf., 517 note; *Claughton v. Macnaughton*, 2 Munf., 513; but see *Overseers of Poor v. Hart*, 3 Leigh, 1.

But while the old form of corporation sole has thus passed away with the system of religious establishment of which it was a part, a new form of it has sprung into being and is vigorously flourishing today. Some churches in this country object to lay management of their temporal affairs. They aim to concentrate this management in the bishop or the priest. Pressure has therefore been brought to bear upon the various legislatures to make bishops corporations sole, and thus obviate the embarrassment experienced from lay trustees. This application has not always been successful. Legislatures have leaned against it, believing that the Roman Catholic Church, which would be the main beneficiary of such a law, was asking for an undue privilege.<sup>1</sup> In other states no such legislation appears to have been asked, and a bishop or priest has hence been held not to possess corporate rights.<sup>2</sup> In still other states the decisions go so far the other way as to create a quasi corporation sole without any express legislative authority.<sup>3</sup> In many states, however, the question is now settled by statutes authorizing bishops of various denominations to become corporations sole by complying with certain prescribed conditions,<sup>4</sup> which are usually extremely simple, consisting merely of the filing of some statement, certificate or affidavit with a certain officer. Their purpose is to afford public notice of the existence of the corporation. A

<sup>1</sup> *Union Church v. Sanders*, 1 Houst. (Del.), 100; 63 Am. Dec., 187.

<sup>2</sup> *M'Girr v. Aaron*, 1 Pen. & W. (Pa.), 49; *Dwenger v. Geary*, 113 Ind., 106; 14 N. E., 903.

<sup>3</sup> *St. Antonio v. Odin*, 15 Tex., 539; *Santillan v. Moses*, 1 Cal., 92; *Beckwith v. St. Philip's Parish*, 69 Ga., 564.

<sup>4</sup> *Mora v. Murphy*, 83 Cal., 12; 23 Pac., 63; *State v. Getty*, 69 Conn., 286; 37 Atl., 687; *Searle v. Roman Cath. Bishop of Springfield*, 203 Mass., 493; 89 N. E., 809; *Chiniquy v. Catholic Bishop of Chicago*, 41 Ill., 148; *Daly v. Catholic Church*, 97 Ill., 19; *Kennedy v. LeMoyne*, 188 Ill., 255; 58 N. E., 903; *Tichenor v. Brewer's Executor*, 98 Ky., 349; 33 S. W., 86; *Gump v. Sibley*, 79 Md., 165; 28 Atl., 977.

Mormon bishop who had failed to comply with the statute has therefore been denied the right to act as a corporation sole.<sup>1</sup>

While corporations sole are thus recognized under the statutes of the various states, a somewhat similar recognition is given to the Pope at Rome under a treaty of the United States. This brings us to the third form of religious corporation in the American law.

### 3. THE ROMAN CATHOLIC CHURCH

The Roman Catholic Church is recognized by the courts as a corporation—but only in our island possessions—by the treaty of Paris which concluded the Spanish-American war. This treaty contained an article declaring that the cession of the Philippines, Porto Rico and other territory “cannot in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds of . . . *ecclesiastical* or *civic bodies* . . . having legal capacity to acquire and possess property in the aforesaid territories.”<sup>2</sup> It was soon found that by the Spanish law then in force in these islands the Roman Catholic Church was an ecclesiastical body and had a juristic personality and legal status.<sup>3</sup> There was nothing for the courts to do but to recognize it as a corporation, allow it to sue and be sued, and give it the protection provided for by the treaty.<sup>4</sup> It has therefore been said that the contention that the Catholic Church is not a corporation in these islands did not require serious consideration being “made with reference to an institution which antedates by almost

<sup>1</sup> *Blakeslee v. Hall*, 94 Cal., 159; 69 Pac., 623.

<sup>2</sup> *Treaty of Paris*, article viii, cited in *Ponce v. Roman Catholic Church*, 210 U. S., 296, 310.

<sup>3</sup> *Ibid.*, 296, 319.

<sup>4</sup> *Santos v. Roman Catholic Church*, 212 U. S., 463; *Ponce v. Roman Catholic Church*, *supra*.

a thousand years any other personality in Europe and which existed 'when Grecian eloquence still flourished in Antioch, and when idols were still worshipped in the temple of Mecca'".<sup>1</sup> It follows that so far as our island possessions are concerned the Roman Catholic Church with the Pope at Rome as its president will be recognized by all the branches of the government as a corporation. Negotiations carried on at Rome with the Pope by a special agent of the President of the United States in regard to a disposal of some of the vast holdings of that church are therefore entirely proper from any viewpoint whatsoever.

The scope of this recognition, however, does not extend further than to the territory covered by the treaty. As to all other parts of the United States the Catholic Church as such is not a corporation but an hierarchy. A contention that it can own property as such is an "inconceivable assumption." As a sovereign power, a political and ecclesiastical state, it can acquire property in the various states only "by treaty with the government at Washington."<sup>2</sup>

The three forms of church corporations so far considered are not native products of the American soil. The first two were imported from England and have perished; the territorial parish absolutely, the corporation sole in its original form. The third, the Roman Catholic Church, is a Spanish product, thrust upon us by the treaty of Paris and ill-suited to our conditions. It will in the course of time probably share the fate of the territorial parish. The modern form of the corporation sole is the only form of church corporation so far considered which can be called

<sup>1</sup> *Barlin v. Ramirez*, 7 Philippines, 41, 58. In case any of these islands should become separate states, this part of the treaty would probably cease to be effective. *Pointe Coupee Roman Catholic Church v. Martin*, 4 Rob., 62 (La.).

<sup>2</sup> *Bonacum v. Murphy*, 71 Neb., 463, 493.

American in the true sense of the word. An extension of the principle of this corporation and an improvement of it is presented by the fourth form of church corporation, which we will now scrutinize.

#### 4. THE TRUSTEE CORPORATION

When early in our history territorial parishes began to disintegrate, voluntary societies for religious worship were formed by those who severed their connection with the parishes. These societies generally existed for a time in an unincorporated form. This arrangement worked well enough as long as no property was acquired. When, however, property accumulated, the question who was to hold it was at once presented. It could not be held in the name of all the members, as they were too numerous and changing. It could not be held in the name adopted by the society, as that was not recognized by law. The difficulty was solved by selecting certain persons to hold as trustees for the members of the society. This solution was generally adequate for the time measured by the life and good behavior of the trustees.

Since, however, the trustees took as individuals,<sup>1</sup> if they became obstreperous they were in a position to cause untold difficulties to the society. And when they died, as die they must, the question of their successors might and did cause even greater trouble. Whether the courts adopted the view that their trusteeship was for life only and the fee thereafter reverted to the original owner,<sup>2</sup> or whether they adopted the view that the fee passed to the respective survivors,<sup>3</sup> and after the death of the last survivor to his heirs,<sup>4</sup>

<sup>1</sup> *Follett v. Badeau*, 26 Hun., 253.

<sup>2</sup> *Morgan v. Leslie*, *Wright* (Ohio), 144.

<sup>3</sup> *Peabody v. Eastern Methodist Society*, 87 Mass. (5 Allen), 540; *Burrows v. Holt*, 20 Conn., 459.

<sup>4</sup> *Cahill v. Bigger*, 47 Ky. (8 B. Mon.), 211.

the title was liable to get into the hands of men incapable of understanding the needs of the society or, what was even worse, hostile to it. Nothing that the society could do was effective to prevent this result. It could not by the appointment of new trustees terminate the estate of the old board and transfer its title to the property.<sup>1</sup> It retained no power over them and could not after their death elect their successors. At times it might not even be able to tell who were such successors. That it could appeal to the power of equity to remove the trustee and appoint his successor was small consolation, as this involved a lawsuit with all its consequences of embittered feelings, the very thing which churches seek to avoid. The inconvenience of the situation is well illustrated by a Massachusetts case in which the trustee was dead for almost a lifetime and the church succeeded in saving its property merely by the doctrine of adverse possession.<sup>2</sup>

It thus became obvious that a system of holding church property by trustees, however well it might work for a time, was not adapted to permanent usefulness. The lives of the trustees were too limited. Something more permanent must be devised. The evil to be corrected was the instability of the trustees. This would very readily be remedied by making the trustees a corporation. This accordingly was done, first by special charters, later by general incorporation statutes. Where there was an existing board of trustees the statute generally incorporated them. If there was no such body some other committee of the church society was selected to act as the corporation. Thus the

<sup>1</sup> *Lee v. M. E. Church*, 193 Mass., 47; 78 N. E., 646; *Bundy v. Birdsall*, 29 Barb., 31.

<sup>2</sup> *First Baptist Church of Sharon v. Harper*, 191 Mass., 196; 77 N. E., 778.



vestry of a church,<sup>1</sup> its deacons,<sup>2</sup> its rector, vestrymen, and wardens,<sup>3</sup> and even the selectmen, clerk and treasurer of towns have been thus incorporated.<sup>4</sup> The policy of the law was "to invest some known and designated officers and functionaries, chosen and set apart according to the constitution and usages of such respective bodies, with corporate powers to take and hold property in succession, in trust for the unincorporated association often fluctuating and varying in numbers and members."<sup>5</sup>

This new corporation bears a striking resemblance to the corporation sole. It is devised upon the same lines of policy. The few represent the many. But while it resembles the sole corporation, it is not a cheap imitation of it, but rather a distinct improvement on it. The great fault of the corporation sole is that it and the title resting on it at times must inevitably be in abeyance. The sole corporator cannot live forever. If he dies, some time must elapse before his successor is elected. During this time confusion may ensue. Such a result is not probable with the trustee corporation. This consists of not less than three and may consist of twenty or more members. If one or more die, others can be elected by the society to fill the vacancy and the corporate succession can thus be kept up indefinitely, without any break whatsoever.

<sup>1</sup> *Bartlett v. Hipkins*, 76 Md., 5; 23 Atl., 1089; 24 Atl., 532; *Stubbs v. Vestry of St. John's Church*, 96 Md., 267; 53 Atl., 917.

<sup>2</sup> *Weld v. May*, 63 Mass. (9 Cush.), 181; *Anderson v. Brock*, 3 Me., 243; *Buckingham v. Northrop*, 1 Root, 53.

<sup>3</sup> *Montague v. Smith*, 13 Mass., 396, 405; *Commonwealth v. Woelper*, 3 S. & R., 29; 8 Am. Dec., 628; *Appeal of Burton*, 57 Pa., 213; 25 L. J., 325; *In the matter of Howe*, 1 Paige (N. Y.), 214; *Den v. Bolton*, 12 N. I. Law, 206.

<sup>4</sup> *Trustees in Levant v. Parks*, 10 Me., 441; *Minister and School Fund v. Kendrick*, 12 Me., 381; *Warren v. Stetson*, 30 Me., 231; *Abbott v. Chase*, 75 Me., 83.

<sup>5</sup> *Earle v. Wood*, 62 Mass. (8 Cush.), 430, 450.

It is also worthy of remark that this trustee corporation added another aspect to the church in whose interest it was created. Before its creation a distinction was made merely between the church and the society. Now the corporation was added. Churches therefore now presented a threefold aspect.<sup>1</sup> The church was the spiritual body of believers over which courts could have no jurisdiction whatsoever; the society consisted of all those who had associated themselves together and who elected the trustees whether they were of the church or not; while the trustees, under whatever name they might be known, and whether they were members of the church or the society or both or neither, were the corporation, created for the express purpose of holding the property of the society.

The society, while it was the reproductive organ of the corporation, creating it and filling vacancies in it, was not a part of it in any sense. It was a segregated body, whose only function was to give birth to certain officers, whom the law thereupon invested with corporate powers. The law took cognizance of its usages in electing such officers and, if an election had been carried on in accordance with them, at once recognized the person elected as a part of the corporation. The theory of the law was not that the societies "select persons to be a corporation, but being chosen to offices recognized by law and usage, the law annexes *proprio vigore* the corporate capacity to the office."<sup>2</sup> Similarly, on his removal by death, resignation or otherwise, the law *ipso facto* divested the trustee of all power as a corporator and recognized his legally chosen successor.<sup>3</sup> The

<sup>1</sup> *Miller v. Trustees of Baptist Church*, 16 N. J. L., 251; *Lawyer v. Cipperly*, 7 Paige (N. Y.), 281; *Gray v. Good*, 44 Ind. App., 476; 89 N. E., 498; *First Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec., 223.

<sup>2</sup> *Bailey v. M. E. Church of Freeport*, 71 Me., 472, 477.

<sup>3</sup> *Commonwealth v. Green*, 4 Whart., 531; *Earle v. Wood*, 62 Mass. (8 Cush.), 430; *Weld v. May*, 63 Mass. (9 Cush.), 181.

voluntary society henceforth was recognized only so far as it elected the corporators. In all questions of contract and property the courts looked to the corporation and to the corporation only.

It followed that every contract made by a religious society, in order to be legally binding, must henceforth be either made or ratified by the trustee. Whatever view churches might take of the relation between themselves and their pastors, courts, when they were called upon to adjudicate difficulties arising out of it, must apply the ordinary rules of contract. Since the trustees were the only body recognized by the court, a minister, to recover his salary, must show either that his contract was made with the trustees or at least had been ratified by them.<sup>1</sup> Without ratification or assent by the trustees he was not entitled to the pulpit and would be enjoined from occupying it.<sup>2</sup> If for any reason he forfeited his position, the duty to depose him devolved upon the trustees and not upon the congregation.<sup>3</sup> Since these trustees might be non-members,<sup>4</sup> and even persons who had been excommunicated,<sup>5</sup> it can readily be seen that they might cause considerable trouble to the congregation when it came to calling or dismissing a minister. It must be said, however, that, so far as appears from the cases, trustees have caused little actual difficulty in contract matters.

The same, however, cannot be said when property rela-

<sup>1</sup> *Miller v. Trustees of Baptist Church*, 16 N. J. L., 251; *Lawyer v. Cipperly*, 7 Paige, 281; *Everett v. Trustees of First Presbyterian Church of Asbury Park*, 53 N. J. Eq., 500; 32 Atl., 747.

<sup>2</sup> *German Reformed Church v. Busche*, 7 N. Y., Super. Ct., 666.

<sup>3</sup> *Stubbs v. Vestry of St. John's Church*, 96 Md., 267; 53 Atl., 917.

<sup>4</sup> *Fort v. First Baptist Church of Paris (Tex. Civ. App. 1899)*, 55 S. W., 402; *In re Walnut Street Presbyterian Church*, 3 Brewst., 277; 7 Phila., 310.

<sup>5</sup> *Baptist Church v. Witherell*, 3 Paige (N. Y.), 296.

tions are considered. The trouble caused in this respect is due, not so much to any personal perversity of the trustees, but rather to the inherent defects of the system itself. The trustees are exactly what the word indicates. They are trustees. They hold the church property in trust. They occupy substantially the same relation which unincorporated trustees created by deed or will would occupy.<sup>1</sup> Theirs is an estate. While they are entitled to the possession of the church property against the violent and unauthorized acts even of the members of the society which they represent,<sup>2</sup> the latter nevertheless are the beneficiaries and have both the *jus habendi* and the *jus disponendi* for all legitimate purposes,<sup>3</sup> while the trustees have only the bare legal title,<sup>4</sup> and speaking algebraically "are merely x, y and z."<sup>5</sup> Their title is so absolutely apart from all beneficial ownership that an act of the legislature transferring it to another body has been upheld.<sup>6</sup>

It follows that equity has jurisdiction over them. If a trustee misbehaves he can be removed by the court on ordinary equity principles.<sup>7</sup> His actions are under the scrutiny of the court. Any of the beneficiaries, if dissatisfied, may

<sup>1</sup> *Munson v. Bringe*, 146 Wis., 393; 131 N. W., 904; *Robertson v. Rock Island Lumber Co.*, 74 Kans., 117; 85 Pac., 799; 87 Pac., 1134; *Trustees v. Laird* (Del. Ch. 1913), 85 Atl., 1082.

<sup>2</sup> *People v. Runkle*, 9 Johns., 147.

<sup>3</sup> *Morgan v. Rose*, 22 N. J. Eq., 583; *Page v. Asbury M. E. Church*, 78 N. J. Eq., 114; 78 Atl., 246.

<sup>4</sup> *Worrell v. First Presbyterian Church*, 23 N. J. Eq., 96; *Bridges v. Wilson*, 58 Tenn., 458.

<sup>5</sup> *North Carolina Christian Conference v. Allen*, 156 N. C., 524; 72 S. E., 617, 618.

<sup>6</sup> *Presbytery of Jersey City v. Weehawken First Presbyterian Church*, 80 N. J. L., 572; 78 Atl., 207.

<sup>7</sup> *Kniskern v. Lutheran Churches*, 1 Sandf. Ch. (N. Y.), 439; *In re St. George Lithuanian Church* (Pa. 1914), 90 Atl., 918; *Bates v. Houston*, 66 Ga., 198.

invoke the aid of equity,<sup>1</sup> which will thereupon define the trust and restrain any violation of it,<sup>2</sup> and will in proper cases direct the alienation of the trust property and the application of the proceeds of the sale to the trust purposes.<sup>3</sup> A class of litigation was thus developed with which courts are ill equipped to cope. Questions which should be settled by the various societies themselves were dragged into the courts, embarrassing them and inflicting great damage on the society.

But the control which courts thus were forced to assume over the persons of the trustees is not the only evil. Since there are trustees and beneficiaries, there must also be a trust of some kind.<sup>4</sup> Says the Illinois court: "By the election which organized the corporation the title became vested in the trustees and their successors for the use of the trust as completely as if the use had been declared by deed."<sup>5</sup> Where there was an express provision in the deed the trust of course was quite easily determined. Where the society was of the connectional kind, acknowledging some synod or similar body as a superior, the question was also comparatively simple. But where the title was acquired by an independent society under an absolute deed from a grantor who thought of nothing but perhaps the money realized by the sale, the question became very difficult. The only criterion that remained was the religious opinion of the associates at the time of the grant,<sup>6</sup> which accordingly was seized upon by the courts.

<sup>1</sup> *East Haddam Baptist Church v. East Haddam Baptist Society*, 44 Conn., 259; *Holmes v. Trustees of Wesley M. E. Church*, 58 N. J. Eq., 327; 42 Atl., 582.

<sup>2</sup> *Wiswell v. First Congregational Church*, 14 Oh. St., 31.

<sup>3</sup> *Trustees v. Laird* (Del. Ch. 1913), 85 Atl., 1082.

<sup>4</sup> *Ibid.*; *Munson v. Bringe*, 146 Wis., 393; 131 N. W., 904.

<sup>5</sup> *Brunnenmeyer v. Buhre*, 32 Ill., 183, 190.

<sup>6</sup> *Wilson v. Livingston*, 99 Mich., 594, 603.

It must be obvious upon the slightest reflection that such a trust was but a "vague charitable use"<sup>1</sup> and that the problem of discovering and preserving it assumed gigantic proportions. A vast field for judicial inquiry was thrown open, difficult enough where the property had but recently been acquired, but presenting almost insurmountable obstacles where any considerable period had elapsed. Evidence, which in its nature was extremely vague while fresh, certainly did not gain definiteness by age. The problem of discovering the collective faith of a number of persons was difficult enough if all these persons could be subpoenaed into the court. Where, however, many, if not all of them, were dead and gone, it might be utterly impossible to discover their opinion and the trust resting on it. Courts were thus asked to stultify themselves by an inquiry which was hopeless.

Another unexpected evil developed by the trustee corporation theory was that church property without any express exemption was held to be execution-proof. If judgment was recovered against the corporation an execution became useless, since it held only the legal title. The creditor, however good his claim, was without remedy, even if he was able to recover judgment.<sup>2</sup> But even this slight consolation was denied him. It was held that the trustees had no power to contract debts. If they did, the creditor, unless he by some chance could hold the individual trustees, was helpless.<sup>3</sup> The spectacle of a church, a moral agent, evading its just debts on a technicality, is certainly not very elevating. Yet such result, while not general, was always within the range of possibility and was occasionally realized.

<sup>1</sup> *Ackley v. Irwin*, 130 N. Y. Supp., 841; 71 Misc., 239.

<sup>2</sup> *Lord v. Hardie*, 82 N. C., 241; 33 Am. Rep., 683.

<sup>3</sup> *Bailey v. M. E. Church of Freeport*, 71 Md., 472. This was a case of a quasi corporation organized however like the typical trustee corporation.

These evils at last led to an abrogation of this particular theory of religious corporations in a number of states, not by legislative action, but rather by judicial legislation. The New York courts served as pioneers. After struggling till 1850 under an ever-increasing mass of intricate trust questions growing out of the relation of the society and the corporation, they at last overthrew the entire theory and eliminated all its consequences by simply adopting another construction of their religious incorporation act. This act was not drawn with a clear perception of the consequences of the trustee corporation theory. It referred in some places to the members of the societies as corporators. These provisions were taken hold of by the court. Support for the new construction was found in the language of some of the previous cases in which similar reference was made to society members. The corporate franchise was extended to all the members of the society and the trustees from exclusive corporators were reduced to mere officers of the corporation. The distinction between society and corporation was abolished, so that churches henceforth presented only a twofold aspect (church and corporation) instead of a threefold aspect (church, society, and corporation).<sup>1</sup> It followed, since the trustees, though still called such, were in fact only officers, that there was no trust relation between them and their associates. The entire theory of an implied trust was thus brought down in a crumbling mass by one blow.<sup>2</sup> The New York courts and others who followed in their wake were henceforth relieved from a class of litigation which was not only highly unprofitable to the

<sup>1</sup> *Robertson v. Bullions*, 9 Barb., 64 (affirmed 11 N. Y., 243); *People v. Fulton*, 11 N. Y., 94; *Hundley v. Collins*, 131 Ala., 234; 32 So., 575; 90 Am. St. Rep., 33; *Wheelock v. First Presbyterian Church*, 119 Cal., 477; 51 Pac., 841.

<sup>2</sup> *Petty v. Tooker*, 21 N. Y., 267, 270.

litigants but also intensely vexing to the courts. This brings us to the consideration of the highest form of religious corporation.

#### 5. THE CORPORATION AGGREGATE

This form of church corporation is so simple that it does not require much space to elucidate it.

Religious incorporations are aggregate corporations, and whatever property they possess or acquire is vested in the body corporate. It is true the officers have it under their control or dominion, but their possession is the possession of the artificial person whose agents they are. Although called trustees they do not hold the property in trust. Their right to intermeddle with or manage the property is an authority, and not an estate or title. They have no other or greater possession than the directors of a bank in a banking establishment. The whole title or estate is vested in the incorporated body and the corporation is the proper party to sue.<sup>1</sup>

The church members are incorporators and may in a body as a church provide rules and regulations for the election, government and removal of the trustees.<sup>2</sup>

It follows that trustees "do not hold the property in the absence of a declared or at least clearly implied trust for any church in general, nor for the benefit of any peculiar doctrines or tenets of faith and practice in religious matters, but solely for the society or congregation whose officers they are."<sup>3</sup> By whatever name they may be known, they will act under the direction of the corporation of which they are officers,<sup>4</sup> and not under the direction of the

<sup>1</sup> *North St. Louis Christian Church v. McGowan*, 62 Mo., 279, 288.

<sup>2</sup> *Fort v. First Baptist Church of Paris*, 55 S. W., 402 (Tex.).

<sup>3</sup> *Calkins v. Cheney*, 92 Ill., 463, 477.

<sup>4</sup> *Sanchez v. Grace M. E. Church*, 114 Cal., 295; 46 Pac., 2.



courts.<sup>1</sup> Their discretion is similar to the discretion vested in the board of directors of any other corporation.<sup>2</sup> While it is their duty to act with due regard to the feelings of the members of the corporation,<sup>3</sup> they may do many things, such as mortgage the church property, without any express consent on the part of such members.<sup>4</sup> While they cannot turn the corporate property over to another body,<sup>5</sup> they are entitled to the control over it against any unauthorized act of their fellow-corporators.<sup>6</sup>

While the superiority of the corporation aggregate over the trustee corporation is obvious, it must not for a moment be supposed that the trustee corporation has been eliminated from the American law. It is too well adapted to the purposes of non-congregational churches to be completely overthrown, whatever its defects. Churches like the Catholic and Episcopal cannot well adapt themselves to the new theory. Courts will adopt "such a view of the law as will permit religious bodies to be incorporated, and yet preserve their original form of church government, instead of revolutionizing it from a hierarchical or synodical into a congregational form."<sup>7</sup>

Furthermore, the trustee corporation is better adapted than the corporation aggregate to the purpose of incorporating synods and similar bodies, whose membership is very

<sup>1</sup> *Robertson v. Bullions*, 9 Barb., 64 (affirmed 11 N. Y., 243); *Attorney General v. Geerlings*, 55 Mich., 562; 22 N. W., 89.

<sup>2</sup> *People's Bank v. St. Anthony's Roman Catholic Church*, 39 Hun., 498, affirmed in 109 N. Y., 512; 17 N. E., 408; 16 Am. St. Rep., 856.

<sup>3</sup> *Wyatt v. Benson*, 23 Barb., 327.

<sup>4</sup> *In re St. Ann's Church*, 14 Abb. Prac., 424; 23 How. Prac., 285.

<sup>5</sup> *Kenton Union Sunday School Association v. Espy*, 17 O. Cir. Ct. R., 524; 9 O. C. D., 695.

<sup>6</sup> *First M. E. Church v. Filkins*, 3 Thomp. & C. (N. Y.), 279.

<sup>7</sup> *Klix v. Polish Roman Cath. St. Stanislaus Parish*, 137 Mo. App., 347; 118 S. W., 1171.

large and spreads over a vast area. So also where universities and colleges are supported by large church bodies these institutions are quite generally incorporated under the trustee corporation plan. The trustee corporation is thus, to some extent, still recognized in all the states, even in those that have taken the most advanced position in adopting the other theory.

No attempt will be made to classify the various states according to the theories adopted by them. The statutes in regard to religious corporations are quite frequently ambiguous and the judicial utterances are more or less vacillating between the two theories. The same court will be found to adopt now one theory, now another. Occasionally opinions are even found which adopt both, or which are written in such a way that it is impossible to say which theory is favored by the court.

Nor do all courts which adopt the aggregate theory carry it to its logical conclusion. Many still hold on to the doctrine of implied trust, though they remove the foundation on which it rests. The whole subject, on account of changes in and ambiguity of the statutes, and owing to the uncertain tone of many decisions, is in quite an unsatisfactory state. The statutes of any particular state and the decisions construing them must be examined with great care to determine whether or not particular trustees are merely officers accountable to the corporation or holders of the legal title accountable to the courts. The aggregate theory, having come into the field only in 1850 after many states had already committed themselves to the trustee theory, has had an uphill fight and appears to be still in the minority when a poll of the various states is taken.

It goes without saying that the question whether a particular church corporation is a trustee or aggregate corporation must be solved by counsel at the threshold of every

lawsuit involving a church corporation. Cases have been lost because the pleader has attempted to sue the church direct instead of suing its trustees.<sup>1</sup> It has been held, however, that such a mistake is the subject of an amendment in the court below,<sup>2</sup> while still other courts hold that it is a matter of no significance whether the one or the other form is adopted.<sup>3</sup>

It is apparent from the foregoing that there are three forms of church corporations in full bloom in the states of the Union. Of these the corporation sole serves the necessities of those churches who believe in vesting their bishops or similar dignitaries with large discretion in matters of property. The trustee corporation is adapted to the needs of those churches who are somewhat more democratic without being congregational, while the aggregate corporation represents the triumph of democratic government in church affairs and is a splendid fit for those churches which vest the complete control of church property directly in the congregations. It remains to say a few words concerning a class of corporations which may assume any of the forms above mentioned and which is recognized in a number of states.

#### 6. THE QUASI CORPORATION

The quasi corporation must not be confounded with the *de facto* corporation. A *de facto* corporation requires two things: 1, a law under which a *de jure* corporation might be organized; 2, an attempt, however abortive, to organize under it and to use corporate powers. As against all persons but the state such a *de facto* corporation is just as good as a corporation *de jure*. A quasi corporation, on the

<sup>1</sup> *Ada St. M. E. Ch. v. Garnsey*, 66 Ill., 132; *Drumheller v. First Universalist Ch.*, 45 Ind., 275; *Gaff v. Greer*, 88 Ind., 122.

<sup>2</sup> *Trustees of First Baptist Society in Syracuse v. Robinson*, 21 N. Y., 234.

<sup>3</sup> *Davis v. Bradford*, 58 N. H., 476.

other hand, is a body recognized by the law as a corporation, but only for some special limited purpose, such as taking property.

While the procedure by which churches are incorporated is generally extremely simple and inexpensive, many churches for one reason or another do not see fit to acquire corporate rights. It happens that some testator devises or bequeathes property to them in the name by which they are generally known. The validity of this gift is at once brought into question. Many such donations have been declared void by the courts. This was felt as an evil and the legislatures were appealed to for a remedy. The remedy applied was to declare all such bodies corporations for the purpose of taking property. Such statutes were passed even before the Revolution. Thus the Pennsylvania statute creating such quasi corporations dates back to 1731,<sup>1</sup> while Maryland followed in 1779,<sup>2</sup> Massachusetts in 1811,<sup>3</sup> and Vermont in 1814.<sup>4</sup> Similar statutes have been passed in New Hampshire, North Carolina, and Tennessee,<sup>5</sup> and other states, while in Michigan religious societies will receive recognition only after exercising corporate functions for ten years.<sup>6</sup>

<sup>1</sup> *Phipps v. Jones*, 20 Pa., 260; 59 Am. Dec., 708; *Krauczunas v. Hoban*, 221 Pa., 213; 70 Atl., 740.

<sup>2</sup> *Bartlett v. Hipkins*, 76 Md., 5, 25; 23 Atl., 1089; 24 Atl., 532.

<sup>3</sup> *Christian Society in Plymouth v. Macomber*, 46 Mass. (5 Met.), 155; *Hamblett v. Bennett*, 88 Mass. (6 Allen), 140; *Glendale Union Christian Society v. Brown*, 109 Mass., 163; *First Baptist Ch. of Sharon v. Harper*, 101 Mass., 196; 77 N. E., 778.

<sup>4</sup> *M. E. Society v. Lake*, 51 Vt., 353; *Horton's Executor v. Baptist Church and Society in Chester*, 34 Vt., 309.

<sup>5</sup> *Bean v. Christian Church*, 61 N. H., 260; *Lord v. Hardie*, 82 N. C., 241; 33 Am. Rep., 683; *Rhodes v. Rhodes*, 88 Tenn., 637; 13 S. W., 590; *Nance v. Busby*, 91 Tenn., 303; 18 S. W., 874; 15 L. R. A., 801.

<sup>6</sup> *First Ev. Luth. Church of Dearborn v. Rechlin*, 49 Mich., 515; 14 N. W., 502; *Congregational Church of Ionia v. Webber*, 54 Mich., 571; 20 N. W., 542.

The doctrine illustrates the extreme liberality with which American churches are treated by the law-making power. Though such bodies have done nothing but organize according to the rules of their church, though corporate existence was far removed from their thoughts, the law, for their own protection, invests them with corporate rights for which they have expressed no desire.

It must not, however, be supposed that all states have such statutes. In some states no request has ever been made for such a statute and none has been enacted. It will, therefore, be well where congregations are organized not to rely on such statutes, but to acquire full corporate powers by a due compliance with the simple provisions of the religious corporation acts.

To sum up: The two original forms of American church corporations, namely, the territorial parish and the corporation sole, were public municipal corporations developed before the Revolution as part of the religious establishment then in vogue. They have passed away with that establishment, the territorial parish absolutely, the corporation sole in its original form. In their place have grown up three forms of private religious corporations, namely, the corporation aggregate, the trustee corporation and the modern form of the corporation sole. Of these, the corporation aggregate fills the needs of churches with a congregational form of government, while the corporation sole serves the necessities of churches whose form of government is monarchical. For such churches as occupy an intermediate position, the trustee corporation presents the ideal means of corporate existence. In addition to these forms the Roman Catholic Church is recognized as a corporation in our insular possessions by virtue of the treaty of 1898 with Spain, while unincorporated church societies are in some states by virtue of a statute recognized as quasi corporations.

## CHAPTER III

### NATURE OF CORPORATIONS

THE existing American religious corporations, whatever may be said of those that now happily belong exclusively to the domain of history,<sup>1</sup> are purely civil bodies and bear no resemblance or analogy to the English ecclesiastical corporations. They

are not to be regarded as ecclesiastical corporations, in the sense of the English law, which were composed entirely of ecclesiastical persons, and subject to the ecclesiastical judicatories; but as belonging to the class of civil corporations to be controlled and managed according to the principles of the common law as administered by the ordinary tribunals of justice.<sup>2</sup>

The proper place of these corporations, so far as the state is concerned, will appear, not only by a general survey of the relation of church and state on this side of the Atlantic, but also by an attentive examination of the steps by which they come into and pass out of being, are reincorporated, and are recognized even where their birth has been attended with irregularities. Their proper relation with the church will appear from reviewing the effect which incorporation has on the church property and on the church and society itself. We will first consider the relation of these corporations with the state.

<sup>1</sup> See ch. ii.

<sup>2</sup> *Robertson v. Bullions*, 11 N. Y., 243, 251, affirming 9 Barb., 64, 87; *Calkins v. Cheney*, 92 Ill., 463, 478.

## I. CORPORATION AND STATE

In most European countries and in the early history of our own country there is no separation of state and church. The state directs the religious activities of its citizens and the church in turn exerts what influence it can on the state. The state uses the church as an instrumentality and the church uses the state for the same purpose. Under these circumstances church bodies, where they are granted corporate existence, are but agencies of the state like counties, cities, towns and villages. They are established as such. They are public corporations. Such corporations are obviously impossible in the United States, where the establishment of any church is forbidden by the federal and state constitutions. It follows that the present-day American church corporation cannot be a public corporation. Since there are only two classes of corporations—public and private—the conclusion that such American religious corporations are private corporations becomes irresistible.

This conclusion is strengthened when a somewhat closer view of the various laws under which church corporations are formed is taken. When, early in our history, demands for corporate charters came from church societies which were not in harmony with the established church in the particular colony or state, and when these demands became insistent enough to reach the halls of legislation, there were no general incorporation acts of any kind. There was very little business and very few private corporations. What private corporations existed were chartered directly by the legislature. If, therefore, a church society desired corporate existence, the only way to obtain it was to petition the legislature for a charter. A bill to incorporate the society, and defining its powers and duties, would have to be introduced, and would become a law if it received the necessary vote in both houses and the consent of the executive. Ac-

cordingly, church societies were thus incorporated by private charters in the early period of our history.

However, this procedure was a rather burdensome one, particularly when the society which desired incorporation was in disfavor with the powers in control. And even where no enmity on the part of the legislature existed toward any particular denomination, the feeling toward church societies generally was one of distrust and the legislature would hesitate long before granting such charters. In consequence many church societies which needed corporate charters managed to get along without them. They simply exercised corporate powers for long periods of time and received recognition as private corporations by individuals and even by the legislature itself.<sup>1</sup> The question of their actual status would generally not come up for a long time. Then something would happen. The validity of a contract made with the society, or a testamentary gift made to it, in the belief that it was a private corporation, would come before the courts for decision. No charter to the society could be shown, though corporate powers had been exercised by it perhaps for a century and though it had been recognized by individuals and officials as a corporation for the same length of time.

Under such circumstances the common-law doctrine of prescription was applied. A presumption was raised, from the long exercise of corporate powers, that a charter had been granted but had been lost. Under the theory of this fictitious lost charter the society was recognized as capable of making contracts<sup>2</sup> and taking devises.<sup>3</sup> Bodies united for religious purposes, though without a written charter or law, were considered as private corporations by prescrip-

<sup>1</sup> *Brown v. Langdon, Smith (N. H.)*, 178.

<sup>2</sup> *Whitmore v. Fourth Congregational Society in Plymouth*, 68 Mass., 306.

<sup>3</sup> *Brown v. Langdon, supra*.



tion, with all the common-law attributes, incidents, and rights of such corporations.<sup>1</sup>

It is obvious, however, that this method of obtaining a corporate existence by prescription is not only irregular but uncertain in the highest degree. No particular time is fixed after which the prescription becomes effective. The facts upon which it is based must, in part at least, be established by oral evidence. This necessarily will perish with the persons capable of giving it. Burdensome as the procuring of a special charter was, such a charter was for a time the only safe method by which church societies could assume corporate existence.

However, this method was subject to grave abuse, not so much in regard to church societies, but rather in regard to other private corporations. Not only would gross favoritism be shown to particular persons in granting charters to them, but the ever-increasing demand for such charters threatened to swamp the legislatures and prevent them from performing their other duties. As a consequence constitutional amendments were passed in many states prohibiting the legislature from granting any such special charters and requiring them to pass general incorporation acts not only in regard to corporations for profit but also in regard to all other corporations.

Under these constitutional amendments, and the laws passed in accordance with them, the creation of private corporations has become an administrative function. The legislature lays down the conditions upon which charters are to be granted. The administrative officer entrusted with the enforcement of these laws determines whether these conditions have been met in the particular case, and

<sup>1</sup> *Magill v. Brown*, Fed. Cas. 8, 952. This was a case in which a yearly meeting of Quakers was recognized as a corporation. See *contra Green v. Dennis*, 6 Conn., 293; 16 Am. Dec., 58.

issues the charter in case his determination is favorable to the petitioner.

Turning now to the particular procedure required in the various states to incorporate church societies, a great lack of uniformity will be found to exist. Each state has more or less passed through a development peculiar to itself, not only in regard to private corporations in general, but also in regard to religious societies. The influence which particular denominations have exerted on the legislature at various times is discernible in the statutes which have been passed in regard to religious corporations. The trust or distrust with which the various denominations have been regarded, and the favor or disfavor shown to them, can be observed by a careful reading of the statutes in force today. In addition these statutes, so far as they deal with the incorporation of religious societies, are frequently grafted on the general incorporation statutes of the particular state, which are also very diverse. In consequence it will be found that the policy of the various states ranges from a complete prohibition of religious corporations in Virginia and West Virginia<sup>1</sup> to an incorporation of all religious societies by the mere act of association without any public notice of any kind in Arkansas,<sup>2</sup> Mississippi,<sup>3</sup> New Hampshire,<sup>4</sup> and North Carolina.<sup>5</sup> In between these extremes some states will be found which make the incorporation of church societies more difficult than the chartering of corporations for profit, while others exact about the same amount of formality from either, and still others allow such societies to assume corporate existence by merely filing

<sup>1</sup> Virginia Constitution, art. iv, sec. lix; West Virginia Constitution, art. vi, sec. xlvii.

<sup>2</sup> *Digest of Statutes of Arkansas*, secs. 6851, 6852.

<sup>3</sup> *Mississippi Code*, sec. 933.

<sup>4</sup> *Public Statutes of New Hampshire*, ch. 152.

<sup>5</sup> *Revised Statutes of North Carolina*, sec. 2670.

some declaration, affidavit or other paper prescribed by the statute with some designated officer. But whatever the formalities may be, it is clear from these statutes, their setting and wording, that the corporation intended to be created is merely a private corporation.

That this is the purpose of these laws is further apparent from the construction which they have received by the courts. Like all human actions, the incorporation of church corporations has been attended with blunders and mistakes. In many cases the statute in regard to this matter has but partially been complied with. What is the result of such a condition of affairs? It is clear that if the corporation were a public corporation, such mistakes would soon become entirely immaterial in suits brought by individuals as well as in suits brought by the state. Public policy would not permit the legality of their incorporation to be questioned after corporate rights had been exercised for some limited time. However, this principle of public law is not applied to religious corporations. On the contrary, the distinction between *de jure* and *de facto* corporations, which is distinctly a principle of private as distinguished from public corporate law, is fully applied to the religious corporation. It has therefore been held that while nobody but the state can question the *de jure* existence of a church corporation,<sup>1</sup> its *de facto* existence, where there is a law under which the society might legally incorporate and a user by it of corporate rights,<sup>2</sup> can be questioned only when it comes up directly. While the exercise of corporate powers for twenty<sup>3</sup> or twenty-five years<sup>4</sup> has been held to make the

<sup>1</sup> *Klix v. Polish Roman Catholic St. Stanislaus Church* (Mo. App.), 118; S. W., 1171; *Dubs v. Egli*, 167 Ill., 514; 47 N. E., 766; *Catholic Church v. Tobbein*, 82 Mo., 418; *Vernon Society v. Hills*, 6 Cow., 23.

<sup>2</sup> *M. E. Union Church v. Pickett*, 19 N. Y., 482; affirming 23 Barb., 436; *Van Buren v. Reformed Church of Gansevoort*, 62 Barb., 495.

<sup>3</sup> *Chittenden v. Chittenden*, 1 Am. Law Reg. (O. S.), 538, (N. Y.).

<sup>4</sup> *White v. State*, 69 Ind., 273.

associates a *de facto* corporation though no attempt to incorporate had been made, this result will not be achieved by mere user of corporate powers for a short period. In such cases the act must have become the special charter of the associates in some way other than by mere user in order to make them a corporation *de facto*.<sup>1</sup>

Just what action, short of creating a corporation *de jure*, will bring into being a corporation *de facto* is a question that cannot be answered categorically. Much will depend upon the relation which the person who questions the corporate existence has borne toward the associates. Where such person has dealt with such associates as a corporation, proof of very irregular attempts at incorporation will be sufficient to establish a *de facto* corporation. Societies have under such circumstances received recognition as corporations though they were organized under an inapplicable<sup>2</sup> or unconstitutional statute;<sup>3</sup> though no sufficient notice was given of the meeting to incorporate;<sup>4</sup> though the certificate made by them contained but one of the four statutory requisites,<sup>5</sup> or was indefinite in some particular,<sup>6</sup> or had not been sealed,<sup>7</sup> or sworn to,<sup>8</sup> or prop-

<sup>1</sup> Baptist Church *v.* Railroad Co., 4 Mackay (D. C.), 43; Van Buren *v.* Reformed Church of Gansevoort, 62 Barb., 495.

<sup>2</sup> St. John the Baptist Greek Catholic Church *v.* Baron (N. J.), 73 Atl., 422.

<sup>3</sup> Catholic Church *v.* Tobbein, 82 Mo., 418.

<sup>4</sup> East Norway Lake Lutheran Church *v.* Froislie, 37 Minn., 447; 35 N. W., 260.

<sup>5</sup> Fifth Baptist Church *v.* Baltimore and Potomac Railroad Co., 4 Mackay, 43; s. c., 5 Mackay, 269; 137 U. S., 568.

<sup>6</sup> Lynch *v.* Pfeiffer, 110 N. Y., 33; 17 N. E., 402; All Saint's Church *v.* Lovett, 1 N. Y. Supr. Court, 213.

<sup>7</sup> Stoker *v.* Schwab, 56 N. Y. Supr. Court, 122; 1 N. Y. Supp., 425.

<sup>8</sup> Baltimore Inc. Railroad *v.* Fifth Baptist Church, 137 U. S., 568; s. c., 4 Mackay 43; 5 Mackay, 269.

erly acknowledged.<sup>1</sup> Their *de facto* corporate existence has been upheld by the courts though the certificate was not made in time,<sup>2</sup> or had not been filed at all,<sup>3</sup> or had been filed in the wrong office.<sup>4</sup>

Where, however, the person who objects to the corporate existence of the church society has not recognized it in his dealings as a corporation, a far stricter rule will be applied. It has therefore been held under such circumstances that a certificate not signed by the proper person,<sup>5</sup> or acknowledged before the proper officer,<sup>6</sup> or which is deficient in its statements, lacks a seal and is recorded only two and one-half years after its execution,<sup>7</sup> is insufficient to confer a *de facto* corporate existence. The most scrupulous care should therefore be exercised in drawing up the necessary papers and in filing or recording them in the proper office.

The essentially private nature of religious corporations further appears from the provisions which are made for re-incorporating or dissolving them. A public corporation, being an agency of the state, is not created for any limited period and is dissolved, not by any acts of its own, but by

<sup>1</sup> East Norway Lake Lutheran Church *v.* Froislie, 37 Minn., 447; 35 N. W., 260; Franke *v.* Mann, 106 Wis., 118; 81 N. W., 1014; 48 L. R. A., 856. But see Evenson *v.* Ellingson, 72 Wis., 242, 265; 39 N. W., 330; First Baptist Society *v.* Rapalee, 16 Wend., 605.

<sup>2</sup> Willard *v.* M. E. Church Trustees, 66 Ill., 55; *In re* Cutchogue Society, 131 N. Y., 1; 30 N. E., 43.

<sup>3</sup> *In re* Court Street M. E. Society of Rome, 51 Hun., 104; 4 N. Y. Supp., 723; Mendenhall *v.* First New Church Society of Indianapolis, (Ind.), 98 N. E., 57; East Norway Lake Lutheran Church *v.* Froislie, *supra*; First Baptist Church *v.* Baltimore Potomac Railroad Co., 5 Mackay, 269, 273.

<sup>4</sup> *In re* Arden, 1 Con. Sur., 159; 4 N. Y. Supp., 177.

<sup>5</sup> Congregational Church of Ionia *v.* Webber, 54 Mich., 571; 20 N. W., 542.

<sup>6</sup> First Baptist Society *v.* Rapalee, *supra*.

<sup>7</sup> Ferrara *v.* Vasconcelles, 23 Ill., 456.

the action of the state when its usefulness is considered to be at an end. Religious corporations, on the other hand, though they may in some states be created in perpetuity, are quite frequently incorporated for only limited periods. The charter will thus expire at some time and the associates will be confronted with the question of losing their corporate existence or of re-incorporating as provided by the statute. Such re-incorporation under the old special charter system was effected by obtaining another special charter from the legislature by the same method by which the original charter was procured.<sup>1</sup> This method is obviously inapplicable under modern incorporation acts. However, the same effect may be achieved without loss of identity or forfeiture of franchise by following the statutory directions for re-incorporation. Where this is done the new corporation, though it may have assumed a different name,<sup>2</sup> will take the property of the old corporation and assume all its obligations.<sup>3</sup> Whether or not, however, the new corporation is simply a continuation of the old body or an independent organization will be a matter of intention.<sup>4</sup> It has, therefore, been held that where the old corporation was insolvent and had lost its church property by foreclosure, a new corporation under a different name, though principally made up of the same membership, affiliated with the same conference, occupying the same locality, and pursuing the same general policy, was not liable to a creditor of the old corporation though it had purchased the property formerly owned by

<sup>1</sup> *St. Luke's Church v. Slack*, 61 Mass., 226; *Episcopal Charitable Society v. Dedham Episcopal Church*, 18 Mass., 371.

<sup>2</sup> *Mussey v. Bulfinch Street Society*, 55 Mass., 148.

<sup>3</sup> *Miller v. English*, 21 N. J. L., 317; *Hosea v. Jacobs*, 98 Mass., 65; *First Society in Irving v. Brownell*, 5 Hun., 464; *Roman Catholic Church v. Texas Railway*, 41 Fed., 564; *Ludlow v. St. John's Church*, 124 N. Y. Supp., 75.

<sup>4</sup> *First Society in Irving v. Brownell*, *supra*; *Miller v. English*, *supra*.

the old corporation from the purchaser under the foreclosure sale. The intention not to continue the old corporation but to form a new one was too clear to be ignored.<sup>1</sup>

The private nature of religious corporations will further appear from the method by which they may pass out of existence. Putting the question of corporate death by expiration of the charter entirely aside, the corporation—being a private concern—may commit suicide or may die a lingering death by simply ceasing to perform any corporate functions. While the question whether an abortive re-incorporation will dissolve the old corporation has been answered in the affirmative in Wisconsin<sup>2</sup> and in the negative in Vermont,<sup>3</sup> the cases are unanimous that such dissolution may take place by a resolution to disband<sup>4</sup> and may be made a matter of record by an application to a court for dissolution.<sup>5</sup> Such application may be made by a majority of the trustees without authority from any corporate meeting when the society has ceased to hold meetings.<sup>6</sup>

But the corporation may be dissolved not only by some affirmative action taken by the associates or some of them, but may also die a natural death by absolute inaction on the part of everybody concerned. It has therefore been held that while a failure of the corporation for a time to hold corporate meetings and elect officers will not dissolve it,<sup>7</sup>

<sup>1</sup> *Allen v. North Des Moines M. E. Church*, 127 Iowa, 96; 102 N. W., 808; 69 L. R. A., 255.

<sup>2</sup> *Evenson v. Ellingson*, 72 Wis., 242, 265; 39 N. W., 330.

<sup>3</sup> *Chester Congregational Church v. Cutler*, 76 Vt., 338; 57 Atl., 387.

<sup>4</sup> *McRoberts v. Moudy*, 19 Mo. App., 26.

<sup>5</sup> *In re St. Ambrose Church*, 4 Pa. C. C., 272; 20 W. N. C., 317.

<sup>6</sup> *In re Third M. E. Church of Brooklyn*, 67 Hun., 86; 21 N. Y. Supp., 1105; affirmed 142 N. Y., 638.

<sup>7</sup> *Lynde v. Hill*, 31 Mass., 447; *Oakes v. Hill*, 31 Mass., 442; *Tobey v. Wareham Bank*, 54 Mass., 440; *Baptist Meeting House of St. Albans v. Webb*, 66 Me., 398.

such failure if continued for a long time will bring about this result.<sup>1</sup>

We have thus far considered the private nature of the modern American religious corporation. We have seen that under our system it cannot be a public corporation, and hence of necessity is a private entity. This conclusion has been strengthened by reviewing the steps by which these corporations come into being, are re-incorporated and pass away, and the recognition which they receive when their birth has been irregular. The sole effect which such incorporation has on the state is simply to add another private corporation to the innumerable number of such bodies. It remains to consider the effect of incorporation on the church and society and on the property of the latter.

## 2. CORPORATION AND CHURCH

In considering the effect which incorporation has on the church and society these two must be carefully distinguished. An unincorporated church, so-called, if it has any interest in property at all, presents a twofold aspect. It has a body, the society, with which courts can deal, and a soul, the church, with which courts cannot deal. The church is the spiritual entity with spiritual sanctions and spiritual bonds of union. The society is the temporal body with temporal understandings and temporal articles of association. The church is subject to spiritual censure, the society is subject to the temporal powers that be. The object of the church is the preaching of the gospel; the object of the society is the management of property. The members of the society are not necessarily members of the church, and the members of the church are not necessarily members of the society. The society may exist and be recognized by the

<sup>1</sup> *Easterbrook v. Tillinghast*, 71 Mass., 17; *Scott v. Curle*, 48 Ky., 17; see *Miller v. Riddle*, 227 Ill., 53; 81 N. E., 48; reversing 130 Ill. App., 392.



courts of the land though there is no church, and the church may exist and be recognized by its spiritual superiors though there is no society.

Since the church is thus entirely removed from temporal control it follows that incorporation will not affect it in the least. The spiritual entity created by spiritual means can neither be swallowed up nor affected by a temporal corporation created under temporal statutes. The corporation can exist without the church, and the church without the corporation. The corporation, created by the state, may continue though the church is dissolved, while the church may continue though its charter has expired or has been cancelled by the state. Each is derived from a different source, has different powers, and is absolutely independent of the other.

While thus by incorporation no effect is produced on the church, the change that takes place in the society is very marked. The members of the society are recognized by the courts as at least the equitable owners of the church property. Their rules and by-laws will be considered by the courts in deciding cases involving such property and will often be of controlling influence. The society is thus a body with which the courts and the state in general can deal, and which receives a certain amount of recognition from both. It is a temporal body, and hence is vitally affected by a temporal incorporation. In fact, according to the particular theory of religious corporations which prevails in the particular state, it is either annihilated and swallowed up by the corporation or it is allowed to remain with increased powers. Where the aggregate theory of religious corporations is in vogue the society will disappear and be merged in the corporation, and its members henceforth will be the members of the corporation. Where, on the other hand, the trustee corporation theory prevails, only the trus-

tees will form the members of the corporation and the society will remain for the purpose of duly electing these members. By the power which the society exercises over the trustees it will be able to accomplish directly what formerly could be accomplished only by invoking the aid of equity. It follows that incorporated church societies under the aggregate theory present only a two-fold aspect—church and corporation,—while under the trustee theory their aspect is three-fold—church, society and corporation.<sup>1</sup>

While, however, the effect produced by incorporation on the society is important, the effect produced on the title of the property of such society is still more important. Church corporations are usually not organized till some property, tangible or intangible, has been acquired by the associates. Since these associates are generally too numerous and changing to hold this property as co-owners, and since they cannot hold it by the name which they have adopted, the property will be found under such circumstances to be held by some person or persons under an express or implied trust for the society. The effect of incorporation on this trust is well settled, both by the statutes and the decisions of the courts. Such property, except when it has been granted or

<sup>1</sup> For cases distinguishing *church and society* see *First Baptist Church in Hartford v. Witherell*, 3 Paige, 296; *Downs v. Bowdoin Square Baptist Society*, 149 Mass., 135; 21 N. E., 294; *Wilson v. Livingston*, 99 Mich., 594; 58 N. W., 646; but see *Riffe v. Proctor*, 99 Mo. App., 601; 74 S. W., 409. For cases distinguishing *society and corporation* see *Feiner v. Reiss*, 90 N. Y. Supp., 568; 98 App. Div., 40; *Order of St. Benedict v. Steinhouser*, 179 Fed., 137; affirmed 194 Fed., 289. For cases distinguishing *corporation and church* see *Barr v. First Parish in Sandwich*, 9 Mass., 277; *Hardin v. Baptist Church*, 51 Mich., 137; 16 N. W., 311; 47 Am. Rep., 555; *Catholic Church v. Tobbein*, 82 Mo., 418; *Huntley v. Collins*, 131 Ala., 234; 32 So., 575; *Reinke v. German Ev. Luth. Trinity Church*, 17 S. D., 262; 96 N. W., 90. For cases distinguishing *church, society and corporation* see *Lawyer v. Cipperly*, 7 Paige, 281; *People v. German Church*, 53 N. Y., 103; reversing 6 Lans., 173, and affirming 3 Lans., 434.

devised to individual trustees for the society with intent that it should be held and managed by such trustees and none others,<sup>1</sup> will on incorporation without any extra formality, act, or resolution on the part of the incorporators,<sup>2</sup> be divested by operation of law from the trustees<sup>3</sup> and vested in the corporation exactly as such vesting takes place under the statute of uses.<sup>4</sup> No conveyance by the trustees to the corporation will be necessary to complete its title, though such conveyance—except in a case where the trustee has a lien against the property<sup>5</sup>—will be enforced<sup>6</sup> or presumed<sup>7</sup> for the convenience of the recorded title.<sup>8</sup> The

<sup>1</sup> *Methodist Society v. Bennett*, 39 Conn., 293; *Exeter New Parish v. Odiorne*, 1 N. H., 232, 236; see *Catholic Church v. Tobbein*, 82 Mo., 418.

<sup>2</sup> *Sanchez v. Grace M. E. Church*, 114 Cal., 295; 46 Pac., 2; *Duessel v. Proch*, 78 Conn., 343; 62 Atl., 152; *Chatham v. Brainerd*, 11 Conn., 60; *Andrews v. Andrews*, 110 Ill., 223; *Dubs v. Egli*, 167 Ill., 514; 47 N. E., 766; *Christian Church v. Church of Christ*, 219 Ill., 503; 76 N. E., 703; *People v. Braucher*, 258 Ill., 604; 101 N. E., 944; *Miller v. Chittenden*, 2 Iowa, 215; *Shapleigh v. Pilsbury*, 1 Mo., 271; *Reed Howard v. Stouffer*, 56 Md., 236; *African M. E. Church v. Conover*, 27 N. J. Eq., 157; *Bundy v. Birdsall*, 29 Barb., 31; *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch., 186; *Reformed Dutch Church v. Harder*, 12 N. Y. Supp., 297; 34 St. Rep., 645; affirmed 126 N. Y., 646; 27 N. E., 853; *First Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec., 223; *Schenectady Dutch Church v. Veeder*, 4 Wend., 494; *Williams v. Presbyterian Church*, 1 Ohio St., 478; *Brendle v. German Reformed Congregation*, 33 Pa. St., 415; *Zion's Church v. Light*, 7 Pa. Supr. Ct., 223; *Martin v. German Reformed Church of Washington Co.*, 149 Wis., 19; 134 N. W., 1125; *Reorganized Church of Latter Day Saints v. Church of Christ*, 60 Fed., 937.

<sup>3</sup> *Reformed Dutch Church v. Mott*, 7 Paige, 77; 32 Am. Dec., 613.

<sup>4</sup> *Morgan v. Leslie*, 1 Wright, 144.

<sup>5</sup> *Canajoharie Church v. Leiber*, 2 Paige, 43.

<sup>6</sup> *Fourth Universalist Parish v. Wensley*, 5 Weekly Notes Cas., 273; *South Baptist Church v. Yates*, 1 Hoffman Ch., 142.

<sup>7</sup> *Reformed Dutch Church v. Mott*, 7 Paige, 77; 32 Am. Dec., 613.

<sup>8</sup> *State v. First Catholic Church of Lincoln, Neb.*, 128 N. W., 657; *St. Paul's Ev. Luth. Church v. Gray*, 198 Pa. St., 321; 47 Atl., 976.

corporation will be subjected to whatever obligations such trustees have assumed,<sup>1</sup> and entitled to whatever personal property they have acquired,<sup>2</sup> and will be able to bring actions of tort against trespassers on the church property,<sup>3</sup> and enforce land contracts<sup>4</sup> and subscription agreements<sup>5</sup> made by such trustees for the associates.

From the foregoing the sphere of activity of the American religious corporation is clear and well defined. It has no concern with church work proper. It is not created to preach or to administer the sacraments. Its work is of a far humbler kind and compares with the work of the church proper as the work of the church janitor compares with that of the clergyman. Its sole purpose is to make contracts and acquire, hold and dispose of property. It is thus a purely secular agency. It is as much a business corporation, within its limited powers, as the International Harvester Company is within its wider powers. It is the humble handmaid of the church created by the state for the purpose merely of conducting the business affairs of the church.

To sum up: The modern American religious corporation in its relation to the state is, unlike its predecessors, in no sense a public municipal body but a mere private corporation created by the state for the benefit of the incorporators

<sup>1</sup> *Wesley Church v. Moore*, 10 Pa., 273, 278.

<sup>2</sup> *North St. Louis Christian Church v. McGowan*, 62 Mo., 279.

<sup>3</sup> *Upper Nyack M. E. Church v. Bennett*, 73 Hun., 585; 26 N. Y. Supp., 341; *Second Congregational Parish in North Bridgewater v. Waring*, 41 Mass., 304. But see *Mountain Top Missionary Baptist Church v. McLarty*, Ga., 66 S. E., 243.

<sup>4</sup> *Gewin v. Mt. Pilgrim Baptist Church*, Ala., 51 So., 947.

<sup>5</sup> *Willard v. Methodist Episcopal Church Trustees*, 66 Ill., 55; *Whitsitt v. Preëemption Presbyterian Church*, 110 Ill., 125; *Reformed Protestant Dutch Church v. Brown*, 4 Abb. Dec., 31; 24 How. Pr., 76, affirming 29 Barb., 335; 17 How. Pr., 287.

and those connected with them. In its relation to the church it is not a spiritual agency with spiritual powers to preach the gospel and administer the sacraments, but a humble secular handmaid whose functions are confined to the creation and enforcement of contracts and the acquisition, management and disposition of property. The corporation thus has neither public nor ecclesiastical functions, being a mere business agent with strictly private secular powers.

## CHAPTER IV

### POWERS OF CORPORATIONS

THE powers of religious corporations, whatever their form,<sup>1</sup> are limited. While a natural person has powers which are limited only by the rights of others as declared by law, religious corporations, like other corporations, are confined to such powers as are expressly or impliedly conferred upon them by their charters. They must remain within such limits as the legislature or the treaty-making power has marked out for them. Their charters are to them what the United States constitution is to the federal government. All power exercised by them must be traced back to the charters either directly or by implication.

In examining the various charters that have been granted by the various legislatures to religious bodies, either directly by special legislation or indirectly through general incorporation acts, a great variety of forms will be found. Some charters are very explicit and full, while others are couched in the briefest possible terms. All, however, give the corporation such powers to acquire and sell property and make contracts as the legislature has deemed necessary for the due administration of their affairs. They also, usually in express terms, confer power on the corporation to make by-laws. These powers and their limitations will now be considered. The legislative power, or power to make by-laws, being largely used to regulate the administrative functions of the corporation, will be disposed of before the administrative powers are taken up.

<sup>1</sup> *Cf. supra*, ch. ii.

## I. LEGISLATIVE POWERS

The supreme law of a religious corporation will be found in the laws constituting its charter. "The charter of every corporation is its constitution, which protects the rights of all the corporators, majority and minority. Acting within the charter, the corporation majority is sovereign; but seeking to transcend it, the majority become powerless."<sup>1</sup> These laws cannot be abrogated by any action taken by the corporation. The only power which can even change them is the legislature which has enacted them.

But while the charter is supreme, it is not the only law to which a religious corporation may be subject. It is impossible for the legislature, particularly under general incorporation acts, to foresee and make provision for every possible contingency with which any particular corporation may be confronted. And if it were possible, it would not be expedient to make the attempt, as it would make the statutes too bulky for practical purposes. The charter laws will therefore generally be found to be but a bare outline of the various powers conferred on the corporation. The manner in which these powers are to be exercised is left to the discretion of each particular corporation. The power to make by-laws for this purpose, where it is not expressly granted, will therefore be implied, unless it is expressly excluded by the terms of the charter.<sup>2</sup>

Since religious corporations are generally of such small size that all the corporators can be assembled in one meeting, the proper body to formulate such by-laws is *prima facie* a regular or special meeting of such corporators. However, this power may also be conferred on the board of trustees or some other committee of the corporation,

<sup>1</sup> Langolf *v.* Seiberlitch, 2 Pars. Eq., 64, 74.

<sup>2</sup> Curry *v.* First Presbyterian Congregation, 2 Pitts., 40; Taylor *v.* Edson, 58 Mass., 522, 526.

either by the charter itself or by some resolution passed by the incorporators. This select body will thereupon act in the same capacity in which a city council acts in passing ordinances, and may therefore pass by-laws binding upon all the incorporators.<sup>1</sup>

The procedure by which such by-laws are enacted may be of the simplest character. In the case of city ordinances a great deal of form is generally required. There are various readings of the proposed ordinance, public notice and the like. No such requirements are exacted in the case of a by-law. It need not even be reduced to writing. Mere customs and usages may be recognized as such.<sup>2</sup> A resolution by a congregation, passed before the corporation was formed, will have the force of a by-law as against those who voted in its favor and acted in accordance with it.<sup>3</sup>

A religious corporation, like any other, is bound by the acts of its authorized agents in matters that are within its corporate capacity, and may, by the enactment of by-laws, or the distribution of the exercise of its powers among its various officers, or by conferring authority upon special agents, so charge itself as to become amenable for the acts of individuals representing it, and acting by its authority.<sup>4</sup>

It has been seen that by-laws validly passed are a part of the law governing the corporation and its members. It follows that they must be obeyed by the members.

A person who voluntarily joins a church, and tacitly at least, agrees to be bound by all the rules and regulations of such

<sup>1</sup> *Papiliou v. Manusos*, 113 Ill. App., 316; see *Vestry of St. Luke's Church v. Mathews*, 4 Desaus., 578; 6 Am. Dec., 619.

<sup>2</sup> *Jucker v. Commonwealth*, 20 Pa. (8 Har.), 484; *Miller v. Eshbach*, 43 Md., 1.

<sup>3</sup> *Vestry of Christ Church v. Simons Executor*, 2 Rich. Law, 368.

<sup>4</sup> *Constant v. St. Albans Church*, 4 Daly, 305, 308.



church, cannot afterwards be allowed to wholly ignore and disregard such rules and regulations. As to all matters pertaining to the church, he is clearly bound by the rules and regulations of the church, unless the same are clearly illegal.<sup>1</sup>

Before proceeding to the subjects which may be covered by such by-laws, it may be well to refer briefly to the inherent limitations to which they are subject. It is clear that a by-law which conflicts with the charter of the corporation is absolutely void. If it were otherwise, the corporation by its own act could abolish the law to which it owes its existence. "All by-laws to be of legal validity must be made in conformity with the charter. They are but the working machinery of the charter, and are required to be framed to move in harmony with it. They are like acts of the legislature, which must be consistent with the constitution."<sup>2</sup> Where, therefore, the charter prescribes that certain conditions must be fulfilled by prospective voters for two years before they may be allowed to vote, such time cannot, by by-laws, be reduced to six or three months.<sup>3</sup> Neither can a statutory provision, imposing certain duties upon the "register" of the corporation, be abrogated by a church canon imposing such duties upon the rector.<sup>4</sup>

Even if a by-law does not conflict with any express terms of the charter, it may nevertheless be void. The statutes contemplate that the affairs of the corporation are to be carried on in a reasonable manner.<sup>5</sup> It follows that such

<sup>1</sup> *Venable v. Ebenezer Baptist Church*, 25 Kans., 177, 182.

<sup>2</sup> *Langolf v. Seiberlitch*, 2 Pars. Eq., 64, 76; *Prickett v. Wells*, 117 Mo., 502; 24 S. W., 52; *Calkins v. Cheney*, 92 Ill., 463; *People ex rel. Hart v. Phillips*, 1 Denio., 388.

<sup>3</sup> *Raynor v. Beatty*, 9 W. N. C., 201.

<sup>4</sup> *Torbert v. Bennett*, 24 W. L. R., 149.

<sup>5</sup> *Saltman v. Nesson*, 201 Mass., 534; 88 N. E., 3.

by-laws to be valid must be reasonable.<sup>1</sup> The power to make them should "be exercised with great caution, with no sinister design and without counteracting the charter or substituting a new rule."<sup>2</sup> A by-law requiring the payment of fifty dollars from each corporator as a prerequisite to voting<sup>3</sup> or which provides that it is to be revoked only by unanimous vote of all the corporators<sup>4</sup> will therefore be held to be void. The courts will enforce by-laws only where they move within the limits of the charter.<sup>5</sup>

The question of how long a by-law is to remain in force depends entirely upon the pleasure of the corporation. It can by long-continued disregard repeal a by-law, so that the courts will refuse to enforce it.<sup>6</sup> It can also expressly repeal any by-law at any time by majority vote, and any provision in such by-law, that it is not to be so repealed, will be nugatory and void.<sup>7</sup> A by-law made by one meeting, to govern the proceedings of future meetings, is inoperative beyond the pleasure of the corporation acting by a majority vote at any regular meeting. The power of the society to enact by-laws is continuous, residing in all regular meetings of the society, as long as it exists. Any meeting can, by a majority vote, modify or repeal the law of a previous meeting, and no meeting can bind a subsequent one by irrevocable acts or rules of procedure. The power to enact is a power to repeal.<sup>8</sup>

<sup>1</sup> *Bretzlaff v. Ev. Luth. St. John's Benefit Soc.*, 125 Mich., 39; 83 N. W., 1000; *Hussey v. Gallagher*, 61 Ga., 86; *Saltman v. Nesson*, 201 Mass., 534; 88 N. E., 3.

<sup>2</sup> *Vestry of St. Luke's Church v. Mathews*, 4 Desaus., 578, 586; 6 Am. Dec., 619.

<sup>3</sup> *Ibid.*, see *Commonwealth v. Cain*, 5 S. & R., 510.

<sup>4</sup> *Saltman v. Nesson*, *supra*.

<sup>5</sup> *Alexander v. Bowers*, 79 S. W., 342 (Tex.).

<sup>6</sup> *Commonwealth v. Cornish*, 13 Pa., 288.

<sup>7</sup> *Saltman v. Nesson*, *supra*; *Wardens of Christ Church v. Pope*, 74 Mass., 140, 142.

<sup>8</sup> *Richardson v. Union Congregational Society*, 58 N. H., 187.

The question of membership is not usually covered by the charter. Yet it is of supreme importance to each religious corporation. While growth, rapid growth if possible, is the aim of all these bodies, a growth that is too rapid and brings too many heterogeneous elements into the corporation will often lead to precipitate decay and disintegration. A restriction on its membership is therefore within the power of the corporation. This may be accomplished by a judicious use of the blackball. It may also be done by by-laws declaring what shall constitute membership and what shall operate to cause a forfeiture of it. Such by-laws may be passed, not only where the charter expressly authorizes them, but also where it is merely silent on the subject.<sup>1</sup> A corporation which considers certain other societies as inimical to its purposes may therefore, by by-law, debar members of such hostile organizations and will be justified in expelling a member for joining such a society.<sup>2</sup> It may even, after his death, deny to his relatives the benefits on account of which he has become a member.<sup>3</sup>

Perhaps the most important duty of a member of a religious corporation is the payment of his dues. A member who does not pay them, particularly when he is able to do so, becomes worse than useless to the organization. He may even, in connection with others in the same position, become a positive menace to it. Therefore the corporation, while it cannot bar a member because he has not been specially admitted to vote or has not paid an amount in addition to his dues,<sup>4</sup> may pass a by-law disfranchising a

<sup>1</sup> *Taylor v. Edson*, 58 Mass., 522, 526; but see *People v. Young Men's Society*, 41 Mich., 67.

<sup>2</sup> *Mazurkiewicz v. St. Adelbertus Society*, 127 Mich., 145; 86 N. W., 543; 54 L. R. A., 727.

<sup>3</sup> *Bretzlaff v. Ev. Luth. St. John's Benefit Society*, 125 Mich., 39, 83 N. W., 1000.

<sup>4</sup> *Vestry of St. Luke's Church v. Mathews*, 4 Desaus., 578, 586; 6 Am. Dec., 619.

voter who has not paid his ordinary dues, though the number of voters is thereby reduced to narrower limits than were marked out by the charter.<sup>1</sup> Similarly, where pews are leased, the corporation may adopt a by-law to assess them, though both its charter and the deed under which they are held are silent on this subject.<sup>2</sup>

Where no by-laws have been made in regard to the expulsion of members, the common-law rules as to such expulsion will have to be followed. A member, under such circumstances, cannot be expelled except after notice of the charges against him is given and he has been presented with an opportunity to make his defense.<sup>3</sup> Nor can he be expelled from the corporation (as distinguished from the church) for mere moral delinquency.<sup>4</sup> Some action by the corporation declaring his status will generally be necessary. A by-law which provides that "any member who shall either cease to worship regularly with the society, or who shall fail to contribute to the support of its public worship for the term of one year, shall have his or her name dropped from the list of members" cannot automatically enforce itself. The tests provided for are so vague that some action by the corporation, applying this by-law to any particular case, is necessary before it will result in ousting any particular corporator.<sup>5</sup>

Where special meetings of the corporation may be called at any time without stating their purpose, a small determined faction of the corporators may succeed, by adroit

<sup>1</sup> *Taylor v. Edson*, 58 Mass., 522, 526; *Commonwealth v. Cain*, 5 S. & R., 510.

<sup>2</sup> *Curry v. First Presbyterian Congregation*, 2 Pitts., 40; see *Mussey v. Bulfinch Street Society*, 55 Mass., 148.

<sup>3</sup> *Jones v. State*, 28 Neb., 495; 44 N. W., 658; 7 L. R. A., 325.

<sup>4</sup> *People v. German United Evangelical St. Stephen's Church*, 53 N. Y., 103; reversing 6 Lans., 172; affirming 3 Lans., 434.

<sup>5</sup> *Gray v. Christian Society*, 137 Mass., 329; 50 Am. Rep., 310.

management, to impose its will on the corporation. Such an undesirable result can be avoided, or at least made difficult of accomplishment, by a by-law which requires the object of such meetings to be stated in the notice. Where such a by-law exists, an admission of new members at a special meeting, not noticed as required by it, will be held void and of no effect.<sup>1</sup>

The rules to be observed by a corporation while holding its elections are not generally prescribed by the charter. Yet such rules are necessary, and the power to make them, not having been exercised by the legislature, must reside in the corporation itself. Therefore a by-law which requires the assent of the bishop for the election of lay trustees is valid and enforceable.<sup>2</sup> A by-law which declares void all ballots which have on them anything but the vote, and authorizes the president of the corporation to appoint two inspectors of election to enforce this provision, will be upheld as reasonable, consistent with the charter, and tending to the due discharge of business.

Where a religious corporation is authorized by its charter to issue stock certificates, these will be like other certificates of stock. They will represent a certain proportion of the property of the corporation, but will not be redeemable in cash at the wish of the holder. Where, however, a by-law has been passed, making the stock of such members as have paid an additional sum redeemable in cash, such by-law will become a part of the contract under which the stock was taken, and will be enforced by the courts.<sup>4</sup>

We have thus far considered the powers of a religious corporation to pass by-laws. These, like statutes passed by

<sup>1</sup> *Gray v. Christian Society*, 137 Mass., 329; 50 Am. (Rep.), 310.

<sup>2</sup> *St. Hyacinth Congregation v. Borucki*, 141 Wis., 205; 124 N. W., 284.

<sup>3</sup> *Commonwealth v. Woelper*, 3 S. & R., 29; 8 Am. Dec., 628.

<sup>4</sup> *Davis v. Second Universalist Meeting House in Lowell*, 49 Mass., 321.

a legislature or ordinances passed by a city council, are not an end in themselves, but rather a means to an end. They are passed principally to guide the action of the various committees of the corporation and thus help to accomplish the proper administration of its temporal affairs. This administrative side of the matter will now be considered.

## 2. ADMINISTRATIVE POWERS

The possession of property, real or personal, by religious organizations is the cause of the various incorporation acts that have been passed in their favor. As long as a religious society possesses no property, it can get along very well without corporate existence. The acquirement of property will, however, not only raise the question who is to hold the title, but will also bring the members of the church into contract relations with others. In all these respects the unincorporated associates are at a disadvantage. They will not have the direct control over their property that corporate existence would afford them. They will meet difficulties in making contracts for improvements of it. The inducements for them to incorporate, and thereby to obtain the most advantageous position before the law and the best business relations with third persons, are thus very strong.

But the possession of property is not only the reason why church societies should incorporate, but is also the basis of the work which they perform. Even the employment of a minister may be connected with the property owned by the corporation. A church building without divine service would certainly be a very unprofitable investment. Divine services will generally be impossible without a minister. The services of a minister are therefore necessary to give the meeting-house any substantial value. All acts of a religious corporation, even the contracts which it makes, can thus be traced back to the property which it

owns. The right to acquire property and to sell, mortgage or lease it thus become of great importance to every religious corporation.

While natural persons are restrained in acquiring property only by the rights of others, religious corporations, being the creatures of law, may be and usually are confined to narrower limits.<sup>1</sup> These limitations, however, do not apply to personal property. As to this the law generally gives them a free hand. If, therefore, a religious corporation has surplus funds, it may invest the same in any way such as buying stock in a Sunday school association<sup>2</sup> or in a bank.<sup>3</sup>

The line is, however, much more closely drawn in regard to real estate. There was a time in England when churches, through devises and other means, were acquiring land so fast and in such quantities as to arouse Parliament to restraining measures. Accordingly mortmain statutes were passed from time to time to prevent the "dead hand" of the church from monopolizing the soil. In America there is not much call for such measures. The quantity of land is so great, and its speculative value so small, as to present little inducement to churches to acquire land not needed for their legitimate purposes. Moreover, the great majority of American churches have all they can do to meet their current expenses and are in no position to accumulate property. Hence some states do not restrain church corporations at all in the acquisition of real property.

There are other states, however, which have, to a greater or less extent, adopted the policy of the English mortmain statutes. Thus Maryland, by its constitution, has made the

<sup>1</sup> Trustees *v.* Dickinson, 12 N. C., 189, 202.

<sup>2</sup> State *v.* Rohlfs, 19 Atl., 1099 (N. J.).

<sup>3</sup> Davis *v.* First Baptist Society, 44 Conn., 582; United Society *v.* Eagle Bank, 7 Conn., 456; Bishops Fund *v.* Eagle Bank, 7 Conn., 475.

assent of the legislature a condition precedent to the acquisition of real property by religious corporations.<sup>1</sup> The legislature is made the judge, in each instance, of the question whether the acquirement of realty by a church corporation is proper and necessary. The inconvenience incident to such a requirement has, however, been overcome by reading such a consent out of a charter which authorizes the corporation to acquire realty.<sup>2</sup>

Where restraining measures are passed, but no unlimited discretion is vested in any particular body, it becomes necessary to provide some test by which the amount of property which religious corporations will be permitted to acquire may be determined. This test may be a certain money value or such a quantity of land as may be needed by the corporation for its legitimate purposes. Thus Congress has limited the value of real estate of any church corporation in the territories to \$50,000 and has provided for a forfeiture and escheat of the excess.<sup>3</sup> The Iowa legislature has established no restriction as to quantity or value but only as to the purposes for which the property is to be acquired and applied.<sup>4</sup> It is obvious that these tests are quite vague and may easily lead to disagreeable controversy. Questions of value, as well as the question of how much land is needed by any particular church, are matters of opinion, on which honest men may differ widely. Both these tests have, therefore, generally been abandoned and a limitation, simply on the quantum of land to be held by the corporation, substituted in their stead. These amounts differ widely in the

<sup>1</sup>Grove *v.* Trustees, 33 Md., 451.

<sup>2</sup>Rogers *v.* Sisters of Charity of St. Joseph, 97 Md., 550; 55 Atl., 318.

<sup>3</sup>United States *v.* Church of Jesus Christ, 5 Utah, 361; 15 Pa., 473.

<sup>4</sup>Miller *v.* Chittenden, 2 Iowa (2 Cole), 315, 361; see Catholic Church *v.* Tobbein, 82 Mo., 418, 424.



various states. The decided cases show that they vary between two and forty acres.<sup>1</sup>

Under such statutes the value of the land and its adaptability to the purposes of the church become immaterial. A statute which covers only quantity will not be construed to cover quality.<sup>2</sup> Whether the quantum of land allowed to a church is situated in the business center of a populous city or in some uninhabited locality, whether it represents a fortune or a mite, is of no consequence. Church corporations will know their limitations and will be able to arrange their affairs in such a way as to achieve their end without conflicting with the law. Whatever may be thought of the policy of such mortmain statutes, as applied to American conditions, there can be no doubt that, such policy being determined upon, a limitation by quantity rather than by value or purpose is the most adequate, feasible and definite test that can be adopted.

This limitation, however, refers only to land held for their own use. Where they hold land in trust for others as they may<sup>3</sup> such land is not their own but belongs to the cestui que trust. They have only the legal title, which is rather a burden than a benefit. There can be no reason why they should not be allowed to assume this burden.

<sup>1</sup> Two acres: *Dangerfield v. Williams*, 26 App. D. C., 508, 516. Five acres: *University v. Calvary M. E. Church*, 104 Md., 635; 65 Atl., 398; *Dickerson v. Franklin Street Presbyterian Church* (Md.), 66 Atl., 494. Ten acres: *Andrews v. Andrews*, 110 Ill., 223; *St. Peter's Roman Cath. Church v. Germain*, 104 Ill., 440. Twenty acres: *Morgan v. Leslie*, 1 Wright (Ohio), 144. Forty acres: *Kinney v. Kinney's Executor*, 86 Ky., 610; 6 S. W., 593.

<sup>2</sup> *Andrews v. Andrews*, *supra*.

<sup>3</sup> *Whitelick Quarterly Meeting v. Whitelick Quarterly Meeting*, 89 Ind., 136; *White v. Rice*, 112 Mich., 403; 70 N. W., 1024; *Tabernacle Baptist Church v. Fifth Ave. Baptist Church*, 70 N. Y. Supp., 181; affirmed 172 N. Y., 598; *in re Williams Estate*, 23 N. Y. Supp., 150; in the matter of *Howe*, 1 Paige, 214.

Therefore a devise to a church of land in excess of its power to acquire "to be applied to foreign missions" is perfectly good and valid.<sup>1</sup>

Nor must the statute be construed to include every corporation which in any sense may be called a religious corporation. Mission societies, publishing firms, colleges, and universities exist in connection with religious bodies. It is quite obvious that some of these bodies imperatively require more land or land of greater value than is permitted by the statute to religious corporations. It is not the purpose of the law to strangle such deserving institutions. Hence such statutes will be confined to religious corporations whose members "meet for worship in any one place" and will not be extended to synods and similar bodies.<sup>2</sup>

Since the statutory regulations differ so widely on this subject, it is not surprising that intricate questions of private-international law or conflict of laws have occasionally arisen in connection with them. Church corporations, which, by the law of their domicile, have absolute power to acquire real estate, will sometimes be the beneficiaries of a devise in a state which imposes such a limitation on religious corporations as to render the devise invalid if it had been given to a domestic corporation. Such a devise, however, has been upheld by the United States Supreme Court.<sup>3</sup> The Ohio court has even allowed the foreign corporation to take such land, though on account of a peculiar provision of the statute of wills in the state of its domicile, it could not have taken it, if the will had been made in such state.<sup>4</sup>

As to the effect of such statutes on deeds made in contra-

<sup>1</sup> *Kinney v. Kinney's Executor*, 86 Ky., 610; 6 S. W., 593; see also *Germain v. Baltes*, 113 Ill., 29.

<sup>2</sup> *Morgan v. Leslie*, 1 Wright (Ohio), 144.

<sup>3</sup> *American and Foreign Union v. Yount*, 101 U. S., 352.

<sup>4</sup> *American Bible Society v. Marshall*, 15 Oh. St., 537.

vention of them to religious corporations the authorities are divided. Some cases hold such deeds to be absolutely void and capable of being attacked in a collateral proceeding,<sup>1</sup> while others hold that the defect can be taken advantage of only by the state in a direct proceeding for that purpose.<sup>2</sup> They may, however, serve as a good "color of title" for the purposes of adverse possession. It follows that a church corporation may, through adverse possession under such a deed, acquire more property than the statute allows.<sup>3</sup>

Not less important than the right to acquire property is the right to dispose of it by sale, mortgage, lease, or in any other manner. There would seem to be no reason to limit or control such disposition. Yet such a policy has been adopted by one important state. It becomes necessary, therefore, to treat of the limitation to which such disposal may be subject in the hands of a religious corporation.

The power of church corporations to sell their real estate will depend, in the first place, upon the conditions, if any, under which it is held. It is elementary law that a sale in breach of such conditions will work a forfeiture of the title to the original owner.<sup>4</sup> Similar reasoning has also been applied to land held under an express or implied trust,<sup>5</sup> though the weight of authority, in cases where the property has become inconvenient or useless, favors the practice of

<sup>1</sup> *St. Peter's Roman Catholic Congregation v. Germain*, 104 Ill., 440.

<sup>2</sup> *Hanson v. Little Sisters of the Poor*, 79 Md., 434; *Bogardus v. Trinity Church*, 4 Sandf. Ch., 633, 758; *DeCamp v. Dobbins*, 29 N. J. Eq., 36.

<sup>3</sup> *Dangerfield v. Williams*, 26 App. D. C., 508.

<sup>4</sup> *Patrick v. Y. M. C. A. of Kalamazoo*, 120 Mich., 185; 79 N. W., 208; *General Assembly of Presbyterian Church v. Alexander*, 20 Ky. Law Rep., 391; 46 S. W., 503.

<sup>5</sup> *Reed Howard, et al. v. Stouffer*, 56 Md., 236; *Avery v. Baker*, 27 Neb., 388; 43 N. W., 174; 20 Am. St. Rep., 672.

allowing the sale and attaching the trust either to the proceeds or to the property acquired with these proceeds.<sup>1</sup>

There is no good reason why a perpetual restraint should be placed upon the alienation of the estate of religious societies. That which is suited to the present, by a change of times becomes unsuited for the future. The unpretending church or modest parsonage or primitive school-house of a village or borough town becomes unsuited to the growth, situation or progress of taste and culture of a large city. The ground itself often becomes the most valuable possession, and by a sale may add greatly to the welfare of the body, enabling it to erect finer edifices, better adapted to the change of times and circumstances. Conversion is not destruction, and can be made for the benefit of the trust. No solid objection lies to the change of church property so long as its true purpose is presented. A sale is frequently the best mode of executing the trust.<sup>2</sup>

Any limitation of the power to alienate, because of conditions or trusts, however, is not due to any inherent lack of power on the part of the corporation, but to the contract into which it has entered and which it will not be allowed to break. In the absence of such contract the corporation, unless specially restrained by its charter, has the inherent right, without any express authority, to dispose of its prop-

<sup>1</sup> *Griffiths v. Cope*, 17 Pa., 96; *Wiswell v. First Congregational Church*, 14 Oh. St., 31; *Ryan v. Porter*, 61 Tex., 106; *in re First German M. E. Church of Scranton*, 1 Lack. L. N., 89; *Hardy v. Wiley*, 87 Va., 125; 12 S. E., 233; *in re Van Horn*, 18 R. I., 389; 28 Atl., 431; *Phillips v. Westminster Church*, 225 Pa., 62; 73 Atl., 1062; *Starr v. Starr Methodist Protestant Church*, 112 Md., 171; 76 Atl., 595; *Mills v. Davison*, 54 N. J. Eq., 659; 35 Atl., 341; *Starr v. Starr Methodist Episcopal City Mission v. Appleton*, 117 Mass., 326; *Old South Society v. Crocker*, 119 Mass., 1; 20 Am. Rep., 299; *M. E. Society v. Harriman's Heirs*, 54 N. H., 444; *in re Seller's Chapel M. E. Church*, 139 Pa., 61; 21 Atl., 145; 11 L. R. A., 282.

<sup>2</sup> *Burton's Appeal*, 57 Pa., 213, 218.

erty,<sup>1</sup> and such disposition will be approved by the courts.<sup>2</sup> The sale, however, whether under an express or implied charter authority, should be a sale in good faith. "A power to dispose of corporate estate for the use of the corporation does not mean a power to convey it to trustees to employ it under trusts purporting to be for the use of the corporation, but depriving them of all dominion and control over it."<sup>3</sup>

It remains to notice the restrictions by statute which have been placed on religious corporations in this regard. Occasionally a special charter may be found which in terms absolutely prohibits the sale of such property.<sup>4</sup> More frequently charters provide that the property is not to be conveyed except with the consent of a certain bishop or a certain church body. Where there is such a provision it will be enforced by the courts.<sup>5</sup> It will readily be seen that these restrictions are of little moment, except to the particular corporations which are subject to them.

There is, however, a general restriction imposed on all religious corporations in New York, which deserves a close analysis, both on account of the importance of the state

<sup>1</sup> *Langolf v. Seiberlitch*, 2 Pars. Eq., 64, 76.

<sup>2</sup> *Eggleston v. Doolittle*, 33 Conn., 396; *Nelson v. Solomon*, 112 Ga., 188; 37 S. E., 404; *Enos v. Chestnut*, 88 Ill., 590; *Catholic Church v. Manning*, 72 Md., 116; 19 Atl., 599; *Van Houten v. First Reformed Dutch Church*, 17 N. J. Eq., 126; *Holmes v. Wesley M. E. Church*, 58 N. J. Eq., 327; 41 Atl., 102; *United Presbyterian Church Petition*, 166 Pa., 43; 30 Atl., 1012; *Blanc v. Asbury*, 63 Tex., 490; 51 Am. Rep., 666; *Mason v. Muncaster*, Fed. Cas., 9, 247.

<sup>3</sup> *Langolf v. Seiberlitch*, 2 Pars. Eq., 64, 76.

<sup>4</sup> *Burton's Appeal*, 57 Pa., 213, 218.

<sup>5</sup> *Lane v. Calvary Church of Summit*, 59 N. J. Eq., 409; 45 Atl., 702; *in re First German M. E. Church of Scranton*, 1 Lak. L. N., 89; *Church of St. Bartholomew v. Wood*, 80 Pa. St., 219; see also *Presbystery v. Westminster Presbyterian Church*, 127 N. Y. Supp., 851; 142 App. Div., 876.

and the side light which is thrown by it on the absolute power to sell possessed by church corporations generally. The reason for this restriction in New York goes back to the time of Queen Elizabeth. During her reign and immediately after, several statutes were passed restraining the absolute power of religious corporations to alien their property. These statutes were considered as having been brought along by the colonists to the colony of New York. This conception, together with the power which equity had over the real estate of church corporations under the trustee-corporation theory, which flourished in the state till 1850,<sup>2</sup> cast a doubt over the title conveyed by any such corporation.<sup>3</sup> It therefore became the practice to petition the legislature for leave to sell, so as to be able to convey a clear title. This soon proved to be very burdensome, both to the petitioners and to the legislature. A statute was therefore passed in 1806 and re-enacted in 1813, as part of the religious incorporation act, making it lawful for the chancellor, on the application of any religious corporation, in case he should deem it proper, to make an order for the sale of any of its real estate and to direct the application of the moneys arising therefrom to such uses as the corporation, with the consent and approbation of the chancellor, should conceive to be most for its interest.<sup>4</sup>

Though this act in terms was merely permissive, the courts, by judicial construction of it, soon were firmly committed to the doctrine that it operated to forbid sales of

<sup>1</sup> *De Ruyter v. St. Peter's Church*, 3 Barb. Ch., 119, 122, cited with approval in *Wyatt v. Benson*, 23 Barb., 327, 333; *Madison Avenue Baptist Church v. Baptist Church of Oliver St.*, 46 N. Y., 131, 142; see *Dudley v. Congregation of St. Francis*, 138 N. Y., 451, 456.

<sup>2</sup> *Robertson v. Bullions*, 11 N. Y., 243. Cf. *supra*, ch. ii.

<sup>3</sup> *Dutch Church in Garden St. v. Mott*, 7 Paige, 77, 84.

<sup>4</sup> In the matter of the Brick Presbyterian Church, 3 Edw. Ch., 155, 166.

real estate by religious corporations without their assent.<sup>1</sup> The word sale was construed to include a mortgage,<sup>2</sup> though it was pointed out that a mortgage is a lien rather than a sale.<sup>3</sup> Investors were thus forced to insist on a judicial approval of every mortgage issued by a church corporation.<sup>4</sup>

This, however, is the extent to which the courts have extended the statute by judicial construction. In all other regards the enactment is recognized as impairing what would otherwise be a common-law right, and is therefore strictly construed.<sup>5</sup> The court's consent need only be procured for an actual sale of real property by a religious corporation. A deed as a gift,<sup>6</sup> a purchase money mortgage,<sup>7</sup> an agreement to sell,<sup>8</sup> a sale in a partition action,<sup>9</sup> or a reservation of a right of way over land, granted to a church corporation, though such reservation has taken the form of an independent deed by such corporation,<sup>10</sup> will not be regarded as sales within the statute. A church put on

<sup>1</sup> *Dudley v. Congregation of St. Francis*, 138 N. Y., 451, 456, 457; affirming 65 Hun., 21; 19 N. Y. Supp., 605.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Manning v. Moscow Presbyterian Society*, 27 Barb., 52.

<sup>4</sup> *In re St. Ann's Church*, 23 How. Pr., 285; *In re Church of the Messiah*, 25 Abb. N. C., 354; 12 N. Y. Supp., 489; see cases cited in *Moore v. Rector of St. Thomas*, 4 Abb. N. C., 51.

<sup>5</sup> *Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. Pr. (N. S.), 484, 489.

<sup>6</sup> *Muck v. Hitchcock*, 212 N. Y., 283; 106 N. E., 75; *Madison Avenue Baptist Church v. Baptist Church of Oliver St.*, 46 N. Y., 131, 143; s. c. 73 N. Y., 82.

<sup>7</sup> *South Baptist Society v. Clapp*, 18 Barb., 35, 47.

<sup>8</sup> *Congregation Beth Elohim v. Central Presbyterian Church*, *supra*; *Bowen v. Irish Presbyterian Congregation*, 19 N. Y. Sup. Ct., 245.

<sup>9</sup> *New York Home Missionary Society v. First Free Will Baptist Church*, 130 N. Y. Supp., 879; 73 Misc., 128.

<sup>10</sup> *Protestant Reformed Dutch Church v. Bogardus*, 5 Hun., 304.

rollers and moved off the land,<sup>1</sup> or property acquired subject to a land contract,<sup>2</sup> will be treated as personal rather than real property. A quasi corporation will not be considered as a religious corporation within the meaning of the act.<sup>3</sup> The cases in which the courts may act are thus quite limited.

But this is not all. Where they have jurisdiction, their powers in the matter are also severely limited. They have no original power over the property. Such power is not consistent with the principle of universal toleration of religious opinions and organizations and abstinence of all intermeddling in their affairs. They cannot, therefore, originate any scheme either for the sale of the property or the disposition of the proceeds.<sup>4</sup> They can only say yes or no in regard to any plan proposed by the corporation. They can only regulate and permit. They can protect the members of the corporation from the perversion of their property through unwise bargains;<sup>5</sup> they can protect the corporation itself against dissolution by a transfer of all its property to another similar corporation;<sup>6</sup> they can refuse an application for a sale, where it is shown that the majority of the incorporators are opposed to it,<sup>7</sup> though the petition on the part of the trustees need not show that they

<sup>1</sup> *Beach v. Allen*, 7 Hun., 441; see *in re* Second Baptist Society in Canann, 20 How. Pr., 324, holding that no consent of the court need be asked for the removal of the church to another site.

<sup>2</sup> *Edelstein v. Hayes*, 100 N. Y. Supp., 403; 50 Misc. Rep., 130.

<sup>3</sup> *Feiner v. Reiss*, 90 N. Y. Supp., 568; 98 App. Div., 40.

<sup>4</sup> *Wheaton v. Gates*, 18 N. Y., 395, 402.

<sup>5</sup> *Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. Pr. (N. S.), 484, 489; *In re* Reformed Church at Saugerties, 16 Barb., 237; *Muck v. Hitchcock*, 212 N. Y., 283; 106 N. E., 75.

<sup>6</sup> *Wheaton v. Gates*, *supra*; see *Massachusetts Baptist Missionary Society v. Bowdoin Square Baptist Society*, 212 Mass., 198; 98 N. E., 1045.

<sup>7</sup> *Wyatt v. Benson*, 23 Barb., 327; 4 Abb. Pr., 182; *Matter of Brick Presbyterian Church*, 3 Edw. Ch., 155.



have consented to it,<sup>1</sup> but they cannot dictate to the corporation what it shall do. The agreement of the corporation is indispensable and the option to sell or not to sell, down to the moment when a valid contract for the sale is made, belongs entirely to it.<sup>2</sup> The order of the court is simply an authority to the church to complete its voluntary undertaking and gives the deed regularity of form. It does not make the sale a judicial one<sup>3</sup> nor an adjudication between the parties.<sup>4</sup> A New York religious corporation, therefore, "has the title to its real property, may determine when it should be sold, and has the sole and exclusive power to enter into contracts for that purpose. The only distinction which exists between its power of alienation and that possessed by other corporations is that the consent of the court is necessary."<sup>5</sup>

While thus the jurisdiction of the courts is quite limited in more than one respect, where they have jurisdiction their assent must be procured or the transaction will be void though it consists only of a mortgage<sup>6</sup> or the sale of a pew.<sup>7</sup> Nor will the courts allow the statute to be frittered away by the application of the principles of estoppel.<sup>8</sup>

<sup>1</sup> *Madison Avenue Baptist Church v. Baptist Church of Oliver St.*, 46 N. Y., 131, s. c. 73 N. Y., 82; affirming 11 Abb. Pr. (N. S.), 132; *In re St. Ann's Church*, 23 How. Pr., 285; *Burton's Appeal*, 57 Pa., 213; 25 L. I., 325.

<sup>2</sup> *Bowen v. Irish Presbyterian Congregation*, 19 N. Y. Super Ct., 245, 266, 267.

<sup>3</sup> *Christie v. Gage*, 71 N. Y., 189.

<sup>4</sup> *St. James Church v. Redeemer Church*, 45 Barb., 356; 31 How. Pr., 381.

<sup>5</sup> *Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. Pr. (N. S.), 484, 488; see *Bowen v. Irish Presbyterian Congregation*, 19 N. Y. Super. Ct., 245, 267.

<sup>6</sup> *Dudley v. Congregation of St. Francis*, 138 N. Y., 451.

<sup>7</sup> *Dutch Church in Garden Street v. Mott*, 7 Paige, 77; 32 Am. Dec., 613; *In re Reformed Dutch Church in Saugerties*, 16 Barb., 237; *Montgomery v. Johnson*, 9 How. Pr., 232.

<sup>8</sup> *Associate Presbyterian Congregation of Hebron v. Hanna*, 98 N. Y. Supp., 1082; 113 App. Div., 12.

The question whether church corporations in New York can consolidate by a transfer of all the property of one to the other has given rise to serious embarrassment. Applications have been made to the courts for an approval of such arrangements. It has been held that since the purpose of the statute is to protect the church corporation from unwise bargains in cases where it can be ascertained whether the consideration is adequate and the proposed investment judicious,<sup>1</sup> the statute can have no application to such a situation.<sup>2</sup> Neither will the courts approve of a division of such property between two churches, into which the corporation has divided.<sup>3</sup> To make such arrangements binding, the consent of the legislature must be procured in New York.

The inherent faults of this New York doctrine are obvious. Its historical foundation is so faulty that other states, whose early settlers likewise have come from England, have refused to recognize it. It makes church corporations the wards of the courts and thus leads to litigation which might as well be avoided. It throws obstacles in the way of a consolidation of religious corporations and fetters the free transfer of their property. In its ordinary application it inevitably degenerates into a mere matter of form. It is to be hoped, therefore, that the New York legislature may repeal the statutes which have brought about this condition of things, including the English statutes, so far as they are applicable, or are supposed to be applicable, to the state.

Next in importance to the power to sell is the power to

<sup>1</sup> *Muck v. Hitchcock*, 212 N. Y., 283; 106 N. E., 75.

<sup>2</sup> *Madison Avenue Baptist Church v. Baptist Church of Oliver St.*, 46 N. Y., 131, 143, s. c. 73 N. Y., 82.

<sup>3</sup> *Reformed Church v. Schoolcraft*, 65 N. Y., 134, 143; see *contra* *Wiswell v. First Congregational Church*, 14 Oh. St., 31.

mortgage or lease church property. Without such power church property would often have to lie fallow, or at least would be prevented from achieving its highest usefulness. The power of church corporations to mortgage or lease their property is therefore usually granted in express terms.<sup>1</sup> Even where it is not so granted, it will be implied from the more general power to sell, as incident to the very existence of the corporation. Some express or clearly implied prohibition by the legislature will, in such case, be required to deprive the corporation of this power.<sup>2</sup>

Where the terms of the charter are ambiguous, such a construction of them will be adopted as will uphold the mortgage or lease. A charter which authorizes the corporation to sell and convey, mortgage or lease any of its real estate, provided that no such sale or conveyance shall be made, except with the consent of two-thirds of the society, will be construed to limit only the power to sell and convey and not the power to mortgage or lease.<sup>3</sup> Nor will a church corporation be allowed, by a trust of its own creation, to protect the property it has mortgaged from its creditors and shield it from appropriation for the payment of its just debts.<sup>4</sup> It follows that such mortgage, after breach of condition, may be foreclosed like any other mortgage,<sup>5</sup> and the purchaser on foreclosure will acquire full title after the redemption period has elapsed.<sup>6</sup>

<sup>1</sup> *Zion Church of Sterling v. Mensch*, 178 Ill., 225; 52 N. E., 858; affirming 74 Ill. App., 115; *Trustees M. E. Church v. Schulze*, 61 Ind., 511; *Keith & Perry Coal Co. v. Bingham*, 97 Mo., 196; 10 S. W., 32.

<sup>2</sup> *Walrath v. Campbell*, 28 Mich., 111. Such, in a limited sense, is the case in New York where, as has already been seen, such a mortgage must be approved by the court before it will become binding.

<sup>3</sup> *Scott v. First Free Methodist Church*, 50 Mich., 528; 15 N. W., 891.

<sup>4</sup> *Magie v. German Ev. Dutch Church*, 13 N. J. Eq., 77.

<sup>5</sup> *Mills v. Davison*, 54 N. J. Eq., 659; 35 Atl., 1072; *New York City Baptist Mission Society v. Tabernacle Baptist Church*, 17 Misc., 699.

<sup>6</sup> *M. E. Church v. Gamble*, 26 Oh. Cir. Ct. Rep., 295.

The power of a church corporation to lease its property is equally well established. It does not require the citation of authorities to show that pews may be leased to members or others. Without such power to lease pews, there could be no churches in which pews are not "free." But the power to lease goes further. The entire meeting-house may be leased for a particular purpose. A church may lease its building to a convention of the same faith,<sup>1</sup> or to the school board for a public school,<sup>2</sup> or for a Fourth of July celebration,<sup>3</sup> and even for opera-house purposes.<sup>4</sup> Where the property has become unsuitable for church purposes, it may even be leased under an agreement that a business building is to be erected on it for which the church corporation, on the termination of the lease, agrees to pay "a just and reasonable sum."<sup>5</sup>

Closely connected with the power to buy, sell, mortgage and lease property is the power to make contracts. Without power to own and handle property there would be little or no call for the power to make contracts. Without the power to make contracts property could not ordinarily be acquired or aliened. Without such power to bind itself and others by contract, a religious corporation could not well fulfil its legitimate functions. The power to make contracts is therefore generally granted, in general terms,

<sup>1</sup> Warner *v.* Bowdoin Square Baptist Society, 148 Mass., 400; 19 N. E., 403.

<sup>2</sup> Millard *v.* Board of Education, 19 Ill. App., 48; affirmed 121 Ill., 297; 10 N. E., 669.

<sup>3</sup> Jackson *v.* Rounseville, 46 Mass., 127.

<sup>4</sup> Catholic Institute *v.* Gibbons, 3 W. L. B. (Ohio), 581. The court points out that religious instruction has sometimes been given by means of the stage.

<sup>5</sup> Hollywood *v.* First Parish in Brockton, 192 Mass., 269; 78 N. E., 124; but see First M. E. Church *v.* Dixon, 178 Ill., 260; 52 N. E., 887, reversing 77 Ill. App., 166.

in the various charters. These contracts may be (1) with its own members, (2) with other religious corporations, (3) with persons and corporations generally.

Since a religious corporation is, in legal contemplation, a separate entity, it may make contracts with its own members. In the case of ordinary corporations these contracts usually take the form of stock subscriptions. It has been stated that the chief distinction between church corporations and business corporations is that in the former there are no stockholders.<sup>1</sup> While this is generally true, charters will occasionally be found which authorize the issue of such stock by church corporations.<sup>2</sup> Where this is the case, courts will enforce a contract by which a subscriber, by the payment of three dollars additional on each of his shares, has acquired the right to have his shares redeemed in cash.<sup>3</sup>

But the issue of shares of stock may even be upheld, at least in collateral proceedings, though the charter is entirely silent on this matter. Thus the Missouri court has held valid a levy of execution on such stock, though it was contended that such business feature of the corporation was of no effect and might be disregarded, because foreign to the object of the charter, and therefore contrary to the laws governing the corporation.<sup>4</sup>

While contracts for stock subscription in a religious corporation are rare, contracts for voluntary subscriptions, to defray the ordinary expenses of the church or to make improvements on the church property, are correspondingly numerous and have frequently come before the various courts. The power of church corporations to make these contracts is undoubted. "In this country, all support of re-

<sup>1</sup> *Reis v. Rohde*, 34 Hun., 161, 164.

<sup>2</sup> *Rogers v. Danby Universalist Society*, 19 Vt., 187, 192.

<sup>3</sup> *Davis v. Lowell*, 49 Mass., 321.

<sup>4</sup> *St. George's Church Soc. v. Branch*, 120 Mo., 226, 243; 25 S. W., 218, 222.

ligion being voluntary, there can be no question that solicitation is within the scope of the powers which every religious corporation enjoys." <sup>1</sup> It has, therefore, been held that a subscription contract, made with a religious corporation, is valid <sup>2</sup> though it is in terms made with an individual and is not reduced to writing. <sup>3</sup>

Where voluntary subscriptions have proved to be insufficient, resort has been had to assessments on the members of the corporation. These have usually taken the form of pew rent. Where the pews in a church are held by or leased to individuals, there can be no question of the power of the corporation to make contracts in regard to them, by which they are not merely deeded or leased, but by which the right to levy an assessment on them is retained. This power is so obviously necessary to a religious corporation that it will be implied, when it has not been granted in express terms. <sup>4</sup>

At common law, corporations had no power to consolidate. They could, however, surrender their charters and acquire a new one. Under modern incorporation acts such power to consolidate is sometimes granted, subject to certain conditions. Two religious corporations cannot therefore consolidate without such authority or without at least an attempt to comply with the law on this subject. <sup>5</sup> Nor

<sup>1</sup> *Harriman v. The First Bryan Baptist Church*, 63 Ga., 186, 195; 35 Am. Rep., 117.

<sup>2</sup> *Whitestown v. Stone*, 7 Johns., 112.

<sup>3</sup> *Methodist Episcopal Society v. Lake*, 51 Vt., 353.

<sup>4</sup> *Mussey v. Bulfinch Street Society*, 55 Mass., 148.

<sup>5</sup> *Chevra Bnai Israel Aushe Yanove v. Chevra Bikur Cholim*, 52 N. Y. Supp., 712; 24 Misc. Rep., 189; *Davis v. Congregation Beth Tephila Israel*, 57 N. Y. Supp., 1015; 40 App. Div., 424; *Chevra Medrash Auschei Makaver v. Makower Chevra Auchei Poland*, 66 N. Y. Supp., 355; 100 St. Rep., 355; *Erste Sokolower Congregation Anshe Yosher v. First United Royatiner Sokolower Verein*, 66 N. Y. Supp., 356; 32 Misc., 269.

can such consolidation be effected unless the corporations are of a similar nature, with purposes and machinery which are not essentially different.<sup>1</sup> Thus a religious corporation and a corporation for missionary<sup>2</sup> or other charitable purposes<sup>3</sup> cannot enter into such an agreement.

The organic differences between the corporation of a church under denominational control and a charitable society organized under the free church act, are so striking that the property of the latter should not be allowed to be diverted from the uses to which it was intended to be devoted by its donors, to the support of an organization so essentially distinct and different.<sup>4</sup>

It quite frequently happens that corporations, which have reached the point at which the advisability of consolidation is agitated, have interlocking directorates. It is quite evident that under such circumstances one or both corporations will be deprived of the unbiased counsel of certain of their officers. Under such circumstances a transfer of land from one corporation to another, as a gratuity, will be deemed to be fraudulent by the courts.<sup>5</sup> A consolidation agreement will not receive any more favor. Where, therefore, a majority of the trustees on the boards of both corporations are identical, no legally binding contract for a consolidation of the two corporations can come into existence.<sup>6</sup>

<sup>1</sup> Selkir v. Klein, 100 N. Y. Supp., 449; 50 Misc. Rep., 194.

<sup>2</sup> Stokes v. Phelps Mission, 47 Hun., 570; 14 N. Y. St. Rep., 901; Selkir v. Klein, 100 N. Y. Supp., 449; 50 Misc. Rep., 194.

<sup>3</sup> Chevra Bnai Israel Aushe Yanore v. Chevra Bikur Cholim, 52 N. Y. Supp., 712; 24 Misc. Rep., 189.

<sup>4</sup> Stokes v. Phelps Mission, *supra*.

<sup>5</sup> St. James Church v. Church of the Redeemer, 45 Barb., 356.

<sup>6</sup> Stokes v. Phelps Mission, *supra*; *In re Court Street M. E. Society of Rome*, 51 Hun., 104; 4 N. Y. Supp., 723.

Where, however, the statutory provisions have been followed and the two corporations have dealt with each other at arms' length, without fraud or suspicious circumstances, a valid agreement for a consolidation may come into existence, which will be recognized by the courts.<sup>1</sup> Such an agreement may exist even between two religious societies, which are merely quasi corporations.<sup>2</sup> When carried out so as to create a new corporation the old corporations will be absolutely wiped out, so that a devise or bequest to either will not inure to the new corporation, but will fall to the ground.<sup>3</sup>

Since the property of a church corporation is generally quite limited, and since the proper care and improvement of its property and the engagement of clergymen, sextons and the like constitutes its sole business, its relations to the outside world are of a much more limited character than are those of other corporations.

Every corporation must act according to its nature: a trading corporation must trade, a manufacturing corporation must manufacture, a banking corporation must bank, a transportation company must carry, and a religious corporation must preach, teach, minister to spiritual edification, and promote works of mercy and benevolence. A church incorporated as such cannot engage, even for a day, in merchandising, or in spinning or weaving, or in banking or broking, or in transporting freight or passengers. It must derive its income, not from the conduct of any worldly business, but from such property as it may happen to own, and from voluntary contributions. However urgent its needs for money, it cannot rent a farm to make a crop of corn or cotton, nor a store to buy and sell goods,

<sup>1</sup> *Jones v. Sacramento Avenue Church*, 198 Ill., 626; 64 N. E., 1018.

<sup>2</sup> *Brown v. Lutheran Church*, 23 Pa., 495.

<sup>3</sup> *Gladding v. St. Mathew's Church*, 25 R. I., 628; 57 Atl., 860; 65 L. R. A., 225.



nor a livery stable to let out horses and carriages, nor can it hire a vessel to transport the public upon rivers or the ocean.<sup>1</sup>

It has, therefore, been held that a religious corporation cannot erect a business block,<sup>2</sup> or establish a bank,<sup>3</sup> or carry on a fair,<sup>4</sup> or buy real estate for speculation,<sup>5</sup> or slaves with the purpose of emancipating them,<sup>6</sup> or construct streets and manufacture brick,<sup>7</sup> or operate a garage, sell gasoline and adopt a trade name,<sup>8</sup> or become a common carrier of passengers,<sup>9</sup> It may, however, take a conditional estate,<sup>10</sup> insure its property,<sup>11</sup> build more than one house of worship,<sup>12</sup> erect a church as a memorial to a departed mem-

<sup>1</sup> *Harriman v. The First Bryan Baptist Church*, 83 Ga., 186, 195; 36 Am. Rep., 117.

<sup>2</sup> *First M. E. Church of Chicago v. Dixon*, 178 Ill., 260; 52 N. E., 887, reversing 77 Ill. App., 166.

<sup>3</sup> *Huber v. German Congregation*, 16 Oh. St., 371.

<sup>4</sup> *Constant v. St. Albans Church*, 4 Daly, 305.

<sup>5</sup> *Thompson v. West*, 59 Neb., 677; 82 N. W., 13; 49 L. R. A., 337.

<sup>6</sup> *White v. White*, 18 N. C., 260; *Trustees of Quaker Society v. Dickenson*, 12 N. C., 189. Says the court in the latter case on page 202: "If a sense of religious obligation dictates to any society the exercise of an enlarged benevolence, which, however virtuous and just in the abstract, the policy of the law, founded on the duty of self-preservation, has forbidden, it irresistibly follows that a transfer of property so directed must be void."

<sup>7</sup> *Roman Catholic German Church v. Weighaus*, 16 Ky. Law. Rep., 446.

<sup>8</sup> *Pocono Pines Assembly v. Miller*, 229 Pa., 33; 77 Atl., 1094.

<sup>9</sup> *Harriman v. First Bryan Baptist Church*, *supra*. Where the society is communistic, however, a wider range is of necessity afforded to it, and it may among other things deal in cabbage-seed and will be responsible for a breach of warranty committed in connection with such dealing. *White v. Miller*, 71 N. Y., 118; 27 Am. Rep., 13, reversing 7 Hun., 427.

<sup>10</sup> *Starr v. Starr Methodist Protestant Church*, 112 Md., 171; 76 Atl., 595.

<sup>11</sup> *First Baptist Church v. Brooklyn Fire Insurance Co.*, 19 N. Y., 305.

<sup>12</sup> *Brendle v. German Reformed Congregation*, 33 Pa. St., 414; *Wagner v. Episcopal Church*, 9 Rich. Eq., 155.

ber,<sup>1</sup> eject any non-member from its buildings,<sup>2</sup> devote its general funds to the purpose of other churches,<sup>3</sup> and establish schools in heathen lands, in which, among other things, secular subjects are taught.<sup>4</sup> Where difficulties arise, it may submit them to arbitration,<sup>5</sup> engage attorneys,<sup>6</sup> and compromise and settle the controversy.<sup>7</sup> In carrying on its work, it may bind itself, without the use of a corporate seal,<sup>8</sup> become liable on an implied or quasi contract,<sup>9</sup> exercise such incidental functions, not expressly enumerated in its charter, which relate to the accomplish-

<sup>1</sup> *Cushman v. Church of Good Shepherd*, 162 Pa., 280; 29 Atl., 872; s. c. 188 Pa., 438; 41 Atl., 616; *Cumming v. Reid Memorial Church Trustees*, 64 Ga., 105.

<sup>2</sup> *Attorney General v. Federal Street Meeting House*, 69 Mass., 1.

<sup>3</sup> *Enos v. Harkins*, 187 Mass., 40; 72 N. E., 253; *Wiswell v. First Congregational Church*, 14 Oh. St., 31, 47.

<sup>4</sup> *Boardman v. Hitchcock*, 120 N. Y. Supp., 1039; see *Eaton v. Woman's Home Missionary Society*, 264 Ill., 88.

<sup>5</sup> *Morville v. American Tract Society*, 123 Mass., 129.

<sup>6</sup> *Harbison v. First Presbyterian Society*, 46 Conn., 529; 33 Am. Rep., 34; *Whiton v. Albany City Insurance Co.*, 109 Mass., 24; *Child v. Christian Society*, 144 Mass., 473; 11 N. E., 664; *Cicotte v. St. Ann's Church*, 60 Mich., 552; 27 N. W., 682.

<sup>7</sup> *Horton's Executor v. Baptist Church in Chester*, 34 Vt., 309; *Johnson v. Osment*, 108 Tenn., 32; 65 S. W., 23.

<sup>8</sup> *Second Precinct in Reboboth v. Catholic Congregation*, 40 Mass., 139; *Antipoeda Baptist Church v. Mulford*, 8 N. J. L., 182; *Garvey v. Colcock*, 1 Nott & McC. (S. C.), 231.

<sup>9</sup> *Gortemiller v. Rosengarn*, 103 Ind., 414; 2 N. E., 829; *Morville v. American Tract Society*, 123 Mass., 129, 137; *Storrs v. Congregational Church of Wilmington*, 17 Weekly Dig., 179; *Dunn v. Rector of St. Andrew's Church*, 14 Johns., 118; *Wilson v. Tabernacle Baptist Church*, 59 N. Y. Supp., 148; 28 Misc. Rep., 268; *Tull v. Trustees of M. E. Church*, 75 N. C., 424; *Cushman v. Church of Good Shepherd*, 162 Pa., 280; 29 Atl., 872.

ment of the substantial purposes of its incorporation,<sup>1</sup> and become indebted to accomplish such purposes.<sup>2</sup>

In construing a particular provision in a charter, this provision should not be treated as separate and apart from the balance of the instrument.

All the clauses are to be considered together and in association with one another in determining what the society may do. Its powers are not to be limited by reading each sentence by itself and carefully excluding every act not expressly included in some one sentence, but are defined by reading the statement of its powers as a connected whole.<sup>3</sup>

To sum up: The charter of a religious corporation constitutes its supreme law, to which everything else is subordinate. It is not intended, however, to be the only law by which the affairs of the corporation are governed. In the absence of an express prohibition in the charter, a religious corporation will therefore possess the power to make and enforce by-laws, which are reasonable and consistent with the charter.

The powers of the corporation as to property are circumscribed in various ways. Its power to acquire real property is in many states limited by mortmain statutes, whose test is usually the quantum, rather than the value or adaptability of the property. Its power to sell or mortgage its real property is absolute, except in the state of New York, where a statute requires the assent of a court to such a transaction. *California also an exception*

<sup>1</sup> *Sherman v. American Congregational Association*, 113 Fed., 609, 613.

<sup>2</sup> *First Baptist Church v. Caughey*, 85 Pa., 271; *Cornelius v. Tully*, 2 Ky. Law Rep., 204; *Catton v. First Universalist Society*, 46 Iowa, 106. A quasi corporation however has no such power, *Bailey v. Trustees M. E. Church*, 71 Me., 472; *Jefts v. York*, 64 Mass., 392.

<sup>3</sup> *Eaton v. Woman's Home Missionary Society*, 264 Ill., 88, 92.

The contract powers of the corporation are also limited. While it may contract with its members for contributions which may even take the form of stock subscriptions, and while it may, following the method outlined by the statute, agree to consolidate with corporations of a similar nature, it cannot enter into any business relations with the outside world, except such as are immediately necessary for the proper management of its own concerns.

## CHAPTER V

### CHURCH CONSTITUTIONS

THE word "constitution" does not mean the same thing to an American and to an Englishman. This is due to the difference in the fundamental laws of the two countries. The American constitution is a written instrument which can be amended, in theory at least, only by the people themselves acting in the modes prescribed by it. The English constitution, on the contrary, is a conglomerate of customs, usages, royal decrees and statutes, and can at any time be amended by any ordinary act of parliament.

It is not astonishing that some confusion should have resulted from confounding the two types of constitutions when an instrument, called a constitution, is found as the corner-stone of a church society. Such a document may be a constitution in the American sense or it may be a mere act of legislation. When the society is incorporated there can be no question but that the statute under which it has been incorporated is its constitution. The charter under such circumstances is the frame-work which supports and protects the temporal interests of the corporation.<sup>1</sup> Says the Pennsylvania Court: "A religious corporation is a society; its charter, its constitution, and its privileges are dependent on whatever conditions are clearly expressed."<sup>2</sup>

<sup>1</sup> *McIlvain v. Christ Church of Reading*, 2 Woodw. Dec. (Pa.), 293, 297; 28 Leg. Int., 126; 8 Phila., 507.

<sup>2</sup> *Juker v. Commonwealth*, 20 Pa. (8 Harris), 484, 495.

Any other instrument which such a society may draw up, no matter what name it may attach to it, will be but a "code of bylaws" and not a constitution, even in the English sense of the word.<sup>1</sup> It follows that any provision attempting to make a change of such an instrument impossible except by a two-thirds or similar vote is invalid.<sup>2</sup>

But even when a society is unincorporated it has been doubted whether the instrument regarded by it as a constitution is such in fact. It has been argued that such an instrument "has none of the powers or requisites of a constitution in political bodies, which emanates from a higher power than the legislature, and always is supposed to be enacted by a power superior to the legislature, and hence is unchangeable, except by the body which established it."<sup>3</sup> It has been said that "the notion of a constitution adopted by acquiescence is unknown to American constitutional law,"<sup>4</sup> and that the constitution adopted by the United Brethren in 1841, without submission to the component parts of the church, was itself but an act or ordinance of the general conference, adopted by it over half a century after the original organization of the church, and that there is nothing in the instrument to differentiate it from other ordinances, except the name and the expression of the will of the general assembly that it should not be amended unless as therein provided.<sup>5</sup>

But whether such a constitution be regarded as superior to the ordinary by-laws of the church or as a mere by-law

<sup>1</sup> *Canadian Religious Association v. Parmenter*, 180 Mass., 415, 417; 62 N. E., 740.

<sup>2</sup> *Appeal of Ehrenfeld*, 101 Pa., 186, 190; 12 W. N. C., 262; 39 L. I., 420.

<sup>3</sup> *Smith v. Nelson*, 18 Vt., 511, 550, 551.

<sup>4</sup> *Horsman v. Allen*, 129 Cal., 131, 140; 61 Pac., 796.

<sup>5</sup> *Horsman v. Allen*, 129 Cal., 131, 139; 61 Pac., 796.

subject to repeal at any of its sessions, it will in any event be a matter of considerable importance. Though it does not contain the body of the rules and maxims in accordance with which the sovereign power of the church is to be exercised, and though it has not been adopted with all the formalities requisite to the making of a constitution, it may nevertheless operate as a binding compact between the members of the church.<sup>1</sup> It has therefore been said that the constitution of the Cumberland Presbyterian Church is in the nature of a contract between the members of the church whose interpretation of it will accordingly be given great effect by the courts.<sup>2</sup> Where such constitution makes provision for its own amendment it follows that persons who become members of a church not only accept it as it is at the time, but also either expressly or tacitly consent to such changes of it as the supreme authority of the church shall lawfully make.<sup>3</sup>

It has sometimes been said that the constitution of the United States is modeled on the Presbyterian form of government. If this is true it must be admitted that the two differ radically in one important particular. The Presbyterian form of government, like that of most other churches, does not separate the various governmental functions but vests all of them in one body.<sup>4</sup> Its general assembly "is a homogeneous body, uniting in itself, without separation of parts, the legislative, executive and judicial functions of the gov-

<sup>1</sup> *Kuns v. Robertson*, 154 Ill., 394, 401; 40 N. E., 343; *Bear v. Heasley*, 98 Mich., 279, 307; 57 N. W., 270; 24 L. R. A., 615.

<sup>2</sup> *Permanent Committee of Missions v. Pacific Synod*, 157 Cal., 105, 122; 106 Pac., 395. See *Hayes v. Manning*, 263 Mo., 1, 33; 172 S. W., 897; *Hayes v. Manning*, 263 Mo., 129; 172 S. W., 897.

<sup>3</sup> *Griggs v. Middaugh*, 10 Ohio Dec. Reprint, 643; 22 W. L. Bull., 367, 369.

<sup>4</sup> *Harris v. Cosby*, 173 Ala., 81, 93; 55 So., 231.

ernment, and its acts are referable to the one or the other of them, according to the capacity in which it sat when they were performed.”<sup>1</sup> Being thus the highest legislative, executive and judicial power of the church, it has in these three capacities all the authority that is expressly conferred by the constitution, as well as that which is necessarily implied from any of the express powers therein granted or from the general design and purpose for which the organization was formed.<sup>2</sup>

Since all these powers are vested in one body it is not surprising that it is not always easy to decide in which capacity such body acts in any particular case. In fact, such body may itself be anything but clear on the nature of its action. Yet the distinction especially between legislative and judicial acts is important and should be constantly kept in mind.

The business of the legislature is to make general laws for the public good; that of judicial tribunals to make specific settlements of private disputes. One establishes laws for future action, and is prospective; the other applies established laws to past actions; and is retrospective in its operation. The law is made by the one and applied by the other.<sup>3</sup>

Judicial action, therefore, is deliberative and contemplative; legislative action to a certain extent is arbitrary, involving in the case of a church body “but a matter of church polity which, from its very nature, must rest largely in the discretion of the superior court.”<sup>4</sup> Every church

<sup>1</sup> *Commonwealth v. Green*, 4 Whart. (Pa.), 531, 601. Cited *Philomath College v. Wyatt*, 27 Ore., 390, 468; 31 Pac., 206; 37 Pac., 1022; 26 L. R. A., 68.

<sup>2</sup> *Mack v. Kime*, 129 Ga., 1; 58 S. E., 184; 24 L. R. A. (N. S.), 675.

<sup>3</sup> *Philomath College v. Wyatt*, 27 Ore., 390, 468.

<sup>4</sup> *McAuley's Appeal*, 77 Pa. (27 P. F. Smith), 397, 417.



and every denomination has, therefore, within itself some legislative or supreme power having control over matters of doctrine as well as discipline, and some jurisdiction at least over what pertains to the faith as well as the practices of its members.<sup>1</sup> In the exercise of such legislative powers such a body may, therefore, erect new<sup>2</sup> and excind old Presbyteries,<sup>3</sup> take the necessary steps to change its constitution,<sup>4</sup> enter into an act of union with other church bodies,<sup>5</sup> make missionary arrangements by which congregations of another denomination are permitted to avail themselves of the preaching of the preachers of either denomination,<sup>6</sup> and construe its own acts. Says the Oregon Court: "When such body, acting in its legislative capacity, has placed a construction upon its acts, there is no good reason why the civil courts should not respect and even adopt such construction, unless the same is shown to be clearly and palpably contrary to some constitutional prohibition."<sup>7</sup> When, however, such bodies, in their legislative capacity, commit unconstitutional acts, these acts may be set aside by the courts, and such bodies compelled to observe and act under the constitution legally adopted for their guidance.<sup>8</sup> Therefore resolutions by a vestry which impose severer qualifications on voters than is provided by

<sup>1</sup> *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind., 136, 163.

<sup>2</sup> *Smith v. Nelson*, 18 Vt., 511, 563.

<sup>3</sup> *Commonwealth v. Green*, 4 Whart. (Pa.), 531, 601. *Contra Smith v. Nelson*, 18 Vt., 511, 563; *McAuly's Appeal* 77 Pa. (27 P. F. Smith), 397, 417.

<sup>4</sup> *Philomath College v. Wyatt*, 27 Ore., 390, 460, 468; *Lamb v. Cain*, 129 Ind., 486, 519; 29 N. E., 13; 14 L. R. A., 518.

<sup>5</sup> *Landrith v. Hudgins*, 121 Tenn., 556, 645; 120 S. W., 783.

<sup>6</sup> *Commonwealth v. Green*, 4 Whart., 531, 600.

<sup>7</sup> *Philomah College v. Wyatt*, 27 Ore., 390, 470.

<sup>8</sup> *Bear v. Heasley*, 98 Mich., 279, 292.

the constitution will be declared null and void by the civil courts.<sup>1</sup>

Nor need such construction be necessarily in the form of a resolution or vote. On the contrary, it is often made by contemporaneous or subsequent usages and customs which more or less clearly show the understanding of all concerned of certain clauses of such instruments. While such customs, like the constitution itself, will not be upheld where they are in conflict with the established rules of law<sup>2</sup> or the charter of incorporation,<sup>3</sup> no matter how old they may be,<sup>4</sup> or when they are in conflict with the contract under consideration,<sup>5</sup> while, in other words, they cannot abrogate or abolish the constitution of the church, they are very useful as a practical construction of it. On points not clearly expressed in the charter, the understanding of the congregation, evidenced by their practice, is a circumstance entitled to consideration.<sup>6</sup> The courts will therefore take such customs as its guide just as between individuals it takes their contracts and usages,<sup>7</sup> and will even accord them the dignity of by-laws.<sup>8</sup>

The steps necessary to be taken to bring into existence a church constitution in the American sense of the word are not clearly defined. It would seem, however, that some-

<sup>1</sup> Howard *v.* African Episcopal Church, 52 Pa. Sup. Ct., 116.

<sup>2</sup> McCrary *v.* McFarland, 93 Ind., 466; First African M. E. Zions Church *v.* Hillery, 51 Cal., 155.

<sup>3</sup> Miller *v.* Eshbach, 43 Md., 1, 6.

<sup>4</sup> Hicock *v.* Hoskins, 4 Day., 62 (Conn.).

<sup>5</sup> Shortz *v.* Unangst, 3 Watts & S. (Pa.), 45. Zion Church of Sterling *v.* Mensch, 74 Ill. App., 115; affirmed 178 Ill., 225; 52 N. E., 858.

<sup>6</sup> Weckerly *v.* Geyer, 11 S. & R., 35, 38 (Pa.).

<sup>7</sup> Church *v.* Wells, Executors, 24 Pa. (12 Harris), 249. See Commonwealth *v.* Green, 4 Whart. (Pa.), 531, 601.

<sup>8</sup> Miller *v.* Eshback, 43 Md., 1; Jacker *v.* Commonwealth, 20 Pa. (8 Har.), 484.

thing more than the mere vote of adoption by the highest legislative body of the church is required to give to any of its acts a higher authority than is accorded to its ordinary action.<sup>1</sup> Be that as it may, a constitution originally but a mere act of legislation may by long-continued acquiescence and recognition by the church receive all the sanction that is required. This is strikingly illustrated by a series of cases arising out of the Church of the United Brethren of Christ, a Methodist organization, during and following the year 1889. This church, while founded before 1800, had made no attempt to adopt a constitution until 1837. In that year the General Conference of the church, feeling that its government "was not as firm as it ought to be," and well aware that it transcended the bounds delineated by its Discipline,<sup>2</sup> proposed a constitution to be ratified and adopted by the next general meeting of the church in 1841. The constitution thus proposed, however, was not adopted in 1841 but another instrument was agreed upon as a constitution and printed as such in each quadrennial discipline thereafter issued, without having been in any other way ratified or adopted by any of the various congregations of the church. When, finally, through an attempt to amend this constitution in 1889 the entire matter was thrown into the courts, the constitution of 1841 was recognized as having been adopted by acquiescence by all the courts which adjudicated this question,<sup>3</sup> with the exception of the Cali-

<sup>1</sup> *Horsman v. Allen*, 129 Cal., 131; 61 Pac., 796.

<sup>2</sup> *Rike v. Floyd*, 6 Ohio Cir. Ct. Rep., 80, 100; affirmed 53 Ohio St., 653; 44 N. E., 1136.

<sup>3</sup> *Brundage v. Deardorf*, 55 Fed., 839; s. c. 92 Fed., 214; 34 C. C. A., 304; *Knus v. Robertson*, 154 Ill., 394; 40 N. E., 343; *Lamb v. Cain*, 129 Ind., 486; 29 N. E., 13; 14 L. R. A., 518; *Bear v. Heasley*, 98 Mich., 279; 57 N. W., 270; 24 L. R. A., 615; *Russie v. Brazell*, 128 Mo., 93; 30 S. W., 526; 49 Am. St. Rep., 542; *Rike v. Floyd*, *supra*; *Schlichter v. Keiter*, 156 Pa., 119; 27 Atl., 45; 22 L. R. A., 161; *Itter v. Howe*, 23 Ont. App. Rep., 256.

fornia Court, which held that such an instrument was at most but a constitution in the English sense of the word.<sup>1</sup> Says the Illinois Court:

After such a lapse of time, during which it seems no legal steps were taken toward having the validity of the constitution judicially determined, a court would, in view of the long continued acquiescence, even upon the clearest and most satisfactory proof of irregularity in its adoption, be loath to declare it void, and would be warranted in doing so only when required by the principles of substantial justice, morality and public policy.<sup>2</sup>

A constitution, while intended to be stable, is not generally intended to be absolutely rigid. The example of the Medes and Persians in making their laws irrevocable is not followed in these modern times of rapid and phenomenal changes. Some provision for amendment is therefore found in the United States constitution as well as in that of the various states, and will generally be more or less clearly expressed in the constitutions by which church bodies are governed. Courts in construing such constitutions will therefore not apply "a cast-iron rule to the serious possible injury of a religious society in rendering them unable to explain more definitely their peculiar doctrines, directions, or systems of procedure, however experience may show the absolute necessity for the use of larger or more intelligible language."<sup>3</sup> Much may even be left to implication. The power of individuals and congregations to voice their sentiments in regard to the affairs of a Presbyterian church is not of so important a nature that nothing

<sup>1</sup> *Horsman v. Allen*, 129 Cal., 131; 61 Pac., 796. See also *Brundage v. Deardorf*, 92 Fed., 214, 223; 34 C. C. A., 304.

<sup>2</sup> *Knus v. Robertson*, 154 Ill., 394, 400; 40 N. E., 343.

<sup>3</sup> *Itter v. Howe*, 23 Ont. App. Rep., 256.

less than an express declaration in the constitution can be received as evidence that it has been delegated to the Presbyteries. "Human intentions and desires are manifested in various ways, and the manifestation may be equally authoritative and binding when evidenced by conduct as when shown by express statement."<sup>1</sup> Of course, such an amendment "must be adopted in accordance with the provisions of the constitution in force at the time of such adoption respecting such amendment."<sup>2</sup>

Whether or not a proposed amendment of a church constitution is valid has prominently come before the courts in the cases above mentioned of the United Brethren in Christ. This large Methodist church body had a constitution which provided that "there shall be no alterations of the foregoing constitution unless *by request of two-thirds of the whole society.*" Since about 1865 there had been a growing difference of opinion in the church concerning: 1, lay representation, 2, the ratio of representation, and 3, secret societies. This agitation came to a head at the general meeting of the church at Fostoria, Ohio, in May, 1885, when a commission of twenty-seven persons was appointed to revise the constitution in such manner as would be best adapted to secure the growth and efficiency of the church "in evangelizing the world." This commission, after having done its work in the fall of the same year, submitted the result of its labors to the vote of the members and fixed the time of the vote for November, 1888. The vote at this election was the largest that had ever been cast by the church. Out of a total membership of 204,517, 50,685 voted for and 3,659 against the amendment. A petition against the proposed change was also circulated by the

<sup>1</sup> Permanent Committee of Missions *v.* Pacific Synod, 157 Cal., 105, 123; 106 Pac., 395.

<sup>2</sup> Bear *v.* Heasley, 98 Mich., 379, 308.

opposition and received 16,187 signatures. Even counting the votes registered against the measure by petition, there was thus a clear two-third majority of the votes registered in favor of the proposed change. Accordingly, at a meeting of the church held at York, Pa., the report of the commission was adopted by a vote of 110 to 20 and the result proclaimed by five of the six bishops. This action divided the church into two parties. Fifteen delegates under the leadership of the dissenting bishop left the meeting and proclaimed themselves to be the true Church of the United Brethren. The aftermath in the courts now became inevitable. While the result of this litigation hung by a thread in Oregon,<sup>1</sup> and was decided against the majority in Michigan,<sup>2</sup> all the courts, with the exception of the Michigan court, finally approved the amendment and upheld the "liberals" as against the "radicals."<sup>3</sup> While some of the cases put their decision in whole or part on the short ground that the declaration of the church in 1889 is decisive and binding on the civil courts,<sup>4</sup> other courts recognize that the civil courts may examine and say whether the General Conference of the church "proceeded in an obviously illegal and arbitrary manner—in a manner evidently in disregard of its plain organic law (its constitution)—to amend its constitution and change in essentials of doctrine its confession of faith,"<sup>5</sup> and put their decision

<sup>1</sup> *Philomath College v. Wyatt*, 27 Ore., 390, 460, 468.

<sup>2</sup> *Bear v. Heasley*, 98 Mich., 279, 292.

<sup>3</sup> *Brundage v. Deardorf*, 55 Fed. 839; s. c. Fed., 214; 34 C. C. A., 304; *Horsman v. Allen*, 129 Cal., 131; 61 Pac., 796; *Knus v. Robertson*, 154 Ill., 394; 40 N. E., 343; *Lamb v. Cain*, 129 Ind., 486; 29 N. E., 13; 14 L. R. A., 615; *Russie v. Brazell*, 128 Mo., 93; 30 S. W., 526; 49 Am. St. Rep. 542; *Rike v. Floyd*, *supra*; *Philomath College v. Wyatt*, *supra*; *Schlichter v. Keiter*, 156 Pa., 119; 27 Atl., 45; 22 L. R. A., 161; *Itter v. Howe*, 23 Ont. App. Rep., 256.

<sup>4</sup> *Brundage v. Deardorf*, *supra*; *Knus v. Robertson*, *supra*; *Schlichter v. Keiter*, *supra*.

<sup>5</sup> *Griggs v. Middaugh*, 10 Ohio Dec. Reprint 643; 22 Weekly Law Bull., 367, 368.

on more substantial ground than the mere declaration of the meeting of 1889. The questions discussed by the courts are two: 1, whether the vote was a request, and 2, whether it was a request by two-thirds of the whole society.

There can be no question that such vote, if sufficient as a two-third vote, constituted a request. That it was produced by an agitation on the part of the clergy and by the action of the meeting of 1885 cannot detract from its nature as a request.<sup>1</sup>

It is highly improbable that at any time two-thirds of the whole society or any considerable number of the members thereof would spontaneously and with one accord request or signify their desire to the general conference, that a change should be made in the constitution. Some organized effort among such a numerous membership would be necessary to obtain unison of action and contemporaneous results.<sup>2</sup>

It is therefore no objection that the agitation which led to this vote was produced by one class.

The bishops and clergy who make up so largely the membership of the conference are, by reason of their constant attention to religious and theological subjects, and the working of the machinery of the church, peculiarly qualified to lead the thought of the church on all such subjects. It is not desirable, nor is it necessary . . . that they should sit with folded hands waiting to be addressed by the society on any subject of denominational or religious importance.<sup>3</sup>

The question whether the vote was a request on the part of two-thirds of the society has also been answered in the affirmative. Of course there was no contention that two-

<sup>1</sup> *Rike v. Floyd*, 6 Ohio Cir. Ct. Rep., 80, 100.

<sup>2</sup> *Philomath College v. Wyatt*, 27 Ore., 390, 480; 31 Pac., 206; 37 Pac., 1022; 26 L. R. A., 68.

<sup>3</sup> *Schlichter v. Keiter*, 156 Pa. St., 119, 144; 22 L. R. A., 161; 27 Atl., 45.

thirds of all the members of the society had actually voted in its favor. The entire vote that had expressed itself at all, regularly or irregularly, by going to the polls or by signing a petition, was only about seven-twentieths of the entire membership. It was probably a physical impossibility to rouse even a majority of all the members to action for or against the measure. Much more was it impossible to get two-thirds of all of them to vote in favor of the change. If the constitution under these circumstances was to be amended at all, it was necessary to construe it in such a way as to make its provisions practicable.<sup>1</sup> Moreover, at the time when the constitution was adopted the church was opposed to "numbering Israel," which was held by the courts to be a strong indication that no such conception as that for which they now were contending was in the minds of its makers. The courts, therefore, refused to assume that the fathers of the church, in ordaining the constitution, intended "to follow the example of the Medes and Persians, and fetter future generations for all time, unless two-thirds of all the members, — men, women, children, non-communicants, those 'beyond sea,' African converts, and all,—should request the change,"<sup>2</sup> and held that the provision was "not intended as an impassable barrier thrown in the way of improvement of all sorts, but as a protection against the introduction of heretical doctrine, destructive of the distinctive theological character of the church."<sup>3</sup> Accordingly they reached the decision that a two-thirds vote by those members who availed themselves of their privilege was all that was required by the constitution, and that those who opposed the measure but re-

<sup>1</sup> *Russie v. Brazzell*, 128 Mo., 93, 108; 30 S. W., 526; 49 Am. St. Rep., 542.

<sup>2</sup> *Rike v. Floyd*, 6 Ohio Cir. Ct. Rep., 80, 100.

<sup>3</sup> *Schlichter v. Keiter*, 156 Pa. St., 119 at 144 of official report.



frained from voting indulged in "an ineffectual kind of opposition."<sup>1</sup>

The question whether legislative powers can be delegated by a church body to a committee has arisen in a series of cases springing out of the unfortunate dissensions by which the Evangelical Association of America, another large Methodist body, was shaken to its foundation during the last decade of the last century. At the quadrennial general meetings of this body, held at Buffalo in 1887, no invitation to hold the next meeting within the border of any congregation was available. The discipline provided that the time and place of the general conference should be appointed by the bishops, with the consent of the majority of the conference; and if there should be no bishops present the matter should be attended to by the general conference itself or by the oldest annual conference. All the three bishops of the church being present, the time of the next meeting was duly fixed, but no invitations being on hand, the task of selecting the place was by unanimous vote delegated to the "board of publication," of which board the three bishops were members. After the close of the conference and before the board of publication had taken action appointing Indianapolis as the place for the meeting of 1891, all three bishops were ousted from their ecclesiastical offices, which action resulted in a schism which split the church in twain. It was clearly seen that the action of the board was controlled by two of the ousted ecclesiastics. Accordingly, the adherents of the third bishop in February, 1891, prevailed upon the East Pennsylvania conference of the church as the oldest conference to appoint Philadelphia as the next place of meeting.

The result of this divergent action could not be in doubt. Separate but simultaneous meetings of the two factions

<sup>1</sup> Schlichter v. Keiter, 156 Pa. St., 119 at 145 of official report.

held at the time appointed by the meeting of 1887, which both parties recognized as valid, were the inevitable result. At these meetings each convention recognized the bishop or bishops of its choice and affirmed the excision of the opposing bishop or bishops. Accordingly, the persons meeting at Indianapolis, by adopting the names of the bishops recognized by them, became known as the Bowman and Esher party, while the persons who met at Philadelphia received the appellation of the Dubs party. The controversy, however, did not end here but percolated down to numerous individual congregations, who became equally divided. It was but natural that both parties of such divided congregations should claim its property. This in turn, owing to the intense bitterness that had been generated, brought the controversy into the civil courts. Not less than six separate courts<sup>1</sup> have been confronted with it.

It was inevitable that in the solution of the question thus presented the right of the conference of 1887 to delegate the power of selecting the place of the next meeting to the board of publication should hold the center of the stage. All the courts that have passed upon the question have held that such power could be delegated. While some do not commit themselves on the question whether this power is legislative, executive or judicial,<sup>2</sup> their general leaning is to hold that it is a mere matter of detail necessary to the administration of the polity or ecclesiastical system of the church,<sup>3</sup> inserted in the discipline for the purpose of secur-

<sup>1</sup> *Schweiker v. Husser*, 44 Ill. App., 566; affirmed 146 Ill., 399; 34 N. E., 1062; *Anracher v. Yerger*, 90 Iowa, 558; 58 N. W., 893; *Fuchs v. Meisel*, 102 Mich., 357; 113 Mich., 559; *Pounder v. Ashe*, 44 Neb., 672; *State ex rel Dubs v. Esher*, 3 Ohio C. D., 468; 6 Ohio Cir. Ct. R., 312; affirmed 51 Ohio, 599; *Krecker v. Shirey*, 163 Pa., 534; 30 Atl., 440; 29 L. R. A., 476; 35 Wkly. Notes Cas., 165.

<sup>2</sup> *Ahracher v. Yerger*, *supra*.

<sup>3</sup> *Krecker v. Shirey*, *supra*.

ing the appointment of a town or city which would be easily accessible to the members of the conference, where a suitable church or other building could be obtained in which to transact the business of the conference, and where the members would be properly entertained.<sup>1</sup> Says the trial judge of one of the cases whose judgment was adopted by the State Appellate Court and affirmed by the Supreme Court:

The board of publication was an executive body of the church, existing under the discipline, to which the general conference might, without doubt, commit the duty of procuring a hall for the meeting of the conference and all plans for the entertainment of delegates, and it is difficult to distinguish wherein the duty of inquiring into and fixing upon the place for holding the next conference partakes of legislation in any material degree beyond that of performing such other details as those mentioned. Both are merely directory and executive in character, and are mere administrative details to enable the governing body of the church to conveniently perform its legislative functions.<sup>2</sup>

While union is the aim of all church life, it is sometimes not possible, and where possible not expedient, to uphold an external union where causes are active under the surface which make this union a mere empty shell. An example of this is afforded by the Methodist Episcopal Church of ante Civil War days. In this great church the conflicting opinions on slavery which rocked public sentiment for a generation before the Civil War had in the early forties produced such a hopeless division of opinion that the leading men of the church clearly saw that a separation into a Northern and Southern body could not much longer be prevented. A carefully-worked-out plan for an amicable

<sup>1</sup> State *ex rel* Dubs *v.* Esher, 3 Ohio C. D., 468; 6 Ohio Cir. Ct. R., 312.

<sup>2</sup> Schweiker *v.* Husser, 44 Ill. App., 566, at 571 official report.

division of the church was therefore submitted by the general assembly of the church in 1844 to the Southern conferences, and was speedily adopted by them, so that the separation of the body into two parts—the Methodist Episcopal Church and the Methodist Episcopal Church South—became an accomplished fact in 1845.

This division must not be confounded with a schism. It did not present a situation in which the courts are called upon to decide which of two parties, into which a church body has divided, is the church. It did not present the question which of the two bodies was the legitimate successor of the Methodist Episcopal Church. On the contrary, both bodies under the plan of division represented the legitimate succession of the old church within the territorial bounds assigned to them respectively. When, therefore, the question of the rights of the preachers of the two organizations in the book concern of the old Methodist Episcopal Church came before the United States Supreme Court for decision the court entertained no doubt but that the General Conference of the Church was competent to make the division and

that each division of the church, under the separate organization, is just as legitimate, and can claim as high a sanction, ecclesiastical and temporal, as the Methodist Episcopal Church first founded in the United States. The same authority which founded the church in 1784 has divided it, and established two separate and independent organizations occupying the place of the old one.<sup>1</sup>

The same conclusion was reached in the principal "border states"—Kentucky and Virginia—in which this question was presented,<sup>2</sup> and was adhered to by the West Virginia

<sup>1</sup> *Smith v. Swarmstedt*, 56 U. S. (16 How.), 288, 306.

<sup>2</sup> *Gibson v. Armstrong*, 7 B. Mon., 481 (Ky.); *Humphrey v. Burnside*, 4 Bush, 215 (Ky.); *Brown v. Monroe*, 80 Ky., 443; *Lewis v.*

court after that state had separated from Virginia during the days of the Civil War.<sup>1</sup>

If the great Methodist Episcopal Church has thus been instrumental in obtaining a legal determination of the right of church bodies to divide amicably without loss of identity or property, the great Presbyterian Church has been similarly instrumental in obtaining a demonstration of the converse proposition. The union consummated by the Presbyterian Church in the United States with the Cumberland Presbyterian Church in 1906 has not only filled church papers and theological journals with animated discussions but has also brought in its train a judicial discussion of the right of churches thus to unite which is unique in the history of our jurisprudence. Not less than twelve state courts of last resort as well as the federal courts from the lowest to the highest have participated in this discussion. Every possible angle of the subject has been fully investigated and adjudicated. The entire subject-matter has been literally exhausted. A stage has been reached when the exhaustive opinions of the various courts make unnecessary and unwarranted any further extended statements which could only impose additional burdens upon those seeking the light of precedent. The great learning, ability and industry of the various courts has left little that can be supplied with profit in support of the divergent views expressed. We can, therefore, very well pass by a few scattered cases arising generally out of Presbyterian circles independent of this Cumberland controversy and which, with one exception,<sup>2</sup> uphold the right of churches

Watson, 4 Bush, 228 (Ky.); Brooke *v.* Shacklett, 13 Gratt., 301 (Va.); Hoskinson *v.* Pusey, 32 Gratt., 428 (Va.); Boxwell *v.* Affleck, 79 Va., 402.

<sup>1</sup> Venable *v.* Coffman, 2 W. Va., 310.

<sup>2</sup> Associate Reformed Church of Newburgh *v.* Theological Seminary, 4 N. J. Eq (3 Green), 77.

to unite into one body<sup>1</sup> and confine our attention to the Cumberland controversy. In order to understand this controversy, so important not only to the litigants, but to other churches as well, it will be profitable to undertake a short review of the history of the two churches.

The Presbyterian church, with its famous Westminster Confession formulated during the years 1643 to 1649 by the Westminster Assembly, appointed by the Long Parliament, though it had an organization in this country before the Revolution, did not form a general assembly till 1789. Eleven years later the great revival of 1800 swept over the country. This revival had a profound effect on the church, particularly in certain parts of Tennessee and Kentucky known as the Cumberland country. Preachers being scarce in this country, devout laymen were licensed to preach. This fact, as well as the rejection of the fatalistic doctrine of election and foreordination contained in the Westminster Confession on the part of the revivalists, brought down the censure of the Presbyterian Church on this movement. Certain of the newly-licensed preachers were cited to appear and answer to a charge of rejecting the Westminster Confession and to submit to an examination "in the learned languages." This action, and the consequent prohibition issued against these persons, induced three clergymen, Twing, King and McAdow, in 1810 to break with the mother church by organizing a new presbytery in a log cabin in Dickson county, Tennessee. From this small beginning the Cumberland church grew so rapidly that in 1813 three separate presbyteries had already been established, which in that year joined hands in a synod and formulated a brief statement to the effect that there

<sup>1</sup> *Trinity M. E. Church v. Harris*, 73 Conn., 216; 47 Atl., 116; 50 L. R. A., 636; *McBride v. Porter*, 17 Iowa, 203; *McGinnis v. Watson* 41 Pa., 9; *Wheaton v. Cutler*, 84 Vt., 476; 79 Atl., 1091.

are no eternal reprobates and that Christ died for all mankind. In 1814 the same body revised the Westminster Confession, and in 1839 formed a general Assembly, which, with the coöperation of the presbyteries, adopted a constitution in 1883. In 1906 its general assembly numbered 17 synods, 114 presbyteries, 1514 ordained ministers, 9614 elders, 3914 ordained deacons, 2869 congregations, and 185,212 members.

Through all the period of this great growth a yearning for a reunion with the mother church, however, was very pronounced and led to numerous overtures, all of which came to naught because of doctrinal differences. Nor was the mother church indifferent to such a reunion. It therefore undertook to revise its confession of faith by an "amendatory statement," and finished this task in 1903. The principal difficulty having been eliminated, at least in a measure, the question of reunion was taken up in 1903 by both church bodies assembled respectively at Los Angeles and Nashville. A joint committee on "union and reunion" was appointed by the two bodies, and in 1904 made a joint report, which was adopted as a basis of union by the Cumberland Assembly by a vote of 162 to 74. The matter was then submitted to the 110 presbyteries of the Church, which approved of the plan by a vote of 60 to 51. The mother church having taken similar action, arrangements were made at the meetings of the two bodies in 1905 to consummate the union in the following year. Accordingly both bodies met simultaneously in 1906, the Presbyterian Church at Des Moines, Iowa, the Cumberland Church at Decatur, Illinois. The meeting of the Cumberland Church, after receiving telegraphic notice of the final action of the body assembled at Des Moines, by a vote of 165 to 91 adjourned *sine die* to meet henceforth as a component part of the Presbyterian Church in the United

States. This adjournment, however, was not taken without a vigorous protest on the part of the opposition. This, after adjournment, withdrew to a different hall and proclaimed itself to be the true Cumberland Presbyterian Church, entitled to all its rights and privileges.

It was but natural that this division begun at the top of the Cumberland Church should at once percolate to the bottom of it. This inevitably led to local controversies over local church property between the adherents of the two dissentient parties, which in turn threw the matter into the civil courts. Nor were the loyalists, under which name the "persisting Cumberlands" became known in contradistinction to the unionists, unsuccessful during the first stages of the great legal battle which ensued. While they failed in their attempt to obtain an injunction against the Presbyterian Assembly at Decatur, enjoining it from a consummation of the union,<sup>1</sup> they succeeded in obtaining favorable decisions in the Appellate Courts of Indiana and Texas,<sup>2</sup> and in the Supreme Courts of Tennessee and Missouri.<sup>3</sup> Then however the tide of battle turned. The Supreme Courts of Texas and Indiana reversed their respective Appellate Courts,<sup>4</sup> while the courts of last resort of Georgia, Kentucky, California, Illinois, Arkansas, Alabama, Mississippi and Oklahoma, in the order named, took similar views and upheld the union.<sup>5</sup> This left the loyalists but two states

<sup>1</sup> *Fussel v. Hail*, 134 Ill. App., 620; affirmed 233 Ill., 73; 84 N. E., 42.

<sup>2</sup> *Ramsey v. Hicks*, 44 Ind. App., 490; 87 N. E., 1091; 89 N. E., 597; *Clark v. Brown*, 108 S. W., 421 (Tex. Civ. App.).

<sup>3</sup> *Landrith v. Hudgins*, 121 Tenn., 556; 120 S. W., 783; *Boyles v. Roberts*, 222 Mo., 613; 121 S. W., 805.

<sup>4</sup> *Brown v. Clark*, 102 Tex., 323; 116 S. W., 360; 24 L. R. A. (N. S.), 670. See also *Horton v. Smith*, 145 S. W., 1088 (Tex. Civ. App.); *Ramsay v. Hicks*, 174 Ind., 428; 91 N. E., 344; 92 N. E., 164; 30 L. R. A. (N. S.), 665. See also *Bentle v. May*, 175 Ind., 494; 94 N. E., 759.

<sup>5</sup> *Mack v. Kime*, 129 Ga., 1; 58 S. E., 184; 24 L. R. A. (N. S.), 675;



—Missouri and Tennessee. As to these the matter was thrown into the federal courts on the ground of the diverse citizenship of the parties. This procedure resulted in decisions in a Missouri and in a Tennessee federal court favorable to the unionists,<sup>1</sup> which decisions were instrumental in inducing the Missouri court in 1914 to reverse its stand on the matter and come over to the majority.<sup>2</sup> The important state of Tennessee, the cradle of the Cumberland Church, was now the only state left which favored the cause of the loyalists. In this state was situated the publishing house of the Cumberland Church, which fact added to the importance of the task of neutralizing the effect of the state court decision by the action of the federal courts. It being clearly seen that all attempts to induce the state court to change its stand would be unsuccessful,<sup>3</sup> the task of nullifying its decision was taken in hand in a workmanlike manner. In addition to other actions, two bills, involving respectively the property of the publishing house and that of an ordinary church, were brought and prosecuted up to the United States Supreme Court.<sup>4</sup> After

*Wallace v. Hughes*, 131 Ky., 445; 115 S. W., 684; *Permanent Committee of Missions v. Pacific Synod*, 157 Cal., 105; 106 Pac., 395; *First Presbyterian Church of Lincoln v. First Cumberland Church*, 245 Ill., 74; 91 N. E., 761; *Fancy Prairie Presbyterian Church v. King*, 245 Ill., 120; 91 N. E., 776; *Pleasant Grove Congregation v. Riley*, 248 Ill., 604; 94 N. E., 30; *Sanders v. Baggerly*, 96 Ark., 117; 131 S. W., 49; *Harris v. Cosby*, 175 Ala., 81; 55 So., 231; *Morgan v. Gabard*, 176 Ala., 568; 58 So., 902; *Corothers v. Moseley*, 99 Miss., 671; 55 So., 881; *First Presbyterian Church at Wagner v. Cumberland Presbyterian Church*, 34 Okla., 503; 126 Pac., 197.

<sup>1</sup> *Barkley v. Hayes*, 208 Fed., 319 (Mo.); *Sherard v. Walton*, 206 Fed., 562 (Tenn.).

<sup>2</sup> *Hayes v. Manning*, 263 Mo., 1; 172 S. W., 897; *Missouri Valley College v. Guthrie*, 263 Mo., 52; 172 S. W., 909.

<sup>3</sup> *Bonham v. Harris*, 125 Tenn., 452; 145 S. W., 169.

<sup>4</sup> *Helm v. Zarecor*, 222 U. S., 32; *Sharpe v. Bonham*, 224 U. S., 241.

this court had decided that the trustees, who in both cases were friendly to the complainants and residents of the state, were properly made defendants and that the federal courts had jurisdiction of the cases, the federal district court of the Middle District of Tennessee rendered decisions in which it refused to follow the decision of the state court in this matter,<sup>1</sup> while a similar decision was rendered by the Circuit Court of Appeals of the Eighth Circuit in another case arising in Tennessee.<sup>2</sup> The result of these decisions is that the Tennessee court stands alone not only in this matter as against eleven other state courts, but also finds its action completely neutralized by the decisions of the various federal courts which have jurisdiction over its territory.

It must not be supposed, however, that the right of churches to unite or the right of the Cumberland Church and the Presbyterian Church thus to unite is at all questioned by any of these decisions. The Missouri court indeed for a time assumed this position,<sup>3</sup> but has since abandoned it.<sup>4</sup> The Tennessee Court, standing as it does in lonely grandeur against the overwhelming weight of authority in holding the union to be unauthorized, is curiously enough the most emphatic of all the courts in stressing this particular power of church bodies. Says the court:

In Christian thought unity is more desirable than division. All denominational church organizations have as their primary object the propagation of the Christian religion. The individual advancement of each separate organization is looked upon as a contribution that far to the general cause. A union with

<sup>1</sup> Helm *v.* Zarecor, 213 Fed., 648; Sharp *v.* Bonham, 213 Fed., 660.

<sup>2</sup> Duvall *v.* Synod of Kansas, 222 Fed., 669; 138 C. C. A., 217.

<sup>3</sup> Boyles *v.* Roberts, 220 Mo., 613; 121 S. W., 805.

<sup>4</sup> Hayes *v.* Manning, 263 Mo., 1; 172 S. W., 897.

another church organization having the same purpose may be regarded, therefore, as a step forward in the consummation of the work in which all are engaged.<sup>1</sup>

The court therefore reasons that there is in every church organization an implied or inherent power of union with other church organizations, growing out of the purpose for which all are constituted, viz., the dissemination of the Christian religion.<sup>2</sup> This power it proceeds to state

exists from the very nature of the case, not only in the Cumberland organization, but in every other Christian society in whose standards there is not an explicit pronouncement to the contrary, because they are all parts of one whole, all engaged in the same work, seeking the same end, and animated by a common purpose.<sup>3</sup>

Nor are the other courts at all backward in their pronouncements of the desirability of union among church bodies. The question whether or not the various families of the Presbyterian faith must remain forever separated, although the causes which originally divided them have disappeared in the light of modern theological evolution, is indeed one which must give solicitude to all who have the advancement of civilization at heart.<sup>4</sup> Union, therefore, argues the Kentucky court, "means strength and life, and when applied to such a union as that under consideration it means a wider horizon of usefulness, a larger field for service, and a multiplied opportunity for propagating the gospel and doing the will of the Master."<sup>5</sup> Says the Arkansas court:

<sup>1</sup> Landrith v. Hudgins, 121 Tenn., 556, 576, 577; 120 S. W., 783.

<sup>2</sup> *Ibid.*, at 583.

<sup>3</sup> *Ibid.*, at 585.

<sup>4</sup> Wallace v. Hughes, 131 Ky., 445, 493; 115 S. W., 684.

<sup>5</sup> *Ibid.*, at 490.

Church organization are not brought into being, like commercial corporations and purely social or fraternal organizations, for the purpose of preserving separate denominational identity. Churches merely represent the coming together of people sharing the same religious beliefs, or preferring the same mode of worshipping Almighty God, and name and separate identity are mere incidents. The only real lines of separation between churches are the differences in belief; and when these become harmonized, the lines of separation marked by distinct organizations remain as but shadows, without substantial justification.<sup>1</sup>

And the District Court of the United States of the Western District of Missouri concludes:

It is repugnant to all conceptions of progress and development, with the increased vitality and power for good in larger fields that flow therefrom, to hold that a church once formed must exist forever as a separate entity, under a separate name, and without practical verbal change in its declarations of faith.<sup>2</sup>

Turning now from mere abstract expressions in favor of church union to the particular objections raised to this particular union, such objections, with exception of the contention that such union was procured by fraud which was promptly overruled whenever raised,<sup>3</sup> may be divided into three heads, as follows: 1, that the constitution of the Cumberland Church conferred no power to unite with the Presbyterian Church; 2, that the question was not submitted to the individual congregations; 3, that the action of 1906 was not a union of the two churches but rather a merger of the Cumberland Church with the

<sup>1</sup> Sanders *v.* Baggerly, 96 Ark., 117, 129; 131 S. W., 49.

<sup>2</sup> Barkley *v.* Hayes, 208 Fed., 319, 325.

<sup>3</sup> Permanent Committee of Missions *v.* Pacific Synod, 157 Cal., 105; 106 Pac., 395; Horton *v.* Smith, 145 S. W., 1088 (Tex. Civ. App.); Helm *v.* Zarecor, 213 Fed., 648, 658.

Presbyterian Church. While these objections are of no consequence where the view is taken, as it is in many of the cases, that the decision of the General Assembly is decisive on the question under the doctrine of *Watson vs. Jones*,<sup>1</sup> they have nevertheless been answered by the courts, and hence deserve treatment in this connection.

We can quickly dispose of the first objection. Not only had the Cumberland Church, acting through its general assembly, the body best qualified to know what its organic law meant, by repeated overtures for such a union, given a practical construction to its constitution which could not, under a familiar rule of construction, but have great influence on the action of the courts in interpreting that constitution,<sup>2</sup> but that very constitution expressly provided that

upon the recommendation of the General Assembly, at a stated meeting, by a two-thirds vote of the members thereof, voting thereon, the confession of faith, catechism, constitution and rules of discipline may be amended or changed when a majority of the presbyteries, upon the same being submitted for their action, shall approve thereof. It is difficult to imagine how language could be broader, or express greater power.<sup>3</sup>

Nor is the question at all affected by another provision which limits the powers of the various church bodies "by the express provisions of the constitution, since such constitution is like that of the various states of the union and

<sup>1</sup> *Harris v. Cosby*, 173 Ala., 81; 55 So., 231; *Sanders v. Baggerly*, *supra*; *Permanent Committee of Missions v. Pacific Synod*, *supra*; *Mack v. Kime*, *supra*; *First Presbyterian Church of Lincoln v. First Cumberland Church*, *supra*; *Fussell v. Hail*, *supra*; *Bentle v. Ulay*, 175 Ind., 494; 94 N. E., 759; *Wallace v. Hughes*, *supra*; *Corothers v. Moseley*, *supra*; *Hayes v. Manning*, *supra*; *First Presbyterian Church at Wagoner v. Cumberland Presbyterian Church*, *supra*; *Brown v. Clark*, *supra*.

<sup>2</sup> *Hayes v. Manning*, 263 Mo., 1, 29, 172 S. W., 897.

<sup>3</sup> *Sanders v. Baggerly*, 96 Ark., 117, 129; 131 S. W., 49.

unlike that of the United States, a limitation on the powers of the various church judicatories and not a grant of them." <sup>1</sup>

Nor is it any objection that the various congregations of the Cumberland Church, as such, were not given a voice in the settlement of this matter. Presbyterian churches, as distinguished on the one hand from congregational churches such as the Baptist churches, which are pure democracies, and on the other hand from oligarchic churches, such as the Roman Catholic church, which is perhaps the best example of a pure monarchy left in the world to-day, are governed by a representative arrangement which is not unlike that which has found expression in the constitution of the United States. According to this arrangement the presbyteries (as the name of the church indicates), not the congregations, are the foundations of the church. The congregations indeed control the presbyteries through the representatives which they send to them. Nevertheless it is the presbyteries who take action. It is perfectly clear, therefore, that the "history of the presbyterian family of churches is a history of divisions, separations, and reunions always effected by the action of the representative bodies, and not by the body of the people directly." <sup>2</sup> The very constitution of the Cumberland Church adopted in 1883 was proposed by the general assembly and ratified by the presbyteries and not by the individual congregations. The fact that the congregations of the Cumberland Church were not, as such, given a voice in deciding the matter therefore becomes entirely immaterial.

This brings us to the third contention, which indeed has

<sup>1</sup> *Wallace v. Hughes*, 131 Ky., 445, 481; 115 S. W., 684.

<sup>2</sup> *Harris v. Cosby*, 173 Ala., 81, 92; 55 So., 231.

proved the hardest to answer. This contention is that the action of 1906 was not a union but a merger, and that the Cumberland Church had no power to cease to exist and to render up its name, organization and separate identity. It is this contention which has caused the Indiana and Texas Appellate Courts,<sup>1</sup> and the Missouri and Tennessee Supreme Courts, to hold the union invalid.<sup>2</sup> And while the judgment of the Indiana and Texas Appellate Courts has been reversed by their respective Supreme Courts,<sup>3</sup> while the judgment of the Missouri Supreme Court has been overruled by the same tribunal,<sup>4</sup> the Tennessee state court still adheres to its opinion<sup>5</sup> in the face of the rulings of the federal courts of that state.<sup>6</sup>

It is, of course, true that the Cumberland Church, as such, gave up its name when the union of 1906 took place. What else could be expected since that church had but 200,000 members while the Presbyterian Church had 1,300,000? Under such circumstances it certainly would involve all church organizations in a peculiar situation if it were held that no union of one church could take place with another and that two churches could not unite in a partnership the same as individuals.<sup>7</sup> The two churches could have united into a confederation without changing

<sup>1</sup> *Ramsey v. Hicks*, 174 Ind., 428; 91 N. E., 344; 92 N. E., 164; 30 L. R. A. (N. S.), 665; *Clark v. Brown*, 108 S. W., 421 (Tex. Civ. App.).

<sup>2</sup> *Boyles v. Roberts*, 220 Mo., 613; 121 S. W., 805; *Landrith v. Hudgins*, 121 Tenn., 556; 120 S. W., 783.

<sup>3</sup> *Ramsey v. Hicks*, *supra*; see *Bentle v. May*, 175 Ind., 494; 94 N. E., 759; *Brown v. Clark*, 102 Tex., 323.

<sup>4</sup> *Hayes v. Manning*, *supra*.

<sup>5</sup> *Bonham v. Harris*, 125 Tenn., 452; 145 S. W., 169.

<sup>6</sup> *Sherard v. Walton*, *supra*; *Sharp v. Bonham*, 224 U. S., 241; *Helm v. Zarecor*, 222 U. S., 32; *Duvall v. Synod of Kansas*, *supra*.

<sup>7</sup> *First Presbyterian Church of Lincoln v. First Cumberland Church*, 245 Ill., 74, 115; 31 N. E., 761; 19 Am. Cas., 275.

the name of either and without any provision fixing the name of the new and united church, and such union would have been entirely valid and effectual. "The name of the united church in that event would have been matter for further consideration by the united church, and it could have been determined in the proper and lawful manner by the lawfully authorized bodies of the new church."<sup>1</sup> But what after all is there in a name? The name Cumberland Church was never adopted at a meeting of the church, but was rather like the name Christian at the time of the Apostles, a popular name given to the church by such as were outside of it and for the purpose of distinguishing it from other churches.<sup>2</sup> Says the Illinois Appellate Court: "If a smaller church can be received, surely affiliation and union can be made with a stronger sister church, if thereby the church, as a religious body, is prospered and enlarged."<sup>3</sup> Nor is it true that the union or merger simply made the Presbyterian Church the successor of the Cumberland Church. Each particular church, each presbytery and each synod, established by the Cumberland Church, retained its individual and separate integrity and existence and its property rights after the union as fully as before, until some change was made by the regular authorities of the united church having power to make it. The main difference in their conditions resulting from the union was that they now belonged to a larger body and had relatively less influence and power in affairs affecting the whole church.<sup>4</sup>

It remains to say a few words concerning a "union"

<sup>1</sup> Permanent Committee of Missions *v.* Pacific Synod, 157 Cal., 105, 121; 106 Pac., 395.

<sup>2</sup> Barkley *v.* Hayes, 208 Fed., 319.

<sup>3</sup> Fussel *v.* Hail, 134 Ill. App., 620, 632, affirmed 233 Ill., 73; 84 N. E., 42.

<sup>4</sup> Permanent Committee of Missions *v.* Pacific Synod, 157 Cal., 105, 125; 106 Pac., 395.



between Lutheran and Reformed congregations or synods which is quite common in this country, as well as in Europe, and has come before the courts in a number of cases. It goes without saying that, so far as the courts are concerned, the difference between these two great branches of the Protestant Church can be of no consequence where individual bodies of such religionists have found a *modus vivendi* according to which they manage to use property in common. It certainly cannot be intended to erect a barrier between different denominations of Christians, and prevent their union on common ground, at least with regard to the temporalities and secular administration of their property.<sup>1</sup> The motives for such unions particularly in new and thinly-settled neighborhoods, are obvious and commendable, since they furnish these facilities for Christian worship and burial, which each sect of itself is too weak to supply.<sup>2</sup> Cases have even arisen where the bond of nationality and language has proved so strong that not only Lutherans and Calvinists, but even Catholics and Jews, have for a time continued in harmony to attend the same religious exercises.<sup>3</sup> It is true that such unions in the end will generally prove to be most unwise. No matter how solemnly the parties may agree that everything is to be transacted in love and peace, they generally sooner or later realize in bitter experience that two cannot walk together unless they are agreed. This is no reproach to Christianity. It is a jealous and conscientious regard for what is believed to be right, for different forms of the same essential faith that produces the discord. Dogmas for which one cares but little are easily compromised. But what one be-

<sup>1</sup> Neale v. St. Paul's Church, 8 Gill. (Md.), 116, 118.

<sup>2</sup> Brown v. Lutheran Church, 23 Pa. (11 Harris), 495, 499.

<sup>3</sup> Ebbinghaus v. Killian, 1 Mackay (D. C.), 247, 250.

believes with his whole heart he contends for earnestly.<sup>1</sup> However that may be, and however much some theologians may view such an arrangement as an impossibility and as a monstrosity, the courts will not follow them in their reasoning nor adopt its results.

The labors of the casuists have undoubtedly in some instances promoted the growth of practical religion; and it may very well be that the world owes the elucidation of many truths now familiar to writers whose reasonings seem to the general student so obtruse and minute as to be useless, frivolous and repulsive. But the masses of Christian men have neither talent, taste, nor time for such investigations. They advance to the point where knowledge is acquired of plain, obvious, appreciable and intelligible principles; and in all relations of society, business and government, where the line is drawn at which the common mind of the community stops, there the common law stops with it. The law goes no further in the direction of religious pedantry than it goes in the direction of any other abstraction.<sup>2</sup>

Such unions have, therefore, been uniformly upheld by the courts so far as property rights are concerned.<sup>3</sup>

To sum up: Where a church body is incorporated its charter, or the law under which the incorporation has been effected, is its constitution, while any other document, no matter what name may be applied to it, is but at most a by-law which must be consistent with the constitution in order to be valid. Where such body is unincorporated it may adopt a fundamental law which is superior to its ordinary acts of legislation and which can be amended only by pur-

<sup>1</sup> *Brown v. Lutheran Church*, 23 Pa. (11 Harris), at 499, 500.

<sup>2</sup> *Dunkle and Stout v. Dries*, 1 Woodw. Dec., 114, 119.

<sup>3</sup> *Ibid.* *Neale v. St. Paul's Church*, 8 Gill., 116 (Md.); *German Evangelical Society of St. Cloud v. Henschell*, 48 Minn., 494; 51 N. W., 477; *Heckman v. Mees*, 16 Ohio, 583; *Kisor's Appeal*, 62 Pa., 428.

suing the procedure outlined therein. Such constitution may in the first instance be an ordinary act of legislation and receive its binding force by long-continued acquiescence. If its terms at all admit of it, it will be construed by the courts as reasonably open to amendment, as permitting the delegation of mere ministerial functions, and as allowing either a division of the body into two or more parts or its union with some other similar body. When doubt is cast upon the meaning of any of its provisions, the construction which these provisions have received, either by formal votes and resolutions passed by such body or by mere customs and usages developed by it, will have great weight with the courts, provided that they are not in conflict with the law of the land.

## CHAPTER VI

### IMPLIED TRUSTS

OF all the questions of law that come before the courts in connection with church controversies, those relating to trusts offer the greatest inherent difficulties. Where such trusts are express, as is often the case, in devises of bequests and in deeds or assignments, the construction of the trust provisions and their application to a constantly changing state of society in this new country of many divergent sects and conflicting religious opinions is a formidable enough task.<sup>1</sup> It is, however, a simple matter compared with the difficulties occasioned by the theory of implied trusts. The implications that can be drawn from the manner in which a particular fund has been collected, from the religious proclivities of the individual contributors to it, from the way in which it has been applied by those active in procuring it, and from its subsequent history, are so various and uncertain, particularly where the original donation has been made a long time ago, that the whole subject is quite well shrouded in mystery. The subject is further intimately interwoven with the development of the various forms of church corporations. The resulting uncertainty is increased by the conscious or unconscious application by a number of courts of the various conflicting doctrines of charitable trusts to it. The parties interested, their attorneys, and the judges who must decide such questions will therefore quite frequently find themselves almost com-

<sup>1</sup> See chapter seventeen of this book dealing with a trust deed known as the Methodist Episcopal Deed.

pletely at sea in such a matter. This fact has led a number of courts to deny the existence of any implied trust and to require donors, if they intend to impress a trust upon the property donated by them, to do so in express terms. Such action, while it simplifies matters in the particular jurisdiction, complicates them further when it is sought to obtain a view of the law as a whole.

When the Pilgrim Fathers landed at Plymouth Rock they at once established their own form of worship. Similar action was taken in Virginia and repeated in the other colonies, with the exception of Pennsylvania and Rhode Island, in which religious liberty reigned supreme from the very beginning. It is obvious that with an established church as a part of the government questions of implied trusts would not ordinarily arise in connection with such favored church. On the contrary, such church would take property given to it by the government or by individuals and administer it according to the direction of the government. This state of simplicity, however, did not long endure. Dissenters from the established church not only appeared at once, but became more and more numerous, and soon founded societies of their own and acquired property. Since these societies were not incorporated, it followed that they could not hold the legal title to their property. Since such legal title had to be vested somewhere, individuals sometimes unbeknown to themselves became trustees for such societies. This was an unsatisfactory state of affairs. When this was recognized, the custom developed of selecting certain individuals (generally leading members of the society) to take the property for the church as trustees. This was generally satisfactory so long as these trustees remained among the living. Since their death, however, was sure to happen, the question of the legal title after that event would cause no little anxiety. This question was

solved by incorporating such trustees first by charters specifically granted by the legislature, and later under general incorporation statutes. These charters did not in the least change the relation of the trustees to the church property. The trustees were simply incorporated and made perpetual, but remained trustees just the same. Since they were trustees and the members of the church beneficiaries, a definition of the trust that existed between them was soon demanded. Where such trust was expressed in comprehensive language this task was a simple one. However, such cases were rare. The conveyance in question was ordinarily in the form of an absolute deed in which the trustees were designated by their corporate name. Surely if there was a trust in such a deed it had to be implied. Nor is it surprising that such an implication should be made. It was but natural that courts should look for a trust where there were both trustees and beneficiaries. That they would have difficulties in defining such trust, particularly where the matter came before them after all or most of the original donors were in their graves, might be expected. This was particularly so where it was claimed that churches had torn away from their original denominational moorings. However difficult the task, the courts bravely wrestled with it, going far afield into the domain of doctrinal theology, polemics and church history in their attempts to define the vague implied trust which was by legal theory impressed upon the property but which was so very, very hard to trace.<sup>1</sup>

Our attention must now for a moment be directed to one particular jurisdiction. On account of its age, its size, and the wealth of its church societies, the state of New York naturally occupied a prominent place in this line of

<sup>1</sup> For an extreme case along this line see *Knistern v. Lutheran Churches*, 1 Sandf. Ch., 439 (N. Y.).

litigation. For decades it drifted along with the stream, its courts struggling valiantly with difficulties which they were ill-equipped to solve. Each case naturally rested on its own peculiar facts and could be of little help in deciding subsequent cases. The legislature in 1813 had passed a general incorporation statute which for many years was treated by all concerned as incorporating merely the trustees. This piece of legislation was ambiguous, and it is not astonishing, in view of the history of the matter, that it should be construed as it was.

However, this construction made the position of the courts increasingly uncomfortable. Of disputable cases there was no end. Some means was therefore sought to dam off this rich stream of litigation. The judicial mind in this dilemma reverted back to the incorporation statute of 1813. Expressions were found in it which could be construed as incorporating all the members of the church society. Somewhat similar dicta were found in some of the earlier decisions of the state. A new construction of the statute was therefore adopted in *Robertson v. Bullions*,<sup>1</sup> according to which a church corporation was placed on an equality with other corporations by making all the members of the society corporators, while the trustees were reduced to the position of a mere board of directors. This decision eliminated with one stroke all questions of implied trusts in connection with church corporations. Says the court: "When in a deed executed to trustees for religious purposes the use is expressed in general and not in specific terms, it cannot be *inferred* from the religious tenets and faith of the grantor that it was intended to limit the use to the support of the particular doctrines which he professed or the religious class to which he belonged."<sup>2</sup> The

<sup>1</sup> 11 N. Y., 243; affirming 9 Barb., 64.

<sup>2</sup> *Robertson v. Bullions*, 11 N. Y., 246, 266; affirming 9 Barb., 64.

power of the trustees to receive such donations, subject to a trust for the support of a particular faith or a particular class of doctrines, is denied for the reason that such a trust "is inconsistent with those provisions of the statute which give to the majority of the corporators, without regard to their religious tenets, the entire control over the revenues of the corporation."<sup>1</sup> According to the further argument of the court, if a society wishes to devote its property under the new doctrine to "an unchangeable form of worship and to tie down its members to a Procrustean bed of creeds and confessions of faith,"<sup>2</sup> it must remain a voluntary society and must not commit the management of its affairs to a corporation.

The doctrine thus established was amplified in a subsequent case in which the church was denied the right of impressing its denominational character upon the corporation in such a way as to make it ineffaceable by the voice of the majority of the corporators.<sup>3</sup> Only two means of preventing property from being devoted to other than its original purposes thus remained. The church could either jealously guard its membership and admit only such as subscribed to its particular faith, or it could take the property under an express condition that it should be devoted to the propagation of the faith favored by it. The various church societies which had incorporated and had taken their property by absolute deed were under these decisions now free to change their doctrines, their form of worship, their government and their allegiance to other church bodies without incurring a forfeiture.<sup>4</sup>

<sup>1</sup> *Robertson v. Bullions*, 11 N. Y., 246, at p. 267.

<sup>2</sup> *Ibid.*, on p. 264.

<sup>3</sup> *Petty v. Tooker*, 21 N. Y., 267, 270.

<sup>4</sup> *People ex rel. Gearn v. Farrington*, 22 How. Pr., 294; *Watkins v. Wilcox*, 4 Hun., 220; 6 *Thomp. & C.*, 539; affirmed 66 N. Y., 654; *Gram v. Prussia Emigrated Ev. Luth. German Society*, 36 N. Y., 161.



This result, while satisfactory to the courts, was unsatisfactory to the churches. They therefore appealed to the legislature for relief. This was granted in 1875 and 1876 in the form of an amendment to the incorporation statute of 1813, which provided that the property and revenues of church corporations should be applied "according to the discipline, rules and usages of the denomination to which the church members of the corporation belong."<sup>1</sup> The significance of this amendment is obvious. Its object and intention is unmistakably "to prevent the owners from being so deprived of the property which they have acquired, and to devote and confine it to the promotion of the views and purposes leading to its acquisition."<sup>2</sup> Its effect is to overrule the judicial construction of the incorporation statute as contained in the decisions just noted so far as it affects the question of implied trusts and to restore such implied trust to the jurisprudence of the state.

It must not, however, be supposed that the case of *Robertson v. Bullions* was thereby eliminated from the jurisprudence of the country. On the contrary, it is still one of the most important decisions that has ever been handed down by any court. Not only did it bring before the various state legislatures and courts a new conception of religious corporations which was destined to supersede the old conception in numerous instances, but the extreme deduction drawn by it from this new theory was destined to find its echo in other courts and greatly to influence the law in regard to implied trusts. In consequence, the reader is now confronted with two theories of implied trusts which occupy opposite extremes. It remains to examine these two theories, probe the reasons by which they are sup-

<sup>1</sup> *First Reformed Presbyterian Church v. Bowden*, 14 Abb. N. C., 356, 360; affirming 10 Abb. N. C., 1 (N. Y.).

<sup>2</sup> *Isham v. Dunkirk First Presbyterian Church*, 63 How. Pr., 465, 468.

ported, and find, if possible, a middle ground on which the majority of the cases can be supported.

The theory of an implied trust is not only favored by more states than the opposite theory, but is also older in time. In fact, it is not a purely American product, but traces its ancestry back to England. A Protestant body of dissenters in 1701 had erected a meeting-house on a plot of ground held under a deed which declared that its purpose was "for the worship and service of God." In 1817 the majority of the society had become anti-trinitarian, which fact brought the question of the ownership of this property before Lord Eldon. The chancellor, after a most erudite consideration of the case, granted the injunction prayed for and decided

that if any persons seeking the benefit of a trust for charitable purposes should incline to the adoption of a different system from that which was intended by the original donors and founders; and if others of those who are interested think proper to adhere to the original system the leaning of the court must be to support those adhering to the original system, and not to sacrifice the original system to any change of sentiment in the persons seeking alteration, however commendable that proposed alteration may be.<sup>1</sup>

This case has become a leading case in America, frequently being cited by the courts.

It is not without significance that Lord Eldon classifies the implied trust with which he deals as a charitable one. Only on such a theory can his reasoning be really supported. It is, of course, often a difficult as well as a delicate question to determine whether a certain transaction creates a charitable trust. Our American legal literature has been enriched, or at least augmented, by many more or

<sup>1</sup> Attorney General *v.* Pearson, 3 Merriv., 353, 418, 419 (England).

less illuminating discussions of the subject.<sup>1</sup> It has been said that a religious society is but a trustee of a public charity,<sup>2</sup> and that the support and propagation of religion is clearly a charitable use and that this includes gifts for the erection, maintenance and repair of church edifices, the support of the ministry, and other similar purposes.<sup>3</sup> In this view all gifts to religious purposes, whether they take the form of land, money or services, whether they consist of the widow's mite or the millionaire's check, whether they are given in a lump sum or in annual monthly or weekly installments, whether they are made to endow a church or to pay its running expenses, are charitable gifts encumbered with a trust which cannot be breached. Says the Missouri Appellate Court: "A charity given for any particular purpose cannot be altered or diverted to any other. It must be accepted and retained upon the same terms upon which it was given, and no concurrence among the donees can operate to transfer or apply it to other purposes."<sup>4</sup>

The difficulty that attends such a theory is obvious. Churches are far more often built, supported and even endowed by a great number of small donations than by a small number of munificent gifts. While the purpose of a single gift, particularly where it is large, can generally be ascertained with a fair degree of definiteness, the individual and collective purposes of a great number of small donations will often be so indefinite and contradictory as to become imperceivable. The task of the courts in such

<sup>1</sup> Wisconsin Universalist Convention *v.* Union Unitarian and Universalist Society, 152 Wis., 147, 155; 139 N. W., 753.

<sup>2</sup> Christ Church *v.* Holy Communion Church, 14 Phila., 61, 70; 8 W. N. C., 542; 37 L. I., 272 (Pa.); Rosh's Appeal, 69 Pa. (19 P. F. Smith), 462; 8 Am. Rep., 275.

<sup>3</sup> Beckwith *v.* St. Phillips Parish, 69 Ga., 564, 570.

<sup>4</sup> McRoberts *v.* Moudy, 19 Mo. App., 26, 32.

cases is therefore environed with the greatest difficulties, even where the controversy arises shortly after the donations have been made. It has been said that where the disputed construction of general grants depends "on an examination of religious doctrines, and the history of theological opinion and controversy, the inquiries upon which the courts are obliged to enter are of an unusual and embarrassing character."<sup>1</sup> This is particularly so where the controversy arises after a great lapse of time, when no living witness can inform the conscience of the court, and when its search for truth must be made in history and in the controversial writings of the contemporaries of the donors. The truth and its alleged perversion will thus be frequently shrouded in mystery and involved in the subtleties of polemics and theology.<sup>2</sup>

The religious proclivities of the particular judges confronted with such controversies, while they may be of some practical importance, will of course be no guide in the solution of the difficulties. The question is not which faith or doctrine in the opinion of the court is the most reasonable or the most orthodox, but rather which was the faith or doctrine of the original donors.<sup>3</sup> Property may be dedicated to the support of the tenets of every sect down to the last shadowy point at which Christianity is lost in morality or where rationalism destroys faith.<sup>4</sup>

Were the administration of the great variety of religious charities with which our country so happily abounds to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by

<sup>1</sup> Attorney General *v.* Dublin, 38 N. H., 459, 509.

<sup>2</sup> Knistern *v.* Lutheran Churches, 1 Sandf. Ch., 439, 502 (N. Y.).

<sup>3</sup> Field *v.* Field, 9 Wend., 394 (N. Y.).

<sup>4</sup> Miller *v.* Gable, 2 Denio, 492, 525; reversing 10 Paige, 627 (N. Y.).

such charities, were consonant to the doctrines of the Bible, we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration.<sup>1</sup>

The inquiry therefore will be of a far more limited nature and will concern itself solely with the facts as they existed at the time the donations were made. Equity will not pause to inquire whether in its judgment the founders of the trust have done wisely in prescribing the laws which give direction to it, or in directing the garb in which it shall be clothed or the order to which it shall for all time adhere. These may have had their origin in mere caprice or prejudice, in crabbed and peculiar notions, without affecting the matter in the least.<sup>2</sup>

Where a donor therefore has dedicated property for the purposes of advancing or disseminating any particular religious doctrine or faith, if conflicting claims arise as to its ownership or possession, the civil courts will, however delicate and unpleasant the duty, examine into and decide which of the rival claimants is holding to the faith the donor desired to favor<sup>3</sup> and will restrain those who have departed from that faith from using the property.<sup>4</sup> If they can ascertain what those tenets were, and what church government was within the views of the donors, it is their province and their duty to direct the property to be placed in the hands of those who acknowledge the same doctrines, and obey the same authority.<sup>5</sup> Those for whose use a donation is intended have a right to claim that the property shall be appropriated and applied to the support of the worship of

<sup>1</sup> *Knistern v. Lutheran Churches*, 1 Sandf. Ch., 439, 507 (N. Y.).

<sup>2</sup> *Jones v. Wadsworth*, 11 Phila., 227, 229; 33 L. I., 390; 4 W. N. C., 514, 516.

<sup>3</sup> *Wallace v. Hughes*, 131 Ky., 445, 467; 115 S. W., 684.

<sup>4</sup> *Bowden v. M'Leod*, 1 Ed. Ch., 588, 592.

<sup>5</sup> *Miller v. Gable*, 2 Denio, 492, 556, reversing 10 Paige, 627.

God and to the propagation of the doctrines and the administering of the sacraments of the church as established at the time.<sup>1</sup> It would be unjust to allow persons who have become members of a religious society, formed for the purpose of inculcating particular views, by their subsequent votes to appropriate the property which they may have done nothing to acquire to the promotion of views of an entirely different character from those entertained by the persons through whose contributions the property has been obtained.<sup>2</sup> Says the Texas Appellate Court:

Where property has become dedicated to the support of some specific form of religious doctrine, it becomes a trust and the courts will hear evidence and determine what that doctrine is, regardless of its ecclesiastical, sectarian or denominational bearing, in order to ascertain the trust, and having so found, will enforce the trust and not permit it to be diverted to other and different doctrinal uses.<sup>3</sup>

It is obvious that such an inquiry necessarily must lead the courts into regions which they are ill fitted to explore. Their search for truth "must necessarily take a wide range and affect a vast amount of property held for religious and charitable uses."<sup>4</sup> It will be necessary for them to employ much theological learning in the examination of religious tenets and in exhibiting the points in which eminent theologians of centuries past have agreed or disagreed.<sup>5</sup> An extreme example of this is afforded by an early New York case, in which the court heard the testimony of many

<sup>1</sup> *Gable v. Miller*, 10 Paige, 627, 640; reversed 3 Denio, 492 (N. Y.).

<sup>2</sup> *Isham v. Dunkirk First Presbyterian Church*, 63 How. Pr., 465, 468 (N. Y.).

<sup>3</sup> *Peace v. First Christian Church of McGregor*, 20 Tex. Civ. App., 85, 90; 48 S. W., 534.

<sup>4</sup> *Miller v. Gable*, 2 Denio, 492, 552, reversing 10 Paige, 627.

<sup>5</sup> *Miller v. Gable*, *supra*, at p. 553.

divines as to the faith and practice of the Lutheran Church, and received in evidence a vast bulk of theological books and pamphlets, and on this testimony reached the conclusion that the defendants had "adopted a rule or standard of faith which is different from the Augsburg Confession of Faith, and the other standards of faith and doctrine of the Evangelical Lutheran Church, as held and maintained by the founders of the two churches in controversy."<sup>1</sup>

It goes without saying that in such a controversy the question which party has the majority can be of no moment. A trust cannot be established by counting noses. Where property is dedicated to a particular religious use it is not in the power of the majority, however large it may be, to carry the property to a new and different doctrine.<sup>2</sup> Where such majority has seceded and organized a new church it will not be entitled to share in the benefits of the property held in trust for the original society.<sup>3</sup> That such majority cannot control a trust must be the law until courts will say that if a man devises his property to one of several heirs, the majority may control his gift, and take it from him. Courts must therefore interfere at the complaint of a single worshipper, provided that the property was dedicated to such purposes and that those in possession of it are violating those purposes.<sup>4</sup> The power of the majority to govern is derivative, and the source of derivation limits the power.

The manner of the application is delegated to the judgment of

<sup>1</sup> *Knistern v. Lutheran Churches*, 1 Sandf. Ch., 439, 558.

<sup>2</sup> *Lamb v. Cain*, 129 Ind., 486.

<sup>3</sup> *Cape v. Plymouth Congregational Church*, 117 Wis., 150, 156.

<sup>4</sup> *Miller v. Gable*, 2 Denio, 492, 525, reversing 10 Paige, 627. Of course all the beneficiaries may agree in which case there can be no plaintiff and hence no case. *Attorney General v. Federal Street Meeting House*, 69 Mass. (3 Gray), 1.

a majority of the members of the church, but there is no delegation of authority to the majority to apply it to the advancement of a church of another faith by a direct transfer, or by changing the faith of a majority of the church.<sup>1</sup>

The reason for this theory is not far to seek. It rests on an ideal sense of justice, whatever may be said about its practical workings. It seeks to sustain the religious establishments built up by generations now in the grave. It seeks to prevent the injustice that necessarily results when property, donated for the support of a certain system of religion, is used for its destruction. It denies to persons now members of a society but not donors of its property the right to divert it from the original trusts upon which it was bestowed or carve out new trusts in respect to it.<sup>2</sup> It is clear that, if a majority should spring up in a Protestant congregation in favor of the Roman Catholic or Mohammedan religion and should introduce auricular confession and indulgences or the Koran into it, the liberties and rights of the minority which adheres to the Protestant faith would be grossly violated.<sup>3</sup> Stability in religious matters is therefore the aim of the implied trust theory.

Where a religious society is formed, a place of worship provided and either by the will of the founder the deed of trust through which the title is held or by the charter of incorporation a particular doctrine is to be preached in the place and the latter is to be devoted to such particular doctrine or service, in such a case it is not in the power of the trustees of the congregation to depart from what is thus declared to be the object of the foundation or original formation of the institution and teach new doctrines and set up a new mode of worship there.<sup>4</sup>

<sup>1</sup> *Mt. Zions Baptist Church v. Whitmore*, 83 Iowa, 138, 148, 149; 49 N. W., 81; 13 L. R. A., 198.

<sup>2</sup> *Cammeyer v. United German Lutheran Church*, 2 Sandf., 186, 223.

<sup>3</sup> *Harmon v. Dreher*, 17 S. C. Eq. (Spears Eq.), 87, 124.

<sup>4</sup> *Bowden v. M'Leod*, 1 Ed. Ch. 588, 592 (N. Y.).



Nor does the theory of implied trusts rest upon mere judicial opinion. On the contrary, it has statutory support in many states. It has already been seen that the contrary theory was overthrown in New York by an amendment of the New York incorporation statutes. Similar provisions exist in some other states and limit the use of church property to its denominational purposes.<sup>1</sup> Nor are church corporations peculiar in this respect.

If every taxpayer in a city but one were to favor the use of public property for a purely private use, the one, backed by the power of the court, would prevail. If all the stockholders of a business corporation but one were to favor the use of the corporate property for something entirely foreign to the purposes of the corporation, the one stockholder, with right on his side, and the power of the court to enforce it, would control and prevent the mischief. The power of a religious corporation as to the use of its property is limited by its organic act the same as any other. When it exceeds such limitations its acts are *ultra vires*.<sup>2</sup>

It is clear, however, that the statutory provision must be supplemented by proof of the religious faith, practice, and government in vogue in any society, as such provision naturally is drawn in general terms.

It is necessary to investigate the proof that must be made to establish such faith, practice, or government. There are no technical rules in this regard. The beneficiaries will be ascertained by any competent evidence proving association and organization under a particular form, the choice of officers, the keeping of minutes, the issuing of reports, the annunciation of its objects, and the like.<sup>3</sup> Evidence which will enable the courts to place themselves as near as pos-

<sup>1</sup> Strong v. Doty, 32 Wis., 381, 385.

<sup>2</sup> Franke v. Mann, 106 Wis., 118, 129; 81 N. W., 1014; 48 L. R. A., 856.

<sup>3</sup> Earle v. Wood, 62 Mass. (8 Cush), 430, 449.

sible in the situation of the contributors will be resorted to with a view of determining the sense in which they employed terms susceptible of different interpretations but "not for the purpose of ascertaining the intention of the donor independent of the deed, but for the purpose of determining the meaning and application of the terms used by him."<sup>1</sup> A construction will not be indulged in by which a minister of a denomination of Christians convicted of bastardy and adultery, but supported by a majority of his congregation, will be permitted to turn his church into a house of ill-fame.<sup>2</sup> The denominational name adopted by a church will be of the greatest significance and will sometimes be decisive, being expressive of its purposes and indicative of the nature of the trust.<sup>3</sup> Says the Indiana Court: "No principle is better settled than that property conveyed to trustees for the use of a church by its denominational name . . . creates a trust for the promulgation of the tenets and doctrines of that denomination."<sup>4</sup> Where money is contributed to a church with full knowledge that it is to be applied to the use of a certain denomination, it will be held to have been contributed upon an implied understanding that it is to be devoted to such purposes.<sup>5</sup>

But while such name is a strong indication of the government, faith and practice of a congregation where a large and well-recognized denomination is involved, it may mean little or nothing where a small denomination is in question, of whose nature and aim the general public as well as the courts are naturally ignorant. Under such circumstances

<sup>1</sup> *Miller v. Gable*, 2 Denio, 492, 541, reversing 10 Paige, 627.

<sup>2</sup> *Yanthis v. Kemp*, 43 Ind. App., 203; 85 N. E., 976; s. c. 86 N. E., 451.

<sup>3</sup> *Hale v. Everett*, 53 N. H., 9; 16 Am. Rep., 82, 124, 125.

<sup>4</sup> *Smith v. Pedigo*, 145 Ind., 361, 416; 19 L. R. A., 433; 44 N. E., 363, 371; 32 L. R. A., 838. Cited in *Ramsay v. Hicks*, 44 Ind. App., 490, 512.

<sup>5</sup> *Christ Church v. Holy Communion Church*, 14 Phila., 61, 68; 8 W. N. C., 542; 27 L. I., 272 (Pa.).

it will be necessary for the courts to look "to the written declarations in the constitution, by-laws and written documents of the organization to ascertain the trust and the purpose for which the property was conveyed."<sup>1</sup> They will therefore examine the articles of incorporation of the church, its declaration of faith and practice, the purposes for which the funds were subscribed,<sup>2</sup> and the church ceremony known as dedication.<sup>3</sup> Where all these fail, contemporaneous usage will be resorted to as "evidence of an implied contract between the founder and the congregation, and consequently of the purpose intended by him."<sup>4</sup> Where the nature of the worship intended cannot be discovered by these means it may even be implied from the usage of the congregation prior to the controversy.<sup>5</sup> Of course, where such usage could not have possibly existed at the time material to the inquiry, evidence of it will be excluded.<sup>6</sup> The evidence will thus be confined to the question of the belief, doctrine and practice of the donors at the time of the donation,<sup>7</sup> though such donation may, where the debts of a church at the beginning of its existence are greater than the value of its property, be in fact long subsequent to its acquirement.<sup>8</sup>

<sup>1</sup> *Fuchs v. Meisel*, 102 Mich., 357; 60 N. W., 773; 32 L. R. A., 92.

<sup>2</sup> *Park v. Chaplin*, 96 Iowa, 55, 65; 64 N. W., 674; 31 L. R. A., 141; 59 Am. St. Rep., 353; *McRoberts v. Moudy*, 19 Mo. App., 26.

<sup>3</sup> *Reorganized Church v. Church of Christ*, 60 Fed., 937; See *Curd v. Wallace*, 37 Ky. (7 Dana), 190; 23 Am. Dec., 85, 90; *Knistern v. Lutheran Churches*, 1 Sandf. Ch., 439, 534.

<sup>4</sup> *Presbyterian Congregation v. Johnston*, 1 W. & S., 9, 37 (Pa.).

<sup>5</sup> *Greek Catholic Church v. Orthodox Greek Church*, 195 Pa., 425, 434; 46 Atl., 72.

<sup>6</sup> *Presbyterian Congregation v. Johnston*, 1 W. & S., 9, 37 (Pa.).

<sup>7</sup> *Knistern v. Lutheran Churches*, 1 Sandf. Ch., 439, 513; *Presbyterian Congregation v. Johnston*, 1 W. & S., 9, 36 (Pa.).

<sup>8</sup> *Gable v. Miller*, 10 Paige, 627, 640, 641; reversed 2 Denio, 492 (N. Y.).

Having thus far considered the theory of implied trusts, together with its legal support, it will be well now to examine the opposite theory. It cannot be denied that this theory has considerable support in legal reasoning.

The policy of the law of this country is opposed to fettering estates. It favors the sale and transfer of them from hand to hand, and discourages all attempts to tie them up, and clog them with limitations or restrictions which tend to impair or destroy in them this quality.<sup>1</sup>

It certainly cannot be claimed that a practice of implying a trust from every transfer to a religious society is in harmony with this general principle.

Nor is the theory of such implied trust in harmony with an enlightened public policy in a new country such as the United States. It cannot but cast doubt upon the title of at least one-half of all our church property and is a source of discord and an incentive to controversies and feuds not the less bitter because they are bloodless.<sup>2</sup> It cannot but result in locking up property intended to be productive of good. Says the Vermont Court:

Not having any religious establishment in this country and our population continually varying and shifting, one denomination of Christians being at one time the most numerous, and in the course of a few years another, unless the right of the majority is recognized, and a gift or donation is to be construed as having reference to this state of our society and as being intended by the donors to be controlled by a majority, property given devised or bequeathed to a religious society and for a religious purpose, might, in the course of a very few years, be wholly locked up and secluded from any useful and beneficial purposes.<sup>3</sup>

<sup>1</sup> *Alexander v. Slavens*, 46 Ky. (7 B. Mon.), 351, 353.

<sup>2</sup> *Miller v. Gable*, 2 Denio, 492, 549, reversing 10 Paige, 627.

<sup>3</sup> *Smith v. Nelson*, 18 Vt., 511, 547.

Nor is this theory in many instances even in accord with the actual intentions of the donors. It is common knowledge that many churches are, to a greater or smaller extent, built by the donations of men and women who are outside of their pale. It is certainly a violent assertion that such contributors are intent on dedicating their property to the particular form of worship in vogue in such church.<sup>1</sup> The presumption of such intent discredits the public spirit and liberality of our people, who, whether Christians or not, when called upon to aid in such enterprises, do not stop to inquire into the particular religious belief of the congregation nor concern themselves with the continuance of particular doctrines, but are actuated by the more laudable purpose of advancing the cause of Christianity. It involves the absurdity that a Methodist who contributes to the building fund of a Baptist church does so

for the express purpose of perpetuating and promulgating the doctrine that *immersion* alone is baptism and that infants are excluded from the rights of the church. The contributing Jew—they are not few—is presumed to be especially anxious that the Messiahship of Christ should be taught, though the failure to believe it cast down his temple and broke down the walls of his holy city, making his people wanderers upon the earth. If the majority of such a congregation should be converted to the belief that sprinkling is valid baptism and so change their teaching and practice, the Methodist brother who aided to build the house could interfere and say “No you must teach immersion as the only valid mode, because my gift was based upon your continuance in teaching that error.” Or if the majority should abandon their faith in Christ as the Messiah and change their teaching, as did the Unitarians in *Hale v. Everett*,<sup>2</sup> the Jew contributor could say, “Nay you

<sup>1</sup> *Gable v. Miller*, 10 Paige, 627, 640, reversed 2 Denio, 492.

<sup>2</sup> 53 N. H., 9; 16 Am. Rep., 82.

must abandon your doctrine, because my donation binds you to teach the divinity of Christ, although false in fact.<sup>1</sup>

But all these objections to the theory of implied trusts, serious as they are, leave the most serious objection still to be stated. It is impossible to prevent changes in a living organism. Mutation is the essence of all growth. Plants, animals, human beings, human institutions—all are subject to incessant though oftentimes slow and almost imperceptible change. A society of men or women will never be the same for any length of time. Old members will pass out of it and new ones will come in to take their places. Nor will the principles on which it is founded remain absolutely stationary, though they may have been fixed by constitutions and by-laws. However rigid the language of these instruments, the interpretation which they will receive at the hands of the society is sure to bring about important changes. Thus the Constitution of the United States, even leaving out of view the formal amendments which have been added to it, is certainly a far different instrument today than it was at the time when it was adopted.

It does not require any deep thought to determine that churches are not exempt from this law of nature. Not only are their members continually changing, but their very teaching is subject to the same law. Different times and different circumstances demand at least a different emphasis on points of both doctrine and discipline.

To fix their fleeting wherries; to anchor them immovably in the stream of time, is beyond human power; for the mind at least is free; ranging by its inherent strength through the boundless fields of knowledge, molding its belief according to its apprehension of the truth, and incapable of fixedness until the day when all truth shall be made known.<sup>2</sup>

<sup>1</sup> Paris First Baptist Church *v.* Fort, 93 Tex., 215, 226; 54 S. W., 892; 49 L. R. A., 617.

<sup>2</sup> Keyser *v.* Stansifer, 6 Ohio, 363, 365.

To hold that no congregation can change any part of its principles or practices without forfeiting its property would be imposing a law upon churches which is contrary to the very nature of all intellectual and spiritual life. It would forbid both growth and decay; not prevent them, for that is impossible.<sup>1</sup> No one, least of all the churches, can stand still in the rapid current of time as it flows on to eternity. There must be a continual adaptation to the new conditions as they arise. An attempt to stand still would involve the greatest change of all—the change from life to death.

This rule even applies to ecclesiastical connections with higher church bodies. While adherence to the higher church body in connection with which a local church has been constituted is generally held to be essential,<sup>2</sup> to such an extent that it has been said to be “just as great a moral and legal wrong to carry away property collected and held for a special purpose, in connection with a particular congregation or parish, as it is to carry such property into independence or to another denomination,”<sup>3</sup> yet this rule has not always been enforced but has yielded even to political changes. Thus the Episcopal Church in this country was originally annexed to the diocese of London. Yet it will

scarce be pretended that, after its separation from it as a natural, but not inevitable consequence of our political independence, a single American parishioner might have recovered the

<sup>1</sup> *McGinnis v. Watson*, 41 Pa., 9, 16.

<sup>2</sup> *First Constitutional Presbyterian Church v. Congregational Society*, 23 Iowa, 567; *Parish of the Immaculate Conception v. Murphy*, 131 N. W., 946 (Neb.); *Means v. Presbyterian Church*, 3 W. & S., 303 (Pa.); *Jones v. Wadsworth*, 11 Phila., 227; s. c. 239; 33 L. I., 390; s. c. 416; 4 W. N. C., 514; *Roshi's Appeal*, 69 Pa. (19 P. F. Smith), 462; 8 Am. Rep., 275.

<sup>3</sup> *Christ Church v. Holy Communion Church*, 14 Phila., 61, 70; 8 W. N. C., 542; 37 L. I., 272.

church with its parsonage and glebe, when there was any, from his dissentient brethren, by insisting on a continuance of the ancient connection.<sup>1</sup>

Says the Massachusetts Court in relation to the same matter :

After the Revolution their relation to the British government, the acts of Parliament, and the Church of England, were changed. Under our laws, it was no breach of the trust for the society to connect themselves with the Protestant Episcopal Church of this country, and cast aside the requirements of the acts of Parliament referred to in the deed, so far as they interfered with their duties as citizens of the United States and members of the Protestant Episcopal Church established here.<sup>2</sup>

It has been pointed out in support of the theory of implied trust that should it be once understood to be the law that funds bestowed for the maintenance of a Protestant church may, with the change of faith of the members, at any time be applied to the support of the Roman Catholic or any other antagonistic form of worship and religious doctrine we should "hear no more of the munificent eleemosynary donations, which so much distinguish and adorn our country."<sup>3</sup> This is certainly a false alarm. A donor who has such fears can very easily prevent the mischief. If he is of opinion that spiritual blessings can only flow in particular channels, if the church or a creed in his mind takes the place of the revelation upon which it is founded, he should declare his opinions explicitly in order to have them respected.<sup>4</sup> He therefore may dispose of his property in express trust to maintain and inculcate any doc-

<sup>1</sup> Presbyterian Congregation *v.* Johnston, 1 W. & S., 9, 39 (Pa.).

<sup>2</sup> Sohler *v.* Trinity Church, 109 Mass., 1, 20.

<sup>3</sup> Knistern *v.* Lutheran Churches, 1 Sandf. Ch., 439, 509 (N. Y.).

<sup>4</sup> Miller *v.* Gable, 2 Denio, 492, 549, reversing 10 Paige, 627.



trine of Christianity clearly and specially designated.<sup>1</sup> He may convey it to be held so long as the society continues in a certain ecclesiastical connection; or so long as it supports a minister of a certain faith; and this condition, if explicit and clear and free from all doubt or obscurity, will be enforced.<sup>2</sup> He

may prescribe his own terms, and, if he declares the object of his gift to be to promulgate a particular creed or class of doctrines or to secure a real or imaginary stability, by having these doctrines taught by a clergyman, and by a church in connection with, or in subordination to a particular ecclesiastical judicatory, his will, as in the case of a device, stands for a reason and must be respected.<sup>3</sup>

If, however, he takes no pains to guard against the changes that occur by limiting or clogging his donation with conditions or stipulations he should be regarded as having intended to allow the donee to retain such gift even after undergoing a change.<sup>4</sup> No intention of subjecting the trustees appointed by him to an accounting in the courts for a misapplication of the funds donated by him to the support of contrary doctrines should be imputed to him unless he has made himself clear and has used appropriate and explicit terms excluding such doctrine.<sup>5</sup>

In consequence of the inherent weakness of the implied-trust theory a limited number of courts have abandoned it altogether and have held that no such trust arises by reason of a general conveyance to a church body.<sup>6</sup> Under this

<sup>1</sup> *Attorney General v. Federal Street Meeting House*, 69 Mass. (3 Gray), 1; 58 cited *Attorney General v. Dublin*, 38 N. H., 459, 511.

<sup>2</sup> *Robertson v. Bullions*, 11 N. Y., 234, 265, affirming 9 Barb., 64.

<sup>3</sup> *Miller v. Gable*, 2 Denio, 492, 540, reversing 10 Paige, 627.

<sup>4</sup> *Smith v. Nelson*, 18 Vt., 511, 554.

<sup>5</sup> *Attorney General v. Dublin*, 38 N. H., 459, 510.

<sup>6</sup> *Shaeffer v. Klee*, 100 Md., 264; 59 Atl., 850.

theory where property is held by a voluntary association or a corporation, absolutely and without any limitation, a majority may dispose of, retain, or occupy and manage it as they please, admitting the minority to the same benefits as themselves.<sup>1</sup> If land thus becomes the absolute property of an association,

subject to no use except its general purposes, it is incident to the very nature of a corporation to hold such property at the will of the majority, if the charter of incorporation does not otherwise provide. It is theirs to dispose of, to retain or to occupy after their own pleasure.<sup>2</sup>

The same result has been reached even where the money necessary had been in part contributed by persons of other denominations who understood that they were to have the right to use the building.<sup>3</sup> The reward of such persons has been said to consist "in having contributed to a worthy public enterprise."<sup>4</sup>

It is now in order to ascertain whether a middle ground can be found which avoids the bad results of the two opposite theories which have so far been considered in this chapter. It is clear that both lead to undesirable results. The trust theory imposes great burdens upon the courts, while the other theory frustrates the design of the donors. The latter gives too much liberty to the churches, the former not enough. No principle should be maintained in this country by which religious creeds stereotyped many years if not centuries ago should, without express words of trust, control for all time to come the disposition of church

<sup>1</sup> *McBride v. Porter*, 17 Iowa, 203.

<sup>2</sup> *Keyser v. Stansifer*, 6 Ohio, 363, 365.

<sup>3</sup> *Fallett v. Badeau*, 26 Hun., 235 (N. Y.).

<sup>4</sup> *Miller v. Milligan*, 9 Am. Law. Rec., 419; 6 Ohio Dec. Rep., 1000, 1005; *contra Williams v. Concord Congregational Church*, 193 Pa., 120.

property. Some discretion should be reposed in its adherents so as to allow them to change their tenets and carry the property with them. The maintenance of a contrary doctrine in Europe has led to universal governmental proscriptions in order to sweep away the property and estates held for obnoxious trusts whenever there was a change in the religion of the State.<sup>1</sup> While a limit should be set to the change that may legitimately be made by any church, such change within such limits should be allowed. Where property is conveyed by a general deed to an ecclesiastical organization it should be presumed that it is the donor's intention to devote it to religious purposes in such manner and in such way as the governing body of the organization, whatever it may be, shall under its constitution and rules determine.<sup>2</sup> Not every trivial transmutation of phraseology or every addition to the confession of faith of a church should be allowed to affect the question or destroy church identity.<sup>3</sup> Even though there should be a change in church polity or alteration in its expressed form of faith, if the substantive theological doctrine and the general polity be retained the courts should not construe such change as a departure, a misuse, or perversion of a trust.<sup>4</sup>

Between that extreme which confers all power upon the congregation or the trustees and the doctrine which subjects the property to forfeiture for departures from doctrine or forms of government, in matters not indispensable to the great ends to be obtained by religious organizations, there is a wide inter-

<sup>1</sup> *Knistern v. Lutheran Churches*, 1 Sandf. Ch., 439, 508.

<sup>2</sup> *Mack v. Kime*, 129 Ga., 1; 58 S. E., 184; 24 L. R. A. (N. S.), 675, 689.

<sup>3</sup> *Philomath College v. Wyatt*, 27 Ore., 390, 465; 31 Pac., 206; 37 Pac., 1022; 26 L. R. A., 68.

<sup>4</sup> *Kuns v. Robertson*, 154 Ill., 394, 415; 40 N. E., 343.

val where we may take our stand sustained by the law and by a sober and enlightened public sentiment.<sup>1</sup>

Following out this line of reasoning it has been intimated that no trust would be breached so long as the religious tenets and devotions of the congregation are confined to the sphere of Christianity, but that such breach would occur if the church were to become Mohammedan or pagan.<sup>2</sup> The line has been drawn closer in other cases. It has been said that if a Unitarian Society had a Unitarian minister it could with safety be inferred that it was not the intention of the founders that their bounty should be applied to the dissemination of Trinitarian doctrines. But that beyond this, in all matters not deemed indispensable, a discretion would be vested in the congregation and their trustees as the representatives of the donors.<sup>3</sup> The line has been drawn still closer in other cases. Says the Pennsylvania Court:

Without an express condition, it might be a breach of the compact of association for the majority of a congregation to go over to a sect of a different denomination, though it were different only in name. For instance, the majority of a congregation of seceders could not carry the church property into the Presbyterian connection, though these two sects have the same standards and plan of government. But this principle is inapplicable to a change of connection as regards different parts of the same denomination or sect.<sup>4</sup>

While accordingly it has been held that a change from a

<sup>1</sup> *Miller v. Gable*, 2 Denio, 492, 548, reversing 10 Paige, 627.

<sup>2</sup> *Organ Meeting House v. Seaford*, 16 N. E. (1 Dev. Eq.), 453; *Distinguished Knistern v. Lutheran Churches*, 1 Sandf. Ch., 506.

<sup>3</sup> *Miller v. Gable*, *supra*.

<sup>4</sup> *Presbyterian Congregation v. Johnston*, 1 W. & S., 9, 37, 38 (Pa.).

Reformed to a Lutheran,<sup>1</sup> or from an Evangelical to a Lutheran,<sup>2</sup> or from a Lutheran to an Evangelical<sup>3</sup> church involves a breach of trust; while the Wisconsin Court has held that a congregation organized as an independent non-sectarian religious society open to Christians, Jews, Mohammedans, Buddhists, Brahmans, or Confucians cannot be turned into a Universalist Church over the protests of members disinclined to tie themselves down to even so moderate an approach to orthodox Christianity as the Universalist confession of faith implies,<sup>4</sup> it has also been held that a change from one Lutheran general body to another,<sup>5</sup> or from one general Baptist body to another,<sup>6</sup> or from one ritual to another<sup>7</sup> involves no such breach.

It must now be clear that a change even in the ecclesiastical relation of a church for whose benefit property is held does not necessarily involve any perversion of a trust or a diversion of a fund from its legitimate purposes.<sup>8</sup> Such changes, in fact, must go on incessantly in all living organizations.<sup>9</sup> All history reveals the church as an institution that is continually educating, developing and changing

<sup>1</sup> *Baker v. Ducker*, 79 Cal., 365; 21 Pac., 764.

<sup>2</sup> *Franke v. Mann*, 106 Wis., 118; 81 N. W., 1014; 48 L. R. A., 856. *Marien v. Evangelical Creed Congregation*, 132 Wis., 650; 113 N. W., 66; s. c. 140 Wis., 31; 121 N. W., 604.

<sup>3</sup> *Rottman v. Bartling*, 22 Neb., 375; 35 N. W., 126.

<sup>4</sup> *Wisconsin Universalist Convention v. Union Unitarian and Universalist Society*, 152 Wis., 147; 139 N. W., 753.

<sup>5</sup> *Schradi v. Dornfeld*, 52 Minn., 465; 55 N. W., 49; *Pine Hill Lutheran Congregation v. St. Michael's Evangelical Church*, 48 Pa. (12 Wright), 20.

<sup>6</sup> *First Baptist Church of Paris v. Fort*, 93 Tex., 215; 54 S. W., 892; 49 L. R. A., 617.

<sup>7</sup> *Saltman v. Nessen*, 201 Mass., 534; 88 N. E., 3.

<sup>8</sup> *Swedesborough Church v. Shivers*, 16 N. J. Eq. (1 C. E. Green), 453, 457.

<sup>9</sup> *Gibson v. Armstrong*, 46 Ky. (7 B. Mon.), 481, 504.

society, and changing with the changes it produces. In its very nature it must grow with society and in adaptation to its intelligence, wants, times, and circumstances, and in so far as it fails in this it detracts from its social identity and social life and begins to decay. That the changes that thus take place work hardship on individuals cannot alter the situation. Changes often operate very harshly upon those who fall in the rear of the social movement. No law, however, can ameliorate their suffering. The progress of the race cannot be stopped because there are many who cannot keep up with it. No man or generation of men can stop it, for nature will vanquish all obstructions and do its work. The state cannot "visit regular and orderly changes in religion with forfeiture of rights without condemning the Reformation, and setting itself up as a judge of religious controversies."<sup>1</sup> The courts will therefore disregard "nice distinctions or shades of opinion on doctrinal points or practice."<sup>2</sup> They will not sustain the contention that no change can be made in a church constitution,<sup>3</sup> and will require clear proof that a change or departure has taken place in fundamental doctrines before they will hold that an implied trust has been perverted or misused.<sup>4</sup> It must be a plain and palpable abuse of trust which will induce them to interfere respecting a controversy growing out of a difference in religious or sectarian trusts.<sup>5</sup> They will not interfere

<sup>1</sup> *McGinnis v. Watson*, 41 Pa., 9, 19.

<sup>2</sup> *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138, 148; 49 N. W., 81; 13 L. R. A., 199.

<sup>3</sup> *Winebrenner v. Colder*, 43 Pa., 244, 255. For a striking illustration see the United Brethren Controversy described in chapter five of this book.

<sup>4</sup> *Knus v. Robertson*, 154 Ill., 394, 415; 40 N. E., 343.

<sup>5</sup> *Miller v. Gable*, 2 Denio, 492, 548. Cited in *Watkins v. Wilcox*, 66 N. Y., 654.

on account of inaccuracies of expression or inappropriate figures of speech, nor for departures from mathematical exactness in the language employed in inculcating the tenets of the donors. There must be a real and substantial departure from the purposes of the trust, such an one as amounts to a perversion of it, to authorize the exercise of equitable jurisdiction in granting relief.<sup>1</sup>

This is particularly the case where the change has been made a long time ago.

A trust which has been administered for more than one hundred years without question as to the right or the manner of its administration, ought not to be disturbed without clear and unequivocal evidence that the terms of the trust have been disregarded, and that the just and legal rights of the party complaining have been infringed.<sup>2</sup>

Churches, like individuals, sometimes change their names, without effecting any substantial change in their identity.<sup>3</sup> Such a change, therefore, is of itself no change of religious doctrines or systems, though it may be significant of such a change.<sup>4</sup>

Whether individuals or associations are stationary or itinerant, their identity is not preserved or lost by a continuance or a change of name. Without a name, as well as with a name, changed or unchanged, a church or other society, religious or non-religious, may be transplanted from Nauvoo to Salt Lake and may survive a Mosaic exodus or Babylonish captivity.<sup>5</sup>

<sup>1</sup> *Happy v. Morton*, 33 Ill., 398, 407.

<sup>2</sup> *Attorney General v. Reformed Protestant Dutch Church*, 33 Barb., 303, 318; affirmed 36 N. Y., 452.

<sup>3</sup> *McBride v. Porter*, 17 Iowa, 203; *Church of Christ v. Christian Church of Hammond*, 193 Ill., 144; 61 N. E., 1119; *Cahill v. Bigger*, 47 Ky. (8 B. Mon.), 211.

<sup>4</sup> *Watkins v. Wilcox*, 4 Hun., 220; 6 Thomp.&C., 539; aff. 66 N. Y., 654.

<sup>5</sup> *Holt v. Downs*, 58 N. H., 170, 179.

The union by which the Cumberland Presbyterian Church in 1906 gave up its name and the division by which the southern part of the Methodist Episcopal Church in 1845 assumed a new name<sup>1</sup> has therefore been held not to violate any trust. Property given generally to a church will thus not be affected by any specific trust in favor of such church under the name under which it is then known, but will be presumed to have been given with full knowledge that it has power to change such name.<sup>2</sup>

It must be admitted that the line which separates a change which does from one which does not violate an implied trust is shadowy and ill-defined, and that men of the purest morals and highest intellect may seriously disagree on the question of its exact location. This is a misfortune which must be endured by the courts, the attorneys, and the churches themselves. The situations as they arise are often so extremely complex and the facts which they present so radically different one from the other that a submission to the courts will sometimes be the only feasible method of bringing about an adjustment of the difficulties. No general rule can be formulated by which all controversies can be conclusively assigned to one or the other side of the line. The matter must be left to the judicial process of exclusion and inclusion. All that can be accomplished, particularly on the part of the churches and their attorneys, is to decrease the number of civil cases on this subject by amicably settling such cases as are clearly on or near the line rather than gambling on the decision which the courts may render in regard to them.

To sum up: The question whether or not a general gift to a religious society creates an implied trust of a charitable

<sup>1</sup> See chapters five and seventeen of this book.

<sup>2</sup> Permanent Committee of Missions *v.* Pacific Synod, 157 Cal., 105, 127; 106 Pac., 395.



character has been the subject of much judicial deliberation and has led courts into extremes in both directions. The New York Court has experimented with both of these extremes and is now governed by a statute which favors the implied-trust theory. Other courts have followed the New York court in either the one or the other of its excesses and have thus thrown the law on the subject into considerable confusion. The implied-trust theory is not only the older of the two, is not only favored by more courts, but rests on an ideal sense of justice, makes for stability in the title of church property, and has statutory support in a number of states. It leaves out of view, however, the practical limitations of the courts and the fact that a living organism is in its very nature subject to continuous change. It also has a tendency to fetter estates and lock up property to uses which are obsolete. It further limits unduly the liberty of the various church societies and is in many cases out of harmony with the actual intent of the donors. It is, therefore, not at all astonishing that some courts have broken away from it entirely and by this means have relieved themselves from disagreeable litigation. While they have by this action unfettered estates and provided for the changes which go on in religious organizations, they have also given too much liberty to church bodies and have frustrated the designs of the donors of their property. A compromise between the two positions by which a change within limitations only is permitted is the ideal solution and has been adopted by a number of courts. Just what those limitations are is of course unascertainable as an abstract proposition and must depend upon the peculiar facts of each case as it arises.

## CHAPTER VII

### SCHISMS

SCHISMS are as old as the church itself and will probably be in evidence as long as it endures on this earth. They are analogous to the process of breaking and reforming by which a glacier makes its slow way to its destination. They are as necessary to the growth of the church as the fissures on the outer bark of trees produced by the expansion of the living tissue below. While viewed by many as a curse, they are in fact a blessing in disguise. They are an indication of life and a hopeful rather than a distressing sign. They are the process by which the living church continually adapts itself to the living society upon which it operates. With all the wastage that is incident to them, with all the heartache and headache that they cause, they must be recognized as necessary to the natural growth of the church in the fulfilment of its proper mission.

It is however not the purpose of the present chapter to deal with the theological aspects of this matter. Our attention must be confined to its legal side. This naturally presents grave and difficult questions. Not only is the number of denominations in the United States which are undergoing this process very large, but their forms of government and their articles of faith are also very diverse. Large and small denominations, Christian, Jew or heathen, Protestant or Catholic, orthodox or unorthodox, exist in uncounted numbers with or without written confessions of faith and are subject to church governments which range from absolute monarchies through representative forms of church gov-

ernment to ideal local democracies. It is but natural that comparatively few cases arising under a monarchical form of government such as the Roman Catholic will, on account of the firm control of the church authorities, come before the civil courts. It is also obvious that dissensions in independent congregations such as Baptist or Lutheran bodies will generally be confined to their place of origin and will not often affect other similar churches, though they may be members of the same general confederation of churches. It is therefore under the representative form of government, such as the Methodist and Presbyterian, that the most important and most bitterly contested cases of schisms may be expected to originate.

A schism has been defined as "a division or separation in a church or denomination of Christians occasioned by diversity of opinion."<sup>1</sup> It generally leads not only to intense bitterness between the parties to it but also to a dispute over the property owned by the former united body. The claim which both parties usually advance for this property naturally throws the question into the civil courts. Since a division of the property or its concurrent use by both parties is not possible except under special statutes<sup>2</sup> or particular contract stipulations,<sup>3</sup> the courts under such circumstances will be forced to decide which party represents the legitimate succession and is in point of law identical with the former united body to which both trace their origin.<sup>4</sup> The solution of this difficulty will often be found to be bound up with trusts, express or implied, and to in-

<sup>1</sup> *Nelson v. Benson*, 69 Ill., 27, 30.

<sup>2</sup> Kentucky has such a statute. *Poynter v. Phelep*, 129 Ky., 381; 111 S. W., 699; 24 L. R. A. (N. S.), 729 and note.

<sup>3</sup> *Nelson v. Benson*, *supra*.

<sup>4</sup> They have sometimes though not often sidestepped this important duty. *Rodgers v. Burnett*, 108 Tenn., 173; 65 S. W., 408; *Cox v. Walker*, 26 Me., 504.

volve questions of doctrine or church government, or both. It will require a somewhat different treatment where an independent congregation or where a church of the associated kind is involved. In the first case each congregation is the absolute master of its destinies so far as other congregations are concerned, while in the second case the position assumed by the associated church of which the congregation in question is a part will have an important bearing. The relation of individual congregations in the first case will be like that of independent sovereign states towards each other, while in the second case it will be like that of counties which are mere subordinate parts of one great organism.

It will not require extended argument to show that a schism does not generally descend upon a church like a thunderbolt out of a clear sky, but is rather the culmination of a division which may have existed for a long time. It is not always easy to determine when the mere division ends and the schism begins. It has therefore been held in a Wisconsin case, in which the minority had not been expelled and had not by formal declaration announced its withdrawal, that the fact that it kept up a separate organization, held separate meetings at separate times supported only by its own organization, and attempted to depose the pastor supported by the majority, merely showed that there was a deplorable division within the church and an abundance of ill-feeling and intolerance on both sides, but did not, both sides claiming to be the church, show that there was anything more than a division, a fight for control, a contest for supremacy *within* the church.<sup>1</sup>

The position of any particular church in regard to dependency or independency is of course in the first instance a matter of its own free choice.

<sup>1</sup> West Koshkonong Congregation v. Ottesen, 80 Wis., 62, 74; 49 N. W., 24.

A religious society, whether it is or is not a church, is not inevitably subject, by reason of its religious character, to any peculiar disability, inherent or extraneous, degrading it to a dependent, appurtenant or subordinate position. Its relations with others are such as it chooses: it may choose none.<sup>1</sup>

Whether or not it is an independent or an associated church will depend not merely upon the name which it has adopted but upon its action as a whole. The line between associated and independent churches is thus not always sharply defined. Associated churches quite frequently grant extensive rights and privileges to their individual congregations, while independent congregations often yield considerable power to the confederation of which they are members. It has therefore been said that associated church bodies are not necessarily Episcopal or Presbyterian in form but may be Congregational to the extent that each worshipping unit has the absolute control of its own property while its connection with the main body is merely spiritual, disciplinary and doctrinal.<sup>2</sup> While Presbyterian, Methodist, and Catholic congregations are generally presumed to be of the associated character, while Lutheran and Reformed bodies are by general consent classed as independent churches, a Catholic<sup>3</sup> or Methodist<sup>4</sup> or Presbyterian<sup>5</sup> church has at times been treated as independent, while on the other hand a Lutheran<sup>6</sup> or a Reformed<sup>7</sup> church has been treated as closely knitted to its synod.

<sup>1</sup> *Holt v. Downs*, 58 N. H., 170, 171, 172.

<sup>2</sup> *Vargo v. Vajo*, 73 Atl., 644, 648 (N. J. Eq.).

<sup>3</sup> *Canadian Religious Association v. Parmenter*, 180 Mass., 415; 62 N. E., 740.

<sup>4</sup> *Harper v. Straws*, 53 Ky. (14 B. Mon), 48.

<sup>5</sup> *Vasconcellos v. Ferrara*, 27 Ill. (17 Peck.), 237.

<sup>6</sup> *Harmon v. Dreher*, 17 S. C. Eq. (Spears Eq.), 87.

<sup>7</sup> *Roshi's Appeal*, 69 Pa., 462; 8 Am. Rep., 275.

The adherence to or rejection of certain religious doctrines is generally the one and only touchstone on which to test the right of the parties into which an independent congregation has divided. The question of government cannot be such a touchstone, as the society is independent of all higher ecclesiastical control and can usually by majority vote make its government such as it pleases.<sup>1</sup> Where, on the other hand, an associated congregation is divided, the question of doctrine usually is of little consequence, while that of church government is all-important. Whenever a church or religious society has been originally endowed in connection with or subordination to some ecclesiastical organization and form of church government it can no more unite with some other organization or become independent than it can renounce its faith or doctrine and adopt others."<sup>2</sup> There is a plain distinction in sound reasoning and supported by authority, between the dedication of property to support peculiar tenets, and its dedication to support such tenets in connection with and subjection to particular church government.<sup>3</sup> While the question of identity in the case of an independent church is very difficult, involving an inquiry into abstruse theological doctrines and beliefs, it is comparatively easy of solution where there is a higher church body whose decision in the matter the courts can adopt. While it is a question of much nicety which part of a Congregational society has departed from the purposes of its organization the question is thus very simple where the society which has divided is an integral member of a larger synodical body.<sup>4</sup> Says the New York Court:

<sup>1</sup> *Gibson v. Morris*, 31 Tex. Civ. App., 645; 73 S. W., 85.

<sup>2</sup> *Roshi's Appeal*, 69 Pa., 462, 468; 8 Am. Rep., 275.

<sup>3</sup> *Miller v. Gable*, 2 Denio, 492, 511; reversing 10 Paige, 627 (N. Y.).

<sup>4</sup> *Cape v. Plymouth Congregational Church*, 130 Wis., 174, 182; 109 N. W., 928.

A regular Dutch Church originally formed as a branch of the main body, or in subordination to its church government *as a Dutch Church*, cannot break off from that government and discipline without losing the very character of a Dutch Church. A church avowedly independent in its origin, may form a union, the breach of which only restores it to its former position.<sup>1</sup>

It is but natural in this great country of many faiths in which there is still a great movement of the population, particularly from the country to the city and from one city to another, that a considerable shift should constantly occur between the various denominations. The removal of one manufacturing plant may deprive a populous church of almost all its members while the establishment of another may bring into it a class of people which will change its entire aspect. Even aside from such physical movements the views of part of a church, owing to the great freedom of thought enjoyed by its members and their constant association with people of other denominations, may gradually change either in regard to doctrine or government or both and this may be one of the many reasons that lead to a schism. But be the reason for such a division a contrariety of opinion as to doctrine or practice or merely a like or dislike for the ministering clergyman or a family dispute, or any other whim or prejudice, the courts when confronted with it are in duty bound to determine which side represents the legitimate succession to the original society and is entitled to its property.

The question will be a comparatively simple one where the property in question is held under an express trust. In such case the trust provision will govern the situation and the property will be adjudged to be in that part of the congregation which acts in harmony with it. There can be no question that under a deed to trustees in trust for a Congrega-

<sup>1</sup> *Miller v. Gable, supra.*

tional church, so long as such church shall profess the doctrine of the trinity, a party of Unitarians arising within the church cannot claim such property as against those members who remain Trinitarians. While the construction of the trust provision itself may present great difficulties such provision having been construed and found applicable to the situation will be absolutely decisive in favor of those who act in accordance with it.

The same result follows where the doctrine of implied trusts is recognized. While the establishment of an implied trust will be hedged about with very grave difficulties, where once these difficulties have been overcome and the trust has been established, it will be as decisive as an express trust provided that it applies to either of the parties before the court.<sup>1</sup>

It has already been intimated that the situation is a very simple one where a society belonging to an associated church has suffered the schism. In such case it does not come before the courts as a small independent body but merely as a small part of a large organization. It follows naturally that the part of such local organization which adheres to the general body is the legitimate owner of the property. The fact that the dissenting party in the subsidiary society is the majority of such society cannot avail. The majority of the congregation does not as against the majority of the entire church control the property. Those who "are a minority of the whole church are not entitled to any part of the property of the church from which they thought proper to separate."<sup>2</sup>

There is no presumption that such local majority is at all times and places the society.<sup>3</sup> It cannot therefore rule

<sup>1</sup> See chapter six of this book.

<sup>2</sup> *Skilton v. Webster Brightly*, N. P., 203, 247 (Pa.).

<sup>3</sup> *Holt v. Downs*, 58 N. H., 170, 181.



over the local minority with a high hand in violation of the laws, rules, usages, faith and practice upon which the church is founded. It cannot on receiving an unfavorable decision from the higher church body to which it belongs deny the power of such body, withdraw from it, and claim the property.<sup>1</sup> In subjection to the higher law, the subordinate cannot assert or maintain an independence of the body whose supervision and control it voluntarily accepted and whose name it has been permitted to bear as a condition upon which, in the first instance, the organization was allowed to take to itself a separate existence.<sup>2</sup> It has just as little right to sever its connection with the higher church body as a majority in a county has to separate its connection with the state or as a majority in a state has to separate its connection with the United States. "With temporal, as well as ecclesiastical governments, as a general rule, there is no means by which any of the subordinate members of the government, or even the individuals attached to the organization, may, without the consent of the body, sever their connection with the organization."<sup>3</sup>

Such local church can therefore only rule consistently with the law to which it has subjected itself.

Unless the law of its organization, its government and usages authorize a withdrawal from the general organization, its consent must be obtained, or those adhering to its tenets and submitting to its authority in a divided church will be regarded as composing the church, and entitled to all of its rights and privileges.<sup>4</sup>

<sup>1</sup> *Smith v. Pedigo*, 145 Ind., 361, 382; 33 N. E., 777; 44 N. E., 363; 19 L. R. A., 433; 32 L. R. A., 838.

<sup>2</sup> *Christ Church v. Holy Communion Church*, 14 Phila., 61, 64; 8 W. N. C., 542; 37 L. I., 272.

<sup>3</sup> *Ferraria v. Vasconcellos*, 23 Ill., 456, 460.

<sup>4</sup> *Vasconcellos v. Ferraria*, 27 Ill. (17 Peck.), 237, 239.

An act by which it declares its independence will be just as revolutionary as was the secession of the southern states in 1861. The question in such cases is not which party has the local majority but which is right according to its own law.<sup>1</sup> It is idle to say that a majority which has severed its connection with the old organization in the most solemn form possible can any longer claim to be the church whose name and organization it has both by words and acts solemnly repudiated.<sup>2</sup>

That majority which makes use of its corporate form for the purpose of instituting an organized resistance to the legitimate authority of their ecclesiastical superiors; that expels the members of the minority for refusing to contribute to the support of their disorderly organization and that institutes as its pastor a regularly expelled minister of their denomination; such a majority is not the true congregation.<sup>3</sup>

It has therefore been held that a minority of a local Presbyterian church which adheres to its presbytery<sup>4</sup> and a similar minority in a local Methodist Episcopal Church which adhere to its conference<sup>5</sup> is entitled to its property on the principle that a church or religious society which has been duly constituted in connection with or in subordination to some

<sup>1</sup> *Sutter v. First Reformed Dutch Church*, 42 Pa., 503; 3 Grant Cas., 336.

<sup>2</sup> *Mt. Helm Baptist Church v. Jones*, 79 Miss., 488, 501; 30 So., 714.

<sup>3</sup> *Winebrenner v. Colder*, 43 Pa., 244, 256.

<sup>4</sup> *Ferraria v. Vasconcellos*, *supra*; *Ramsey v. Hicks*, 44 Ind. App., 490; 87 N. E., 1091; 89 N. E., 597; *Gaff v. Greer*, 88 Ind., 122; 45 Am. Rep., 449; *First Presbyterian Church of Louisville v. Wilson*, 77 Ky. (14 Bush), 252; *Wilson v. Johns Island Presbyterian Church*, 2 Rich. Eq., 192 (S. C.).

<sup>5</sup> *People v. Steele*, 2 Barb., 397; 1 Edm. Sel. Cas., 505; 6 N. Y. Leg. Obs., 55; *Cape v. Plymouth Congregational Church*, 130 Wis., 174; 109 N. W., 928; see *Fuchs v. Meisel*, 102 Mich., 357; 60 N. W., 773; 32 L. R. A., 92.

† ecclesiastical organization or form of church government, and as a church so connected and subordinated has acquired property by subscriptions, donations, or otherwise, cannot by majority vote break off this connection and unite with some other religious organization, or become independent, save at the expense of impairing the title to the property so acquired.<sup>1</sup> Where an associated church acquires property and then suffers a schism the courts will therefore go no farther than to determine which of the claimants can be identified with the general church government and will award the property to them.<sup>2</sup> Thus in a Roman Catholic Congregation which has accepted the priests assigned to it and has placed itself under and submitted to the authority of its archbishop the title to the property acquired by it will be taken and held as provided by the canons of the Roman Catholic Church and will be the property of the church, subject to its control in the manner directed by its laws.<sup>3</sup>

However, the cases of schisms in associated church bodies are not always of so simple a character. They do not always originate in a subordinate body but in numerous instances begin at the top and from there extend down to the bottom. In such cases the decision of the highest church body is not available since that body itself is divided. Courts must therefore first decide which part is the proper successor of the old general body which both parties recognize. They must determine which of the two parties is the true organization. It is obvious that such a situation is exactly analogous to that arising out of a schism in an independent congregation. In either case there is no other

†<sup>1</sup> *Jones v. Wadsworth*, 11 Phila., 227, 230; 33 L. I., 390; 4 W. N. C., 514, 516.

†<sup>2</sup> *Wallace v. Hughes*, 131 Ky., 445, 469; 115 S. W., 684.

<sup>3</sup> *Dockhus v. Lithuanian Benefit Society of St. Anthony*, 206 Pa., 25, 29.

body whose decision can be relied upon. The controversy must be determined on principles which differ essentially from those that apply where a subsidiary organization attempts to break away from the large united body of which it is an integral part.

There is no difficulty in regard to the general principles which govern in such cases. These, on the contrary, are well settled and easily comprehended. Effect will be given to the will of that part of the organization which acts in harmony with the ecclesiastical laws, usages, customs, and principles which were accepted by the organization before the dispute arose.<sup>1</sup> The courts will adopt such rules and enforce such polity "in the spirit and to the effect for which it was designed."<sup>2</sup> The test of identity will therefore be which party maintains the regular forms of organization "according to the laws and usages of the body, or, in the absence of these according to the laws, customs, and usages of similar bodies in like cases or in analogy to them."<sup>3</sup> The stereotyped form which this rule has assumed is as follows: "The title to the church property of a divided congregation is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws, usages, customs, and principles which were accepted among them before the dispute began, are the standard for determining which party is right."<sup>4</sup> Adherents of such regular organizations cannot

<sup>1</sup> *Barton v. Fitzpatrick*, 187 Ala., 273; 65 So., 390; *Philomath College v. Wyatt*, 27 Ore., 390; 31 Pa., 206; 37 Pa., 1022, 1023; 26 L. R. A., 68.

<sup>2</sup> *Rottman v. Bartling*, 22 Neb., 375; 35 N. W., 126.

<sup>3</sup> *Kerr v. Trego*, 47 Pa., 292, 296; see *Middleton v. Ellison*, 95 S. C., 158; 78 S. E., 739.

<sup>4</sup> *Smith v. Pedigo*, 145 Ind., 361, 375; 33 N. E., 777; 44 N. E., 363; 19 L. R. A., 433; 32 L. R. A., 838; *True Reformed Dutch Church v. Iserman*, 64 N. J. Law, 506; 45 Atl., 771; *Roshi's Appeal*, 69 Pa. (19 P. F. Smith), 462; 8 Am. Rep., 275; *Appeal of First M. E. Church of Scranton*, 16 W. N. C., 245 (Pa.); see *Barton v. Fitzgerald*, 65 So., 390 (Ala.); *Philomath College v. Wyatt*, *supra*; *Whitelick Quarterly Meeting v. Whitelick Quarterly Meeting*, 89 Ind., 136.

therefore be ousted "by digging up their personal faults in the past or spreading upon the record their inconsistencies in church relationship."<sup>1</sup> Whether slaves or sinners in the past, consistent or inconsistent church adherents, all that they have to establish to entitle themselves to the use of the property is that they are members of such regular organization.

In determining this matter mere majority will of course be of no consequence. While it is impossible not to feel that it is hardly in accord with republican principles and the spirit of the age that the majority of a congregation who have actually furnished the necessary money should be excluded, while the victory of the minority in such cases will generally prove barren because it will so reduce the income of the church as to deprive such minority of what it had before, while hence the courts should proceed cautiously in sustaining a minority against a majority and should interfere only in clear cases of a serious diversion of the property,<sup>2</sup> yet in determining the part which is acting in harmony with its own law the numerical strength of the various factions is quite immaterial.<sup>3</sup>

No number, however great the majority may be, has the right to secede and take the church property with it to the new affiliation, so long as there remains a faction which abides by the doctrines, principles, and rules of the church government which the united society professed when the land was acquired.<sup>4</sup>

An organized church cannot therefore be divested of its

<sup>1</sup> *Mason v. Hickman*, 4 Ky. Law Rep., 313, 317.

<sup>2</sup> *Everett v. First Presbyterian Church of Asbury Park*, 53 N. J. Eq., 500, 519, 520; 32 Atl., 747.

<sup>3</sup> *Holt v. Downs*, 58 N. H., 170.

<sup>4</sup> *Karoly v. Hungarian Reformed Church*, 91 Atl., 808 (N. J.).

property by even a majority of its members who enter into a new organization, although they adopt the same name,<sup>1</sup> or claim that they have merely "reorganized" the old society.<sup>2</sup> Such majority proves might rather than right. The question, however, is not which party possesses numerical strength but which is in the right according to its own law.<sup>3</sup> Nor does the pronounced numerical weakness of the minority make any difference. Though it consists of but two members,<sup>4</sup> though a church which has become a prey to schisms present as "many frightful heads as did the dragon which the apostle John saw in his vision on the Isle of Patmos," if there is "one righteous life in Sodom, the promise of the covenant and of the law of the land is to him."<sup>5</sup> If a congregation of the associated kind refuses to obey its church law it will be during the continuance of such disobedience in a state of rebellion against its lawfully constituted authority and can be properly excised from the church. If a minority of it in such case is willing to submit to the authority of the general body it will be recognized by the civil courts as the true congregation entitled to the possession and use of the church property.<sup>6</sup> While courts will therefore decide for the majority where it is in the right<sup>7</sup> and acts consistently with the particular and general laws of the organization or denomination to which

<sup>1</sup> *Venable v. Coffman*, 2 W. Va., 310, 320.

<sup>2</sup> *Harper v. Straws*, 53 Ky. (14 B. Mon.), 48.

<sup>3</sup> *Sutter v. First Reformed Dutch Church*, 42 Pa., 503, 511.

<sup>4</sup> *Appeal of First M. E. Church of Scranton*, 16 W. N. C., 245 (Pa.); see also *Ferraria v. Vasconcellos*, 31 Ill., 25, 54, 55.

<sup>5</sup> *Reorganized Church of Jesus Christ v. Church of Christ*, 60 Fed., 937, 953, 954.

<sup>6</sup> *Landrith v. Hudgins*, 121 Tenn., 556, 586; 120 S. W., 783.

<sup>7</sup> *St. Paul's Reformed Church of Bethel Twp. v. Hower*, 191 Pa., 306; 43 Atl., 221; 30 Pitts. Leg. J. (N. S.), 1; *Landis Appeal*, 102 Pa., 467.

it belongs <sup>1</sup> and adjusts itself to its faith and forms of worship <sup>2</sup> they will not hesitate to right the wrongs committed by it where circumstances require such action.<sup>3</sup> The minority when they are pressed from the church by the departure of the majority having the church organization may therefore be justified in taking measures by organization to preserve the identity of the church and its property interests and are entitled to its use and control.<sup>4</sup>

It has been seen that independent congregations and the general bodies of associated churches are alike in that neither has any spiritual superior. It does not follow, however, that they are alike in all other respects. On the contrary, they are quite diverse one from the other in important particulars. Associated churches being highly organized naturally soon develop a form of government which becomes settled. Independent congregations on the other hand, being ideal

<sup>1</sup> *Bentle v. Ulay*, 175 Ind., 494, 497; 94 N. E., 759; *McBride v. Porter*, 17 Iowa, 203, 206; *Miller v. English*, 21 N. J. Law (1 Zab), 317; *Sutter v. First Reformed Dutch Church*, 42 Pa., 503; *Henry v. Dietrich*, 84 Pa., 286; 4 W. N. C., 487; reversing 7 Lanc. Bar, 185; *Long v. Harvey*, 177 Pa., 473; 35 Atl., 869; 39 W. N. C., 123; 34 L. R. A., 169; *Gordon v. Williams*, 3 Leg. Gaz., 113 (Pa.).

<sup>2</sup> *Le Blanc v. Lemaire*, 105 La., 539, 542; 30 So., 135.

<sup>3</sup> *Everett v. Jennings*, 73 S. E., 375 (Ga.); *Brook v. Yadon*, 14 Ky. Law Rep., 863; *Lewis v. Watson*, 67 Ky. (4 Bush), 228; *Harper v. Straws*, 53 Ky. (14 B. Mon.), 48; *Baker v. Fales*, 16 Mass., 488; *Bear v. Heasley*, 8 Mich., 279; 57 N. W., 270; 24 L. R. A., 615; *True Reformed Dutch Church v. Iserman*, 64 N. J. Law, 506; 45 Atl., 771; *Kerr v. Hicks*, 70 S. E., 468 (N. C.); *Schnorr's Appeal*, 67 Pa. (17 P. F. Smith), 138; 5 Am. Rep., 415; *Sutter v. First Dutch Reformed Church*, 42 Pa., 503, 512; *Winebrenner v. Colder*, 43 Pa., 244; *Jones v. Wadsworth*, 11 Phila., 239; 33 L. I., 590; s. c. 416; 4 W. N. C., 514 (Pa.); *Bose v. Christ*, 44 Atl., 240; 193 Pa., 13; *App v. Lutheran Congregation*, 6 Pa. (6 Barr), 201; *Hoskinson v. Pusey*, 32 Gratt, 428 (Va.); *Cape v. Plymouth Congregational Church*, 117 Wis., 150; 93 N. W., 449.

<sup>4</sup> *Mt. Zion's Baptist Church v. Whitmore*, 83 Iowa, 138, 156; 49 N. W., 81; 13 L. R. A., 198.

democracies, will ordinarily conduct all matters of government by mere majority vote. While, therefore, the courts in the case of associated churches have a system of government by which they can judge whether a majority has acted rightly or wrongly, they generally have, in the case of independent churches, little more than the vote itself to guide their decision. Since unanimity of thought and conduct is a goal which, even if it were desirable to be reached, will forever remain unattainable<sup>1</sup> it follows that in independent societies which owe no fealty or obligation to any higher authority, the will of the numerical majority of its members must ordinarily determine the action of the church upon all questions of church government,<sup>2</sup> and be the law of the church.<sup>3</sup> Clear indeed must be the case which will result in setting aside the cardinal principle which lies at the foundation of free government in church as well as in state, viz. the right of the majority to rule.<sup>4</sup>

It is the right of a majority to control in all civil affairs and not less in the management of the temporalities of a religious society than any other. This is a cardinal principle of our free institutions. It pervades the whole structure of society. Where men differ in opinion the will of the majority must prevail. . . . When individuals unite their interests to accomplish a common end they should expect and be willing that a majority of the associates should govern in all matters of common interest. They may be supposed to enter the society with the knowledge that they are to be governed by this principle.<sup>5</sup>

<sup>1</sup> *Phillips v. Westminster Church*, 225 Pa., 62, 64; 73 Atl., 1062.

<sup>2</sup> *Stogner v. Laird*, 145 S. W., 644, 648 (Tex.).

<sup>3</sup> *United Zion's Congregation v. German Ev. Prot. Church*, 5 Kulp, 441 (Pa.).

<sup>4</sup> *Bear v. Heasley*, 98 Mich., 279; 57 N. W., 270; 24 L. R. A., 615.

<sup>5</sup> *Matter of the Reformed Dutch Church in Saugerties*, 16 Barb., 237, 243.



For the same reason for which in the associated form of church government, where each church is a member of a larger organization which has its tribunals for the settlement of disputes, the local churches and their members are held bound by the decisions thereof in the civil courts, the members of congregations organized independently of any larger organization are held bound by the decisions of such congregation.<sup>1</sup> Property belonging to an independent church will therefore in case of a schism be generally awarded to that faction which constitutes the majority.<sup>2</sup> This has been done in regard to a Baptist,<sup>3</sup> Lutheran<sup>4</sup> Congregational<sup>5</sup> church and to a body of religionists which wavered between the Lutheran and the reformed faith.<sup>6</sup> It has been said that a contrary rule "would be as absurd as to say that a lesser number contained more units than a greater."<sup>7</sup> In an Iowa case it has been held that the majority of a Lutheran congregation at the time of the break controlled its destiny though the other party had contributed more money and had since the schism become the stronger of the two.<sup>8</sup>

<sup>1</sup> Jarrell v. Stroles, 20 Tex. Civ. App., 387, 395; 49 S. W., 904.

<sup>2</sup> Wallace v. Hughes, 131 Ky., 445, 468; 115 S. W., 684.

<sup>3</sup> Gewin v. Mt. Pilgrim Baptist Church, 51 So., 947; 166 Ala., 345; Hadden v. Chorn, 47 Ky. (8 B. Mon.), 70; Le Blanc v. Lemaire, 105 La., 539; 30 So., 135; Windley v. McCliney, 161 N. C., 318; 77 S. E., 226; Fort v. First Baptist Church of Paris, 55 S. W., 402 (Tex.); First Baptist Church of Paris v. Fort, 93 Tex., 215; 54 S. W., 892; 49 L. R. A., 617; Stogner v. Laird, 145 S. W., 644 (Tex.); Gipson v. Morris, 67 S. W., 433; (Tex. Civ. App.), s. c. 31 Tex. Civ. App., 645; 73 S. W., 85; s. c. 36 Tex. Civ. App., 593; 83 S. W., 226; Jarrell v. Sproles, 20 Tex. Civ. App., 387; 49 S. W., 904.

<sup>4</sup> Organ Meeting House v. Seaford, 16 N. C. (1 Dev. Eq.), 453; Bartholomew v. Lutheran Congregation, 35 Ohio St., 567.

<sup>5</sup> Nance v. Busby, 91 Tenn., 303; 18 S. W., 874; 15 L. R. A., 801.

<sup>6</sup> United Zion's Congregation v. German Evangelical Protestant Church, 5 Kulp, 441.

<sup>7</sup> Organ House Meeting House v. Seaford, 16 N. C., 453, 455.

<sup>8</sup> Dressen v. Brameier, 56 Iowa, 756; 9 N. W., 193.

In the ascertainment of the party which forms the majority the ordinary rules of law applicable to ordinary elections will be followed. It is settled beyond controversy that an amendment to a state constitution submitted to a vote of its electors for adoption and which requires merely a majority vote will be declared adopted if at the election a majority of those who use their franchise vote for it. Similarly, in church affairs, a majority vote will be construed to mean a majority vote of those present at a meeting, not a vote of all the members present or absent.<sup>1</sup> "A majority consists of more than one-half of those who vote at a given election not of those who might have voted but did not vote."<sup>2</sup> It has therefore been held in the important series of cases which arose out of a schism in the United Brethren in Christ that the majority of a vote of a little more than 50,000 out of a total membership of over 200,000 was sufficient to legally amend the constitution of the church in important particulars.<sup>3</sup>

It has already been intimated that a somewhat different situation may be presented where a general associated church body has divided. In such case it may even be absolutely impossible to apply the majority rule. It is a custom of the Quakers not to decide questions by vote at all but to allow their moderator to ascertain and announce the solid sense of the meeting from its prevailing spirit as evidenced by the discussions that have taken place. This custom has not prevented schisms within the church. These have in part arisen over points of doctrine and in part over the question whether this or that particular person representing a policy over which a contrariety of opinion had developed was to

<sup>1</sup> *Craig v. First Presbyterian Church*, 88 Pa., 42; 32 Am. Rep., 417.

<sup>2</sup> *Schlichter v. Keiter*, 156 Pa., 119, 146; 22 L. R. A., 161; 27 Atl., 45.

<sup>3</sup> See chapter six of this book.

be elected to or continued in the important position of moderator. Since the faith of the Quakers permits of important changes in matters of belief the question which party adhered to the old belief has been quite immaterial. The property has therefore been awarded to that part which retained the old form of organization, the old officers, and which met at the time and place appointed by the last "meeting" prior to the division.<sup>1</sup> Says the Indiana Court in one of these cases:

If there be within the organization officers or duly appointed persons in whom the powers of such control are vested those who adhere to the acknowledged organism by which the organization is governed are entitled to the use of the property without reference to whether they constitute a majority of members.<sup>2</sup>

And the Idaho Court in a different controversy uses the following language:

Where a division occurs in a church or religious organization and one faction withdraws or forms another organization the title to the property will remain in the old organization and be subject to the control and disposition of those who adhere to the doctrines and tenets of such church or organization as originally taught.<sup>3</sup>

Nor does even a change of name make any difference provided that the old organization be retained. Church so-

<sup>1</sup> *Harrison v. Hoyle*, 24 Ohio St., 254; *Earle v. Wood*, 62 Mass. (8 Cush.), 430; *Hendrickson v. Decow*, 1 N. J. Eq. (1 Saxt.), 577; see *ex parte Shoup*, 9 Ohio Dec., 648; 16 W. L. Bul., 71 (Pa.); *Field v. Field*, 9 Wend., 394 (N. Y.).

<sup>2</sup> *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind., 136, 155, 156.

<sup>3</sup> *Apostolic Holiness Union of Port Falls v. Knudson*, 123 Pa., 473, 475; 21 Idaho, 589, 594.

cieties, like individuals, may change their names without losing their identity. Such change may or may not be suggestive of a revolution. It may signify much or nothing. It may be an indication that the society has departed from its original faith and government or it may be a mere yielding to the tendency to use popular rather than technical terms. The particular circumstance must decide the significance of such change in each particular case. Such change of name has therefore been held not to affect the question of identity where it has been the result of a union of two large church bodies in which the smaller of the two yielded up its name<sup>1</sup> or where it has grown out of a voluntary division of a church body in which one part to distinguish itself from the other has adopted a slightly different name.<sup>2</sup>

The supreme importance of the maintenance of the old organization in case of a schism must now be apparent. The identity of a divided church must be determined by a reference to the fundamental law of the church, which is the original contract under which its organization is effected and in pursuance of which, and subject to which, all the property acquired for its use becomes vested in the church. An open flagrant avowed violation of this compact by any persons theretofore members of the church is necessarily a withdrawal from the lawful organization of the church, and a forfeiture of any rights to continued membership therein and to the control and enjoyment of the property conferred on such organization.<sup>3</sup> Adherence to the original organization under such circumstances is without a question the clearest proof of adherence to the fundamental laws of

<sup>1</sup> See Cumberland Presbyterian Church Union, chapter six of this book.

<sup>2</sup> See Methodist Episcopal Church Division, chapters six and seventeen of this book.

<sup>3</sup> *Brundage v. Deardorf*, 55 Fed., 839, 846.

the church of which the matter is capable. The fact that one party has withdrawn<sup>1</sup> or "come out" from the church<sup>2</sup> while the other has retained the old organization will be conclusive in settling the question of identity in favor of the latter. "It is a well settled principle that, when part of any religious association separate and establish a new society, they cease to be members of the original society, and have no longer any claim to their property."<sup>3</sup>

Nor is the personal liberty of the individual member violated by this principle. He may carry his membership elsewhere.<sup>4</sup> He has the liberty to leave a church which has become obnoxious to him. This, however, does not mean that he may take its property with him.<sup>5</sup> The guarantee of religious freedom "does not guarantee freedom to steal churches."<sup>6</sup> It does not confer on seceders the right of appropriating property consecrated to other uses by those who are now sleeping in their graves. Their withdrawal will therefore be considered as an abandonment on their part of the rights which they held in the property of the society<sup>7</sup> and they will not be allowed to recover it from

<sup>1</sup> *Happy v. Morton*, 33 Ill., 398; *Park v. Chaplin*, 96 Iowa, 55; 64 N. W., 674; 31 L. R. A., 141; 59 Am. St. Rep., 353; *Pine Hill Lutheran Congregation v. St. Michael's Evangelical Church*, 48 Pa., 20; *Fernstler v. Seibert*, 114 Pa., 196; 6 Atl., 165; *Gordon v. Williams*, 3 Leg. Gaz., 113 (Pa.).

<sup>2</sup> *Hadden v. Chorn*, 47 Ky. (8 B. Mon.), 77; *Wheaton v. Gates*, 18 N. Y., 395.

<sup>3</sup> *Associate Reformed Church v. Theological Seminary*, 4 N. J. Eq., 77, 98.

<sup>4</sup> *Godfrey v. Walker*, 42 Ga., 562, 573.

<sup>5</sup> *Smith v. Pedigo*, 145 Ind., 361, 364; 33 N. E., 777; 44 N. E., 363; 19 L. R. A., 433; 32 L. R. A., 838.

<sup>6</sup> *Schnorr's Appeal*, 67 Pa., 138; *Roshi's Appeal*, 69 Pa., 462, 469; 8 Am. Rep., 275.

<sup>7</sup> 20 Am. and Eng. Ency. of Law, 791; cited in *Manning v. Shoemaker*, 7 Pa. Super. Court, 375; see *Venable v. Coffman*, 2 W. Va., 310, 324.

those who continue the old organization.<sup>1</sup> Though they may be in theological belief and religious observances identical with the body from which they withdrew they are ecclesiastically distinct from it.<sup>2</sup> The question being one of identity "not of individuals but of the body"<sup>3</sup> and the members having rights in the property only as members<sup>4</sup> by their refusal to submit to the government of the church, they lose that identity, that character which alone gives them rights in its property.<sup>5</sup>

Nor do they by such withdrawal destroy the church as such.

The church possesses the element or quality of unity and the power of perpetuity, and such a society can no more be affected by the withdrawal of a faction of its members than the universe can be destroyed by the disappearance or extinguishment of some of heaven's lesser luminaries.<sup>6</sup>

Without even an attempt at a voluntary separation there is no safe principle which entitles a portion of those who entertain adverse feelings and views to disfranchise the rest, declare the ancient body dissolved or the society broken up into its individual elements and which allows them to erect among themselves a new body and declare it to be the ancient one resettled on its ancient foundation and principles.<sup>7</sup> Whether such portion is the majority or the minority of

<sup>1</sup> *Pine Hill Lutheran Congregation v. St. Michael's Evangelical Church*, 48 Pa. (12 Wright), 20, 21.

<sup>2</sup> *Schlichter v. Keiter*, 156 Pa., 119, 147; 22 L. R. A., 161; 27 Atl. 45.

<sup>3</sup> *Harper v. Straws*, 53 Ky. (14 B. Mon.), 48.

<sup>4</sup> *Godfrey v. Walker*, 42 Ga., 562, 573.

<sup>5</sup> *Miller v. Gable*, 2 Denio, 492, 512; reversing 10 Paige, 627 (N. Y.).

<sup>6</sup> *Griggs v. Middaugh*, 10 Ohio Dec. Rep., 643; 22 Wkl. Law Bul., 367, 369.

<sup>7</sup> *Hendrickson v. Decow*, 1 N. J. Eq. (1 Saxt.), 577, 644.

the society the fact that it has established a new organization with part of the members of the old

while the other party remained an organized body such as it was before except in numbers with the same officers, the same books, the same organization, and all the *indicia* of identity as a body, and with numbers, whether equal to those of the other party or not, manifestly sufficient to maintain themselves as a religious society or congregation,<sup>1</sup>

is decisive on the question of identity. While ordinarily it will be the majority which will remain in control of the organization and the minority which will withdraw, the situation may and not infrequently is reversed without in the least affecting the rule. Those who remain with the original organization whether majority or minority are thus entitled to the use and control of the property.<sup>2</sup>

Of course persons to recover property carried by a majority to another connection must be members of such society. It has therefore been said, in a case where property had been diverted from the Methodist Episcopal Church South to the African Methodist Episcopal Church and certain members of the latter had been expelled or were being disciplined and now sought to recover its property for the Methodist Episcopal Church South, that the courts will not encourage the refractory and evil-disposed to stir up strife and bitterness by decreeing the property to a few colored persons who, to vent their ire, merely posed as members of the Methodist Episcopal Church South.<sup>3</sup>

While stress is laid in the general rule above quoted on adherence to the law which a religious society has created

<sup>1</sup> Harper v. Straws, 53 Ky. (14 B. Mon.), 48, 55.

<sup>2</sup> Apostolic Holiness Union of Port Falls v. Knudson, 21 Idaho, 589, 594; 123 Pac., 473.

<sup>3</sup> Newman v. Proctor, 73 Ky. (10 Bush), 318.

for itself, it must not be forgotten that adherence to its faith is generally one of the requirements of this law and hence will be the decisive factor where the separation has taken place over a doctrinal question.<sup>1</sup> In fact the profession of the faith of a church forms, together with the submission to its government, the two necessary prerequisites of membership.<sup>2</sup> "When men form themselves into associations for the worship of God some correspondence of views, as to the nature and attributes of the Being who is the object of worship, is necessary."<sup>3</sup> When a church therefore is erected for the use of a particular denomination a majority of its members cannot abandon its tenets and doctrines and retain the right to use its property.<sup>4</sup> The existence of adverse feelings and views will not deprive those who retain their ancient faith, maintain their wonted testimony, and adhere to their religious standards of the name the rights and the privileges of the church.

There can be no question that those who retain the original faith of a church or congregation are entitled to retain also the property acquired by or given to such church or congregation. Those who fall away from the original faith, whether the majority or the minority, can have no right to take with them any of the property of the church. The property having been given to the church, or acquired by it, for the purpose of sus-

<sup>1</sup> *Reorganized Church of Jesus Christ v. Church of Christ*, 60 Fed., 937; *Christian Church of Sand Creek v. Church of Christ*, 219 Ill., 503; 76 N. E., 703; *Yanthis v. Kemp*, 43 Ind. App., 203; 85 N. E., 976; s. c. 86 N. E., 451; *Brook v. Yadon*, 14 Ky. Law Rep., 863; *Gardin v. Penick*, 68 Ky. (5 Bush), 110; *United Zion's Congregation v. German Ev. Prot. Church*, 5 Kulp, 441.

<sup>2</sup> *Finley v. Brent*, 87 Va., 103, 107; 12 S. E., 228; 11 L. R. A., 214; *Den v. Bolton*, 12 N. J. Law (7 Halst.), 206.

<sup>3</sup> *Hendrickson v. Decow*, 1 N. J. Eq. (1 Saxt.), 577, 674.

<sup>4</sup> *Ferraria v. Vasconcellos*, 31 Ill., 25, 54, 55. *True Reformed Dutch Church v. Iserman*, 64 N. J. Law, 506; 45 Atl., 771.



taining or spreading the belief taught by the church and the practice of its doctrine, it would be manifestly inequitable that members afterwards rejecting the faith should have any part in the property used in disseminating the same faith.<sup>1</sup>

While courts therefore have no concern with the question how far the separation may have been proper or whether it will stand the scrutiny of the great day of account they are not only permitted but it is their express duty to ascertain by competent evidence the religious principles of any church society which on account of doctrinal difficulties has divided into hostile camps both of which claim the property of the former united body.<sup>2</sup> Such religious principles may find expression in the most peculiar manner. In a Mennonite society the wearing on the part of its minister of a coat of a cut hitherto unheard of among these simple folks may symbolize and signify rebellion against their ancient faith and will therefore entitle those who oppose the wearing of such "new fangled" garment to the church property.<sup>3</sup>

What has been said must however not be understood to mean that a faith once adopted must forevermore remain stationary. From its very origin a change has been continually going on in the Christian Church without producing a forfeiture of its property. Such change is not incompatible with the legitimate succession but is rather a necessary element in its normal progress. Whatever limits theologians may fix for the growth of the church the courts can fix none since they cannot decide that any particular church is perfect. The churches must in their very nature "grow with society and in adaptation to its intelligence and wants,

<sup>1</sup> *Smith v. Pedigo*, 145 Ind., 361, 424; 33 N. E., 777; 44 N. E., 363; 19 L. R. A., 433; 32 L. R. A., 838.

X <sup>2</sup> *Landrith v. Hudgins*, 121 Tenn., 556; 120 S. W., 783; *Hendrickson v. Decow*, 1 N. J. Eq. (1 Saxt.), 577, 633, 634, 645.

<sup>3</sup> *Landis Appeal*, 102 Pa., 467.

and times and circumstances, and in so far as they fail in this, they detract from their social identity and social life and begin to decay.”<sup>1</sup> It has therefore been said that courts should not interfere to prevent the majority of the corporators in a religious society from introducing such changes in the doctrines or modes of worship in their churches as they might deem expedient.<sup>2</sup> A declaration of trust “for the worship of God” to be preserved for all times “for the pious uses aforesaid” made in a bond for a deed to obligees described as the present officers of the Calvinistic Church has therefore been held within limits to “vest a discretion in the congregation, or the trustees as their representatives, upon the subjects of government and of doctrine, to be exercised according to the exigencies of the case.”<sup>3</sup> Accordingly a Jewish society has been allowed to change from the “Askinaz” to the “Swards” ritual<sup>4</sup> and a Lutheran congregation has been allowed to adopt revivals and protracted meetings<sup>5</sup> without incurring a forfeiture of its property.

That no precise rules can be laid down for such growth is unfortunate. Whether a certain change is a legitimate growth or an illegitimate digression will be a question over which not only the parties immediately concerned and their attorneys but also the civil courts may quite often disagree. We cannot better close this discussion than in the words of the Pennsylvania Court: “That acorn: follow the idea of identity in it. Future generations may point to that old oak tree some centuries old, with many of its branches gone, and decay commenced, and say: there it is. That helpless infant: the next generation may point to a Newton or a Washington, with his mature growth, and his immense accretions

<sup>1</sup> *McGinnis v. Watson*, 41 Pa., 9, 28.

<sup>2</sup> *First Baptist Church v. Witherell*, 3 Paige 296, 304; 24 Am. Dec., 223.

<sup>3</sup> *Miller v. Gable*, 2 Denio, 492, 548; reversing 10 Paige 627 (N. Y.).

<sup>4</sup> *Saltman v. Nessen*, 201 Mass., 534; 88 N. E., 3.

<sup>5</sup> *Trexler v. Menning*, 2 W. N. C., 677; 33 L. I., 321 (Pa.).

of intellectual power, and moral majesty and social influence and say: there he is." <sup>1</sup>

To sum up: Schisms are divisions of churches growing out of differences of opinion over doctrine or government. The controversies over property which spring up in connection with them must be decided in favor of that party which represents the legitimate succession of the old united body. This is quite an easy matter in regard to schisms occurring in local congregations of the associated or connectional character. The property will be awarded to that part, whether majority or minority, which adheres to the general body of which the congregation is an integral part. Where, on the other hand, the division has driven a rift into an independent society or into the general body of an associated church the matter is not so simple. There being no superior body in either of these cases, the courts will be forced to decide for themselves which of the two bodies before it retains its identity with the body of which both at one time were parts. This necessarily involves an investigation into the faith and government, the laws and principles, the usages and customs which were accepted by the united body before its division. The property will be awarded to that part which acts in harmony with them or comes closest to such action. Since independent congregations are generally ideal democracies ruled by majority vote under the simplest form of organization such majority vote will often be the only criterion of which courts can take hold to decide the questions presented by a schism in such bodies. The situation will be different in regard to general bodies which by force of circumstances have developed a more complex form of organization. But even in such bodies the majority party will enjoy considerable practical advantages and will generally be successful. On the whole it may be said that victory for the majority is the rule while victory for the minority is the exception.

<sup>1</sup> McGinnis v. Watson, 41 Pa., 9, 28.

## CHAPTER VIII

### CHURCH DECISIONS

THE church tribunals of the established church in England occupy a place in the jurisprudence of that country which is exactly parallel to that occupied in this country by inferior courts. Though their proceedings are according to the forms of the civil law, they are recognized as courts not only by the church but also by the state. Their decisions, provided they have not overstepped the bounds of their jurisdiction, are final and conclusive, unless they are reversed on appeal.

A different situation exists in America, where there is no established church, and where church and state are separated by the Federal as well as the state constitutions. Under these constitutions church relationship has become entirely a matter of individual choice. The state neither establishes, subsidizes nor supports any religion. It follows that the decisions rendered by the tribunals of the voluntary associations through which church work is carried on in America are removed from the domain of public law and are not technically judgments which must be respected as such by the courts.

But while this is true, these decisions nevertheless receive great consideration. In giving this consideration, however, courts are generally quite in the dark as to the proper basis on which it is given. It has been stated that church relationship is not contractual but "stands upon an altogether higher plane."<sup>1</sup> Just what this higher plane may be is a

<sup>1</sup> *Nance v. Busby*, 91 Tenn. (7 Pickle), 303; 18 S. W., 874; 15 L. R. A., 801.

mystery which no court has ever attempted to solve. Nevertheless, at one time or another a great many of the various courts in the United States have in some form or another acted on the supposition that there is such a thing and in consequence have made this important subject an inextricable labyrinth of error. It will therefore be the purpose of the following pages to trace this error to its source and construct if possible a reasonable theory on which the decision (though not the reasoning) of a majority of the decided cases can be supported.

It is not very often that an erroneous conception obtaining a foothold in the law can be so clearly traced as in the case in hand. Nor is it an obscure court far away from the main arteries of our national life which bears the principal responsibility. It is in fact a no less august tribunal than the United States Supreme Court which has produced the leading case, announcing and defending this error, and is thus primarily responsible for the confusion which has ensued. All previous cases, some of which were correctly, some incorrectly, reasoned and decided, have exercised so little influence that they may now well be disregarded.

The controversy out of which this leading case<sup>1</sup> has grown arose out of certain dissensions caused by the Civil War in the Presbyterian Church of the United States. The General Assembly of this church had, despite the fact that its constitution provided that it was not to "intermeddle with civil affairs which concern the Commonwealth," on various occasions stanchly expressed its sense of the obligation of all good citizens to support the government in its struggle with the Confederacy. When the Emancipation

<sup>1</sup> *Watson v. Jones*, 80 U. S. (13 Wall.), 679. The following statement is gleaned from the three *Watson* cases herein mentioned decided respectively by the United States Supreme Court and by the Kentucky and Missouri courts of last resort.

Proclamation was issued, it had expressed itself favorable to it and opposed to slavery. In May, 1865, after the conclusion of the war, it had determined upon a policy by which persons from Southern States who applied for employment as missionaries or ministers were required to disclose their sentiment on the question of slavery. If they were found to harbor sentiments favorable to it they were required to repent and forsake them as sins. This policy in September of the same year led the Presbytery of Louisville, Ky., to promulgate a "declaration and testimony against the erroneous and heretical doctrines and practices which have obtained and been propagated in the Presbyterian Church in the United States during the last five years." This action not only split the Synod of Kentucky, of which the Presbytery was a part, in twain, but also caused great commotion in the "Walnut Street Presbyterian Church" of Louisville, which was a part of the Presbytery. Two parties developed in this church, the larger of which favored the General Assembly and the Northern cause, while the smaller allied itself with the "Presbyterian Church of the Confederate States," and was fortunate enough to control both the trustees and elders of the church, as well as the pastor.

This state of affairs in January, 1866, led to an attempt, seconded and supported by the general assembly of the church, to elect additional officers of the church and thus produce a majority favorable to the Northern side. This attempt naturally was resisted by the officers. The matter was carried into the state court and resulted in 1867 in a triumph of the Southern side, and an adjudication that the General Assembly had overstepped its powers in this matter.<sup>1</sup>

<sup>1</sup> *Watson v. Avery*, 65 Ky. (2 Bush), 348; s. c. 66 Ky. (3 Bush), 635. See also *Gartin v. Penick*, 68 Ky. (5 Bush.), 110.

This triumph was the sweeter to the Southern sympathisers as the General Assembly had some time previous in the same year, at its regular session at St. Louis, Mo., by an *ex parte* decree without the form of a trial, excluded from representation at its sessions that part of the Louisville Presbytery and Kentucky Synod which favored the Southern view, as "in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly." This action had not merely widened the breach that existed in the church, but had actually divided it into two hostile camps, when the decision of the Kentucky Court of Appeals was handed down.

It was now perfectly obvious that the Northern sympathisers could not succeed in the State Court. They were not, however, for that reason willing to give up the fight. The residence of some of their adherents across the Ohio River in Indiana gave them their opportunity to transfer the controversy to the Federal Courts. This was done in 1868. A suit was brought in that year in the United States Circuit Court of Kentucky. It was this suit which was argued before the United States Supreme Court in 1870, was decided in 1871, and appears among the decisions of that court under the title of *Watson v. Jones*.<sup>1</sup> The court in the absence of two of its members, and over the dissent of two others, held that the suit in the State Court was no bar to the present action, and that the Northern party on account of its recognition by the General Assembly, was entitled to the property. In the course of the opinion, which was written by Justice Miller, the questions that come before the courts concerning the rights to church property are classified as follows:

1. Where the property in controversy is by the terms of the instrument under which it is held devoted to the teach-

<sup>1</sup> 80 U. S. (13 Wall.), 679.

ing, support, or spread of some specific form of religious doctrine or belief.

2. Where the property is held by an independent congregation.

3. Where the property is held by a congregation which is subordinate to some general church organization.<sup>1</sup>

With the first of these classes this chapter has nothing to do. In regard to the third class the court lays it down that whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest church judicatory to which the particular congregation is subject, and to which the matter has been carried, the legal tribunals must accept such decision as final and as binding on them in their application to the case before them. In regard to the second class it is laid down that, where in such an organization the government is vested in particular officers their action is conclusive, while otherwise the decision will simply be by majority vote of the members, and will have the same effect. This ruling as to the decisiveness of these decisions is supported by reasoning, to the effect that since ecclesiastical courts are the best judges of these matters, and since our system of separation of state and church demands such a recognition, the decisions of ecclesiastical tribunals even on the question of their own jurisdiction are conclusive.

It is certainly to be regretted that such an important and far reaching decision was rendered by the United States Supreme Court, not only after this very controversy in its earlier stages had been adjudicated the other way by a well balanced State Court of recognized ability in an opinion eminent for its sound reasoning, but also in a case in which that very State Court was the court of last resort for such and similar controversies while the jurisdiction of the United

<sup>1</sup> *Watson v. Jones*, 80 U. S. (13 Wall), 679, 722.



States Supreme Court was but "auxiliary" to it and rested merely on diverse citizenship.<sup>1</sup> Nor is the regret that the Court saw fit to register the decree of the Presbyterian General Assembly made *ex parte* on the question of seating contesting delegations, instead of the deliberate judgment of the Appellate Court of the very state in whose midst the controversy had arisen and adjudicating on the facts which directly led up to such exclusion by the General Assembly, diminished when it is considered that this decision was rendered during the reconstruction period in a matter involving the question of slavery, in which the Court may well have unconsciously felt itself called upon to uphold the loyal action of the General Assembly of the Presbyterian church as against the merely logical decision of the court of a border state holding the action of that very body on a matter closely interwoven with and leading up to the present controversy to be void and of no effect. However that may be, the decision, weakened as it is by these facts, has nevertheless exercised a tremendous influence over the subject of the decisiveness of church decisions, and therefore occupies a distinct place in the history of the American law.

To forestall any misapprehension it may be well at the present time to remark that no stress will be laid in the following pages upon the difference between the adjudication of the church tribunals of independent and of associated churches. These differences have been well discussed in *Watson v. Jones* and the conclusions there reached on this matter may well be allowed to pass undisputed. Whether the highest ecclesiastical court is the congregation itself in whose midst the dissension has arisen or some individual or committee of it, or whether it is some more general body or some committee of it, or an individual dignitary such as a bishop or the Pope at Rome, can make no difference for our

<sup>1</sup> *Watson v. Garvin*, 54 Mo., 353, 384.

present purposes. The question with which we are concerned is the decisiveness of such decision by whatever body or individual it may have been rendered. No distinction will therefore be made between cases arising out of independent congregations and associated organizations so far as the purposes of this chapter are concerned.

It is next in order to examine critically the grounds on which the court bases its opinion. The first reason adduced is that "a broad and sound view of the relations of church and state under our system of laws" demands that

whenever the questions of discipline, or of faith, or ecclesiastical rule, custom or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them in their application to the case before them.<sup>1</sup>

The doctrine of the English courts as announced in such cases as *Attorney General v. Pearson*,<sup>2</sup> and *Craigdallie v. Aikman*,<sup>3</sup> and applied to dissenting churches, is conceded to be otherwise, but an attempt is made to explain it away by saying that the English Chancellor, being himself an ecclesiastic, would feel "even in dealing with a dissenting church, but little delicacy in grappling with the most abstruse problems of theological controversy, or in construing the instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages."<sup>4</sup> The court then lays it down correctly that those who united themselves to a religious society do so with an implied consent to submit themselves to it and then concludes that "it is of the essence of these religious unions and of their right

<sup>1</sup> *Watson v. Jones*, 80 U. S. (13 Wall.), 679, at 727.

<sup>2</sup> 3 *Merival*, 353.

<sup>3</sup> 2 *Blight*, 529.

<sup>4</sup> *Watson v. Jones*, *supra*, at 728.

to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.”<sup>1</sup>

It is respectfully submitted that the Supreme Court by this decision has impeded the progress of religious liberty instead of furthering it. While it is true, as said in other cases, that “in matters purely religious or ecclesiastical the civil courts have no jurisdiction,”<sup>2</sup> while civil government “has no just or lawful power over the conscience, or faith or forms of worship, or church creeds,”<sup>3</sup> while religious freedom “would not long survive if one member of a religious organization, feeling himself aggrieved in some matter of religious faith or church polity, could successfully appeal to the secular courts for redress,”<sup>4</sup> it is not true that the exercise of jurisdiction by civil courts on proof of want of jurisdiction in the church authorities would be “the entering wedge whereby the symmetry of our governmental system with regard to church and state might readily be destroyed.”<sup>5</sup> On the contrary, a denial of the right of civil tribunals in a proper case to construe the constitution, canons or rules of the church and revise its trials and the proceedings of its governing bodies, instead of preserving religious liberty, destroys it *pro tanto*. If a person who connects himself with a religious association is to be placed completely at its mercy irrespective of the agreement which he has made with it, the conception of religious liberty as applied to such a case becomes a farce, a delusion and a snare. Such

<sup>1</sup> *Watson v. Jones*, *supra*, at 729.

<sup>2</sup> *Watson v. Garvin*, 54 Mo., 353, 378.

<sup>3</sup> *Gartin v. Penick*, 68 Ky. (5 Bush.), 110, 117.

<sup>4</sup> *Wehmer v. Fokenga*, 57 Neb., 510, 518, 519; 78 N. W., 28.

<sup>5</sup> *McGuire v. St. Patrick's Church*, 7 N. Y. Supp., 345, 352; 27 St. Rep., 192; 54 Hun., 207.

a conception opens the door wide for the most odious form of religious tyranny. It leaves those in control of church affairs entirely at liberty, so far as the courts are concerned, to do as they please irrespective of the understandings which they have with the other members. It is perfectly patent that the most important ecclesiastical trials, like trials for impeachment of civil officers, are sometimes characterized by a great want of justice and fairness and deeply imbued with a spirit of bitterness and malevolence. And this condition of affairs is not confined to the litigants. Ecclesiastical tribunals themselves are "proverbially influenced more by prejudice and passion than any other species of judicial tribunal."<sup>1</sup> To afford to individual members of a church no protection whatever against a usurpation on the part of those in power is not only a travesty on justice but a blow in the face of the doctrine of religious liberty. While such a result may accord with the conception of an "*imperium in imperio*" a double kind of government "congenially moulded and intended for harmonious coöperation—the one political and the other ecclesiastical—each aiming at the security of liberty civil and religious,"<sup>2</sup> it does not accord with the facts. It is the duty of the State in a proper case to enforce the contracts made by its citizens. The fact that a contract bears a religious character cannot make a difference. To maintain religious liberty the courts must uphold not only the legal rights of religious organizations but also the legal rights of all their members. They must protect the most exalted prelate of the church as well as "the lowliest follower of Him who was meek and lowly."<sup>3</sup> The supreme law of the church must be supreme alike over

<sup>1</sup> I. F. Redfield in 10 Am. L. Reg. (N. S.), 309.

<sup>2</sup> Gartin v. Penick, 68 Ky. (5 Bush), 110, 116.

<sup>3</sup> Wardens of Church of St. Louis v. Blanc, 8 Rob., 51 (La.).

church tribunal and the people. If it only binds the latter the supreme judicatory of the church at once becomes a government of despotic and unlimited powers,<sup>1</sup> fully capable unless restrained by the civil courts of destroying the rights of such portion of the members as may have become *personae non gratae* to it.

The court, however, does not rest its conclusion entirely upon this one misconception. It adduces another in the form of the contention that church tribunals are better judges of the ecclesiastical law than civil courts can ever be. After pointing out that the various associated church organizations each have a body of constitutional and ecclesiastical law to be found in their constitutions, books of discipline, collections of precedents and usages and customs that task "the ablest minds to become familiar with," the court concludes that to allow an appeal from the decisions of their church tribunals to the civil courts would permit "an appeal from the more learned tribunal in the law which should decide the case, to one which is less so."<sup>2</sup>

It must be clear that this contention cannot supply an adequate reason for the courts to abdicate their judicial functions. While it may be true that they are "poorly equipped for the satisfactory adjustment of such difficulties,"<sup>3</sup> while in consequence they "take up matters of religious doctrine with extreme reluctance,"<sup>4</sup> while by undertaking such a task they may "involve themselves into a sea of uncertainty and doubt"<sup>5</sup> the difficulty of their task cannot furnish a valid

<sup>1</sup> *Watson v. Avery*, 65 Ky. (2 Bush.), 332, 349.

<sup>2</sup> *Watson v. Jones*, *supra*, at 729. See *German Reformed Church v. Commonwealth*, 3 Pa. St., (3 Barr.), 282.

<sup>3</sup> *Fort v. First Baptist Church of Paris*, 55 S. W., 402, 406 (Tex.).

<sup>4</sup> *East Norway Lake Church v. Halvorson*, 42 Minn., 503, 507; 44 N. W., 663.

<sup>5</sup> *German Reformed Church v. Commonwealth*, 3 Pa. St. (3 Barr.), 282, 291.

reason for shirking their sworn duty. Their task in such a case can be no more difficult than the determination which of two contending factions in an independent congregation or general body of associated churches is the true church entitled to its property. Nor are the questions arising under deeds which dedicate the property "to the teaching, support or spread of some specific form of religious doctrine or belief"<sup>1</sup> apt to be of a simpler nature. In the first of these cases the court of necessity must decide which of the two conflicting bodies, both of which will usually have produced some kind of a decision favorable to it, is the true church, before the decision reached by such body can be given effect by it.<sup>2</sup> In the second case the Supreme Court itself admits that it is its obvious duty in a case properly made "to see that the property so dedicated is not diverted from the trust which is thus attached to its use."<sup>3</sup> It is not perceived why the difficulty of the matter should make a difference in a case in which the subject has been passed upon by an ecclesiastical tribunal, whose existence is not disputed. Ecclesiastical laws come before the civil courts not as laws but as facts. If they are not sufficiently advised concerning them, "it is their duty to make themselves acquainted with them in all their bearings," and not blindly to register the decrees of such church tribunals as may have passed on them.<sup>4</sup>

Basing its decision on the difficulty of overhauling church decisions and on its misconception as to the nature of religious liberty under our form of government, the court now proceeds to overrule the contention that the Presbyterian

<sup>1</sup> *Watson v. Jones*, *supra*, at 722.

<sup>2</sup> *Brundage v. Deardorf*, 55 Fed., 839, 847; *Smith v. Pedigo*, 145 Ind., 361, 408; 33 N. E., 777; 44 N. E., 363; 19 L. R. A., 433; 32 L. R. A., 838.

<sup>3</sup> *Watson v. Jones*, *supra*, at 703.

<sup>4</sup> *Watson v. Garvin*, 54 Mo., 353, 377.

Assembly had no jurisdiction to render the decree on which the Northern faction of the Walnut Street Church relied. This action is taken in the face of the decision of the Kentucky Court adjudicating the entire matter, except the action of the General Assembly, in non-seating the Southern faction of the Synod to which the Walnut Street Church belonged. This decision of the Kentucky Court of Appeals was not only rendered by a court of very high standing, but was also supported by "a weight of reasoning"<sup>1</sup> which it is impossible to overturn and which therefore was completely ignored by the Federal Supreme Court. While the court concedes that a church tribunal would have no jurisdiction to try and punish with death or imprisonment a member for murder or to adjudge individual property rights between two members of the church, it argues that a different question is presented where matters concerning theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them, are presented, and concludes that in such cases the ecclesiastical decree is conclusive though "no jurisdiction has been conferred on the tribunal to try the particular case before it," though "in its judgment it exceeds the powers conferred upon it" and though "the laws of the church do not authorize the particular form of proceeding adopted."<sup>2</sup> This "startling proposition"<sup>3</sup> is put upon the ground that a different holding would force the civil courts to examine with minuteness and care the whole subject of the doctrinal theology, the usages and customs, the written laws and fundamental organization of every religious denomination whose decision might come be-

<sup>1</sup> *Watson v. Garvin*, at 384.

<sup>2</sup> *Watson v. Jones*, *supra*, at 733.

<sup>3</sup> *Watson v. Garvin*, *supra*, at 377.

fore them and would deprive these bodies of the right of construing their own laws and would transfer to the civil courts, where property rights are concerned, the decision of all ecclesiastical questions.<sup>1</sup>

It is respectfully submitted that the court is too apprehensive. While it is true in such a case that evidence would have to be taken of the fundamental organization and of the written and unwritten laws of the particular denomination in order to determine the jurisdiction of the church tribunal, it does not follow that the whole subject of doctrinal theology would be dragged before the court. The jurisdiction of church tribunals rests on these fundamental laws and may well be decided without delving into the doctrinal theology of the church. Nor would such action by the court deprive a denomination of the right to construe its own law. On the contrary, whatever practical construction such laws had received in the past would on ordinary principles be a valuable aid to the civil courts and would be utilized as such.<sup>2</sup> Nor would the decision of all ecclesiastical questions involving property rights be transferred to the civil courts. Ecclesiastical tribunals could well retain this jurisdiction subject merely to the inquiry whether they had gone beyond their jurisdiction in any particular case. Their position would be somewhat analogous to the position of the ecclesiastical courts in England, which are subject to the supervision of the courts of law, the difference being merely that the power of the English Ecclesiastical court is conferred

<sup>1</sup> *Watson v. Jones*, *supra*, at 733, 734.

<sup>2</sup> *Brundage v. Dearsdorf*, 92 Fed., 214; *Satterlee v. United States*, 20 App. D. C., 393, 419; *Schweiker v. Husser*, 146 Ill., 399, 428; 34 N. E., 1022; *Smith v. Pedigo*, 145 Ind., 361, 373; 33 N. E., 777; 44 N. E., 363; 19 L. R. A., 433; 32 L. R. A., 838; *Prickett v. Wells*, 117 Mo., 502; 24 S. W., 52; *People v. Esher*, 3 Ohio C. D., 468; 6 Ohio Cir. Ct. Rep., 312.



by law while the power of the American Church tribunal is conferred by the consent of the members of the church.<sup>1</sup>

The jurisdiction thus conceded to Church tribunals is certainly an extraordinary one. It far exceeds in scope the jurisdiction conferred upon civil courts, all of whom, from the Supreme Court of the United States down to the humblest justice court, are limited in their jurisdiction by constitutional provisions or statutory enactments. It is much in excess of the jurisdiction exercised by the English ecclesiastical courts, whose powers are limited and who for this purpose are subject to the supervision of the common law courts. It cannot rest on any grant of the state, for church tribunals are not the instrumentalities or agents of the state in any sense. It cannot rest on the consent of the parties, for it goes far beyond that consent. It follows that it must rest on a "higher plane," must flow from a supernatural source, must be conferred from on high. The court therefore at this point leaves the solid ground of law and fact, and soars into the higher regions of mystic theology. It unfortunately, however, does not explain how this power is conferred. We are left in the dark as to whether such grant is written in the human heart, or transcribed on tablets of stone or disclosed to mankind in a revelation.

This decision of the Supreme Court is the more indefensible as it is not only in conflict with all conceptions of natural justice, but also with the express decision of the Kentucky Court of Appeals in this very controversy, to which decision the attention of the court was directed. The state court, while recognizing the principle as firmly and correctly established "that civil courts cannot, and ought not to rejudge the judgments of spiritual tribunals, as to matters within their jurisdiction, whether justly or unjustly, decided,

<sup>1</sup> *Smith v. Nelson*, 18 Vt., 511, 549, 550, 558.

had correctly declared that a doctrine making the question of jurisdiction a purely ecclesiastical one would

subject all individual and property rights, confided or dedicated to the use of religious organizations, to the arbitrary will of those who may constitute their judicatories and representative bodies, without regard to any of the regulations or constitutional restraints by which according to the principles and objects of such organizations, it was intended that said individual and property rights should be protected.<sup>1</sup>

In justice to the United States Supreme Court, however, it must be said that its decision should not be understood as holding that the action of interlopers posing as a church tribunal will be supported and held to be conclusive. No such question was before the court. The status of the body which rendered the decision in the case before the court was not disputed. The only question was whether the action taken by that body was conclusive even if it was beyond the authority conferred upon it. The court did not intend "to establish a rule depriving a member of a church society of a right to resort to the courts in cases where these pretending to act for the society have absolutely no right authority or power."<sup>2</sup> It could therefore with perfectly good grace decide in the following year, in *Bouldin v. Alexander*,<sup>3</sup> that inquiry may be made by a civil court whether a resolution of expulsion was the act of the church or of persons who were not the church and who consequently had no right to excommunicate others.

A somewhat closer question is presented where it is al-

<sup>1</sup> *Watson v. Avery*, 65 Ky. (2 Bush), 332, 348.

<sup>2</sup> *Bonacum v. Murphy*, 71 Neb., 463, 475; 98 N. W., 1030; 104 N. W., 180.

<sup>3</sup> *Bouldin v. Alexander*, 82 U. S. (15 Wall.), 131, 140; cited with approval in *Gewin v. Mt. Pilgrim Baptist Church*, 166 Ala., 345; 51 So., 947; See *Perry v. Wheeler*, 75 Ky. (12 Bush.), 541.

leged that the church tribunal which has tried the matter contained some member who was disqualified according to the constitution, by-laws and customs of the church. In an Indiana case it appeared that the church tribunal contemplated was to consist of five unprejudiced persons, two to be chosen by each side, the fifth to be chosen by the persons so selected. One side of the controversy insisted on choosing two persons who had sat in the same case below and these in turn refused to select anyone as the fifth member except a person equally prejudiced. The court interfered on the ground that an assertion of jurisdiction in such a case is not an interference with the control of the society over its own members, but, on the contrary, it assumes that the constitution was intended to be mutually binding upon all and it protects the society in fact by recalling it to a recognition of its own organic law.<sup>1</sup> Such a case if it should arise in the United States Supreme Court would probably be ruled by *Bouldin v. Alexander*<sup>2</sup> and not by *Watson v. Jones*.

It has occasionally happened that church tribunals have been utilized for fraudulent purposes. It is obvious that such a case is quite distinguishable from *Watson v. Jones* and should not be ruled by it. Courts would make themselves instruments of fraud should they uphold church decisions reached under such circumstances. It has therefore been said by Taft, Circuit Judge, and later President of the United States: "Clearly it was not the intention of the court to recognize as legitimate the revolutionary action of a majority of a supreme judicatory, in fraud of the rights

<sup>1</sup> *Hatfield v. De Long*, 59 N. E., 483; 156 Ind., 207; 51 L. R. A., 751; 83 Am. St. Rep., 194; see *Bonacum v. Murphy*, 71 Neb., 463; 98 N. W., 1030; 104 N. W., 180.

<sup>2</sup> *Ibid.*

of a minority seeking to maintain the integrity of the original compact.”<sup>1</sup> Similarly it has been held by the Washington Court that an expulsion by a pastor of a member who stood between him and a fraudulent scheme to appropriate the church property was a void act and was of no force or effect whatever.<sup>2</sup>

But even excluding cases where the composition of church tribunals is illegal in whole or part or where such tribunals have made themselves into instruments of fraud a large field remains for the application of the rule of *Watson v. Jones*. Laying to one side cases in which church tribunals have acted strictly within their powers and in which therefore a resort to the rule of *Watson v. Jones* is unnecessary, though that decision even in such cases is sometimes cited by the courts in their opinions, this field may be divided into two parts: 1, where only slight injustice in the eyes of the court—whatever may be the opinion of the defeated party—has been inflicted by the decision of the church tribunal; 2, when the injustice thus inflicted even in the opinion of the court is great. In the first of these cases courts have quite generally followed the rule of *Watson v. Jones* as a short and easy cut toward the disposition of the case before them. But even in the second case the rule has sometimes been applied. Thus the Mississippi court has held a miserable expulsion of a stanch and upright member from a Baptist church conclusive, though it was effected without notice given to or charges preferred against him by a secret caucus agreement, and though the court in eloquent and sympathetic language characterized it as a cruel wrong, a petty and unfair exhibition of reli-

<sup>1</sup> Taft, J. in *Brundage v. Deardorff*, 55 Fed., 839, 847, 848.

<sup>2</sup> *Hendryx v. People's United Church of Spokane*, 42 Wash., 336; 84 Pac., 1123; 4 L. R. A. (N. S.), 1154; 7 Am. & Eng. Ann. Cas., 764.

gious tyranny, a hasty, unjust and ruthless act.<sup>1</sup> Generally, however, courts have revolted against the application of the rule to such a case and have cast about for some distinction by which they could do justice to the parties before them without in form overruling the case of *Watson v. Jones*.

Nor has this search been unsuccessful, though the distinction discovered cannot by any stretch of the imagination be called unimpeachable. A remark dropped by the court in *Watson v. Jones* to the effect that an adoption of the English doctrine which limits church tribunals to the powers conferred upon them, "would in effect transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions"<sup>2</sup> may have given them their cue for the cultivation of a distinction which had been laid down in South Carolina as early as 1846 to the effect that civil tribunals possess no authority whatever to determine ecclesiastical matters such as questions of heresy, or what is orthodox, or unorthodox, in matters of belief, while ecclesiastical tribunals have no authority, in any manner to effect a disposition of property by the decisions of their judicatures.<sup>3</sup> This distinction was first applied to distinguish *Watson v. Jones* by the Missouri Court in 1873 in a case arising out of the identical action of the Presbyterian Assembly which was before the Supreme Court in *Watson v. Jones* and resulted in a decision which is the very reverse of that case.<sup>4</sup> It has been the panacea sought and used by the courts ever since in order to escape

<sup>1</sup> *Dees v. Moss Point Baptist Church*, 17 So., 1 (Miss.).

<sup>2</sup> *Watson v. Jones*, *supra*, at 734.

<sup>3</sup> *Wilson v. Johns Island Presbyterian Church*, 2 Rich. Eq., 192, 198, 199 (S. C.).

<sup>4</sup> *Watson v. Garvin*, 54 Mo., 353, 378.

from the injustice which an indiscriminate application of the rule of *Watson v. Jones* would bring about.

Since this distinction thus takes an important place in the law it may be well to analyze it a little closer. It is perfectly obvious that the first part of this South Carolina dictum is absolutely sound. No case can reach the civil courts unless it involves some property or other civil right. The courts of the land are not concerned with mere polemic discussions and cannot coerce the performance of obligations of a spiritual character,<sup>1</sup> or adopt a judicial standard for theological orthodoxy,<sup>2</sup> or determine the abstract truth of religious doctrines,<sup>3</sup> or settle mere questions of faith or doctrine,<sup>4</sup> or make changes in the liturgy,<sup>5</sup> or decide who the rightful leader of a church ought to be.<sup>6</sup> They cannot enquire whether the omission of the word regenerate in the baptismal ceremony is an ecclesiastical offense.<sup>7</sup> They cannot adjudicate whether the word, in any particular case, has "been preached in truth and faithfulness, whether the sacraments had been administered according to the institutions of Christ and whether the work of the gospel ministry had been fulfilled agreeably to the word of God."<sup>8</sup> They have no concern with the question

<sup>1</sup> *Congregation of Roman Catholic Church v. Martin*, 4 Rob., 62, 67, 68 (La.).

<sup>2</sup> *State v. Aucker*, 2 Rich. Law., 245 (S. C.).

<sup>3</sup> *People v. Steele*, 2 Barb, 397; 1 Edw. Sel. Cas., 505; 6 N. Y. Leg. Obs., 55; *Trustees of East Norway Lake Ev. Luth. Church v. Halvorsen*, 42 Minn., 503; 44 N. W., 663, 665.

<sup>4</sup> *Fadness v. Braunberg*, 73 Wis., 257, 293; 41 N. W., 84.

<sup>5</sup> *Shaefer v. Klee*, 100 Md., 264; 59 Atl., 850.

<sup>6</sup> *Lewis v. Voliva*, 154 Ill. App., 48; *Wehmer v. Fokenga*, 57 Neb., 510; 78 N. W., 28.

<sup>7</sup> *Chase v. Cheney*, 58 Ill., 509, 533; 11 Am. Rep., 95.

<sup>8</sup> *Colden*, Senator in *Albany Dutch Church v. Bradford*, 8 Cowen, 456, 526 (N. Y.).

whether a religious congregation is progressive or conservative; whether a musical instrument shall be present or absent during church services; whether the preacher shall be selected from the congregation or shall be a person employed by the congregation for a stated time at a stated salary, whether the missionary societies and Sunday schools shall have separate organizations from the church congregations or not, or whether the funds necessary for the support of the church shall be contributed wholly by its members or raised in part by fairs and festivals.<sup>1</sup>

In regard to all these and similar matters religious societies and their governing bodies must of necessity have exclusive and final jurisdiction.<sup>2</sup>

But while it is perfectly true that civil courts cannot adjudicate mere questions of abstract belief or church polity it does not at all follow that ecclesiastical tribunals cannot in any manner affect a disposition of property by a decision of theirs. On the contrary they are doing this very thing in almost every instance in which they render a decision. They cannot declare one faction in a church to be *the* church; they cannot expel a member of a congregation without affecting at least the equitable rights of the persons so disciplined in the church property; nor can they sever the relation of a clergyman with his flock without affecting his right to practice his profession, which right is a legal and not merely an ecclesiastical one. It is therefore clear that the South Carolina rule is subject to a severe qualification. The jurisdiction of ecclesiastical courts over such matters cannot be denied. Both civil courts and church tribunals have certain powers to pass upon them. It has therefore been said that the jurisdiction of these two tribunals in this matter are over different questions and exercised *diverso intuitu*.

<sup>1</sup> *Christian Church v. Church of Christ*, 219 Ill., 503, 512; 76 N. E., 703.

<sup>2</sup> *Livingston v. Trinity Church*, 45 N. J. L. (16 Vroom), 230, 233.

The one determines a rule of order and regularity of discipline, the other a question of property and equity rights. The one acts directly upon the doings of a subordinate body and approves or reverses them; the other inquires into their regularity, to ascertain and declare the rights dependent on them.<sup>1</sup>

The rule has been stated as follows:

When a civil right depends upon some matter pertaining to ecclesiastical affairs, the civil tribunal tries the civil right, and nothing more, taking the ecclesiastical decisions, out of which the civil right has arisen, as it finds them, and accepting these decisions as matters adjudicated by another jurisdiction.<sup>2</sup>

In one sense, however, this second part of the rule is perfectly correct. Church tribunals have no power by their judgment to settle the rights of property or the status of persons in such a sense that an abstractor in making an abstract of title or a county clerk in issuing a marriage license would have to take notice of them. They cannot affect an individual's matrimonial status,<sup>3</sup> or grant him a divorce or subject him to jeopardy on a criminal charge,<sup>4</sup> or directly adjudicate his property rights,<sup>5</sup> such as the ownership of a tract of land<sup>6</sup> or the right to occupy a parsonage<sup>7</sup> or a

<sup>1</sup> *Earle v. Wood*, 62 Mass. (8 Cush.), 430, 470, 471.

<sup>2</sup> *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind., 136, 151; see *Sweiker v. Husser*, 146 Ill., 399; 34 N. E., 1022; affirmed 44 Ill. App., 566; *Prickett v. Wells*, 117 Mo., 502; 24 S. W., 52.

<sup>3</sup> *Hallitt v. Collins*, 51 U. S. (10 How.), 174.

<sup>4</sup> *Gaines v. Hennen*, 65 U. S. (24 How.), 553.

<sup>5</sup> *Marie M. E. Church v. Trinity M. E. Church*, 253 Ill., 21; 97 N. E., 262; *Boxwell v. Affleck*, 79 Va., 402; *Deaderick v. Lampson*, 58 Tenn. (11 Heisk), 523; *Brock v. Yadon*, 14 Ky. Law Rep., 863; but see *Windham v. Ulmer*, 59 So., 810; 102 Miss., 491; *Bear v. Heasley*, 98 Mich., 279; 57 N. W., 270; 24 L. R. A., 615.

<sup>6</sup> *St. Paul's Reformed Church v. Hower*, 191 Pa., 306; 53 Atl., 221.

<sup>7</sup> *Everett v. First Presbyterian Church*, 53 N. J. Eq., 500; 32 Atl., 747.



church edifice.<sup>1</sup> In other words, their decisions, while they may deal with property and other civil rights, have not *per se* the force of judgments for which execution or other supplementary remedy would issue. While, therefore, the South Carolina rule is sound if limited on the one hand to decisions affecting mere doctrine, belief or church polity and on the other to technical judgments, it breaks down completely when it is applied to the wide zone that stretches between these two narrow extremes and which includes the great majority of all the cases that come both before church tribunals and civil courts.

But however much restricted the South Carolina rule may be, however inapplicable to many circumstances, it has been grasped by the courts and made to do yeoman service. It is however used merely to prevent the intolerable injustice which a logical application of the rule of *Watson v. Jones* would work in certain cases. It is not used to bring all cases in which property rights are involved before the courts. It is merely a back door out of which courts can escape when the case of *Watson v. Jones* is pressed upon them and is felt to work gross injustice. Its orthodox form may be stated as follows: Civil courts will inquire into the question whether or not the organic rules and forms of proceedings prescribed by the ecclesiastical body have been followed only in case property rights are involved.<sup>2</sup>

It is perfectly obvious that this rule, while in form it is used to distinguish the case of *Watson v. Jones*, in fact amounts to an overruling of it. For property rights were the very thing involved in that case. The question before the court was which of the two factions into which the Walnut Street Presbyterian Church had divided was en-

<sup>1</sup> *Everett v. First Presbyterian Church*, *supra*, at 518.

<sup>2</sup> *Pounder v. Ashe*, 36 Neb., 564.

titled to the property. The court therefore refused to limit church tribunals to the powers conferred upon them on the very ground that such a holding "would in effect transfer to the civil courts where property rights were concerned the decisions of all ecclesiastical questions."<sup>1</sup> To confine the decision of *Watson v. Jones* to such questions as involve no property rights is therefore not a distinguishment but an overruling *pro tanto*. Such a result of course is quite satisfactory, though the means by which it is accomplished are not a credit to the intellectual honesty of our courts.

It is now in order to determine when property rights are involved and when they are not involved in such church decisions as find their proper place in the zone which lies between the two extremes covered by the South Carolina rule.<sup>2</sup> Owing to the complex nature of the cases on this subject and the absolutely staggering variety of the reasoning of the courts in deciding them, it is not to be expected that this inquiry can be disposed of in a sentence. It must on the contrary be left to the judicial process of inclusion and exclusion. By reading all the cases and placing them on one side of the line or the other the result can be accomplished. But even this laborious process, while it may result in an enumeration, is ineffective as a basis from which to draw general conclusions. In fact, it is found that courts do not decide that a case is or is not maintainable because property rights are or are not involved. They rather determine on principles of their own which are as indefinite as their individual consciences that a case should be decided one way or another, and then adjust the question whether property rights are or are not involved in this decision. A degree of arbitrariness is thus injected into the law which is but seldom equalled or surpassed by a perverse jury verdict. Like equity of old is

<sup>1</sup> *Watson v. Jones*, *supra*, at 734.

<sup>2</sup> See note 3, p. 215.

said to have differed with the length of the feet of the various chancellors who dispensed it, so justice in this important subject differs with the sense of right and wrong of the particular judge or judges before whom any particular controversy is decided. To attempt to describe in detail the situation that has resulted would be a task as stupendous as it would be stupifying.<sup>1</sup> While the decisions of most of these cases are actually just and reasonable, the reasoning on which they are based is not only highly crabbed and arbitrary but what is worse affords no basis on which to advise church bodies of their legal rights or to predict the probable outcome of future lawsuits.

The situation that results from such a condition of the law naturally is extremely unsatisfactory from every point of view. The complete uncertainty of the law not only increases the burden resting on bench and bar in any particular case but actually brings an ever-increasing volume of such cases before the courts, increases the expenses not only of the litigants but also of the State and prevents both court and counsel from being as firm and definite as they should be. The various trials in consequence will be diffuse and long drawn out as neither court nor counsel will have any adequate theory on which to determine whether certain evidence is admissible or not. Important as the subject is the expense to both the State and the litigants and the labor of both court and counsel in the meantime will become disproportionately great. And what is perhaps worst of all, the respect toward religion on the part of those outside of the churches receives a staggering blow by the wranglings in the courts of those who profess to be the pillars of the church.

<sup>1</sup> No attempt will be made to even cite the many cases. Anyone interested can easily get at them by looking into any digest under the title "Religious Societies." For a well written note interesting in this connection see 24 L. R. A. (N. S.), 692.

It must now be clear that the attempt of the United States Supreme Court to achieve a sort of paternalistic conservation of the interests of the parties to church difficulties by superseding their legal or equitable rights by its judicial notions as to what is best for their interest and for the convenience of the court has not only been a complete failure so far as the convenience of the courts is concerned but, by throwing the whole subject into confusion, has inflicted a grievous wrong on the churches themselves. It has made a portion of the law in which they are interested a perfect jungle with no path leading through it. No one, lawyer or layman, can emerge from an attentive reading of the cases on this subject but with a mind scratched and bleeding and utterly bewildered by the judicial vagaries encountered. In consequence the judicial mind, even in cases arising in different jurisdictions and involving not merely similar but identical facts,

has not been able, after many years of litigation, to uniformly and satisfactorily solve the questions involved, or to apply to facts touching the controversy such a clear and indubitable rule of law as will result in conviction to those in interest, fix the exact status of the contending elements in the church, and forever set at rest the title to the immense amount of property involved.<sup>1</sup>

The recent union of the Cumberland Presbyterian Church with the Presbyterian Church of the United States hence has produced a "conflagration of litigation,"<sup>2</sup> which perhaps is unparalleled in our jurisprudence. In this confusion the decision of the United States Supreme Court occupies about the same position toward the other cases on the subject as the initial prevarication in a typical farce occupies toward the lies invented to cover it.

<sup>1</sup> *Philomath College v. Wyatt*, 27 Oregon, 390, 461; 37 Pac., 1022; 26 L. R. A., 68.

<sup>2</sup> *Duvall v. Synod of Kansas*, 222 Fed., 669, 670.

The situation, however, while bad, is not irretrievable. While the reasoning of the courts on this subject is abominable the actual results on the whole are not so far wrong. In the majority of the cases it will be found that while the courts have floundered helplessly in their reasoning they have actually reached correct results. Occasionally they have even seen a light. While wandering in the wilderness they have beheld visions of the Promised Land. It remains to be seen whether an adequate theory on the subject can be constructed out of these visions, appearing though they do to some extent in the form of dicta. This will be the purpose of the remaining pages of this chapter.

It is too clear for controversy that whatever church relationship is maintained in America is not a matter of status. It is based not on residence, or birth, or compulsion but on voluntary consent. It rests on faith, "primarily faith in God and his teachings; secondarily, faith in and reliance upon each other."<sup>1</sup> It is "one of contract"<sup>2</sup> and is therefore exactly what the parties to it make it and nothing more. A persons who joins a church covenants expressly or impliedly that in consideration of the benefits which result from such a union<sup>3</sup> he will submit to its control<sup>4</sup> and be governed by its laws and usages and customs<sup>5</sup> whether they are of an ecclesiastical<sup>6</sup> or temporal<sup>7</sup> character to which laws, usages

<sup>1</sup> *Hendryx v. Spokane Peoples United Church*, 42 Wash., 336; 84 Pac., 1123; 4 L. R. A. (N. S.), 1154; 7 Am. & Eng. Ann. Cas., 764.

<sup>2</sup> *Bear v. Heasley*, 98 Mich., 279, 307; 57 N. W., 270; 24 L. R. A., 615.

<sup>3</sup> *Philomah College v. Wyatt*, *supra*, at 458.

<sup>4</sup> *Presbyterian Church v. Myers*, 5 Okla., 809, 819; 50 Pac., 70; 38 L. R. A., 687.

<sup>5</sup> *Krecker v. Shirey*, 163 Pa. St., 534, 551; 30 Atl., 440; 35 Weekly Notes Cases, 165; 29 L. R. A., 476; *Dees v. Moss*, *Point Baptist Church*, 17 So., 1, 2 (Miss.).

<sup>6</sup> *White Lick Quarterly Meeting v. White Lick Quarterly Meeting*, 89 Ind., 136, 151.

<sup>7</sup> *German Ev. Luth. Trin. Congregation v. Deutsche Ev. Luth. Dreieinigkeits Gemeinde*, 92 N. E., 868, 872; 246 Ill., 328.

and customs he assents as to so many stipulations of a contract,<sup>1</sup> of which contract the formal evidence will be found in the canons of the church, the constitution, articles, and by-laws of the society and the customs and usages which have grown up in connection with these instruments.<sup>2</sup>

This contract in one form or another will always be found to embody a provision for the necessary discipline. Without discipline of some kind no organization secular or religious, public or private, can exist. The very idea of the social compact entered into requires that the individual aspirations of the individual members be made subservient to the general good of the whole.

The church as an organized body of members must have laws and ordinances for the regulation of its existence, and for the preservation of its doctrine and discipline, and also to maintain the purity of its membership. Without such laws and ordinances it would be impossible to maintain discipline and church establishment.<sup>3</sup>

Some sort of discipline, strict or lax, is therefore of necessity contemplated in every such contract and is evidenced by usages and customs if not by written rules. Whether the more or less simple and vague laws of independent churches or the more or less complex and definite laws of associated churches form part of the contract, it is in every case these laws whatever they are, vague or definite, simple or complex, that will determine to what disciplinary control the member has submitted. If they have organized as an independent church "their law is found in their own separate institutions, customary or written." If they have organized as

<sup>1</sup> *First Presbyterian Church v. Wilson*, 77 Ky. (14 Bush.), 252, 256.

<sup>2</sup> *Philomath College v. Wyatt*, *supra*, at 442; *Brundage v. Deardorf*, 55 Fed., 839, 846; *Bear v. Heasley*, *supra*.

<sup>3</sup> *Satterlee v. United States*, 20 App. D. C., 393, 407.

an associated church. "their law is to be found in their own rules, and in those of the associated organism."<sup>1</sup>

Such disciplinary rules and regulations, however, would be a perfectly dead letter without some tribunal to enforce them. The existence of some sort of a judicature composed of one person, or of a committee, or of the whole society, or of a representative body such as a synod, is, therefore, if not expressly stipulated in the contract, within every reasonable inference of it.

Persons who join churches, secret societies, benevolent associations or temperance organizations, voluntarily submit themselves to the jurisdiction of those bodies, and in matters of faith and individual conduct affecting their relations as members thereof, subject themselves to the tribunals established by those bodies to pass upon such questions.<sup>2</sup>

A submission to properly constituted church tribunals is therefore in every case one of the terms of the original contract by which the membership in the church is created.

But this submission is not an unlimited one. Nor is the limitation confined to the mere organization of the tribunal. A person who becomes a member does not merely stipulate to submit to a tribunal organized in conformity with the laws of the society,<sup>3</sup> but he also contemplates to be bound only by its "regular proceeding and bona-fide determination"<sup>4</sup> made in accordance with the established laws and usages of the society,<sup>5</sup> and covering such matters as have

<sup>1</sup> *McGinnis v. Watson*, 41 Pa. St., 9, 14.

<sup>2</sup> *Landis v. Campbell*, 79 Mo., 433, 439; 49 Am. St. Rep., 239; cited in *Nance v. Busby*, 91 Tenn. (7 Pickle), 303, 331; 18 S. W., 874; 15 L. R. A., 801.

<sup>3</sup> *Lawrence and Sheldon J. J. dissenting in Chase v. Cheney*, 58 Ill., 509, 542; 11 Am. Rep., 95.

<sup>4</sup> *I. R. Redfield in 9 Am. Law Reg.*, 222.

<sup>5</sup> *Deaderick v. Lampson*, 58 Tenn. (11 Heisk), 523, 535.

been expressly or impliedly referred to it by the contract. It follows that these tribunals "are limited by the terms of such agreement and must proceed as therein specified,"<sup>1</sup> To hold that ecclesiastical decisions are conclusive, though arrived at in defiance of the conventional law under which the tribunal is bound to act, would yield to tribunals created merely by contract a supremacy over those to whom the administration of the law is committed. Such a holding would subject all individual and property rights confided in or dedicated to the use of religious organizations to the arbitrary will of those who may constitute their judicatories, without regard to any of the regulations or constitutional restraints by which it was intended that such rights should be protected.<sup>2</sup>

Nor does it make the slightest difference whether property rights of large or small value are involved in the decision of such a tribunal. A person on becoming a member of a church certainly has the right to confer authority to decide such matters on the church tribunals contemplated in his contract. He may make his right to attend services, to control the property of the church, to be buried in its cemetery, and other similar rights affecting property, depend upon its decision. There is no reason in the world, except that of *stare decisis*, why a decision of a properly constituted church tribunal properly rendered according to the contract should not be conclusive on property rights under these circumstances, no matter how extensive they may be. The freedom to make contracts is not and ought not to be abridged in this particular. On the contrary such contracts ought to be encouraged as they relieve the civil courts, when properly carried out, of litigation which is as vexing to them as it is to the litigants.

<sup>1</sup> M. W. Fuller, late Chief Justice of the United States Supreme Court in 10 Am. Law Reg., (N. S.), 314.

<sup>2</sup> *Watson v. Avery*, 65 Ky. (2 Bush.), 232.



From the foregoing the nature of these church tribunals is clear. They are not civil courts. They possess none of the prerogatives of such courts. They are not within the constitutional provision which requires that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."<sup>1</sup> No verity attaches to their decrees which must therefore, in order to be of any effect be proved by evidence *ore tenus* just exactly as any other contract is proved. They do not even have the same effect as the judgments of foreign courts. While they bear some analogy to them in that the introduction in evidence of both may be met by mere verbal testimony, the foreign judgment may be proved by authenticated copy while the decision of a church tribunal must be supported by oral evidence. Nor can any cognizance be taken of these decisions even as thus supported except as they are relied upon by the parties to civil controversies in establishing their rights in the secular courts. Church tribunals are thus in no sense courts within the technical meaning of the word. They are merely the "choice of these subjected to their jurisdiction."<sup>2</sup> Their right to adjudicate is based solely upon the consent of those who submit their difficulty to them, whether that submission is immediate or remote, by a contract for the specific purpose or by the contract of membership.

But while these decisions are not judgments they still have a well defined place in the law. Nor is their position peculiar or confined to church organizations. On the contrary their entire effect rests upon a very familiar and elementary principle of contract law. In complicated contracts disputes of one kind or another may not only happen but are often actually anticipated by the contracting parties. Pro-

<sup>1</sup> United States Constitution Art. 4, Sec. 1.

<sup>2</sup> Crary Senator in *Dutch Church of Albany v. Bradford*, 8 Cowen, 456, 533 (N. Y.).

vision is therefore made by which these disputes are adjusted by arbitrators agreed upon by the parties. Where such an agreement exists the decision of these arbitrators fairly made in the manner agreed upon will become at once a part of the contract and will be as conclusive as the contract itself.

Applying this familiar law to the situation in hand it has been said that a church tribunal is "a conventional court, analogous in its character to standing arbitrators."<sup>1</sup> Its position has been likened "to that of an architect in superintending the erection of a building, who, by the contract between the owner and the contractor, is empowered to determine all questions and direct generally in the erection of the building."<sup>2</sup> The result reached by such a tribunal is what it is, not because there is anything sacred about it or because it is better versed in ecclesiastical lore than civil courts, but rather "because every member of the association, when he joins it, agrees to come under and abide by the rules and regulations embodied in its discipline, and that discipline usually provides a tribunal to arbitrate and determine all matters of church polity."<sup>3</sup> Its powers are not derived from a supernatural source but spring directly from the contract of those who come before it.

Where the contract provides, or by implication contemplates that the question what is according to, and consistent with, the particular doctrine or doctrines shall be determined by some church judicatory, the determination of such judicatory, duly made, when the matter is properly brought before it, will be conclusive upon the civil courts. And this is so, not because

<sup>1</sup> *Everett v. First Presbyterian Church*, 53 N. J. Eq., 500, 507; 32 Atl., 747.

<sup>2</sup> *Ibid.*, at 508; *Sanders v. Baggerly*, 131 S. W., 49, 56; 96 Ark., 117.

<sup>3</sup> *Sampsell v. Esher*, 26 Weekly Law Bull., 156, 157.

the law recognizes any authority in such bodies to make any decision touching civil rights, but because the parties, by their contract, have made the right of property to depend upon adherence to, or teaching of, the particular doctrines as they may be defined by such judicatory. In other words, they have made it the arbiter upon any questions that may arise as to what the doctrines are, and as to what is according to them.<sup>1</sup>

Nor must it be supposed that this theory of the matter is new and unheard-of or rests only on dicta. It is true the submission is remote and refers to difficulties merely anticipated and is by the contract of membership. This, however, cannot distinguish it on principle from situations where the submission is direct by a contract for that purpose and in reference to an existing controversy. In such latter cases the awards of arbitrators, provided that they are not contradictory in their terms<sup>2</sup> or merely advisory<sup>3</sup> and provided that they do not attempt to adjust matters over which the court or the state has reserved exclusive jurisdiction,<sup>4</sup> will be upheld by the courts whether such arbitrators adjust merely private difficulties between individual members of a congregation in reference to the proper boundary line between their

<sup>1</sup> East Norway Lake Church v. Halvorson, 42 Minn., 503, 508; 44 N. W., 663.

<sup>2</sup> Curd v. Wallace, 37 Ky. (7 Dana), 190; 32 Am. Dec., 85. In this case the arbitrators decided that neither side had any right in the church property but that both should enjoy it equally.

<sup>3</sup> Stearns v. First Parish in Bedford, 38 Mass. (21 Pick), 114. This case refers to the "ecclesiastical councils" so common in the early history of the Congregational Church of this country. See also Green v. Carpenter, 12 Weekly Notes Cases, 201.

<sup>4</sup> Wyatt v. Benson, 23 Barb., 327; 4 Abb. Pr., 182. In this case the award was concerned with the sale of a church edifice which under the New York law must be approved by a court and with the right of the trustees to hold office which could be tried only on an information by the state.

respective holdings,<sup>1</sup> or in reference to a contract for the sale of cotton seed<sup>2</sup> or in reference to the liability of a priest for the support of an illegitimate child,<sup>3</sup> in which the church as such is only incidentally interested or whether they adjudicate a controversy arising directly out of the very midst of the church, and causing a division of it into two hostile camps.<sup>4</sup> Since in such cases an "arbitration held and award rendered pursuant to church regulations is equally binding (no more and no less) as if held without reference to such regulation"<sup>5</sup> even though the result may be an erroneous one,<sup>6</sup> it is not perceived why a decision made by a church tribunal in consonance with the contract of membership and in regard to a difficulty anticipated by that contract, though not existing at the time, should not be equally conclusive.

From the foregoing it must be clear that a church tribunal is merely a "conventional court" deriving all its powers from the consent of those before it. Since its very existence is based on that contract it would follow that the rules by which it governs itself must be traced to the same source. Where therefore that contract contemplates an extremely informal or very secretive procedure the tribunal acting within this contemplation will bind the parties by its award. Where more formal steps are prescribed or a public trial is provided for, such directions must of course be followed.

<sup>1</sup> *Payne v. Crawford*, 10 So., 911 (Ala.); but see *Tubs v. Lynch*, 4 Harr., 521 (Del.).

<sup>2</sup> *Jones v. Binns*, 27 Miss. (5 Cush.), 373.

<sup>3</sup> *Poggendorf v. Conniff*, 23 Ky. Law Rep., 2463; 67 S. W., 845. This case arose and was decided on demurrer. For a decision on the merits see 96 S. W., 547.

<sup>4</sup> *Mt. Zion Baptist Church v. Whitmore*, 83 Iowa, 138; 49 N. W., 81; 13 L. R. A., 198.

<sup>5</sup> *Payne v. Crawford*, *supra*, at 913.

<sup>6</sup> *Curd v. Wallace*, 37 Ky. (7 Dana), 190, 194; 32 Am. Dec., 85.

Where the canons of the church do not embody the rules of the common law as to the sufficiency of a charge against an accused and his right to challenge his triers such common law rules will not be enforced.<sup>1</sup> The mode of taking evidence may even be entirely out of touch with common-law principles. Testimony need not be supported by an oath nor is it essential to allow the right of cross-examination.<sup>2</sup> If the party aggrieved by the award had the opportunity to be heard, which his submission stipulated, and the decision was upon the matter submitted, and was honest and *bona fide*, though perhaps erroneous,<sup>3</sup> and though the procedure was very summary, though not more summary than is contemplated in the contract, the matter will be concluded by the award rendered. Says the Nebraska Court:

However much we may think that open and public proceedings and hearings upon due notice ought to be had in every investigation of every sort of charge or issue, we must remember that it is not our province to impose our views as to such matters upon religious denominations. We must not forget that ideas and methods which may seem strange to us are often older than those which, from familiarity, we are prone to think part of the order of nature, and that large bodies of men have been governed by them and are still governed by them, in the internal affairs of the Roman church, without questioning their entire propriety.<sup>4</sup>

The legitimate place of church tribunals both in the affairs of the body which has created them and in the law of the land must now be evident. They owe their existence not to mere

<sup>1</sup> Chase v. Cheney, 58 Ill., 509, 533; 11 Am. Rep., 95.

<sup>2</sup> McGuire v. St. Patrick's Church, 7 N. Y. Supp., 345; 27 St. Rep., 192; 54 Hun., 207.

<sup>3</sup> Landis v. Campbell, 79 Mo., 433, 439; 49 Am. Rep., 239.

<sup>4</sup> Bonacum v. Harrington, 65 Neb., 831, 837; 91 N. W., 886.

law secular or ecclesiastic but to the contract of the parties who come before them. Their decisions are not judgments but awards. If rendered in accordance with the contract they are as conclusive as the contract itself. If they go beyond that contract they are as null and void as any unconstitutional statute. The question whether church tribunals have acted within their jurisdiction cannot therefore in the exercise of a *liberum arbitrium* be conclusively decided by such arbitrators but is a question for the courts of law to solve whenever the question is properly brought before them. Such a court of arbitration is

limited in its authority by the law under which it acts; and when rights of property, which are secured to congregations and individuals by the organic law of the church, are violated by unconstitutional acts of the higher courts, the parties thus aggrieved are entitled to relief in the civil courts, as in ordinary cases of injury resulting from the violation of a contract, or the fundamental law of a voluntary association.<sup>1</sup>

The existence of church tribunals therefore does not in any sense oust this jurisdiction of the civil courts over the contract made by the members of the church, but merely simplifies the task with which these courts are confronted when such matters are brought before them.

Nor need any baneful effects be anticipated from the view here expounded. Church organizations will be left entirely free in their internal affairs, will be given complete home rule so far and so far only as such a condition of things has been contracted for. On the other hand their adherents will be protected from any action on the part of these tribunals which violates the contract to which they owe their existence. Complete justice will thus be done to both sides. That the terms of the contract will often be vague and in-

<sup>1</sup> *Watson v. Avery*, 65 Ky. (2 Bush.), 332, 349.

definite can furnish no sound reason to refuse to investigate them. Courts are created for the very purpose of clearing up such situations. Nor will their task in most cases be at all difficult. The side relying on the decision of the church tribunal may well rest content to prove the decision together with the contract on which it rests. Unless the other side can meet this prima-facie case by proof of *ultra vires*, unfairness or any of the other grounds on which awards of arbitrators are set aside by the courts, the court may well register the decree of the church tribunal, and thus give to it the force of a judgment. Both the number of such cases in the courts and the time spent in deciding them will thus be reduced to a minimum.

To sum up. The proper place of the decisions of church tribunals in the American law has been thrown into inextricable confusion by the decision of the United States Supreme Court in *Watson v. Jones*. This case unfortunately arose, during the reconstruction period, out of a question involving loyalty toward the Union on the part of one of the great church bodies of the country. In deciding it the sympathies of the members of the court very naturally went out toward the loyal faction of the congregation whose property was in question. Against such sentiment the merely logical and well reasoned decision of the court of the state in whose midst the case had arisen adjudicating this very controversy, with the exception of its latest development, was powerless. In seeking to support its decision that the decrees of church tribunals are conclusive though these tribunals actually have transcended their power, the court was forced not only to disregard well reasoned English cases in connection with dissenting churches as inapplicable but was driven to argue that it was too difficult for the courts to examine the question of the jurisdiction of church tribunals and that our theory of religious liberty demands that they

should not attempt such a task. While the conclusive effect assigned to the decrees of church tribunals, is limited to cases where those tribunals are properly organized and act in good faith a number of situations remain in which properly organized church tribunals acting bona fide but blinded by prejudice and bias go beyond their powers and thereby inflict severe injustice. Under such circumstances courts have naturally declined to register such decisions. Yet they have hesitated about overruling *Watson v. Jones*. Instead they have sought to distinguish it. Though property rights were emphatically involved in *Watson v. Jones* they have sought to restrict it to cases where no property rights are involved. In doing this, however, they have reserved to themselves an arbitrary discretion as to when property rights are or are not involved in a particular case. Instead of deciding a case because property rights are or are not involved they have put the cart before the horse and have decided that property rights are or are not involved because they had on principles of their own concluded to decide the case before them one way or the other.

It requires no argument that this condition of the law is not only a discredit to the courts but also a hardship to the litigants. A reasonable theory on which to dispose of cases of this nature certainly is desirable even at the expense of overruling *Watson v. Jones*. Such a theory can happily be constructed from occasional decisions and dicta of the various courts. This theory instead of floating about in the clouds like the reasoning in *Watson v. Jones* bases itself on hard facts and is buttressed by sound law. It takes the initial agreement by which a person becomes a member of a church at its foundation. It connects any church tribunal with that agreement. It limits the decision of that tribunal as distinguished from the legislative, executive or administrative action of the church to the express or implied stipu-



lations of that agreement but makes such decision conclusive within those limits. It draws no artificial distinctions between cases in which property rights are or are not involved. It puts the entire matter upon the understandable proposition of an arbitration and award and removes it from the sphere of the supernatural to which *Watson v. Jones* had relegated it. It does complete justice between a general or special church body and its members and protects the religious liberty of all. It relieves the courts from embarrassment and brings them back to a performance of their judicial duties. It overrules the case of *Watson v. Jones* and relieves the state, and its courts, the litigants, and their attorneys, the churches and the general public from its disastrous effects. It is to be hoped that this theory may become the guiding star for both bench and bar in future controversies involving the decision of church tribunals.

## CHAPTER IX

### TAX EXEMPTIONS

THE exemption from taxation of public property in the various states of the Union rests on reason and presents no difficulty. If a state were to tax its own property or the property of the counties, cities, towns and villages created by it, the burden of the ultimate taxpayer would not be lightened in the least. Since such property is not only acquired but also maintained at public expense the money necessary for this purpose must in any case be ultimately paid by the owners of private property. An attempt to tax public property would only make the bookkeeping of the tax officers more difficult and would in consequence increase rather than decrease the burden of taxation.

But public property is not the only property thus exempted. Exemption statutes, on the contrary, generally cover private property devoted to charitable and educational ventures as well. To such statutes no valid objection can be raised. Both the education of the young and charity toward the poor are recognized as public functions. Primary schools, high schools, and universities, as well as orphan asylums, hospitals, and poorhouses therefore, are built and maintained with public funds. In fact most of the money obtained by taxation is used by the various states for these two purposes. Since private charity prevents persons from becoming a charge on the state and since private schools relieve the congestion that exists in the public schools, particularly in the cities, it is obvious that the bur-

den of taxation is considerably lightened by these private institutions even though they go beyond the work ordinarily done by the state. The state, therefore, is making a very good bargain in having part of its work performed by them in consideration of this tax exemption. It would be decisively the loser if all these institutions were abolished, their property taxed, and the work done by them transferred to the state. The public nature of the work voluntarily shouldered by these private institutions is, therefore, a full and sufficient justification for the exemption extended to them.

The constitutional provisions or statutory enactments which exempt educational and charitable associations, however, do not stop here. They generally add an exemption, more or less qualified, of the property owned or used by religious bodies. This exemption is not so easily justified on principle as it is supported by authority. It is in fact easier to admire the motive which prompted it than to justify it by any sound reasoning. While charity and education may be said to be established in the policy of the state, an establishment of religion is expressly prohibited both by the federal constitution and by most if not all the state constitutions. The strictly religious features of church societies can therefore furnish no valid reason for this exemption. The only rational ground remaining on which it can be justified is the benefit accruing to the state through the influence exerted by the various churches on their members. The religious and moral culture afforded by them is deemed to be beneficial to the public, necessary to the advancement of civilization and the promotion of the welfare of society.<sup>1</sup>

<sup>1</sup> People *ex rel.* Lady of Angels Seminary *v.* Barber, 42 Hun., 27; Atlanta *v.* First Presbyterian Church, 86 Ga., 730; 13 S. E., 252; 12 L. R. A., 852; Commonwealth *v.* Y. M. C. A., 116 Ky., 711; 76 S. W., 522; 25 Ky. Law Rep., 940; 105 Am. St. Rep., 234.

This is so even though the benefits received are of necessity a variable quantity, high in many cases, low in others, and in some instances even entirely absent. Says the Georgia court :

The duties enjoined by religious bodies and the enforcement by them of the obligations arising therefrom, though beyond the power or scope of the civil government, such as benevolence, charity, generosity, love of our fellow men, deference to rank, to age and sex, tenderness to the young, active sympathy to those in trouble or distress, beneficence to the destitute and poor, and all those comely virtues and amiable qualities which clothe life "in decent drapery" and impart a charm to existence, constitute not only the "cheap defense of nations" but furnish a sure basis on which the fabric of civil society can rest, and without which it could not endure.<sup>1</sup>

The moral influence exerted by these bodies over their adherents, like the charity administered and the education imparted by private charitable and educational institutions, is the theoretical reason why church bodies are exempted from taxation. "Exemptions are granted on the hypothesis that the association or organization is of benefit to society, that it promotes the social and moral welfare, and, to some extent, is bearing burdens that would otherwise be imposed upon the public to be met by general taxation."<sup>2</sup>

It must not be supposed, however, that the benefit conferred by churches on the state is the historical reason for

<sup>1</sup> First M. E. Church South v. Atlanta, 76 Ga., 181, 192.

<sup>2</sup> Y. M. C. A. of Omaha v. Douglas County, 60 Neb., 642, 646; 83 N. W., 924; 52 L. R. A., 123. The fundamental ground upon which such exemptions are based has been said to be "a benefit conferred on the public by such institution and a consequent relief, to some extent, of the burden upon the state to care for and advance the interests of its citizens." M. E. Church South v. Hinton, 92 Tenn. (8 Pickle), 188, 190; 21 S. W., 321, 322; 19 L. R. A., 289. See Roberts v. Bradfield, 12 App. D. C., 453; Lefevre v. Detroit, 2 Mich., 586, 592.

the exemptions granted to them. It is more in the nature of an after-thought to justify a practice as old as the oldest of the thirteen colonies. When the practice of exempting church property developed there was a far better and more conclusive reason for it than exists to-day. Church and state in those days were not separated. The church was established. It was a public agency just as cities and villages are to-day. It was as much a municipal corporation as the town. It followed that a taxation of church property would have been but an idle ceremony. As well might a court house or a city hall be subjected to taxation. Church property being public property supported by public taxes could not but be exempt from taxation. So long as towns "exercised parochial functions, and raised taxes for supporting and maintaining houses of public worship, those places of worship were exempt from taxation as public property by the nature of things, and not by the constitution or by statute."<sup>1</sup>

When dissenting churches began to grow up alongside of the established church, their essentially private character was not at first recognized. Not only were they not taxed but they actually, after the first enmity toward them had worn away, were made the recipients of money raised by taxation. Since every inhabitant of the colony was supposed to attend some church and to pay taxes for its support, money flowed into the treasuries of parishes which it was felt to be unjust to retain, since it was paid by adherents of dissenting churches. Arrangements were therefore made by which this money was turned over to these dissenting churches provided they came up to a certain standard and provided the taxpayer had filed a certain statutory notice with the parish clerk. In course of time this arrangement

<sup>1</sup> Franklin Street Society v. Manchester, 60 N. H., 342, 349.

was relaxed to such an extent that the taxes were allowed to be paid to the dissenting church body direct. From this condition of affairs it was but a short step to complete religious liberty. It is obvious, however, that so long as church societies were the recipients of money raised by taxation there was a strong reason why they should be exempt from taxation.

Nor did the custom which had thus grown up of exempting church property from taxation cease when the church was disestablished and full religious liberty was achieved. The practice of exempting them was universally considered to be proper and was "so entirely in accord with the public sentiment, that it universally prevailed."<sup>1</sup> No need of exemption laws was therefore felt in Massachusetts until 1837,<sup>2</sup> in New Hampshire till 1842,<sup>3</sup> and in New Jersey till 1851.<sup>4</sup> Then, however, the people woke up to the fact that the exemptions given to church property rested on a custom the reason for which had disappeared. A more solid foundation for this custom had to be found. The attacks made, by those who were adverse to churches, against the custom were unanswerable. An appeal was therefore made to the legislatures which, obeying "the almost universal, innate promptings of the human heart,"<sup>5</sup> promptly passed such exemption statutes as were demanded by public opinion.

Nor were statutes alone deemed sufficient, for statutes may be declared unconstitutional. A constitutional provision alone could definitely take the matter out of all dis-

<sup>1</sup> *State v. Jersey City*, 24 N. J. L. (4 Zab.), 108, 120.

<sup>2</sup> *All Saints Parish v. Brookline*, 178 Mass., 404; 59 N. E., 1003; 52 L. R. A., 778.

<sup>3</sup> *Franklin Street Society v. Manchester*, 60 N. H., 342, 349.

<sup>4</sup> *State v. Jersey City*, 24 N. J. Law (4 Zab.), 108.

<sup>5</sup> *Howell v. Philadelphia*, 1 Leg. Gaz. R., 242; 8 Phila. (Pa.), 28c.

pute. No such provision can be found in the earlier constitutions. In fact, among the constitutions which are in force to-day ten, adopted between 1780 and 1867, are still entirely silent on this matter.<sup>1</sup> In these states the statutes passed by the respective legislatures are the only foundation on which the practice rests to-day.<sup>2</sup> In all the other thirty-eight states, however, the question has been put at rest by constitutional provisions or amendments. Of these states thirteen, by constitutions adopted between 1859 and 1911, have exempted certain enumerated property by self-executing provisions which either exempt certain property in express terms<sup>3</sup> or prohibit the legislature from taxing it,<sup>4</sup> or, in addition to exempting it, confer upon the legislature the power to supersede the exemptions thus granted.<sup>5</sup> The constitutions of the remaining twenty-five states merely recognize and limit to a greater or less extent the legislative power to pass exemption statutes but do not *per se* attempt actually to exempt any property. While three of these twenty-five constitutions, adopted between 1857 and 1889, require that

<sup>1</sup> The following are the names of these states and the years when their constitutions were adopted: Massachusetts 1780, New Hampshire 1784, Vermont 1793, Connecticut 1818, Maine 1819, Rhode Island 1842, New Jersey 1844, Wisconsin 1848, Iowa 1857, and Maryland 1867.

<sup>2</sup> Massachusetts Revised Laws, ch. xii, § 5; New Hampshire, ch. lv, § 2; Vermont Public Statutes, §§ 496, 498; Connecticut General Statutes, § 2315; Maine Revised Statutes, ch. vi, § 155; Rhode Island, ch. lvi, § 2; New Jersey Compiled Statutes, Taxation, § 3; Wisconsin Revised Statutes, § 1038 (3); Iowa Annotated Code, § 1304; Maryland Public General Laws, Art. 81, § 4.

<sup>3</sup> Kansas (1859) Art. 11, § 1; Arkansas (1874) Art. 16, § 5; Wyoming (1889) Art. 15, § 12; Kentucky (1890) § 170; Utah (1895) Art. 13, § 3; South Carolina (1895) Art. 10, § 4; California (Amendment 1900) Art. 13, § 1½; Louisiana (1898) Art. 230; Oklahoma (1907) Art. 8, § 3; New Mexico (1911) Art. 10, § 6.

<sup>4</sup> Alabama (1901) § 91, held to be self-executing in *Anniston City Land Co. v. State*, 160 Ala., 253; 48 So., 659.

<sup>5</sup> Colorado (1876) Art. 10, §§ 5, 6; Virginia (1902) § 183.

the legislature "shall by general law" exempt from taxation certain enumerated property,<sup>1</sup> thirteen others, adopted between 1851 and 1910, confer upon that body a greater discretion by providing that it "may" exempt such property.<sup>2</sup> In four other constitutions of recent date the sole limitation imposed on the legislative discretion is the requirement (contained also in a good many of the constitutions already referred to) that exemptions are to be granted only by general laws.<sup>3</sup> Of the five remaining states, four by constitutions adopted between 1851 and 1885 merely recognize the power of the legislature to pass exemption statutes by providing that all property shall be taxed except such "as may be exempted (or specially exempted), by law,"<sup>4</sup> while the other constitution, adopted in 1850, approaches the difficulty from the opposite direction by providing that taxes shall be levied on such property as shall be prescribed by law.<sup>5</sup>

Of these two general classes of constitutional provisions the self-executing provisions offer no difficulty whatever. They are as complete in themselves as any statute can be. They can therefore stand alone and will *per se*, without any action by anyone, exempt from taxation such property as they cover. In the absence of a provision giving the legis-

<sup>1</sup> Minnesota (1857), Art. 9, § 3; North Dakota (1889) § 176; South Dakota (1889) Art. 11, §§ 5, 6.

<sup>2</sup> Ohio (1851) Art. 12, § 2; Tennessee (1870) Art. 2, § 28; Illinois (1870) Art. 9, § 3; West Virginia (1872) Art. 10, § 1; Pennsylvania (1873) Art. 9, §§ 1, 2; Nebraska (1875) Art. 9, § 2; Missouri (1875) Art. 10, § 6; Texas (1876) Art. 8, § 2; North Carolina (1876) Art. 5, § 5; Georgia (1877) Art. 7, § 2, §§ 2, 4; Montana (1889) Art. 12, § 2; Idaho (1889) Art. 7, §§ 4, 5; Arizona (1910) Art. 9, § 2.

<sup>3</sup> Washington (1889) Art. 7, § 2; Mississippi (1890) § 90 (h.); New York (1894) Art. 3, 18; Delaware (1897) Art. 8, § 1.

<sup>4</sup> Indiana (1851) Art. 10, § 1; Oregon (1857) Art. 9, § 1; Nevada (1864) Art. 10, § 1; Florida (1885) Art. 9, § 1.

<sup>5</sup> Michigan (1850) Art. 14, § 11.



lature power to supersede them they are beyond the ability of that body to add or detract. They stand like a rock in the surging waters of legislative moods. They stand until they are abolished by the same power that put them into the constitution. They are, in other words, the law definitely laid down by the highest law-making power known to our system of government.

Entirely different principles apply to those constitutional provisions which are not self-executing. Such provisions are powers of attorney to the legislature rather than laws. They merely authorize the legislature to act within certain limits but, with the exception of those which require that the legislature "shall" pass such laws, leave it in the discretion of that body whether it is to act in whole, or part, or at all. Within the limits thus outlined by the enumeration of the constitution<sup>1</sup> the legislature therefore is free to act as it may deem "it just and consistent with the higher claim of the government."<sup>2</sup> The extent and the manner of the encouragement to be held out to religious associations, by exempting their property from taxation<sup>3</sup> as well as the classification and description of such property<sup>4</sup> will under such constitutions be confided to the wisdom and discretion of the legislature. It may exercise this power

to the full extent, or in part, or decline to exempt at all. It can exempt one kind of property held for such purposes, either realty or personalty, and tax other kinds, It can exempt partially, as for instance up to a certain value, and tax all

<sup>1</sup> Louisiana Cotton Mfg. Co. v. New Orleans, 31 La. Ann., 440.

<sup>2</sup> Matlack v. Jones, 2 Disney (Ohio), 2, 5.

<sup>3</sup> Lefevre v. Detroit, 2 Mich., 586, 592; *in re* Walker, 200 Ill., 566; 66 N.E., 144; People *ex rel.* McCullough v. Deutsche Ev. Luth. Jehovah Gemeinde, 249 Ill., 132, 135; 94 N. E., 162; Louisiana Cotton Mfg. Co. v. New Orleans, *supra*, at 443.

<sup>4</sup> Gerke v. Purcell, 25 Ohio St., 229, 245.

above it. It can exempt the property held for one or more of these purposes and tax that held for others.<sup>1</sup>

While it cannot, under a constitution authorizing an exemption of property *used exclusively* for school or religious purposes, exempt such school property as is not shown to be used for school purposes<sup>2</sup> or parsonages—since their use is secular rather than religious<sup>3</sup>—it may confine the exemption to such property as is not only used exclusively for religious purposes but is also owned by the religious society in question.<sup>4</sup>

The constitutions of the various states may therefore be divided into three classes, namely, (1) those which are silent on the matter, (2) those which contain self-executing provisions, (3) those which contain express powers to the legislature to pass exemption statutes. It is obvious that no question of constitutionality can arise under the second of these classes. A provision which is a part of the constitution cannot be in contravention of it. In regard to the third class the question of constitutionality is confined to the query whether the legislature has kept within the power conferred upon it. In regard to the first class, however, the question is not so simple and therefore deserves a somewhat more extended notice.

The power of a legislature to exempt church property in states whose constitution is silent on this matter must be traced back to immemorial usage. There has probably

<sup>1</sup> *United Brethren of Salem v. Forsyth County*, 115 N. C., 489, 493; 20 S. E., 626; *Davis v. Salisbury*, 161 N. C., 56; 76 S. E., 687.

<sup>2</sup> *People ex rel. McCullough v. Deutsche Ev. Luth. Jehovah Gemeinde*, *supra*.

<sup>3</sup> *People ex rel. Thompson v. First Congregational Church of Oak Park*, 232 Ill., 158; 83 N. E., 536.

<sup>4</sup> *People ex rel. Swigert v. Anderson*, 117 Ill., 50.

never been a general tax law without exemptions.<sup>1</sup> Of the classes that have enjoyed exemption none have been more meritorious—and many have been less so—than churches. When the constitutions which are silent on this matter were adopted it was and remained a recognized practice to exempt church property from taxation. That this produced a shifting of the burden of taxation is clear beyond cavil.

It does not require profound reflection to reach the conclusion that whatever deficit there is in the fiscal budget due the State for any given year, by reason of exemptions of property which would otherwise be required to contribute to the common weal, is cast as an additional burden upon the other taxpayers; and it results, therefore, that every exemption is indirectly an additional tax upon the property owners not enjoying a like benefaction.<sup>2</sup>

That a bestowal of such favors indirectly by an exemption from taxation instead of directly by a gift from the state is unsatisfactory and that its result may be that “valuable privileges are enjoyed without gratitude and regarded by others with envy and dissatisfaction,”<sup>3</sup> is also true. Whatever, however, the principles of the matter and the rights of the state, the habit of not taxing such property is inveterate. The Illinois court has therefore said that religion and religious worship have not been “so placed under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the state.”<sup>4</sup> While the New

<sup>1</sup> *In re Tax Cases*, 12 Gill and J. (Md.), 117, 143.

<sup>2</sup> *Commonwealth v. Thomas*, 119 Ky., 208, 213, 214; 83 S. W., 572; 26 Ky. Law Rep., 1128; 6 L. R. A. (N. S.), 320.

<sup>3</sup> *Brainard v. Colchester*, 31 Conn., 407, 410.

<sup>4</sup> *Nichols v. School Directors*, 93 Ill., 61, 64.

Hampshire<sup>1</sup> and Indiana courts<sup>2</sup> have thrown doubt upon the constitutionality of exemption laws in the absence of a constitutional provision authorizing them, the Georgia court has strenuously argued that an exemption of church property is not in conflict with a constitutional provision which prohibits money to be taken from the public treasury "in aid of any church, sect or denomination," saying: "The manifest object of the provision was to prevent any appropriation or subsidy that might look even remotely to the establishment of a state religion, and thereby prevent the full enjoyment of that freedom of worship secured by the same instrument to every inhabitant of the state."<sup>3</sup> In the only case in which the matter has come up squarely, the contention that such an exemption is in conflict with a constitutional provision providing that no person shall be compelled to "pay tithes, taxes or other rates, for building or repairing places of worship, or the maintenance of any minister or ministry" has been denied, the court saying that such exemption was not included in the words of the constitution.<sup>4</sup>

The important question, next to the question of constitutionality, is the question of the construction of exemption statutes, whether they be contained in legislative enactments or are part of the constitution in the form of self-executing provisions. The general rule of strict construction applied to such statutes is familiar, and has been iterated and reiterated by the courts in probably a majority of the cases which deal with the question of exemption.<sup>5</sup> Since taxa-

<sup>1</sup> *Franklin Street Society v. Manchester*, 60 N. H., 342.

<sup>2</sup> *M. E. Church v. Ellis*, 38 Ind., 3, 7.

<sup>3</sup> *First M. E. Church South v. Atlanta*, 76 Ga., 181, 196.

<sup>4</sup> *Griswold College v. State*, 46 Iowa, 275; 26 Am. Rep., 138.

<sup>5</sup> The following are merely a few such cases arising in various states. *New Haven v. Sheffield*, 30 Conn., 160, 171; *Atlanta v. First Presbyterian*

tion is the normal condition, while exemption is an abnormality, the leaning of the judicial mind naturally is toward taxation and away from exemption. It follows that the exemption claimant has the burden of proof. He must point out the statute or constitutional provision under which he claims his privilege. He must bring his case either literally or by clear intendment within the terms of such statute or constitutional provision. The abandonment of taxation in any particular case will not be presumed but must be clearly proved. In making this proof the claimant will not be allowed to resort to implication nor will the courts aid him by judicial legislation. They will not extend the statute beyond its plain meaning. They will not discriminate in favor of any person or institution. Whatever discrimination is made must have its source with the law-making body and not with the judges. In cases of doubt as to the meaning of the written law such doubt will be resolved against and not in favor of exemption. It has therefore been held that where certain land was exempted "while the same continued to be owned" by the church organization the fund realized by a sale of such land is subject to taxation.<sup>1</sup> Where a charter permitted a church corporation to hold property to the amount of \$350,000 exempt from taxation and such property, though originally worth less than that sum had since become worth almost a million, the Mass-

Church, 86 Ga., 730; 13 S. E., 252; 12 L. R. A., 852; *People ex rel. Brey Meyer v. Watseka Camp Meeting Association*, 160 Ill., 576; 43 N. E., 716; *in re Walker*, 200 Ill., 566; 66 N. E., 144; *Orr v. Baker*, 4 Ind., 86; *M. E. Church v. Ellis*, 38 Ind., 3; *St. Peter's Church v. Scott County*, 12 Minn., 395; *Ramsey County v. Church of the Good Shepherd*, 45 Minn., 229; 47 N. W., 783; 11 L. R. A., 175; *Nevin v. Krollman*, 38 N. J. Law, 323; affirmed, 38 N. J. L., 574; *State v. Axtell*, 41 N. J. Law, 117; *United Brethren of Salem v. Forsyth County*, 115 N. C., 489; 20 S. E., 626; *Katzer v. Milwaukee*, 104 Wis., 16; 80 N. W., 41.

<sup>1</sup> *Gorham v. Ministerial Fund*, 109 Me., 22; 82 Atl., 290.

achusetts, court has held that it was subject to taxation insofar as it exceeded the sum fixed by the charter.<sup>1</sup>

This rule of strict construction, however, while generally applied, must not be stretched beyond its fair meaning. It is not so narrow and rigid in its application as to defeat the law-makers' intention ascertained from all the competent evidence. Though called a rule

it is merely evidence to be weighed; and its weight depends upon its reasonableness, and not alone upon its verbal applicability. In other words, it is the duty of the court to ascertain and carry out the intention of the legislature; and that fact is to be found, not by the mechanical or formal application of words and phrases, but by the exercise of reason and judgment. If the literal significance of statutory language, as applied to the facts of a particular case, makes the meaning absurd, strange or inexplicable, it cannot be adopted as the only test of the legislative purpose, without either imputing to the legislature a senseless design, or judiciously evading the duty of ascertaining the intent. If the so-called rule of strict construction, as applied to statutes exempting certain property from taxation, is so strictly applied as to render the exempting language so narrow and restricted as to defeat the apparent legislative purpose, it is clear that too much sacredness is attached to a mere rule, and that it should be either abrogated or applied with more liberality and reason.<sup>2</sup>

It has therefore been said that in construing such a statute "all its terms must be read together, and some regard must be had to the settled legislative policy of the State."<sup>3</sup> It has been recognized that the object of exemption statutes is to foster religious societies and that they hence should be rea-

<sup>1</sup> *Evangelical Baptist Benevolent and Missionary Society v. Boston*, 192 Mass., 412; 78 N. E., 407.

<sup>2</sup> *St. Paul's Church v. Concord*, 75 N. H., 420, 423.

<sup>3</sup> *Louisville v. Werne*, 25 Ky. Law Rep., 2196, 2198; 80 S. W., 224.

sonably construed in furtherance of this object and should not be frustrated by finely drawn technicalities.<sup>1</sup> In a number of cases courts have therefore even applied a liberal rule of construction so far as religious societies are concerned.<sup>2</sup> Examples of both strict and liberal construction will be found in the following pages of this chapter.

Whether an exemption statute is a contract whose impairment is forbidden by the federal constitution is a question that has but seldom come before the courts. There can be no question but that large denominations might be seriously embarrassed if all exemption privileges were suddenly withdrawn from them. No such attempt however has been made nor is it likely that it ever will be made. The question whether such statute amounts to a contract which the legislature cannot impair has therefore been raised in only a few cases. It has been pointed out that "to give a law of general exemption from taxation the character of an irrevocable contract, there must be a consideration; for an exemption, made as a privilege merely, may be revoked at any time."<sup>3</sup> Such a consideration has been discovered by the New York Supreme Court in the fact that a gift was made to the society in reliance on this statute.<sup>4</sup> The Connecticut court in its early days wrestled with this question and after considerable vacillation practically decided that an exemption statute creates no such contract as is contemplated by the Federal Constitution. After holding that a statute passed

<sup>1</sup> *Shaarai Berocho v. New York*, 18 N. Y. Supp., 792; 60 N. Y. Super. Ct. (28 Jones and S.), 479.

<sup>2</sup> *Griswold College v. State*, 46 Iowa, 275; 26 Am. Rep., 138; *Watterson v. Halliday*, 77 Ohio St., 150; 82 N. E., 962; *Mattern v. Canevin*, 213 Pa., 588; *General Assembly v. Gratz*, 139 Pa. St., 497; *Poultney Congregational Society v. Ashley*, 10 Vt., 241.

<sup>3</sup> *Franklin Street Society v. Manchester*, 60 N. H., 342, 350.

<sup>4</sup> *People ex rel. Diocese of Long Island v. Dohling*, 39 N. Y. Supp., 765; 6 App. Div., 86.

in 1702 for the purpose of enabling the giving of gifts for charitable purposes amounted to a contract for the exemption of personal property<sup>1</sup> as well as real estate<sup>2</sup> it soon proceeded to doubt its former decisions though yielding to them as authorities,<sup>3</sup> and still later followed them over a vigorous dissent upon the mere ground of *stare decisis*.<sup>4</sup> When it was again called upon to pass upon the matter it evaded the issue by distinguishing the cases before it on the facts,<sup>5</sup> and when this could not be done as to the next case presented to it, it at last placed itself in a defensible position by practically reversing its former decisions.<sup>6</sup> On the strength of these authorities there can be no question but that a general exemption statute cannot be considered as a contract which may not be impaired by the state.

In considering the subject of tax exemption, taxes must not be confounded with special assessments. Special assessments are not taxes within the constitutional provisions. They are payments for special benefits received, while taxes are burdens, charges or impositions placed on persons or property for general public uses. Special assessments go on the principle that "if an improvement is to be made, the benefit of which is local, it is but just that the property benefited should bear the burden."<sup>7</sup> To this rule church property can form no exception. It is as much benefited as other property. Since it receives the benefit it ought, in justice to adjoining property owners, assume the burden. To exempt

<sup>1</sup> *Atwater v. Woodbridge*, 6 Conn., 223.

<sup>2</sup> *Osborne v. Humphrey*, 7 Conn., 335.

<sup>3</sup> *Parker v. Redfield*, 10 Conn., 490.

<sup>4</sup> *Landon v. Litchfield*, 11 Conn., 251.

<sup>5</sup> *Seymour v. Hartford*, 21 Conn., 481; *New Haven v. Sheffield*, 30 Conn., 160.

<sup>6</sup> *Brainard v. Colchester*, 31 Conn., 407.

<sup>7</sup> *Lockwood v. St. Louis*, 24 Mo., 20, 22.



it would throw the burden of paying for a street improvement in front of a church on the adjacent lots. The increased value of the church property after the improvement would represent an involuntary contribution to it on the part of its neighbors. It is therefore a rule absolutely and unanimously established in the jurisprudence of the various states of the Union that exemptions of property devoted to religious uses do not cover special assessments.<sup>1</sup> The Pennsylvania, Indiana and Georgia courts which at one time had strayed away from this rule<sup>2</sup> have all retraced their steps,<sup>3</sup> the latter court saying that the law is not a "refuge and safe asylum for all the errors that creep into it."<sup>4</sup> This error, so far at least as the Indiana court is concerned, was caused by an accidental omission in the assessment statute, a "legislative *casus omissus*," by which machinery was provided for the special assessment of only such property as was on the tax roll. Since exempt property was not on the tax roll its exemption by accident, for the time being until the legislature could meet and remedy the defect, became an assured fact.<sup>5</sup> Such omissions have cropped up also in other states

<sup>1</sup> *Chicago v. Baptist Theological Union*, 115 Ill., 245; *Dolan and Foy v. Baltimore*, 4 Gill (Md.), 394; *Ottawa v. Free Church*, 20 Ill., 423; *Lefevre v. Detroit*, 2 Mich., 586; *Lockwood v. St. Louis*, 24 Mo., 20; *Matter of Nassau Street*, 11 Johns., 77; *Harlem Presbyterian Church v. New York*, 5 Hun., 442; *Gilmour v. Pelton*, 5 Ohio Dec. (Rep.), 447; *Northern Liberties v. St. John's Church*, 13 Pa. (1 Harris), 104.

<sup>2</sup> *Erie v. First Universalist Church*, 105 Pa., 278; *Jenkintown Borough v. Jenkintown Baptist Church*, 5 Pa. Co. Ct. Rep., 385; *Lowe v. Howland County*, 94 Ind., 553; *First M. E. Church South v. Atlanta*, 76 Ga., 181; *St. Mark's Church v. Brunswick*, 78 Ga., 541; *Atlanta v. First Methodist Church*, 83 Ga., 448.

<sup>3</sup> *Sewickley M. E. Church's Appeal*, 165 Pa., 475; 30 Atl., 1007; 35 W'kly Notes Cas., 554; *Harrisburg v. St. Paul's Church*, 5 Pa. Dist. R., 351; *Rausch v. United Brethren in Christ Church*, 107 Ind., 1; *Atlanta v. First Presbyterian Church*, 86 Ga., 730; 13 S. E., 252; 12 L. R. A., 852.

<sup>4</sup> *Ibid.*, at 733.

<sup>5</sup> *Ft. Wayne Presbyterian Church v. Ft. Wayne*, 36 Ind., 338; 10 Am. Rep., 35.

and have led to different results, the New York court holding the same as the Indiana court,<sup>1</sup> while the Arkansas court has by judicial legislation sought to cure the legislative defect.<sup>2</sup>

A far more serious defect, however, will sometimes come to the surface in the administration of the assessment law. It has been intimated in New York that the benefits which result to church property from special improvements are less than those resulting to other property and that hence an assessment by which such property is put on equal terms with other property is unreasonable and extravagant.<sup>3</sup> This holding opens the gate wide to a favoring of church property in such matters which in effect amounts to an exemption resting in the discretion of the officers in control of the particular assessment. This, of course, inevitably results in the most vicious form of exemption imaginable. An assessment in which church property paid but one-ninth of its equitable share, has therefore been held to be invalid in New York.<sup>4</sup>

Having thus far considered the statutes without reference to particular pieces of property, it is now in order to consider them in their application to the various situations which arise in connection with church property. The question of the amount of real estate that is exempt in connection with a church building is of great importance. It can, of course, be of no difficulty where the statute or constitutional provision in express terms exempts the land on which such building is situated,<sup>5</sup> or which is actually covered by it<sup>6</sup>

<sup>1</sup> *In re* Second Avenue M. E. Church, 66 N. Y., 395; reversing 5 Hun., 442.

<sup>2</sup> *Ahern v. Texarkana Board of Improvement*, 69 Ark., 68, 72.

<sup>3</sup> *Matter of Nassau Street*, 11 Johns., 77.

<sup>4</sup> *People v. Syracuse*, 2 Hun., 433; 5 Thomp. and C., 61.

<sup>5</sup> *Orr v. Baker*, 4 Ind., 86.

<sup>6</sup> *Frederick County v. St. Joseph's Sisters of Charity*, 48 Md., 34.

or is necessary for its occupancy and enjoyment.<sup>1</sup> In all these cases the land is exempted in express terms and hence cannot be taxed.

A more difficult question, however, is presented where nothing more than the house of worship is exempted in express terms. In such cases doubts have been expressed whether the land on which the building stands is exempt.<sup>2</sup> According to the strict rule of construction such doubts might be justified. They have however been dispersed by the decided cases. It has been said that "as the land upon which the building stands is essential to the existence of the structure, it is fairly to be presumed that it was the intention of the legislature to include it in the provisions of the statute by the phrase 'houses of religious worship'".<sup>3</sup> The matter has fairly been set at rest by a decision of the Ohio Court holding that a constitutional provision authorizing the legislature to exempt "houses used exclusively for public worship" does not prevent that body from exempting "the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same."<sup>4</sup>

It is apparent from the foregoing that the exemption granted is not confined to the area actually covered by the building. Such a construction would be too narrow. Nor does it on the other hand extend to all the land which the particular society may own. Such a construction would be too liberal. A middle ground must be found which avoids both extremes. "The idea of a church edifice necessarily carries with it the use of ground ample for its use and pro-

<sup>1</sup> Delaware County *v.* Sisters of St. Francis, 2 Del. Co. R., 149; Hamilton County *v.* Mannix, 9 Ohio Dec., 189; 11 Wkly. Law Bul., 184.

<sup>2</sup> Lefebre *v.* Detroit, 2 Mich., 586, 590.

<sup>3</sup> Trinity Church *v.* Boston, 118 Mass., 164, 165; Mannix *v.* County Commissioners, 10 Wkly. Law Bul., 53 (Pa.).

<sup>4</sup> Gerke *v.* Purcell, 25 Ohio St., 229.

tection against noises, disturbances and intrusions from without during worship.”<sup>1</sup> To this the exemption must be confined. The line must be drawn where the necessity ends and the mere convenience begins. The land around a church that secures for it sufficient light and air, which permits proper access and a reasonable amount of ornament, all conducive to the health of the worshipers and their most complete use of the edifice, is therefore exempted with the church building. Land neither actually occupied, reasonably necessary, nor actually used for the reasonable enjoyment of the building as a church will not be exempt. The ground as an incident of the building must subserve the same use. While it need not be indispensable, it must be reasonably appropriate.

What is reasonably necessary must of course depend upon the circumstances of each particular case.

The size of the building erected, the ability financially and the tastes of the congregation worshipping therein, the numerical strength of the congregation, the location, the character of the religious uses to which it is to be put, the value and surroundings of the entire lot when purchased, these are some of the circumstances to be considered in determining what amount of ground is reasonably necessary to the proper enjoyment of the building itself.<sup>2</sup>

<sup>1</sup> *Mannix v. County Com'rs*, *supra*, at 55.

<sup>2</sup> *Ibid.* Says a Pennsylvania Court: “Ground for entrance and exit, for securing air and light, for the purposes of architecture and natural adornment, for the erection of horse-sheds and, in the country for shade, and, among those who prolong their religious services during a large part of the day, places for refreshment, such as springs of water, etc., all may be included as necessary for the occupancy and enjoyment of church or meeting house in the ordinary sense of the term.” *Pittsburg v. Third Presbyterian Church*, 10 Pa. Super. Ct., 302, 305; 29 Pitts. Leg. J. (N. S.), 441; 44 W. N. C., 215.

The central church of a diocese where councils and synods are held and where deputations from distant states assemble may therefore have a building and contiguous grounds which are more extensive than would be the case with an ordinary congregation.<sup>1</sup> While land owned by a church but separated from the lot on which its building stands by a passageway,<sup>2</sup> or by an archbishop's palace,<sup>3</sup> or by the Palisades of the Hudson River,<sup>4</sup> or which, though it adjoins the church property, is not necessary for church purposes,<sup>5</sup> or is in such a position that rent can be drawn from it,<sup>6</sup> or is actually a source of revenue,<sup>7</sup> or is covered by a secular building acquired by the church to prevent the addition of additional stories to it which would shut out the light from the church<sup>8</sup> is subject to taxation, the exemption will be extended to all portions of church property which are adjacent to and reasonably necessary for the proper use and enjoyment of the church. It has therefore been held that a lot 100 feet wide and 200 feet deep, the 43 feet of the back of which are occupied by coal sheds used in connection with the church, is exempt in its entirety.<sup>9</sup>

Somewhat akin to the question of the quantum of land exempted in connection with a church building is the ques-

<sup>1</sup> *Mannix v. County Com'rs*, *supra*.

<sup>2</sup> *Boston Society of Redemptionist Fathers v. Boston*, 129 Mass., 178.

<sup>3</sup> *Hamilton County v. Mannix*, 9 Ohio Dec., 189; 11 Wkly Law Bul., 184.

<sup>4</sup> *Sisters of Peace v. Westerveld*, 64 N. J. Law, 510; 45 Atl., 788; affirmed 65 N. J. Law, 685; 48 Atl., 789.

<sup>5</sup> *Pulaski County v. First Baptist Church*, 86 Ark., 205; 110 S. W., 1034.

<sup>6</sup> *Gibbons v. District of Columbia*, 116 U. S., 404.

<sup>7</sup> *Orr v. Baker*, 4 Ind., 86; *Frederick v. St. Joseph Sisters of Charity*, 48 Md., 34.

<sup>8</sup> *Calvary Baptist Church v. Milliken*, 148 Ky., 580; 147 S. W., 12.

<sup>9</sup> *Louisville v. Werne*, 25 Ky. Law Rep., 2196; 80 S. W., 224.

tion of the exemption of empty lots held by a church society. Where such land has been acquired merely for the purpose of holding it for a higher price the matter is entirely clear. Churches when entering upon such a venture should enjoy no advantage over other speculators. They should not be allowed to hold such land free from taxation. If exemption was granted to them they

might purchase the most desirable city property, hold it for years without improvement, and, if it should, meanwhile, increase in value, dispose of it, reaping the benefit of the speculation, without having paid a dollar to the public treasury to sustain the government, which has protected the property from injury and enabled the owners to acquire as well as to alien it.<sup>1</sup>

A closer question is presented where land is bought with the actual intention of erecting a church building on it. While the exemption of such land as part of the "funds" of the church has been upheld in Kentucky<sup>2</sup> and denied in New Jersey<sup>3</sup> the general rule is that such property is not exempt until some clear and unequivocal evidence of its dedication to sacred uses is presented. A resolution to erect a church<sup>4</sup> or an intention to the same effect actually carried out after the tax has accrued<sup>5</sup> is not enough. "The law, to warrant the claim of privilege, requires an actual building—a house made with hands—not eternal in the heaven, but temporal, situated on temporal 'lots' resting not on intention, however pious or praiseworthy but on solid sub-

<sup>1</sup> *Matlack v. Jones*, 2 Dist., 2, 8 (Ohio).

<sup>2</sup> *Louisville v. Werne*, *supra*.

<sup>3</sup> *Nevin v. Krollman*, 38 N. J. Law (9 Vroom), 323; affirmed page, 574.

<sup>4</sup> *First Christian Church v. Beatrice*, 39 Neb., 432; 58 N. W., 166.

<sup>5</sup> *Green Bay and Mississippi Canal Co. v. Ontagamie County*, 76 Wis., 587; 45 N. W., 536.

lunary earth.”<sup>1</sup> Even under the English Ecclesiastical Law a church was not regarded as bearing a religious character till it was solemnly dedicated to pious uses. The publicity of the act not only established its claim to sanctity but also gave the proper notice. The exemption is therefore made not in respect to the land but in respect to the use.<sup>2</sup> “A contemplated structure, resting merely in imagination, no stone of which has ever been laid, or even extracted from its primitive quarry, is not such a building for public worship as an assessor is bound to see. When actually erected it will be time enough for the officer of the law to notice it.”<sup>3</sup> It follows that a vacant lot owned by a church society is subject to taxation<sup>4</sup> even where it is mortgaged and the money thus obtained is used to actually erect a church on another more suitable plot of ground.<sup>5</sup> The same principle applies to a lot on which there is a church building which has been abandoned as such<sup>6</sup> even though such abandonment has taken place in the middle of the tax year.<sup>7</sup>

A still closer question is presented where a church is actually in course of construction. It is obvious that the intent in such a case to use the property for church purposes could not be expressed more clearly and forcibly. At the same

<sup>1</sup> *Trinity Church v. New York*, 10 How. Prac., 138, 139 (N. Y.).

<sup>2</sup> *Moore v. Poole, Smith*, 166 (N. H.).

<sup>3</sup> *Trinity Church v. New York*, *supra*.

<sup>4</sup> *Kirk v. St. Thomas Church*, 70 Iowa, 287; 30 N. W., 569; *Enaut v. Tax Collectors*, 36 La. Ann., 804; 51 Am. Rep., 14; *Burr v. Boston*, 208 Mass., 537; 95 N. E., 208; 34 L. R. A. (N. S.), 143; *Matlack v. Jones*, 2 Disn. 2 (Ohio).

<sup>5</sup> *Nugent v. Dilworth*, 95 Iowa, 49; 63 N. W., 448.

<sup>6</sup> *Old South Society v. Boston*, 127 Mass., 378; *Holthaus v. Adams County*, 74 Neb., 861; 105 N. W., 632.

<sup>7</sup> *Moore v. Taylor*, 147 Pa., 481; 23 Atl., 768; 29 Wkly Notes Cas., 495.

time it is clear that there is no actual use for this purpose. The rule of strict construction has therefore been applied in such a case even though the building, a cathedral, had been in course of construction for three years<sup>1</sup> and even though the congregation had erected a temporary structure alongside of it in which actual worship was being carried on.<sup>2</sup> The same result however will not be reached where a church has been destroyed and the congregation at once has commenced the erection of a new structure. In such a case the property has been dedicated and used for church purposes and the mere interruption of such use due to the catastrophe will not subject it to the burden of taxation.<sup>3</sup>

But the mere existence of a church building does not solve all the difficulties in regard to its exemption from taxation. The fact that a building is called a church does not bring it within the exemption. To exempt it it must further be used for religious purposes or religious worship. Some statutes are even stricter and require that it be exclusively used for religious purposes. The difficulty in this regard is not so much in determining what is and what is not religious worship within the meaning of this term. In this land of religious liberty no distinction will be made for or against any religious faith and belief or any religious philosophy of life and death. All, Protestant or Catholic, conservative or liberal, Armenian or Calvinistic, Trinitarian or Unitarian, Christian, Jew or heathen are equally protected. Church property of all these divergent sects, whatever their forms and ceremonies may be, will therefore be

<sup>1</sup> *Mullen v. Erie County*, 85 Pa., 288; 27 Am. Rep., 550; *Erie County v. Bishop*, 13 Phila., 509 (Pa.).

<sup>2</sup> *All Saints Parish v. Brookline*, 178 Mass., 404; 59 N. E., 1003; 52 L. R. A., 778. But see *Washington Heights M. E. Church v. New York*, 20 Hun., 297.

<sup>3</sup> *Trinity Church v. Boston*, 118 Mass., 164.



included within the exemption.<sup>1</sup> It is "not material that the institution claiming the benefit of the constitutional exemption is without an ordained preacher, or that its methods involve a departure from the customary modes of worship. If the worship is religious, commending itself to the consciences of its votaries it is within the pale of the law's favor."<sup>2</sup> The difficulty is rather in connection with certain non-religious activities customarily carried on in church buildings, either by the congregation itself or by some lessee of it.

To understand the law in connection with these activities the early conditions in the thirteen colonies must be taken into consideration. Under the primeval conditions that obtained before the Revolution, the local church buildings, appropriately called meeting-houses, were frequently the only public buildings of any kind. Since they were maintained by public funds it was entirely natural that they should be used for various kinds of public purposes. They were in fact "customarily used for town meetings, lectures, concerts, temperance meetings, political addresses, and for other like special occasions."<sup>3</sup> When church and state at last were separated such extra-religious use continued without bringing about a taxation of the property. When eventually statutes were enacted and constitutional provisions adopted exempting church property the legislature or constitutional convention had in mind the historical situation and had no intention of excluding churches from the benefit of the exemption because an occasional or incidental use was made of their premises for other than religious pur-

<sup>1</sup> *In re Walker*, 200 Ill., 566, 573; 66 N. E., 144.

<sup>2</sup> *Commonwealth v. Y. M. C. A.*, 116 Ky., 711, 719; 76 S. W., 522; 25 Ky. Law Rep., 940; 105 Am. St. Rep., 234.

<sup>3</sup> *Hartford First Unitarian Society v. Hartford*, 66 Conn., 368, 375; cited *St. Paul's Church v. Concord*, 75 N. H., 420, 425; 75 Atl., 531.

poses. So long as such use did not interfere with the strictly religious purposes to which the building was dedicated no objection was made to it. It has therefore been said that so long as the congregation occupies its church building

for such public services of a religious character as it deems useful and desirable and as the building is adapted to subserve to the exclusion of all secular uses, it is used exclusively as a house of public worship. When it is not required or needed for religious services, and when its use for other purposes would not curtail or interfere with the full and free accomplishment of its original and essential design its remaining unoccupied and useless would not seem to be a necessary requisite for its exemption from taxation.<sup>1</sup>

The use of church building for educational purposes<sup>2</sup> or for lectures, concerts, dramas, and even mesmeric performances and political conventions<sup>3</sup> has therefore been held not to take it outside of the exemption statute. The occupation of such buildings by janitors<sup>4</sup> curates or sisters<sup>5</sup> or the use in connection with them of vestries for the pastor and the officers of the church<sup>6</sup> or of guild rooms for the social enjoyment of the members<sup>7</sup> and even the use of a salesroom

<sup>1</sup> St. Paul's Church v. Concord, 75 N. H., 420, 425.

<sup>2</sup> St. Mary's Church v. Tripp., 14 R. I., 307.

<sup>3</sup> Hartford First Unitarian Society v. Hartford, *supra*, but see Connecticut Spiritualist Camp Meeting Ass'n v. East Lyne, 54 Conn., 152; 5 Atl., 849.

<sup>4</sup> Shaarai Beroch v. New York, 60 N. Y. Super. Ct. (28 Jones & S), 479; 18 N. Y. Supp., 792; but see Congregation Kol Auschi Poland v. New York, 52 Hun., 507; 5 N. Y. Supp., 608.

<sup>5</sup> People *ex rel.* St. Mary's Free Church v. Feitner, 168 N. Y., 494; 61 N. E., 762; modifying 71 N. Y. Supp., 257; 63 App. Div., 181.

<sup>6</sup> Lowell South Congregational Meeting House v. Lowell, 42 Mass. (1 Met.), 538.

<sup>7</sup> People *ex rel.* St. Mary's Free Church v. Feitner, *supra*.

in connection with a Salvation Army station<sup>1</sup> have been held not to subject the property to taxation. Church property will be regarded as being used exclusively for public worship though the church building

should also contain such adjuncts to the audience room or place for the assembling of the congregation as rooms for the safe-keeping of the outer coats, wraps, umbrellas etc., of the persons who participate in the religious exercises of worship or rooms required in order to secure the comfort of such persons . . . or a study room for the use of the pastor in the preparation of his sermons, or rooms for Sunday Schools or for sub-organizations of the church or other purposes wholly non-secular and as aids to general religious designs of the congregation.<sup>2</sup>

Even coalsheds in the back part of a church lot have been held to be exempt as contributing to the comfortable enjoyment of the premises.<sup>3</sup> though the same privilege has been denied to such part of a camp meeting property as was used for stabling horses for hire and for victualling purposes.<sup>4</sup>

Closely connected with the question of the use of church property is the question of its ownership. Whether ownership by a church society is necessary to exempt property used for church purposes depends upon the written law of the state in which the question arises. Where the law of any

<sup>1</sup> *People ex rel. Salvation Army v. Feitner*, 74 N. Y. Supp., 1142; 68 App. Div., 639; affirming 68 N. Y. Supp., 338; 33 Misc. Rep., 712; but see *Evangelical Baptist Benevolent and Missionary Society v. Boston*, 204 Mass., 28; 90 N. E., 572; as contrasted with *Appeal of Howard Ass'n*, 70 Pa. (20 P. E. Smith), 344.

<sup>2</sup> *In re Walker*, 200 Ill., 566, 574; 66 N. E., 144.

<sup>3</sup> *Louisville v. Werne*, 25 Ky. Law Rep., 2196; 80 S. W., 224.

<sup>4</sup> *Foxcraft v. Pisquataquis Valley Camp Meeting Ass'n*, 86 Me., 78; 29 Atl., 951.

state requires that property be held<sup>1</sup> or owned<sup>2</sup> by the society or be its exclusive property<sup>3</sup> or, that it be not "leased or otherwise used with a view to profit"<sup>4</sup> it is quite clear that property merely leased to a church or held by it on land contract is not exempt. Even where the church owns the equitable title it should make that fact appear on the record before it will be entitled to have it exempted from taxation.<sup>5</sup>

A different question, however, is presented where all regular places of stated religious worship<sup>6</sup> are exempted or where the requirement is merely that the building be a place actually used<sup>7</sup> or used exclusively<sup>8</sup> for religious purposes. Under such circumstances the use, not the ownership, determines the question of exemption. Land may therefore be held by leasehold for this purpose by a church under such provisions without losing its exemption. Where, however, a church building has been sold on mortgage foreclosure and is held for sale by the purchaser, it will not be exempt as a "building for public worship" though such worship actually continues after the sale, by permission of the purchaser.<sup>9</sup>

<sup>1</sup> *State v. Duryea*, 40 N. J. Law, 266.

<sup>2</sup> *People ex rel. Swigert v. Anderson*, 117 Ill., 50; *People ex rel. McCullough v. Logan Square Presbyterian Church*, 249 Ill., 9; 94 N. E., 155; *Salem Marine Society v. Salem*, 155 Mass., 329; 29 N. E., 584.

<sup>3</sup> *Hebrew Free School Ass'n v. New York*, 99 N. Y., 488; 2 N. E., 399; overruling in effect *s. c.* 4 Hun., 446; and *Washington Heights M. E. Church v. New York*, 20 Hun., 297.

<sup>4</sup> *Dallas v. Cochran*, 166 S. W., 32 (Tex. Civ. App.).

<sup>5</sup> *Mauresa Institute v. Norwalk*, 61 Conn., 228; 23 Atl., 1088.

<sup>6</sup> *Howell v. Philadelphia*, 1 Leg. Gaz. R., 242; 8 Phila., 280 (Pa.).

<sup>7</sup> *Louisville v. Werne*, *supra*.

<sup>8</sup> *Scott v. Russian Israelites*, 59 Neb., 571; 81 N. W., 624; *Church of Epiphany v. Raine*, 10 Ohio Dec., 449; 21 Wkly Law Bul., 180.

<sup>9</sup> *Black v. Brooklyn*, 51 Hun., 581; 4 N. Y. Supp., 78.

Whether land owned by a church society but leased for profit is exempt has not been answered with unanimity by the courts. It has been held that land granted to church societies while they were still municipal corporations will retain its exemption even after it is leased to tenants, though such exemption will not be extended to the buildings erected on such land by the tenants.<sup>1</sup> Similarly it has been held in North Carolina that land rented out by religious societies may retain its exemption "if the rentals are applied exclusively to the support of the gospel."<sup>2</sup> The better reasoning, however, is to the effect that such land, by being leased for profit, even if that profit is used to pay a mortgage on the church property, becomes subject to taxation. The money derived from the lease "is money to the members of the society inasmuch as it relieves them to that extent of the obligation which they are under to pay off this mortgage."<sup>3</sup> Whether the profit is derived from church property or from a manufacturing plant can make no difference. Property acquired by a church subject to a lease will therefore, during the continuance of such lease, be taxable, though the church is actually making preparations to occupy it thereafter.<sup>4</sup> It has even been held that if the rented property is actually used by the church on certain days for its own purposes the exemption will not thereby be restored.<sup>5</sup>

It sometimes happens that a building is used partly for

<sup>1</sup> *Parker v. Redfield*, 10 Conn., 490; *St. Philip's Church v. Charleston*, 16 S. C. Eq. (McM. Eq.), 139.

<sup>2</sup> *United Brethren of Salem v. Forsyth County*, 115 N. C., 489; 20 S. E., 626. See *Davis v. Salisbury*, 161 N. C., 56; 76 S. E., 687.

<sup>3</sup> *First M. E. Church of Chicago v. Chicago*, 26 Ill., 482, 487.

<sup>4</sup> *Board of Home Missions of Presbyterian Church v. New York*, 37 N. Y. Supp., 96; 91 Hun., 642.

<sup>5</sup> *Philadelphia v. Barber*, 160 Pa., 123; 28 Atl., 644; 34 Wkly Notes Cas, 155.

religious and partly for secular purposes. It has been held in New York<sup>1</sup> and intimated in Illinois<sup>2</sup> that the property of Young Men's Christian Associations under a statute which exempts only property exclusively used for religious purposes is taxable in its entirety under such circumstances. The same result has been reached by the Rhode Island Court in regard to a chapel used in part as a dwelling for nuns.<sup>3</sup> In other cases, however, the courts have sanctioned a taxation of the secular and an exemption of the non-secular portion of such Young Men's Christian Association Buildings<sup>4</sup> and have reached the same result in regard to other property similarly situated.<sup>5</sup> The theory on which this result has been reached is that the line of division between taxable and exempt property need not necessarily be a vertical one but may on the contrary run horizontally. It has been stated that there may be several distinct tenements under the same roof and that tenements are as essentially distinct when one is under the other as when one is by the side of the other.<sup>6</sup> Says the Illinois Court:

<sup>1</sup> *Y. M. C. A. v. New York*, 113 N. Y., 187; 21 N. E., 86; reversing 44 Hun., 102; see *in re Watson's Estate*, 73 N. Y. Supp., 1058; 36 Misc. Rep., 504; reversed 171 N. Y., 256; 63 N. E., 1109.

<sup>2</sup> *People ex rel. Gore v. Peoria Y. M. C. A.*, 157 Ill., 403.

<sup>3</sup> *In re City of Pawtucket*, 52 Atl., 679 (R. I.); 24 L. R. A., 86.

<sup>4</sup> *Auburn v. Y. M. C. A.*, 86 Me., 244; 29 Atl., 992; *Detroit Young Men's Society v. Detroit*, 3 Mich., 172; *Y. M. C. A. of Omaha v. Douglas County*, 60 Neb., 642; 83 N. W., 924; 52 L. R. A., 123; *Y. M. C. A. v. Keene*, 70 N. H., 223; 46 Atl., 186.

<sup>5</sup> *First M. E. Church of Chicago v. Chicago*, 26 Ill., 482; *Lowell South Congregational Meeting House v. Lowell*, 42 Mass., (1 Met.), 538; *Philadelphia v. Barber*, *supra*. This result has even been attained in connection with a publishing firm the agent of a church association; *American Sunday-School Union v. Taylor*, 161 Pa., 307; 29 Atl., 26; 23 L. R. A., 695; 34 Wkly Notes Cas, 320; affirming 3 Pa. Dist. R., 139; 14 Pa. Co. Ct. Rep., 213.

<sup>6</sup> *Lowell South Congregational Meeting House v. Lowell*, 42 Mass. (1 Met.), 538, 541.

There is no more difficulty in recognizing the different parts of a building for valuation and taxation, than there is for use. The Tuileries of Paris, though but one building of great extent, no doubt is devoted to various purposes. There is the royal residence, and there too are the royal stables; there reside the ministers of state, and there are their offices. So is it an arsenal, and in it are quartered forty thousand troops, and these are but a portion of its uses. Is it not practicable to value one portion of a building and tax that portion, and not the balance? <sup>1</sup>

The difficulty of properly listing such property in the tax lists has been overcome by excluding the portion of the building occupied for the exempt purposes in the estimation of its value and by levying the tax only upon the value of that which is not exempt, though the description will embrace the whole.<sup>2</sup>

The discussion of exemptions in this chapter has thus far been confined to the church building or meeting house and the land upon which it stands and which immediately surrounds it. This, however, is not the only property ordinarily owned by religious societies. A parsonage and a cemetery are very frequently a part of the church property, while parochial schools are sufficiently numerous to demand attention. The question of exemptions as applied to these forms of property will now be taken up in the following pages.

In approaching the question of the exemption of parsonages it is necessary to disabuse one's mind of the conception that a parsonage has in any sense an ecclesiastical character.

Although by the laws of England and the rules regulating the Established Church as founded thereon a *quasi* clerical, or holy

<sup>1</sup> *First M. E. Church of Chicago v. Chicago*, 26 Ill., 482, 488.

<sup>2</sup> *Detroit Young Men's Society v. Detroit*, 3 Mich., 172; *Philadelphia v. Barber*, *supra*.

character, might be given to a parsonage and that notion to some extent may be imbibed by members of the Episcopal church in this country, yet our laws look upon it in no other light than that of the dwelling of a lay member, or the residence of any other person.<sup>1</sup>

The exalted station, or great ability, or extensive usefulness, or eminent piety of its clerical occupant cannot sanctify it or change its secular use. Private services which may be carried on in it with regularity will not distinguish it from other Christian homes. Even official ecclesiastical functions occasionally conducted in it, such as baptisms and marriages, will not change its secular use. The most saintly clergyman, minister, or priest has secular necessities; he must eat and sleep and to these necessities as well as to the pleasant social amenities of life a parsonage is primarily devoted. A parsonage, therefore, is not a public building in any sense. No person of sense would attempt to enter it without an invitation from within.<sup>2</sup> It is as much the castle of its occupant as is the hut of the most humble or the mansion of the most affluent in the land. If it were to be exempted simply because it is occupied by a person appointed as a clergyman it would follow that a building occupied by the janitor of the church would also be exempt. If the claim for its exemption were allowed it is "not difficult to foresee that some of the wealthy incorporated churches might, and could soon claim immunity for houses built at their expense, as residences for a larger portion of their members."<sup>3</sup>

<sup>1</sup> Dauphin County *v.* St. Stephen Church, 3 Phila., 189, 191 (Pa.).

<sup>2</sup> Such a claim was made by counsel and denied by the court in *in re* Walker, 200 Ill., 566; 66 N. E., 144; and *Pittsburg v. Third Presbyterian Church*, 10 Pa. Super. Ct., 302; 29 Pitts. Leg. J. (N. S.), 441; 44 W. N. C., 215. See also *Mauresa Institute v. Norwalk*, 61 Conn., 228; *Sister of Peace v. Westervelt*, 64 N. J. Law, 510; 45 Atl., 788; 65 N. J. Law, 685; 48 Atl., 789.

<sup>3</sup> Dauphin County *v.* St. Stephen's Church, 3 Phila., 189, 192 (Pa.).



It has therefore been uniformly held by the courts that a parsonage, though it may be property used for church as distinguished from religious purposes or property appropriate for the *support* of public worship,<sup>1</sup> is not exempt as being used for religious purposes<sup>2</sup> or religious worship<sup>3</sup> or public worship<sup>4</sup> or as used *exclusively* for public worship<sup>5</sup> or religious worship<sup>6</sup> or religious<sup>7</sup> Bible or missionary purposes.<sup>8</sup> The rule is applied with such strictness that a sta-

<sup>1</sup> Gerke *v.* Purcell, 25 Ohio St., 229; Watterson *v.* Halliday, 77 Ohio St., 150, 175; 82 N. E., 962 First Presbyterian Church *v.* New Orleans, 30 La. Ann., 259; 31 Am. Rep., 224; People *ex rel.* Thompson *v.* Oak Park First Congregational Church, 232 Ill., 158; 83 N. E., 536.

<sup>2</sup> Ramsay County *v.* Church of Good Shepherd, 45 Minn., 229; 47 N. W., 783; 11 L. R. A., 175; State *v.* Axtell, 41 N. J. Law, 117.

<sup>3</sup> M. E. Church *v.* Ellis, 38 Ind., 3; Third Congregational Society *v.* Springfield, 147 Mass., 396; 18 N. E., 68; St. Joseph's Church *v.* Providence, 12 R. I., 19; 34 Am. Rep., 597; Broadway Christian Church *v.* Commonwealth, 66 S. W., 32; 112 Ky., 448; 23 Ky. Law Rep., 1695; First Presbyterian Church *v.* New Orleans, 30 La. Ann., 259; 31 Am. Rep., 224; Philadelphia *v.* St. Elizabeth's Church, 45 Pa. Super. Ct., 363; See Pittsburg *v.* Third Presbyterian Church, 10 Pa. Super. Ct., 302; 29 Pitts. Leg. J. (N. S.), 441; 44 W. N. C., 215, where a janitor's residence was in question.

<sup>4</sup> St. Mark's Church *v.* Brunswick, 78 Ga., 541; 3 S. E., 561; People *ex rel.* Hutchinson *v.* Collison, 22 Abb. N. C., 52; 6 N. Y. Supp., 711; People *ex rel.* Hutchinson *v.* O'Brian, 53 Hun., 580; 6 N. Y. Supp., 682; see also *in re* Walker, 200 Ill., 566; 66 N. E., 144; in which a janitor's residence was in question.

<sup>5</sup> Vail *v.* Beach, 10 Kans., 214; St. Peter's Church *v.* Scott County, 12 Minn., 395; Hennepin County *v.* Grace, 27 Minn., 503; 8 N. W., 761; Gerke *v.* Purcell, *supra*; Watterson *v.* Halliday, *supra*.

<sup>6</sup> De Kalb First Congregational Church *v.* De Kalb County, 254 Ill., 220; 98 N. E., 275; Muldoon *v.* De Kalb County, 254 Ill., 336; 98 N. E., 673.

<sup>7</sup> *Ibid.*; People *ex rel.* Thompson *v.* Oak Park First Congregational Church, 232 Ill., 158; 83 N. E., 536; United Brethren of Salem *v.* Forsyth County, 115 N. C., 489; 20 S. E., 626; St. Joseph's Church *v.* Providence, *supra*; Vail *v.* Beach, *supra*.

<sup>8</sup> People *ex rel.* St. Mary's Free Church *v.* Feitner, 168 N. Y., 494; 61 N. E., 764; modifying 71 N. Y. Supp., 257. See also Mauresa In-

tute exempting parsonages under a constitution which authorizes the exemption only of "places of religious worship"<sup>1</sup> or of property used "exclusively for religious purposes"<sup>2</sup> will be held to be unconstitutional. The fact that one of the rooms of a parsonage is used as a chapel<sup>3</sup> or that the building itself is used to a great extent for services and for the religious, charitable, and educational work of the church<sup>4</sup> or that children receive religious instruction in it on both weekdays and Sundays<sup>5</sup> will not desecularize it. While it may be exempt as a charity<sup>6</sup> or as property "devoted solely to the appropriate objects" of the religious institutions which it serves<sup>7</sup> but not as a part of its "endowments or funds"<sup>8</sup> it will ordinarily require a statute or constitutional provision expressly naming it to accomplish this result.

Nor will the close proximity of the church and parsonage affect the question in the least. Such proximity does

stitute *v. Norwalk*, 616 Conn., 228; 23 Atl., 1088; where a summer residence of theological professors of the Jesuit Order was held not to be used exclusively "for ecclesiastical societies" within the meaning of the statute.

<sup>1</sup> *St. Mark's Church v. Brunswick*, 78 Ga., 541; 3 S. E., 561.

<sup>2</sup> *People ex rel. Thompson v. Oak Park First Congregational Church*, 232 Ill., 158; 83 N. E., 536.

<sup>3</sup> *Muldoon v. De Kalb County*, 254 Ill., 336; 98 N. E., 673; *St. Joseph's Church v. Providence*, 12 R. I., 19; 34 Am. Rep., 597. See *Northampton County v. St. Peter's Church*, 5 Pa. Co. Ct. Rep., 416.

<sup>4</sup> *Watterson v. Halliday*, 77 Ohio St., 150; 82 N. E., 962.

<sup>5</sup> *Ramsay County v. Church of Good Shepherd*, 45 Minn., 229; 47 N. W., 783; 11 L. R. A., 175.

<sup>6</sup> *Bishop's Residence Company v. Hudson*, 91 Mo., 671; 4 S. W., 435.

<sup>7</sup> *Cook v. Hutchins*, 46 Iowa, 706; *Griswold College v. State*, 46 Iowa, 275. Says the court on page 281: "The holding of such a building and using it solely as the residence of the officiating clergyman is surely appropriate, fit and proper to the objects of the church, such objects being the propagation of the religious doctrines held and taught by the particular denomination to which the church may belong."

<sup>8</sup> *First Reformed Dutch Church v. Lyon*, 32 N. J. Law (3 Vroom), 360.

not change the character of the building. Its object and use remains the same. Whether it is situated on a lot far removed from the church lot or actually adjoins the church<sup>1</sup> or is separated from it only by a narrow space<sup>2</sup> or by a thirteen-inch partition wall<sup>3</sup> or is directly connected with it by a door<sup>4</sup> is immaterial. Even where the land occupied by it might, if vacant, be exempt as necessary for the fair use and enjoyment of the church the use of it as a parsonage will show conclusively that it is not necessary for such purpose and will render it subject to taxation.<sup>5</sup> Nor will even a statute exempting church grounds "together with the parsonage thereon" be of any avail where the parsonage is on a lot separated from the church grounds. The connection contemplated is not a spiritual but a terrestrial one.<sup>6</sup>

All this reasoning, however, applies only to states which do not exempt parsonages in express terms. In states which thus exempt parsonages no important question can arise. The question whether a parsonage temporarily or permanently rented out to persons who are not clergymen is exempt is the only one which has caused the courts any difficulty in such states. This question has received an affirmative answer in South Carolina whose constitution simply exempts all parsonages from taxation<sup>7</sup> and a negative one in Ken-

<sup>1</sup>Third Congregational Society *v.* Springfield, 147 Mass., 396; 18 N. E., 68.

<sup>2</sup>People *ex rel.* Hutchinson *v.* O'Brian, 53 Hun., 580; 6 N. Y. Supp., 862.

<sup>3</sup>Philadelphia *v.* St. Elizabeth's Church, 45 Pa. Super. Ct., 363.

<sup>4</sup>M. E. Church *v.* Ellis, 38 Ind., 3.

<sup>5</sup>State *v.* Axtell, 41 N. J. Law, 117; Gerke *v.* Purcell, 25 Ohio St., 229.

<sup>6</sup>Foley *v.* Oberlin Congregational Church, 121 Pac., 65; 67 Wash., 280; see Dauphin County *v.* St. Stevens Church, 3 Phila., 189 (Pa.).

<sup>7</sup>Protestant Episcopal Church of St. Phillips *v.* Priolean, 63 S. C., 70; 40 S. E., 1026; 57 L. R. A., 606.

tucky whose statutes exempt parsonages "occupied as a home and for no other purpose, by the minister of any religion."<sup>1</sup> Under a Wisconsin statute exempting parsonages "whether occupied by the pastor permanently or rented for his benefit" it has even been held that a building rented by the congregation from third parties and occupied by the pastor is exempt from taxation.<sup>2</sup> Under the same statute it has, however, been further held that a parsonage neither owned by the congregation nor rented by it but which is the property of the bishop is not exempt.<sup>3</sup>

In country districts a cemetery is quite frequently and in cities it is occasionally a part of the church property. There are strong reasons why it should be exempt from taxation. The decent disposition of the dead is a public duty which should by all means be encouraged by the state. If cemetery property were taxed it would be subject to sale on the non-payment of such tax.

The prospect of being called to witness the exposure to public sale of the mouldering remains of those who gave us our being or received theirs from us is quite sufficient to call into exercise the warmest passions indulged by a community of refined sensibilities. Reverence for the dead must be the sentiment of all who can respect the living.<sup>4</sup>

The constituted authorities are therefore obligated to protect the dead as well upon the principle of protection against an act more calculated to destroy the happiness of the living than are many of the petty offences against which their enactments are properly directed as also upon the principle "of cultivating a sound state of social, moral and religious

<sup>1</sup> *Broadway Christian Church v. Commonwealth*, 66 S. W., 32; 112 Ky., 448; 23 Ky. Law Rep., 1695.

<sup>2</sup> *Gray v. LaFayette County*, 65 Wis., 567; 27 N. W., 311.

<sup>3</sup> *Katzer v. Milwaukee*, 104 Wis., 16; 80 N. W., 41.

<sup>4</sup> *Dolan and Foy v. Baltimore*, 4 Gill, 394 (Md.).

character, which cannot be successfully attained by the precepts of schools and colleges, while their instructions are counteracted by the exhibition of spectacles which must shock, and ultimately weaken, the moral sense.”<sup>1</sup> It follows that a burial ground

acquired by the contributions or grants of Christian people and devoted to the worship of God or the interment of the dead, should be released from the ordinary burdens of the government, more especially as there is no private interest in the corporation, except to protect the common estate from being perverted to other than its legitimate uses, or destroyed.<sup>2</sup>

In accord with these sentiments a number of states exempt from taxation all cemeteries, public or private, conducted with or without a view to pecuniary profit. Such a broad statute or constitutional provision will of course cover church graveyards and settle the question of their exemption beyond the shadow of a doubt.

However, not all states are so liberal. In this day and generation cemeteries, particularly in the large cities, are sometimes as much commercial ventures as department stores. Large tracts of land are acquired, partitioned into lots, and sold with a view to profit. Large funds are accumulated by a sale of these lots. Such ventures are therefore quite frequently excluded from the benefit of the exemption statutes.<sup>3</sup> Nor is this principle confined in its operation to cemetery associations. If a church society sells lots in its cemetery and mingles the money thus realized with its general funds, even though it is still indebted for the purchase price of the ground and does not intend to make

<sup>1</sup> *Dolan and Foy v. Baltimore*, 4 Gill, 394, 403 (Md.).

<sup>2</sup> *Matlack v. Jones*, 2 Disn. 2, 7 (Ohio).

<sup>3</sup> *Oak Hill Cemetery Company v. Wells*, 38 Ind. App., 479; 78 N. E., 350.

a profit out of it, the property will not be exempt as a place "of burial not used or held for private or corporate profit."<sup>1</sup>

It remains to determine just what ground will be exempt as a cemetery in such states as do not exempt all cemetery property.

In former times, no church or churchyard was regarded as bearing a religious character, until both were solemnly dedicated to pious use; and the publicity of the act not only established their claim to sanctity, but gave notoriety to the fact that the worship of the living, and the quiet repose of the dead, would be alike protected, within the walls of the one, or beneath the soil of the other.<sup>2</sup>

A mere dedication, however, will not be sufficient in this day and generation. Something more must be done. While the exemption will not be confined to the spots where there are graves,<sup>3</sup> while the fact that a considerable part of the ground is not used for the mere purpose of burial but is utilized for plants useful and ornamental<sup>4</sup> will not render the whole or any part of the land subject to taxation the ground in order to be exempt must at least be platted as<sup>5</sup> or actually used for<sup>6</sup> a cemetery and will not be exempt merely because of the existence of a chapel on it.<sup>7</sup>

<sup>1</sup> *Mt. Olive Borough v. First German Ev. Luth. St. Paul's Congregation of East Birmingham*, 51 Pa. Super. Ct., 343; *Brown's Heirs v. Pittsburg*, 16 Atl., 43 (Pa.).

<sup>2</sup> *Matlack v. Jones*, 2 Disn., 2, 6 (Ohio).

<sup>3</sup> *Appeal Tax Court v. St. Peter's Academy*, 50 Md., 321.

<sup>4</sup> *German Ev. Prot. Cemetery v. Brooke*, 8 Ohio Cir. Ct. Rep., 439, 441.

<sup>5</sup> *German Ev. Prot. Cemetery v. Brooke*, 8 Ohio Cir. Ct. Rep., 439.

<sup>6</sup> *Mulroy v. Churchman*, 52 Iowa, 238; 3 N. W., 72, holding that a forty acre tract of land, thirty-nine acres of which are rented out for farming purposes, is exempt only in regard to the one acre actually used for burial purposes.

<sup>7</sup> *Trinity Church v. New York*, 10 How. Prac., 138 (N. Y.).

Parochial schools are a part of the church property of many Catholic and Lutheran congregations and may be found occasionally in connection with other church property and are exempt from taxation as such by the constitutions or statutes of a number of states. Where this is the case of course no question can arise. The express words of the written law completely control the situation.

However, such an express provision is not absolutely necessary. Parochial schools are not against public policy. It is not the "public policy of the state that the children of the state shall not receive any education in any other school than in one of the public schools established by itself."<sup>1</sup> While exemptions granted to "public schools" will not be construed to exempt parochial schools, though no charge is made by them for tuition,<sup>2</sup> parochial schools will be included where the more general word schoolhouse is used<sup>3</sup> or where property used for educational purposes<sup>4</sup> or for a seminary of learning<sup>5</sup> is exempted. Where the right to exemption is further qualified parochial schools of course must bring themselves within the law in order to enjoy the exemption. They have under such statutes been denied exemption because they were not owned by some congregation<sup>6</sup> or because the association that owned them was not incorporated.<sup>7</sup>

<sup>1</sup> *Gilmour v. Pelton*, 5 Ohio Dec., 447.

<sup>2</sup> *People ex rel. Pavey v. Ryan*, 138 Ill., 263; 27 N. E., 1095; *Gerke v. Purcell*, 25 Ohio St., 229; *St. Joseph's Church v. Providence*, 12 R. I., 19; see *Hennepin County v. Grace*, 27 Minn., 503; 8 N. W., 761.

<sup>3</sup> *Catholic Society v. New Orleans*, 10 La. Ann., 73; *First Presbyterian Church v. New Orleans*, 30 La. Ann., 259; 31 Am. Rep., 224.

<sup>4</sup> *United Brethren v. Forsyth County*, 115 N. C., 489; 20 S. E., 626.

<sup>5</sup> *Hennepin County v. Grace*, *supra*.

<sup>6</sup> *People ex rel. Pavey v. Ryan*, *supra*.

<sup>7</sup> *Church of St. Monica v. New York*, 119 N. Y., 91; 23 N. E., 294; 7 L. R. A., 70; reversing 55 Super. Ct. (23 Jones & S.), 160; 13 N. Y. State Rep., 308.

The cases so far considered exempt parochial schools on account of the educational facilities which they afford. These educational features, however, are not the only reason on account of which the exemption is extended to them. They may furthermore be exempted as charitable institutions or institutions of purely public charity.<sup>1</sup> The establishment and maintenance of a school

out of revenues of the church, and the voluntary contributions of those of its patrons who are able and willing to give, no pecuniary profit being derived therefrom nor expected, the same being open upon equal terms to all children of Catholic parents belonging to the parish and to all other living therein, of whatever religious belief, who may desire to avail themselves of the same, it being left optional with the latter to receive religious instruction or not as their parents may choose, is, in the legal sense, not only a charity, but one wholly and entirely of a public nature, and therefore a purely public one.<sup>2</sup>

Some of the larger and wealthier congregations outside of the features already mentioned acquire camp grounds for their summer outings. Such grounds occupy about the same position in the life of such congregations as a summer home occupies in the life of a well-to-do citizen. They are used only during a small part of the year and are vacant the rest of the time. Their liability to taxation has come before the courts in a few cases. Though a charge is made by them for the use of certain conveniences they have been held to be exempt as a purely public charity.<sup>3</sup> On the other hand such exemption has been denied where several congre-

<sup>1</sup> Appeal Tax Court *v.* St. Peter's Academy, 50 Md., 321; *Gilmour v. Pelton*, *supra*; *Episcopal Academy v. Philadelphia*, 150 Pa., 565; 25 Atl., 55; see *Miller's Appeal*, 10 Wkly. Notes Cas., 168.

<sup>2</sup> *Hennepin County v. Grace*, 27 Minn., 503; 8 N. W., 761.

<sup>3</sup> *Davis v. Cincinnati Camp Meeting Ass'n*, 57 Ohio St., 257; 49 N. E., 401.



gations were the owners and the statute covered only property owned by *the* congregation.<sup>1</sup> In a Maine case that part of the grounds used as a tabernacle or auditorium has been held to be exempt<sup>2</sup> while in Connecticut such a building on account of its use on week days for dancing and parlor skating has been held to be subject to taxation.<sup>3</sup> Of course a grocery store conducted by the association on its premises is liable to taxation<sup>4</sup> as are also cottages erected on the ground by individual worshipers.<sup>5</sup>

It remains to say a few words on a few minor subjects which have come up for discussion such as the exemption granted to ministers, endowment funds and testamentary gifts for church purposes. The subject of ministers' exemptions is very largely an historical one. When ministers were public officials serving for life and paid by the state there was an obvious reason for exempting them from taxation. When

the law made provision for the support of the clergy—making it the duty of the town to raise money, and empowering the magistrates, in case of neglect of towns, to levy money by tax for the honorable support of the teacher—it would have been absurd to tax the minister himself.<sup>6</sup>

In consequence ministers not only of the established church<sup>7</sup>

<sup>1</sup> People *ex rel.* Brey Meyer *v.* Watseka Camp Meeting Ass'n, 160 Ill., 576; 43 N. E., 716.

<sup>2</sup> Foxcroft *v.* Piscataquis Valley Camp Meeting Ass'n., 86 Me., 78; 29 Atl., 951.

<sup>3</sup> Connecticut Spiritualist Camp Meeting Ass'n *v.* East Lynn, 54 Conn., 152; 5 Atl., 849.

<sup>4</sup> Alton Bay Camp Meeting Ass'n *v.* Alton, 69 N. H., 311; 45 Atl., 95.

<sup>5</sup> Foxcraft *v.* Straw, 86 Me., 76; 29 Atl., 950; Connecticut Spiritualist Camp Meeting Ass'n *v.* East Lynn, *supra*.

<sup>6</sup> Kidder *v.* French, Smith, 155, 161 (N. H.).

<sup>7</sup> *Ibid.*; Kelley *v.* Bean Smith; 157 (N. H.); Moore *v.* Poole, Smith, 166 (N. H.).

but even of dissenting churches have been exempted in New Hampshire,<sup>1</sup> Massachusetts,<sup>2</sup> Maine,<sup>3</sup> and perhaps other states. Little of this exemption remains. It has been held, however, that a clergyman, though he is not an officer within the meaning of the statutes relative to taxation,<sup>4</sup> will nevertheless be exempt where a statute expressly so provides though he has retired from active service.<sup>5</sup>

It is a well known fact that an endowment is a prime necessity for the well being of a college or university. It is not necessary for a church. Church societies can and generally do get along without it. However, through the liberality of testators or other donors or through the sale of its property, a church is sometimes put in possession of a fund which is greater than is required for its immediate needs. There are many reasons why such a fund should not be exempt from taxation. A church which is so rich that it has money to invest certainly should pay for the protection which the state gives to its surplus wealth. That the income of this fund is used exclusively for religious purposes can make no difference. "There may be an exclusive use of the income and not of the property from which such income is derived."<sup>6</sup> It has therefore been held that such a fund is not exempt as a "purely public charity"<sup>7</sup>

<sup>1</sup> *Muzzy v. Wilkine, Smith*, 1 (N. H.); but see *Henderson v. Erskine, Smith*, 36 note (N. H.).

<sup>2</sup> *Gridley v. Clark*, 19 Mass. (2 Pick), 403; but see *Ruggles v. Kimball*, 12 Mass., 337.

<sup>3</sup> *Baldwin v. McClinch*, 1 Me. (1 Greenl.), 102; *Gorham v. Ministers' Fund*, 109 Me., 22; 82 Atl., 290.

<sup>4</sup> *Commonwealth v. Cuyler*, 5 W. & S., 275 (Pa.).

<sup>5</sup> *People ex rel. Mann v. Peterson*, 31 Hun., 421 (N. Y.).

<sup>6</sup> *Y. M. C. A. of Omaha v. Douglas County*, 60 Neb., 642; 83 N. W., 924; 52 L. R. A., 123.

<sup>7</sup> *Commonwealth v. Thomas*, 119 Ky., 208, 214; 83 S. W., 572; 26 Ky. Law Rep., 1128; 6 L. R. A. (N. S.), 320.

whether it is invested in a mortgage,<sup>1</sup> in a hall,<sup>2</sup> or in a vacant plot of ground.<sup>3</sup> Only when the statutory exemption is direct and unmistakable and exempts such a fund in express terms will the owner be allowed to enjoy it tax-free.<sup>4</sup>

Since a fund after it has come into the hands of a church is not generally favored by the law to the extent of exempting it from taxation, it follows that it should not be exempt from the tax imposed upon the transfer of such property. There is an obvious distinction between ordinary taxes and death duties. "Exemption from the succession tax deals with the passing of property to a legatee or devisee; the exemption from yearly taxation deals with the holding of property."<sup>5</sup> An inheritance tax, therefore, is not a tax upon property, but upon the right of the donor to give it and upon the right of the donee to receive it.<sup>6</sup> It is a public claim on all estates transferred and conveyed to take effect, be possessed and enjoyed after the death of the grantor or bargainor.<sup>7</sup> It is "a statutory lien on the various kinds of property which descend by will and under the law from a decedent to collateral kindred or particular legatees."<sup>8</sup> Since it is the state which not only confers the power to devise and bequeath on the benefactor but also the power to accept and take on the beneficiary, it follows that it may im-

<sup>1</sup> *Presbyterian Church v. Montgomery County*, 3 Grant Cas. 245 (Pa.).

<sup>2</sup> *Hartford First Unitarian Society v. Hartford*, 66 Conn., 368; 34 Atl., 89.

<sup>3</sup> *State v. Krollman*, 38 N. J. Law, 323; affirmed page, 574.

<sup>4</sup> *State v. Silverthorn*, 52 N. J. Law, 73; 19 Atl., 124.

<sup>5</sup> *Salem First Universalist Society v. Bradford*, 185 Mass., 310, 313; 70 N. E., 204.

<sup>6</sup> *Humphreys v. State*, 70 Ohio St., 67, 84; 70 N. E., 957; 65 L. R. A., 776.

<sup>7</sup> *Commonwealth v. Gilpin's Executors*, 3 Pa. Dist. Rep., 711, 713; 14 Pa. Co. Ct. Rep., 122.

<sup>8</sup> *Ibid.*

pose such conditions as it pleases. The inheritance tax is the price of the privilege which the state has conferred.<sup>1</sup> No reason but positive and unmistakable legislative or constitutional exemption therefore exists why church societies should not pay for this privilege the same as anybody else.

They certainly should not be favored as against other charitable institutions.

The spirit of philanthropy and charity will not be fostered or strengthened, nor the state enriched, by a system of laws which permit an opulent sectarian church to gather into its coffers, tax-free, the legacies of its donors, while the great humanitarian and practical charities of the age must first yield tribute to the state before they can take that which is given them to do their good works.<sup>2</sup>

Unless exempted by plain and unambiguous provisions they should give up the small percentage of the gift which the state exacts as a transfer tax.<sup>3</sup>

On looking into the matter more intimately it will be found that the courts apply the strictest rules of construction when an exemption from death duties is claimed by a church beneficiary. Even though churches are exempted in terms, this exemption will be construed to refer only to the religious associations of the very state in which the question arises. It has been said by the New York Court that while it is the policy of society to encourage benevolence and

<sup>1</sup> *Commonwealth v. Gilpin's Executors, supra.*

<sup>2</sup> *In re Watson's Estate*, 171 N. Y., 256, 262; 63 N. E., 1109; reversing 75 N. Y. Supp., 1134; 70 App. Div., 623, which affirmed 73 N. Y. Supp., 1058; 36 Mis., 504.

<sup>3</sup> *Barringer v. Cowan*, 55 N. C., 436. Thus a bequest for masses: *Appeal of Seibert and Bradley's Executor*, 18 W. N. C., 276, or a bequest subject to the condition that a bell be tolled at a specified time: *Commonwealth v. Gilpin's Executors*, 3 Pa. Dist. Rep., 711; 14 Pa. Co. Ct. Rep., 122, have been held to be subject to taxation.

charity "it is not the proper function of a state to go outside of its own limits and devote its resources to support the cause of religion, education, or missions for the benefit of mankind at large."<sup>1</sup> The contention that an exemption of a gift "to any religious corporation" includes a foreign religious corporation has been characterized by the same court as implying "the grant of a privilege by the legislature without sufficient indications of an intention so contrary to ordinary state policy and to usual statutory presumptions."<sup>2</sup> While such legacies under a statute which exempts religious institutions which are not confined in their operations or benefactions to local or state purposes will not be subjected to a transfer tax if the beneficiary can bring himself within the statutory definition,<sup>3</sup> foreign beneficiaries who do not fit into this definition will be required to pay the tax as a condition of receiving the gift<sup>4</sup> unless they have incorporated also in the state of testator's domicile in which case they will be considered and treated as domestic corporations.<sup>5</sup>

The provisions in various states relieving gifts to religious societies or institutions from the transfer tax provided that their property be "by law exempt from taxation" have received a different construction in the states in which the question has been raised. It has been held in New York that in order to exempt such a gift from the transfer tax the entire property of such church association must be exempt

<sup>1</sup> Matter of Estate of Prime, 136 N. Y., 347, 362; 32 N. E., 1091; 18 L. R. A., 713.

<sup>2</sup> *In re Balleis Estate*, 144 N. Y., 132; 38 N. E., 1007.

<sup>3</sup> *State v. New York Yearly Meeting of Friends*, 61 N. J. Eq., 620; 48 Atl., 227; *in re Jones Estate*, 73 N. J. Eq., 353; 67 Atl., 1035; affirmed 70 Atl., 1101.

<sup>4</sup> *Minot v. Winthrop*, 162 Mass., 113; 38 N. E., 512; 26 L. R. A., 259; *Humphrey v. State*, 70 Ohio St., 67; 70 N. E., 957; 65 L. R. A., 776; *in re Brown*, 13 Ohio Dec., 168.

<sup>5</sup> *In re Lyon's Estate*, 128 N. Y. Supp., 1004.

from general taxation and that the liability of any part of it to taxation will in turn subject the gift to the transfer tax.<sup>1</sup> The Massachusetts court, on the other hand, has held that a devise to a church society for a parsonage (which in that state is subject to taxation) is exempt from the inheritance tax as being given to a religious society "the property of which is by law exempt from taxation." The court argues that it is not provided that such property must be exempt to the extent to which it will be exempt in the hands of the beneficiary.<sup>2</sup> It will readily be seen that in this instance the New York Court construes the statute strictly while the Massachusetts Court indulges in a liberal interpretation of it. In view of the general rule of strict construction of exemption statutes and in further view of the fact that the exemption here in question is from a transfer tax, there can be no doubt but that the decision of the New York Court is entitled to a preference over that adopted by the Massachusetts tribunal.<sup>3</sup>

The state of New York has been a pioneer both in the passage of inheritance tax laws and in their strict construction. It has required church societies which claimed exemption to point out a specific clause in the statute expressly and unmistakably granting the exemption claimed<sup>4</sup> and has denied exemption to a Christian home for intemperate men<sup>5</sup>

<sup>1</sup> *Catlin v. Trinity College*, 113 N. Y., 133; 20 N. E., 864; 3 L. R. A., 206; *Sherrill v. Christ Church*, 121 N. Y., 701; 25 N. E., 50; reversing *in re Van Kleek's Estate*, 55 Hun., 472; 8 N. Y. Supp., 806.

<sup>2</sup> *Salem First Universalist Society v. Bradford*, 185 Mass., 310; 70 N. E., 204.

<sup>3</sup> See also *Carter v. Eaton*, 75 N. H., 560; 78 Atl., 643.

<sup>4</sup> *In re Kavanagh's Estate*, 6 N. Y. Supp., 669; *In re Board of Foreign Missions*, 58 Hun., 116; 11 N. Y. Supp., 310.

<sup>5</sup> *In re Vanderbilt's Estate*, 10 N. Y. Supp., 239.

to a missionary society,<sup>1</sup> to a Y. M. C. A. building,<sup>2</sup> and to a church which derived an income from a fund.<sup>3</sup> It has, however, held that a legacy to a bishop is exempt if that bishop lives out of the state,<sup>4</sup> that any archbishop or cardinal archbishop is a bishop within the meaning of the transfer tax law,<sup>5</sup> that a corporation organized to provide floating churches for seamen is exempt as a religious corporation under the inheritance tax,<sup>6</sup> and that property not exempt at the time of its devolution may become so under a subsequent statute which exempts property "heretofore devised or bequeathed."<sup>7</sup>

To sum up: While the exemption from taxation of property devoted to educational and charitable purposes rests on reason, since such property is devoted to purposes which are public in their nature, a similar exemption extended to church property is not so easily defended since it is not the business of the American government, state or national, to impart religious culture or instruction. The practice of exempting such property, however, rests on an immemorial custom which developed when the parish was as much a municipal corporation as towns, villages, and cities are today. It continued after the reason for it had disappeared

<sup>1</sup> *In re Watson's Estate*, 63 N. E., 1109; 171 N. Y., 256; *In re Board of Foreign Missions*, *supra*; but see *in re McCormick's Estate*, 206 N. Y., 100; 99 N. E., 177.

<sup>2</sup> *In re Watson's Estate*, *supra*. *In re Fay's Estate*, 76 N. Y. Supp., 62; 37 Misc., 532; but see *in re Moses' Estate*, 113 N. Y. Supp., 930; 60 Misc., 637.

<sup>3</sup> *In re Wolfe's Estate*, 2 Con. Sur., 600; 15 N. Y. Supp., 539.

<sup>4</sup> *In re Palmer's Estate*, 53 N. Y. Supp., 847; 33 App. Div., 307; affirmed 52 N. E., 1125; 158 N. Y., 669.

<sup>5</sup> *In re Kelly*, 60 N. Y., Supp., 1005; 29 Misc., 169.

<sup>6</sup> *In re Prall's Estate*, 79 N. Y., Supp., 971; 78 App. Div., 301.

<sup>7</sup> *Roman Catholic Church of the Transfiguration v. Niles*, 86 Hun., 221; 33 N. Y. Supp., 243.

and was then bolstered up by statutory enactments, constitutional provisions, or by a combination of the two. The forty-eight states of the Union may accordingly now be divided into three groups: 1, those in which the statutes are the only authority for the practice; 2, those in which it is based on self-executing constitutional provisions; 3, those in which the constitutional provisions are mere powers of attorney to the legislature, leaving it in the discretion of the latter to exempt or not to exempt in whole or part certain enumerated property. Under all these classes the practice, within the limitation laid down by the statute or constitutional provision or both, has been uniformly upheld by the courts, so that there can be no question of its validity. It has, however, been confined to *tax* exemptions and will not be extended to give churches exemption from special assessments. Except in those states which regulate the matter by self-executing constitutional provisions and thus remove it beyond the sphere of legislative action, the extent of the exemption granted, within the limits of such non-self-executing constitutional provisions as may be in force, is within the discretion of the legislature which may accordingly pass, amend, or repeal exemption statutes without impairing the obligation of a contract.

The property that naturally has the first claim to consideration in this connection is the *meeting-house* or church building and the land on which it stands and which is reasonably necessary for its comfortable enjoyment. Such property, accordingly, is exempted from taxation even though the exempting statute or constitutional provision does not mention the land in terms. The exemption, however, will not be extended to church property which has been abandoned as such or to empty lots owned by a congregation though it is intended to erect a church building on the same, or though such a building is actually in course



of construction. Nor will the fact that the building is occasionally used for other purposes make it taxable where its primary use is for purposes which commend themselves to the consciences of the votaries as religious exercises, extraordinary though they may be. Nor will the fact that part of the building only is used as a church while the balance is devoted to secular purposes make the whole building taxable. The line of division between taxable and exempt property in such cases may be horizontal as well as vertical. Different tenements may be one below the other as well as one beside the other.

In addition to its meeting-house a religious society quite frequently owns a parsonage and a cemetery and occasionally possesses a parochial school and a camp meeting ground. A *parsonage* though it stands in close proximity to the church building and is regularly used for private services, for baptisms, marriages and the instruction of the young, is primarily devoted to the secular necessities of its clerical occupant and is therefore not exempt as property used for religious worship or religious purposes. It may, however, and quite frequently is exempted by statutes or constitutional provisions which particularly name or define this particular property. A *cemetery* is quite frequently exempted as such whether it is owned by a congregation or is a mere commercial venture. Where, however, commercial cemeteries are excluded from the exemption, church bodies should not conduct their cemetery operations on a commercial basis if they desire the exemption. A mere dedication of a plot of ground as a cemetery will not suffice to bring it within the exemption but actual use or actual platting of the ground is necessary for this purpose. *Parochial schools* are exempted in express terms in a number of states. Where this is not the case they will not be exempted as "public schools" though open to all without tuition. They

may, however, enjoy exemption where the more general word "school" is used and may even be exempt as public charities. The exemption of *camp meeting grounds* depends so much upon the complexion of the local statutes and has come before the courts in such few cases that no general rule can be laid down in regard to them.

Of the remaining subjects of exemption statutes the matter of minister's exemption is almost purely an historical one while an exemption of an endowment fund will be conceded only where the statute is clear and unequivocal. The same strict rule of construction applies where a church is made the beneficiary of a testamentary gift and the question is raised whether this gift is subject to the collateral inheritance tax. Such a tax being the price which the state has fixed for the privilege conferred by it on the donor to give and on the donee to receive should be paid by church societies as well as by others unless they are unmistakably exempted from it.

## CHAPTER X

### DISTURBANCE OF MEETINGS

RELIGIOUS freedom is the crown jewel in the rich diadem of American liberties. The federal and state constitutions protect the American citizen from any interference with his rights of conscience on the part of the federal or state governments respectively. Under this protection he may entertain any opinion whatsoever as to his relations with his God, provided he does not allow his views to break out into vicious and unlawful action. Subject to this one necessary restraint, he may think, reason and argue as he pleases, and may belong to any church or to none at all without let or hindrance on the part of the government. In the great battle of thought and action between the various denominations, both the Nation and the States maintain a strict and absolute neutrality.

This neutrality, however, does not spell indifference. Both the State and the United States governments cannot but recognize the high ethical value of religion to their own purposes. Their neutrality is therefore a friendly neutrality toward all the contending forces. No difficulties are thrown into the way of any of them. None are tolerated, none established, but all are protected. Such protection is illustrated by laws exempting the property of all religious bodies from taxation, by Sunday laws which make it possible for all to attend religious worship, and by laws for the incorporation of religious societies.

But perhaps the most striking illustration of this friendly attitude is afforded by the laws against disturbing relig-

ious meetings. While no church is established in the European sense of the word, all are "established for the purpose of the security of the worshipers from penalties or from molestation in the act of worship."<sup>1</sup> Without such security the important provisions in the constitutions which guarantee the free enjoyment of religious principles and worship to every person would become nugatory.<sup>2</sup> Without freedom to assemble and worship God according to the dictates of one's own conscience religious liberty would be but a shadow without a substance. Besides the quiet of the body politic demands that the religion which the citizen professes may be safely professed and sincerely exercised in public assemblies. While, therefore, no one is compelled to attend, or come near to, any church meeting, if he does attend or come near it, it becomes his duty to conduct himself with decorum and respect.<sup>3</sup> If he refuses to do so it becomes incumbent on the state to punish him, since his acts do not only disturb a lawful meeting but tend to destroy the public morals and excite to a breach of the peace and since they constitute a common injury to an indefinite number of persons none of whom can sue alone unless, as in the case of a nuisance, he has received some special and peculiar damage over and above the common injury sustained by all the other worshipers.<sup>4</sup> On this basis acts which disturb religious meetings have been punished with and without statutes both in England and America. The situa-

<sup>1</sup> *State v. Jasper*, 15 N. C., 323, 324.

<sup>2</sup> *People v. Degey*, 2 Wheeler Cr. Cas., 135, 138; *State v. Davis*, 126 N. C., 1059; 35 S. E., 600; *Bell v. Graham*, 1 N. & Mer. C., 278 (S. C.); *State v. Ramsay*, 78 N. C., 448; *Chine v. State*, 130 Pac., 510 (Okl. App.); *State v. Smith*, 5 Har., 490 (Del.).

<sup>3</sup> *Brown v. State*, 1 Wheeler Cr. Cas., 124.

<sup>4</sup> *United States v. Brooks*, Fed. Cas., No. 14,655; *Owen v. Henman*, 1 W. & S., 548; 37 Am. Dec., 481.

tion that has resulted in the United States will be the subject of the following pages. The English situation will be referred to only in passing and for the purpose of illustration.

The religious meetings of the established church in England have been protected from the earliest times. From the regard which every citizen from the sovereign to the humblest subject was supposed to entertain toward the established church and from the theory that such establishment was of common right and necessity, it followed that it was not necessary that the indictment for the offense should state any particular consequence as flowing from the misconduct of the accused, such as that it was against the peace, but that it was sufficient if it simply charged the disturbance as an offense *per se*.<sup>1</sup> Unjustly and irreverently to disturb and hinder the curate of a parish in the exercise of his office and the reading of divine service was therefore an offense at common law without any act of Parliament.<sup>2</sup>

This protection, however, was not extended to the dissenting churches which grew up alongside of the established church during and after the time of Henry the Eighth. These at first were regarded as unlawful and hence entitled to no protection. Even when this theory was relaxed they were for a while treated as necessary evils and left to their own devices in protecting their meetings against disturbance. This, however, proved to be unsatisfactory. It was therefore provided in the famous toleration act of 1688 that

if any person or persons, at any time or times after the tenth day of June, do and shall willingly and of purpose, maliciously or contemptuously come into any cathedral or parish church, chapel, or other congregation permitted by this act, and dis-

<sup>1</sup> 1 Hawk. C. l. c., 32, § 4.

<sup>2</sup> Chitty, Criminal Law, 21, Tremaine, P. C., 239.

quiet and disturb the same, or misuse any preacher or teacher, such person or persons . . . shall suffer the pain and penalty of twenty pounds.<sup>1</sup>

This statute, it will be noticed, was restricted to congregations "permitted by this act." Such permission did not include Roman Catholics. This omission was supplied in 1771 by an act "to relieve, upon conditions and under restrictions the persons herein described from certain penalties and disabilities to which papists or persons professing the papish religion, are by law subject."<sup>2</sup> This statute substantially re-enacted the above cited provision of the toleration act, merely extending its protection to priests and ministers in addition to preachers and teachers.<sup>3</sup>

But even as thus extended the toleration act was insufficient, as it provided for a protection from disturbances created from the inside of a church only. The act was therefore in 1812 extended to cover all such persons as "shall in any way disturb, molest or misuse any preacher, teacher or person officiating at such meeting, assembly or congregation or any person or persons there assembled."<sup>4</sup> Finally, by the enactment in 1860 of an act to abolish the jurisdiction of the Ecclesiastical Courts in England and Ireland in certain cases of brawling, practically all religious worship of every kind has been protected and the entire matter placed upon a rational basis.<sup>5</sup>

<sup>1</sup> Toleration act, 1 William and Mary, Chapter 18, Section 18. It was in reference to this act that Lord Mansfield said in 1765 "that Methodists have the right to the protection of this court if interrupted in their decent and quiet devotions, and so have dissenters from the established church." *Rex v. Wroughton*, 3 Burr., 1683.

<sup>2</sup> 31 George III., Chapter 32.

<sup>3</sup> Section 10.

<sup>4</sup> 52 George III., Chapter 155, Section 12.

<sup>5</sup> 23 and 24 Victoria, ch. 32, sec. 2.

In America it has been pointed out that, since there is no established church in the English sense, all churches are established for the purpose of enjoying complete liberty of worship and that each sect has as perfect a right to be free from disturbance in its public worship as the established church has in England by the common law.<sup>1</sup> In consequence an indictment at common law for a disturbance of religious meetings has been upheld in Delaware,<sup>2</sup> New York,<sup>3</sup> North Carolina,<sup>4</sup> Tennessee<sup>5</sup> and in the District of Columbia.<sup>6</sup> It has been held that the mere existence of a statute on this matter does not bar the remedy at common law.<sup>7</sup> Where, however, all common-law crimes and misdemeanors are abolished, such remedy at common law of course is abrogated.<sup>8</sup>

However, the question whether the offense is punishable at common law is of no great importance, as all the states in the United States now have statutes on the subject. It is true that these statutes are not very uniform. They vary in size from a short sentence to a half-page and prescribe as a punishment fines of from seven dollars to five hundred dollars and imprisonment of from ten days to a

<sup>1</sup> *State v. Jasper*, 15 N. C., 323 and *United States v. Brooks*; Fed. Cas. No. 14,655.

<sup>2</sup> *State v. Smith*, 5 Har., 490.

<sup>3</sup> *People v. Degey*, 2 Wheeler Cr. Cas. 136; *People v. Crowley*, 23 Hun., 412; *Steinert v. Sobey*, 44 N. Y. Supp., 146; 14 App. Div., 505.

<sup>4</sup> *State v. Jasper*, *supra*.

<sup>5</sup> *State v. Watkins*, 130 S. W., 839.

<sup>6</sup> *United States v. Brooks*, *supra*; see *Commonwealth v. Cane*, 1 Am. Law J., 246; 8 Pitts. Leg. J., 246.

<sup>7</sup> *People v. Degey*, *supra*.

<sup>8</sup> *Marvin v. State*, 19 Ind., 181. Overruled on the question of statutory construction in *State v. Oskins*, 28 Ind., 364.

year. They can, however, be roughly classified and will generally lead to the same result.<sup>1</sup>

<sup>1</sup> In Louisiana there appears to be no prohibition except against appearing in a church service or Sunday school in an intoxicated condition.

In Arizona, Connecticut, Ohio and Washington there are no statutes dealing especially with religious meetings. The subject, however, is covered by statutes protecting lawful assemblies against wilful disturbance.

In Delaware, Florida, Kentucky, Massachusetts, Mississippi, Pennsylvania, Rhode Island, Virginia, and Wisconsin, the statutes are very short, being substantially the same at the Massachusetts statute, which is as follows: "Whoever wilfully interrupts or disturbs an assembly of people met for the worship of God shall be punished by" etc.

In Alabama, California, Idaho, Iowa, Michigan, Missouri, Montana, Nevada (sec. 6597), New Jersey, Oregon, Tennessee, Vermont, and Utah, the statutes are somewhat longer and are substantially in the following form taken from the Michigan statutes: "No person shall wilfully disturb, interrupt or disquiet any assembly of people met for religious worship, by profane discourse, by rude and indecent behavior or by making a noise either within the place of worship or so near it as to disturb the order and solemnity of the meeting."

In Maine, Minnesota, Nevada (sec. 6478), New York, North Dakota, Oklahoma, and South Dakota, the statutes are very full, substantially re-enacting the Michigan statute just cited and adding a prohibition against shows, racing or gaming within one mile of a religious meeting and obstructing a highway within a like distance and against cutting, injuring or destroying the property of any of the worshipers.

The statutes of Maryland, South Carolina, and Texas all use the word wilful, but are otherwise quite diverse, while those of Arkansas, Colorado, Georgia, Illinois, Indiana, Kansas, North Carolina, New Hampshire, New Mexico, Nebraska, and Wyoming, show an equal amount of originality but do not expressly require the acts enumerated to have been done wilfully.

A list of the statutes of the various states follows, arranged in alphabetical order. Wherever the statute of any particular state is referred to hereafter, this list may be consulted to obtain the section number of it.

*Alabama* Criminal Code of 1907, sec. 6768. *Arizona* Penal Code of 1913, secs. 412, 423, 429. *Arkansas*, Kirby's Supplement, 1911, sec. 1655. *California* Penal Code 1909, sec. 302. *Colorado* Revised Statutes of 1908, sec. 1839. *Connecticut* General Statutes of 1902, sec. 1281. *Delaware* Revised Statutes of 1893, chap. 131, sec. 2. *Florida* Compiled Laws



Before taking up the various acts by which a religious meeting may be disturbed within the meaning of the statutes, it is necessary to determine just what is a religious meeting within such meaning. "In its true sense a religious meeting is an assemblage of people met for the purpose of performing acts of adoration to the Supreme Being or to perform religious services in recognition of God as an object of worship, love and obedience."<sup>1</sup> The size of such meeting and the particular place where it is assembled,<sup>2</sup> whether it be a field, a forest or a church edifice<sup>3</sup> is immaterial.

1914, sec. 3547. *Georgia*, Park's Penal Code 1914, sec. 412. *Idaho* Revised Code 1908, sec. 6820. *Illinois* Statutes, annotated, sec. 3593. *Indiana*, Burns' Annotated Statutes 1914, sec. 2349. *Iowa* Annotated Code 1897, sec. 4959. *Kansas* Dussler's Statutes 1909, sec. 2755. *Kentucky* Carroll's Statutes 1915, sec. 1267. *Louisiana*, 3 Wolf's Constitution and Revised Laws 1908, page 156. *Maine* Revised Statutes 1904, chap. 125, sec. 22. *Maryland* Public General Laws 1904, art. 27, sec. 375. *Massachusetts* Revised Laws 1902, chap. 212, sec. 30. *Michigan*, Howell's Statutes, sec. 14798. *Minnesota* General Statutes 1913, sec. 8757. *Mississippi* Code 1906, sec. 1113. *Missouri* Revised Statutes 1909, sec. 4713. *Montana* Revised Code 1907, sec. 8372. *Nebraska* Revised Statutes 1913, sec. 8754. *Nevada* Revised Laws 1912, secs. 6597, 6478. *New Hampshire*, ch. 271, secs. 6, 9. *New Jersey* Compiled Statutes 1910, page 5716, sec. 9. *New Mexico* Statutes 1915, sec. 1789. *New York*, Cook's Criminal Code 1914, secs. 2070, 2071. *North Carolina* Revised Statutes 1908, secs. 3705, 3706. *North Dakota* Compiled Laws 1913, secs. 9247, 9249. *Ohio*, Wilson's Criminal Code 1911, sec. 12814. *Oklahoma* Revised Laws 1910, secs. 2412, 2413. *Oregon*, Lord's Laws 1910, sec. 2123. *Pennsylvania*, Peffer and Lewis Digest, p. 2310. *Rhode Island* General Laws 1909, p. 1256. *South Carolina* Criminal Code 1912, sec. 703. *South Dakota* Compiled Laws 1910, Penal Code, p. 565, sec. 54. *Tennessee* Code 1896, sec. 6776. *Texas*, White's Penal Code, art. 193. *Utah* Compiled Laws 1907, sec. 4236. *Vermont* Public Statutes 1906, sec. 5872. *Virginia* Code 1887, sec. 3805. *Washington*, Pierce Code 1912, tit. 135, sec. 587. *West Virginia* Code 1913, sec. 5323. *Wisconsin* Revised Statutes 1898, sec. 4597. *Wyoming* Compiled Statutes 1910, sec. 5901.

<sup>1</sup> *Cline v. State*, 9 Okl. Cr. Rep., 40, 44, 45; 130 Pac., 510.

<sup>2</sup> *State v. Swink*, 20 N. C., 358.

<sup>3</sup> *Rogers v. Brown*, 20 N. J. L., 119.

No matter where the place is, or what the number may be; so that when two or three are gathered together to worship Almighty God according to the dictates of their own consciences, the law casts its mantle of security around them, and protects them from all intentional disturbance and interruption.<sup>1</sup>

An assembly of worshipers at a school house,<sup>2</sup> or at a camp meeting,<sup>3</sup> or under a bush arbor,<sup>4</sup> or even at a private house<sup>5</sup> is therefore protected by the statutes. No formal organization is necessary. An unincorporated society,<sup>6</sup> a meeting not formally organized,<sup>7</sup> or bearing no distinctive name and composed of people belonging to various denominations<sup>8</sup> will receive full protection. Whether the method of worship be common or uncommon,<sup>9</sup> Catholic or Protestant, "Christian or pagan,"<sup>10</sup> is of no consequence. "The law affords equal protection to the religious views, rites and forms of worship of all denominations, all classes and all sects, and does not undertake to state of what they shall consist or how services shall be conducted."<sup>11</sup>

<sup>1</sup> Commonwealth v. Sigman, 2 Clark 36, 48.

<sup>2</sup> Winnard v. State, 30 S. W., 555 (Tex. Cr. App.).

<sup>3</sup> Commonwealth v. Bearse, 132 Mass., 542; 42 Am. Rep., 450; Meyers v. Baker, 120 Ill., 567; 60 Am. Rep., 580; 12 N. E., 79.

<sup>4</sup> Minter v. State, 104 Ga., 743; 30 S. E., 989. But see State v. Schieneman, 64 Mo. 386 where a religious meeting held at a public square was held not to come within the statute, since the place was not "set apart for religious worship."

<sup>5</sup> State v. Swink, 20 N. C. 358; but see State v. Starnes, 151 N. C., 724; 66 S. E., 347; 19 Am. Cas., 448, which was a case of a family reunion held at the house of one of the family and at which some religious service was held.

<sup>6</sup> State v. Stuth, 11 Washington, 423; 39 Pac., 665.

<sup>7</sup> Commonwealth v. Bearse, *supra*.

<sup>8</sup> State v. Ringer, 6 Blackf., 109 (Ind.).

<sup>9</sup> Such as the worship of the Salvation Army. Hull v. State, 120 Ind., 153; 22 N. E., 117. See State v. Stuth, *supra*.

<sup>10</sup> Rogers v. Brown, 20 N. J. L. 119.

<sup>11</sup> Cline v. State, 90 pl. Cr. Rep. 40, 45; 130 Pac. 510.

While these general principles are absolutely clear and simple their application to particular states of fact is often attended with no little difficulty. The number and variety of the various religious systems and forms of worship in this country is so large and the line that separates meetings for religious worship from business meetings on the one hand and meetings for pleasure on the other is often so thin and indistinct that perplexing problems must of necessity arise. While Sunday schools are universally conceded to be meetings for religious worship,<sup>1</sup> except where the statute itself distinguishes between the disturbance of a religious meeting and the disturbance of a Sunday school,<sup>2</sup> a singing school will not be treated as a religious meeting though the songs practised are of a sacred character.<sup>3</sup>

Whether the disturbance of Christmas celebrations will come within the meaning of the statutes depends upon the spirit in which such celebrations are conducted. Many such meetings bear anything but a religious character. In others the religious part is very slight. Still others have all the distinguishing marks of religious meetings. The religious or secular character of such meetings will therefore in a proper case present a question of fact for the jury.<sup>4</sup> Where, however, there is singing, preaching and prayer at such meetings they will as a matter of law be treated as religious meetings,<sup>5</sup> while the absence of these modes of worship will as a matter of law prevent a prose-

<sup>1</sup> *State v. Branner*, 149 N. C., 559; 63 S. E., 169; *Martin v. State*, 65 Tenn., 234; *Lyons v. State*, 25 Tex. App., 403; 8 S. W., 643; *Wyatt v. State*, 56 Tex. Cr. R., 50; 119 S. W., 1147.

<sup>2</sup> *Hubbard v. State*, 32 Tex. Cr. Rep., 389; 24 S. W., 30.

<sup>3</sup> *Adair v. State*, 134 Ala., 183; 32 So., 326; *Green v. State*, 56 S. W., 915 (Tex. Cr. App.).

<sup>4</sup> *Cline v. State*, 9 Okl. Cr. Rep. 40, 130 Pac., 510.

<sup>5</sup> *Stafford v. State*, 154 Ala., 71; 45 So., 673.

cution under the statutes,<sup>1</sup> but not under the common law.<sup>2</sup>

Church business meetings are protected by the express terms of the statutes in Arkansas and Texas. The question whether such meetings are impliedly covered by the other statutes has given rise to some difficulty and to a division of the authorities. It has been held in a New Jersey case that such a meeting, though opened with prayer and singing, is not a religious meeting within the terms of the statute.<sup>3</sup> A Quarterly Meeting Conference has therefore been held in North Carolina not to be protected by the statute.<sup>4</sup> The reason for such a holding is well stated in a Texas case as follows:

When these worldly matters invade the sacred precincts of the church, and she assumes the right and prerogative of their investigation, she must not expect, where moral influence and religious restraints fail, or are inadequate to protect her from the wrongs and outrages of her own members, to exact from the law any other or further protection than that accorded to other business assemblies or secular associations.<sup>5</sup>

Other courts, however, have adopted a "broader and more liberal construction" of the statutes on the theory that one who trifles with sacred things and shows contempt for the rules of the church and rights of conscience deserves no favor and should be punished<sup>6</sup> and have upheld a conviction for disturbing such a meeting held on a secular day.<sup>7</sup>

<sup>1</sup> *Layne v. State*, 72 Tenn., 199.

<sup>2</sup> *State v. Watkins*, 130 S. W., 839 (Tenn.).

<sup>3</sup> *Hughes v. East Orange*, 29 N. J. L. J., 343.

<sup>4</sup> *State v. Fisher*, 25 N. C., 111.

<sup>5</sup> *Wood v. State*, 11 Tex. App., 318, 322.

<sup>6</sup> *Hollingworth v. State*, 37 Tenn., 518.

<sup>7</sup> *Kidder v. State*, 58 Ind., 68. See also *Gozy v. State*, 34 Tex. Cr. Rep., 146.

The question how long before and after the actual services a congregation is protected from disturbance has been settled by the express terms of the statutes of only a few states. In North Carolina rude and indecent behavior at a place of worship, "whether such worship should have begun or not," is made punishable. In New Hampshire the congregation during the interval "between the forenoon and afternoon services" is equally protected. In Wyoming any person present at such meeting "or going to or returning therefrom" enjoys a like immunity. In Ohio a disturbance of a person "while he is at or about the place where such assemblage is to be held or is or has been held" is placed under the ban of the law. In Georgia the persons forming a congregation enjoy protection "until they are dispersed from such place of worship." In the remaining states, however, the statutes appear to be silent on this matter, leaving it entirely to the discretion of courts and juries.

Turning now to the decisions, those dealing with a disturbance before the services have actually commenced will logically be taken up first. While a Pennsylvania Court has directed a verdict in favor of a defendant who had wrongfully taken possession of a church so that it was necessary for the congregation to call a constable to break open the door before services could be held,<sup>1</sup> the general holding is well summarized in the following words of the North Carolina court:

It can make little difference whether the liberty of public worship is denied by conduct which breaks up and disperses a body met for religious purposes and just about to enter upon its duties, or the congregation is interrupted only during its devotions and not wholly prevented from performing them.<sup>2</sup>

<sup>1</sup> *Commonwealth v. Underkoffer*, 11 Pa. C. C., 589; 1 D. R., 676.

<sup>2</sup> *State v. Ramsay*, 78 N. C., 448.

Of course there must be a meeting before there can be a disturbance of a meeting. "The people or some considerable number must be collected at or about the time when worship is about to be commenced, and in the place where it is to be had, in order to make a disturbance of them indictable."<sup>1</sup> Where, however, the gathering of the congregation has actually commenced a disturbance of the assembled people is punishable,<sup>2</sup> though no services are actually conducted either because of the disturbance<sup>3</sup> or because no services were scheduled, though those assembled believed that they were.<sup>4</sup>

But worshippers would be ill secured if they were forced to live in fear of disturbances immediately after the services. Such fear would mar their devotions even while the services were being carried on. There must, of course, be some point of time at which the meeting is at an end. This time has been fixed by the Missouri court as beginning at once after the ministering clergyman has dismissed the congregation.<sup>5</sup> The Indiana court, on the other hand, has made the nature of the meeting at this time a question of fact for the jury,<sup>6</sup> while the North Carolina court has held as a matter of law that the protection of the statute ceases when most of the congregation are on their way home,

<sup>1</sup> *State v. Bryson*, 82 N. C., 576; 35 S. E., 600.

<sup>2</sup> *Kenny v. State*, 38 Ala., 224; *Lancaster v. State*, 53 Ala., 398; 25 Am. Rep., 625; *Calvert v. State*, 14 Tex. App., 154; *Dawson v. State*, 7 Tex. App., 59; *Love v. State*, 35 Tex. Cr. R., 27; 29 S. W., 790.

<sup>3</sup> *Tanner v. State*, 54 S. E., 914; 126 Ga., 77; *State v. Ramsay*, *supra*.

<sup>4</sup> *Laird v. State*, 155 S. W., 260; *Haynes v. State*, 159 S. W., 1059 (Tex. Cr. App.).

<sup>5</sup> *State v. Jones*, 53 Mo., 486; *State v. Leonhard*, 125 S. W., 234 (Mo. App.). See *State v. Edwards*, 32 Mo., 548.

<sup>6</sup> *State v. Snyder*, 14 Ind., 429.

though a number of them still linger on the doorsteps.<sup>1</sup> While these decisions are the law of these particular states, the weight of authority is to the effect that the protection continues till an actual dispersion takes place<sup>2</sup> and the gathering ceases to be a congregation.<sup>3</sup> "The object, purpose, spirit and letter of the law are to protect the religious assembly from disturbance before and after service as well as during the actual service, and so long as any portion of the congregation remains upon the ground."<sup>4</sup> It has accordingly been held that a person may be indicted for disturbing a meeting whether it be a Sunday School,<sup>5</sup> a prayer meeting<sup>6</sup> or a Christmas celebration,<sup>7</sup> though the services at the time of the disturbance are at an end and the assembly is actually leaving the place of worship.<sup>8</sup> This doctrine has even been extended to a case where the assembled worshipers at a camp meeting had retired to their tents for the night,<sup>9</sup> or where they remained on the ground for the purpose of taking dinner in common.<sup>10</sup> It goes without saying that under this doctrine evidence of disturbances occurring after the service is admissible.<sup>11</sup>

<sup>1</sup> *State v. Davis*, 126 N. C., 1059; 35 S. E., 600.

<sup>2</sup> *State v. Lusk*, 68 Ind., 264.

<sup>3</sup> *Williams v. State*, 35 Tenn., 313.

<sup>4</sup> *Dawson v. State*, 7 Tex. App., 59; *Love v. State*, 35 Tex. Cr. Rep., 27; 29 S. W. 790; *Freeman v. State*, 44 S. W., 170 (Tex. Cr. App.).

<sup>5</sup> *Wyatt v. State*, 56 Tex. Cr. Rep., 50; 119 S. W., 1147.

<sup>6</sup> 53 Ala., 398; 25 Am. Rep. 625.

<sup>7</sup> *Stafford v. State*, 154 Ala., 71; 45 So., 673.

<sup>8</sup> *Salter v. State*, 99 Ala., 207; 13 So., 535; *Kinney v. State*, 38 Ala., 224; *Brown v. State*, 80 S. E., 26 (Ga. App.); *Pollock v. State*, 131 S. W., 1094.

<sup>9</sup> *In re Jennings*, 3 Gratt., 624; *contra State v. Edwards*, 32 Mo., 548.

<sup>10</sup> *Minter v. State*, 104 Ga., 743; 30 S. E., 989; *Folds v. State*, 123 Ga., 167; 51 S. E., 305.

<sup>11</sup> *State v. Jones*, 77 S. C., 385; 58 S. E., 8.

It has been seen that the English Toleration Act of 1688 gave protection only from disturbance created from the inside of a church edifice. No such limitation is to be found in any of the American statutes. These, on the contrary, frequently include such disturbance from the outside in express terms. Thus the statutes of California, Idaho, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Dakota and Utah protect the religious meeting from certain acts committed "either within the place where such meeting is held or so near it as to disturb the order and solemnity of the meeting." The statutes of Alabama, South Carolina and Tennessee protect the meeting from disturbance "at or near" the place of meeting, while the language in the Maine, New Jersey and Rhode Island statutes is "within or without," that of New Hampshire and Utah "within or near" and that of Vermont "within or about." Questions of propinquity under these statutes will therefore be purely questions of fact for the jury.

But it is quite immaterial whether a disturbance from the outside is covered by the statutes in express terms or not. A disturbance is a disturbance whether it is created from the inside or from the outside of a church. The effect on the congregation is the same in both cases. Cases can even be imagined where the effect of a disturbance from the outside is far more diastrous than a disturbance from the inside. There is, therefore, every reason for including such disturbances in the general words of the statutes and none for excluding them. The courts accordingly have construed the statutes liberally in favor of religious meetings and have punished disturbers whose disturbance occurred in front of church doors, on church grounds or so near to



the church building as to be heard by the meeting.<sup>1</sup> Of course where such acts have not actually disturbed the congregation though they may have been noticed by an officer of it who kept watch outside of the building,<sup>2</sup> or by a member of it who had separated himself from the congregation to protect his vehicle from indecencies,<sup>3</sup> or where they were brought to the attention of the congregation only by the excited action of another person not an agent of the accused,<sup>4</sup> the congregation has not been disturbed by the act and no indictment will lie.

The number of participants in a religious meeting that must be disturbed before an indictment will lie is fixed by the statutes, which expressly legislate on this matter, at a single worshiper. Thus the statutes of Kansas and Nebraska forbid the disturbing of any religious meeting "or any member thereof." The Wyoming statute protects the individual member not only while present at the meeting but "going to or returning therefrom." In Ohio it would seem that a person need not even be a prospective or retiring worshiper. All that is necessary is that he be "at or about the place where such assembly is to be held."

The same result, however, necessarily follows in those states whose statutes are silent on this matter. It is perfectly obvious that a disturbance to be punishable need not

<sup>1</sup> *Daniel v. State*, 62 S. E., 567; 4 Ga. App., 844; *Taylor v. State*, 67 S. E., 684; 7 Ga. App., 603; *Brown v. State*, 80 S. E., 26 (Ga. App.); *State v. Jones*, 77 S. C., 385; 58 S. E., 8; *Holt v. State*, 60 Tenn., 192; *Holmes v. State*, 45 S. W., 487; 39 Tex. Cr. Rep., 231; 73 Am. St. Rep., 921.

<sup>2</sup> *Taylor v. State*, 1 Ga. App., 539; 57 S. E., 1049.

<sup>3</sup> *Cox v. State*, 136 Ala., 94; 34 So., 168.

<sup>4</sup> *State v. Kirby*, 108 N. C., 772; 12 S. E., 1045. In this case such person rushed into the meeting exclaiming that they were fighting outside.

affect every person present.<sup>1</sup> If such were the case an intolerable burden of proof would be imposed on the state. The disturbance of each worshiper would have to be proved. The size of the assembly and the chance of conviction would be in inverse ratio. The accidental presence of a deaf or blind or otherwise disabled person might exempt the evildoer from punishment. A gross miscarriage of justice would result. "If the whole congregation must be disturbed to make out the charge, not only one person, but a dozen, or any less number of persons than the whole congregation may be disturbed by a rude, ill-mannered man without subjecting himself to punishment."<sup>2</sup> Since it is not necessary that all be disturbed a conviction may be had though the disturbance is confined to a part of the congregation.<sup>3</sup> Since there is no arbitrary test by which to determine how large that part must be it follows that such part may consist of a single individual.<sup>4</sup> "Every individual worshiper in the congregation, as well as the entire congregation, is protected by the object and policy of our statutes from rude and profane disturbance during the solemn moments of public worship."<sup>5</sup> Profane language whispered into the ear of a single member of a congregation beyond the hearing or notice of any other worshiper, therefore, will subject the malefactor to punishment under the statute.<sup>6</sup>

<sup>1</sup> *Clark v. State*, 78 S. W., 1078 (Tex. Cr. App.).

<sup>2</sup> *State v. Wright*, 78 S. W., 1078 (Tex. Cr. App.).

<sup>3</sup> *Holt v. State*, 60 Tenn., 192; *Wyatt v. State*, 119 S. W., 1147; 56 Tex., Cr. Rep. 50.

<sup>4</sup> *McDaniel v. State*, 5 Ga. App., 831; 63 S. E., 919; *Taylor v. State*, 7 Ga., App., 603; 37 S. E., 684; *Nichols v. State*, 103 Ga., 61; 29 S. E., 431; *McVea v. State*, 26 S. W., 834; 28 S. W., 469 (Tex. Cr. App.); *Walker v. State*, 146 S. W., 862 (Ark.).

<sup>5</sup> *Cochreham v. State*, 26 Tenn., 11.

<sup>6</sup> *State v. Wright*, 41 Ark., 410; 48 Am. Rep., 43.

Since the disturbance of a single member of a meeting subjects the disturber to punishment the question what constitutes such membership becomes important. Where a person is inside of the church building no question of his status will ordinarily arise. Where the building is crowded and he has taken his station at the door or at one of the windows in the hope of hearing a part of the services no one would question that he is as much a member of the worshiping assembly as those seated within. Where, however, he has left the meeting with no purpose of again becoming a part of it, it is quite clear that he is not entitled to the protection of the statute. It has therefore been held that an officer of a church who was keeping watch outside,<sup>1</sup> or a member of it who had left the meeting to protect his team from indecencies<sup>2</sup> had ceased to be members of the assembly and were not entitled to protection. Where, however, the absence from the meeting appears to have been intended to be only temporary the question of the status of such absentee is a question of fact for the jury.<sup>3</sup>

There are many happenings which may disturb a congregation to which the statute does not apply. A woman swooning during the services cannot but disturb those in her immediate neighborhood. "A worshiper in a church discovering a building on fire would doubtless be justified in giving the alarm although in doing so he might disturb the assembly."<sup>4</sup> In such and similar cases the intent to disturb is entirely absent though the interruption of the service may be complete. The intent with which the act is done is, therefore, the gravamen of the offense, not the dis-

<sup>1</sup> *Taylor v. State*, 1 Ga., App., 539; 57 S. E., 1049.

<sup>2</sup> *Cox v. State*, 136 Ala., 94; 34 So., 168.

<sup>3</sup> *Adair v. State*, 134 Ala., 183; 32 So., 326.

<sup>4</sup> *Harrison v. State*, 37 Ala., 154, 156.

turbance itself.<sup>1</sup> Therefore, the statutes of not less than thirty-six states contain the word wilful as a substantial part of the description of the misdemeanor.<sup>2</sup> It follows that the act to be punishable must have been done wilfully, designedly, without lawful excuse,<sup>3</sup> with evil intent or without reasonable grounds for believing it to be lawful.<sup>4</sup> Wherever, therefore, the statute uses the word wilful, a defendant cannot be convicted unless the indictment alleges<sup>5</sup> and the proof shows<sup>6</sup> that his act was a wilful one.

The word wilful, however, does not necessarily include a specific intent to disturb the meeting.

A purpose and intent to disturb is not a necessary factor in the crime, but on the contrary, any act, which is within the terms of the statute, the natural consequence of which is to disturb and which is wilfully done, and which in fact does disturb an assembly of people met for religious worship, comes under the denunciation of the law, though the actor may have had no intent to disturb the assembly.<sup>7</sup>

A person therefore who always feels "like praying" when intoxicated can not justify his boisterous entry into a church and profane assertion that he can pray as well as the

<sup>1</sup> *Brown v. State*, 46 Ala., 175.

<sup>2</sup> Alabama, Arizona, California, Connecticut, Delaware, Florida, Idaho, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin.

<sup>3</sup> *Harrison v. State*, *supra*; *Williams v. State*, 83 Ala., 68, 70; 3 So., 743.

<sup>4</sup> *Holmes v. State*, 45 S. W., 487; 39 Tex. Cr. Rep., 231; 73 Am. St. Rep., 921.

<sup>5</sup> *State v. Stroud*, 9 Iowa, 16; 68 N. W., 450.

<sup>6</sup> *Prucell v. State*, 19 S. W., 605 (Tex. Cr. App.).

<sup>7</sup> *Salter v. State*, 99 Ala., 207; 13 So., 535.

preacher as having been done without an intent to disturb.<sup>1</sup> His acts have been done intentionally and have resulted in a disturbance and that in the eyes of the law is enough unless some lawful excuse exists for them.<sup>2</sup>

Such an excuse is afforded by the well known law of self defense. "Divine worship is sacred, but so also is the defense of one's own life."<sup>3</sup> A person therefore has "the right to stand upon his self-defense and rely upon his good right arm even in most sacred places."<sup>4</sup> He may protect himself against violence or threatened violence "even under the very pulpit."<sup>5</sup> That his action disturbs a congregation is not his but its misfortune. To punish him would be flying in the face of every principle of justice. If his life is put in danger by the unlawful act of another his first and foremost duty is to preserve that life even at the expense of disturbing others in their devotion. Of course in states where the doctrine of self-defense is extended so as to give a person provoked by mere words the right to resort to the use of force a different situation is presented. Such law is but a concession to human weakness. There is no urgent necessity for vigorous action. The rights of others must under such circumstances be regarded. A verbal provocation will therefore not excuse a resort to violence in the presence of a worshiping assembly though it might be sufficient under other circumstances.<sup>6</sup>

<sup>1</sup> Johnson *v.* State, 92 Ala., 82; 9 So., 539.

<sup>2</sup> Harrison *v.* State, 37 Ala., 154. See Johnson *v.* State, *supra*.

<sup>3</sup> Cummings *v.* State, 69 S. E., 918; 8 Ga. App., 534.

<sup>4</sup> Wood *v.* State, 11 Tex. App., 318.

<sup>5</sup> Wright *v.* State, 76 Tenn., 563.

<sup>6</sup> Brown *v.* State, 80 S. E., 26 (Ga.). See also Stafford *v.* State, 45 So., 673.

In treating of the acts which constitute the offense the wording of the particular statute under which a case arises is sometimes of great importance. Obstructing a highway within a mile of the meeting and cutting, injuring or destroying the property of the assembled worshipers will be treated as disturbing the meeting only in the states which expressly so provide.<sup>1</sup> Entering a religious meeting in an intoxicated condition will *per se* be an offense only in Georgia, Louisiana, North Carolina, South Carolina and Virginia, whose statutes make express provision in regard to this matter.<sup>2</sup> In the great majority of cases, however, the particular wording of the statute will be of minor import. Acts such as interrupting the Lord's Supper,<sup>3</sup> objecting to a baptism,<sup>4</sup> or beginning a dispute with the officiating clergyman,<sup>5</sup> or talking during the services,<sup>6</sup> or making a mockery of them,<sup>7</sup> or throwing a jug through the window of the church edifice,<sup>8</sup> or putting "hot drops" on the dog of a worshiper with intent to disturb the congregation by the convulsions into which the animal is thrown,<sup>9</sup> or

<sup>1</sup> Maine, Minnesota, Nevada, New York, North Dakota, Oklahoma, South Dakota. See footnote 1, p. 290 for a citation of these statutes.

<sup>2</sup> See *Shirley v. State*, 1 Ga. App., 143; 57 S. E., 912; *Bradford v. State*, 5 Ga. App., 494; 63 S. E., 530; *Busden v. State*, 68 S. E., 622 (Ga. App.); *Smith v. State*, 69 S. E., 590 (Ga.); *Harrell v. State*, 71 S. E., 1030 (Ga. App.); *Johnson v. State*, 92 Ala., 82; 9 So., 539.

<sup>3</sup> *Hicks v. State*, 60 Ga., 464.

<sup>4</sup> *Walker v. State*, 146 S. W., 862 (Ark.).

<sup>5</sup> *Wall v. Lee*, 34 N. Y., 141, 146.

<sup>6</sup> *Taylor v. State*, 1 Ga. App., 539; *Cantrell v. State*, 29 S. W. 42 (Tex. Cr. App.); *Friedlander v. State*, 7 Tex. App., 204; *Nichols v. State*, 103 Ga., 61; 29 S. E., 431.

<sup>7</sup> *Stewart v. State*, 31 Ga., 232; *Chisholm v. State*, 24 S. W., 646 (Tex.).

<sup>8</sup> *Laird v. State*, 155 S. W., 260 (Tex. Cr. App.).

<sup>9</sup> *Winnard v. State*, 30 S. W., 555 (Tex. Cr. App.).

cracking nuts,<sup>1</sup> or behaving ridiculously,<sup>2</sup> or fighting,<sup>3</sup> or shooting<sup>4</sup> near the meeting not in necessary self-defense<sup>5</sup> will subject the offender to punishment in all states no matter how their statutes are worded. A person, however, cannot be convicted for his act in singing as a member of a church choir,<sup>6</sup> or as a member of the assembly,<sup>7</sup> though his efforts in the first case are forbidden by the person conducting the meeting and in the second case are so ridiculous as to greatly irritate the meeting. That the disturber is a member of the congregation,<sup>8</sup> an officer of the church,<sup>9</sup> or even a clergyman,<sup>10</sup> is immaterial.

While the official character of the accused is a complete defense where he has acted reasonably to protect the congregation from imposition and detriment,<sup>11</sup> it will avail him nothing where he has used his position to give vent to his vanity<sup>12</sup> or his anger.<sup>13</sup> Whether or not exclamations

<sup>1</sup> *Hunt v. State*, 3 Tex. App., 116; 30 Am. Rep., 126.

<sup>2</sup> *McElroy v. State*, 29 Tex., 507; *Green v. State*, 56 S. W., 916 (Tex. Cr. App.); *Williams v. State*, 83 Ala., 68; 3 So., 743.

<sup>3</sup> *Goulding v. State*, 82 Ala., 48; 2 So., 478.

<sup>4</sup> *Ball v. State*, 67 Miss., 358; 7 So., 353; *Folds v. State*, 123 Go., 167; 51 S. E., 305.

<sup>5</sup> *Cummings v. State*, 8 Ga. App., 534; 69 S. E., 918.

<sup>6</sup> *Commonwealth v. McDole*, 2 Pa. D. R., 370; 10 Lans. L. R., 119.

<sup>7</sup> *State v. Linkhaw*, 69 N. C., 214.

<sup>8</sup> *State v. Ramsay*, 78 N. C., 448; *Lancaster v. State*, 53 Ala., 398; 25 Am. Rep., 625.

<sup>9</sup> *Dom v. State*, 4 Tex. App., 67; *Coleman v. State*, 62 S. E., 487; 4 Ga. App., 786.

<sup>10</sup> *State v. Dahlstrom*, 90 Minn., 72; 95 N. W., 580; *Stratton v. State*, 13 Ark., 688; *Woodall v. State*, 4 Ga. App., 783; 62 S. E., 485.

<sup>11</sup> *Richardson v. State*, 5 Tex. App., 470; *Morris v. State*, 84 Ala., 457; 4 So., 628.

<sup>12</sup> *Dorn v. State*, 4 Tex. App., 67.

<sup>13</sup> *Coleman v. State*, 4 Ga. App., 786; 62 S. E., 487.

and other actions on the part of the members of the congregation are disturbances or acts of worship must depend upon the rules of the particular meeting. Acts which would be regarded as absolute nuisances in a Presbyterian meeting might be looked upon as highly edifying at an old-time Methodist revival service.<sup>1</sup> The fact that the person, who conducts the meeting, is insane,<sup>2</sup> or that the interruption is only a partial one,<sup>3</sup> will be no defense. While the statute is not passed to settle the rights of the rival factions in a church,<sup>4</sup> the *bona fide* claim of a person to the church property will be a complete defense to the charge of disturbing a religious meeting where he has done nothing more than close the door of the church.<sup>5</sup>

The protection afforded by the ordinary statutes against the disturbance of religious meetings have proved inadequate as applied to such extraordinary gatherings as camp meetings.

Held in the open air for periods of some days in succession, and designed largely, among other purposes, to attract those who do not attend or attend irregularly, stated places of public worship, to induce them to listen to religious instruction, and thus awaken in them a religious interest, such meetings are necessarily more liable to interruption than the services of a regular congregation, alike from the less grave manner of those for whose benefit they are, partially at least, intended, and from the greater facility of coming and going to and from such a meeting and its outskirts, where many, drawn in the first instance by curiosity only, may assemble.<sup>6</sup>

<sup>1</sup> See *Wood v. State*, 16 Tex. App., 574.

<sup>2</sup> *Freeman v. State*, 44 S. W., 170 (Tex. Cr. App.).

<sup>3</sup> *Brown v. State*, 46 Ala., 175.

<sup>4</sup> *Woodall v. State*, 4 Ga. App., 783; 62 S. E., 485.

<sup>5</sup> *State v. Jacobs*, 103 N. C., 397; 9 S. E., 404; *Davis v. State*, 16 So., 377-

<sup>6</sup> *Commonwealth v. Bearse*, 132 Mass., 542, 547; 42 Am. Rep., 450.



But this is not the only evil. Vast crowds will gather at such meetings presenting an opportunity for the vendors of sweetmeats and soft drinks to do a profitable business. This business, if left unchecked, must inevitably disturb the services and make the holding of such meetings difficult if not impossible. While the camp meeting authorities can arrange to hold their meetings away from any established business which is distasteful to them they would, without the help of the law, be perfectly helpless against peddlers and hawkers who cry their wares from wagons, tents or their own back. In fact the more secluded the spot the better would be the opportunity of these petty merchants. Unless restrained by the law they would gather like dogs for a chase, intent on selling their goods no matter what the effect of their action would be on the assembly.<sup>1</sup> That such a special, irregular and transient traffic, engaged in only during the time of the camp meeting and in its neighborhood, for the sole purpose of turning a concourse of people, accepting an invitation to religious worship, into a commercial opportunity, may create a disturbance against which the constitutional rights of religion are entitled to protection, is perfectly clear.<sup>2</sup> "To allow peddlers, hawkers, and hucksters of every sort to frequent the vicinity of camp meetings for the sale of their wares, without any restriction would inevitably lead to disorder, intemperance and immorality."<sup>3</sup> Statutes have accordingly been passed and upheld by the courts<sup>4</sup> which forbid such extraordinary trade within a radius of one or two or even three miles of

<sup>1</sup> For an extreme example see *West v. State*, 28 Tenn., 66.

<sup>2</sup> *State v. Cate*, 58 N. H., 240.

<sup>3</sup> *State v. Read*, 12 R. I., 135.

<sup>4</sup> *Commonwealth v. Bearnse*, *supra*; *Meyers v. Baker*, 120 Ill., 567; 60 Am. Rep., 580; 12 N. E., 79.

any camp meeting; except with the consent and under the regulation of the camp meeting authorities,<sup>1</sup> even though the meeting is not actually disturbed thereby,<sup>2</sup> or though the disturbance accomplished was not intended by the defendant.<sup>3</sup> Such statutes will be held applicable even where adjoining land owners go into a temporary business on account of the presence of the meeting.<sup>4</sup> They will, however, not be held to apply where the meeting is held at an incorporated village and a vendor has been duly licensed by the village authorities to carry on his trade. Under such circumstances the village authorities will be looked to, to maintain the proper order.<sup>5</sup>

Some of the statutes against such disturbance provide for a forfeiture of the goods displayed for sale and authorize the camp-meeting authorities to confiscate them without further notice. This remedy is an extremely dangerous one. The question whether such a taking is not a taking of property without due process of law is a very serious one.<sup>6</sup> Even aside from the constitutional aspect great care must be exercised as courts will confine such a statute within the narrowest possible limits.<sup>7</sup> Therefore persons "attempting to execute such a statute should take care not only to act in good faith but in all things to conform themselves to the provisions of the law."<sup>8</sup> On the whole it will be better to take out a warrant against the offender or,

<sup>1</sup> *State v. Schieneman*, 64 Mo., 386.

<sup>2</sup> *Riggs v. State*, 75 Tenn., 475.

<sup>3</sup> *West v. State*, 28 Tenn., 66.

<sup>4</sup> *Commonwealth v. Bearse*, 132 Mass., 542, 548; 42 Am. Rep., 450; *State v. Solomon*, 33 Ind., 450.

<sup>5</sup> *Ex parte McNair*, 13 Neb., 195; 13 N. W., 172; 42 Am. Rep., 765.

<sup>6</sup> *Fetter v. Wilt*, 46 Pa. St., 457.

<sup>7</sup> *Ibid.*; *Kramer v. Marks*, 64 Pa. St., 151.

<sup>8</sup> *Rogers v. Brown*, 20 N. J. L., 119.

where the statute authorizes such action, put him under bonds not to continue such business rather than to take up the goods which he has for sale and risk a long drawn out legal battle over the legality of such action.

The drafting of the indictment, presentment or information, for disturbing a religious meeting, is a matter of no small importance. While the offense is only a misdemeanor,<sup>1</sup> and consequently the rules applied to it are less strict than those applied to crimes,<sup>2</sup> the importance of correctly charging the offense should not be overlooked. No looseness should be indulged in.<sup>3</sup> While the charge need not be absolutely in the words of the statute<sup>4</sup> there is great danger in adopting other words or slighting or omitting the statutory terms.<sup>5</sup> Indictments which did not allege that the place where the disturbance occurred was "set aside for religious worship,"<sup>6</sup> or which failed to assert that the meeting was conducting itself in a lawful manner,<sup>7</sup> have been held bad under the Missouri and Texas statutes

<sup>1</sup> *Hicks v. State*, 60 Ga., 464; *State v. Ramsay*, 78 N. C., 448; *Phants v. State*, 2 Tex. App., 398; *Winnard v. State*, 30 S. W., 555 (Tex. Cr. App.).

<sup>2</sup> *State v. Sowell*, 59 So., 848.

<sup>3</sup> *State v. Mitchell*, 25 Mo., 420. In this case an indictment charging the disturbance of a "congregation" was held to be bad.

<sup>4</sup> "House of religious worship" may be substituted for "meeting house," *State v. Yarborough*, 19 Tex., 161, and "wilful" may be supplanted by other terms of the same meaning, *State v. Stuth*, 11 Wash., 423; 39 Pac., 665.

<sup>5</sup> *State v. Booe*, 62 Ark., 512; 37 S. W., 47; *Commonwealth v. Phillips*, 11 Ky. L. Rep., 370; *State v. Bankhead*, 25 Mo., 558; *State v. Doty*, 45 Tenn., 33; *State v. Townsell*, 50 Tenn., 6.

<sup>6</sup> *State v. Kindrick*, 21 Mo. App., 507; *State v. Fregitt*, 66 Mo. App., 625; *State v. Ellis*, 71 Mo. App., 269, but see *State v. Karnes*, 51 Mo. App., 293; *State v. Alford*, 127 S. W., 109 (Mo. App.).

<sup>7</sup> *Kizzia v. State*, 38 Tex. Cr. Rep., 319; 43 S. W., 86. See also *Nash v. State*, 32 Tex. Cr. Rep., 368; 24 S. W., 32.

respectively. The only safe course, therefore, will be to follow the statutory words as nearly as possible.<sup>1</sup>

How closely the place at which the disturbance arose must be described has given rise to some difference of opinion. It has been held in Missouri and Texas that an indictment merely charging that the offense occurred in a certain county is insufficient.<sup>2</sup> Other Texas cases, however, as well as the Delaware court, have taken a different view and have upheld such indictments.<sup>3</sup> The reason for this latter holding is well stated by the Tennessee court as follows: "In what precise locality the offender may be is not an essential element of the offense and it may be shown by proof and need not be averred in the presentment."<sup>4</sup>

That the manner, nature and character of the disturbance should be indicated with sufficient fullness to give the defendant the requisite notice and enable his attorney to determine whether the misconduct charged amounts to the statutory offense is quite evident.<sup>5</sup> While it has been held in Virginia that the means by which the disturbance was caused need not be set out<sup>6</sup> the better opinion is that these means should be alleged.<sup>7</sup> Such allegation, however, may be very brief. Where the disturbance has been caused by words spoken by the defendant these words need not be set out in full, as the disturbance is the gist of the offense and

<sup>1</sup> *State v. Stubblefield*, 32 Mo., 563; *Kindred v. State*, 33 Tex., 67; but see *Thompson v. State*, 16 Tex. App., 159.

<sup>2</sup> *State v. Stegall*, 65 Mo. App., 243 *State v. McClure*, 13 Tex., 23.

<sup>3</sup> *Corley v. State*, 3 Tex. App., 412; *Bush v. State*, 5 Tex. App., 64; *State v. Smith*, 5 Har., 490 (Del.).

<sup>4</sup> *Warren v. State*, 50 Tenn., 269.

<sup>5</sup> *Jones v. State*, 28 Neb., 495; 44 N. W., 658; 7 L. R. A., 325; *Conerly v. State*, 66 Miss., 96; 5 So. 625; *State v. Minyard*, 12 Ark., 156; *Fletcher v. State*, 12 Ark., 169.

<sup>6</sup> *Commonwealth v. Daniels*, 2 Va. Cas., 402.

<sup>7</sup> *Thompson v. State*, *supra*.

the words but the instrument by which the offense was accomplished.<sup>1</sup> An indictment which merely charges a disturbance "by loud and vociferous talking and swearing" is therefore fully sufficient.<sup>2</sup>

To sum up: In England the meetings of dissenting churches have but grudgingly been protected from disturbance by toleration statutes while the meetings of the established church have always enjoyed such protection at common law. In America there can be no such distinction as has been drawn in England. There is no established church and no dissenting churches. All churches are equally entitled to complete liberty of worship. It follows that their meetings are protected by the common law as well as by the statutes, no matter whether their exercises are of a singular or of a common character, no matter whether they assume the form of ordinary public devotion, a Sunday school, or even a Christmas or other celebration. These meetings are protected not only while the services are being carried on but a reasonable time before and after. Nor is this protection afforded only where the disturbance affects the entire audience. It may, on the contrary, be confined to a part of the audience and this part may consist of a single individual. It may come from the inside or the outside of the church and may be committed by a stranger, a member, an officer and even a clergyman. To be punishable, however, it must be a wilful one. A person who swoons during the services or is forced to act in self-defense may disturb the congregation but is guilty of no offense. To be guilty he must act with an evil intent though such intent need not necessarily be an intent to dis-

<sup>1</sup> *State v. Ratliff*, 10 Ark., 530; *Minter v. State*, 104 Ga., 743; 30 S. E., 989.

<sup>2</sup> *Lockett v. State*, 40 Tex., 4.

turb the meeting. What acts will disturb a meeting must depend upon the circumstances. Acts considered highly devotional in an old-time Methodist revival service could not but break up a Quaker meeting. Where services such as camp meetings are held in the open air for long periods of time a disturbance may even be caused by the mere selling by traveling merchants of small articles at or near the meeting. The statutes forbidding the vending of such articles within a radius of one, two and even three miles of such a meeting have, therefore, been upheld as constitutional.

In charging the offense the statutory words should be followed as closely as possible and the place where the disturbance occurred should be described. The manner, nature and character of the disturbance should be indicated with sufficient fullness to give the accused due notice, and the means by which it was accomplished should be set out briefly.

## CHAPTER XI

### CONTRACTS

IN considering the question of contract as applied to church societies, the contract of association between the members, where the society is unincorporated, and the contract of the members with the society where it is incorporated, claims our first attention. There can be no question but that the relation, of a member to the society, so far as it can be regulated by the courts, must rest on contract.<sup>1</sup> Under our system of law, according to which church membership is purely a matter of individual choice, it cannot have any other foundation. Such membership, in the case of corporations, may therefore be evidenced even by shares of stock,<sup>2</sup> and will simply mean such control as individual stockholders usually have over the affairs of the legal entity created by the state for their benefit. Such membership, however, will under no circumstances impose any legal liability for the debts of the corporation. While individual members of the old territorial parishes were held liable for the debts of the parish on the same grounds on which inhabitants of towns were held responsible for the debts of the town,<sup>3</sup> members of present-day church corporations, which

<sup>1</sup> *Holt v. Downs*, 58 N. H., 170.

<sup>2</sup> See pages 87 and 103 of this book.

<sup>3</sup> *McLoud v. Selby*, 10 Conn., 390; 27 Am. Dec., 689; *Beardsley v. Smith*, 16 Conn., 368; 41 Am. Dec., 148; *Atwater v. Woodbridge*, 6 Conn., 223; 16 Am. Dec., 46; *Chase v. Merrimack Bank*, 36 Mass. (19 Pick.), 564; 31 Am. Dec., 163; *Fernald v. Lewis*, 6 Me., 264.

bear no analogy to territorial parishes, are exempt from any such claim <sup>1</sup> and are under no greater liability for such debts than are members of ordinary private corporations.<sup>2</sup>

While this much is clear the question of the liability of the members of an unincorporated church society for the debts contracted by its officers, and of the relation of these members toward each other, remains, and is not without difficulty. It has been held in Georgia <sup>3</sup> and strongly intimated in a number of cases involving communistic religious societies <sup>4</sup> that this relation is one of partnership. However, since profit is not the aim of such societies,<sup>5</sup> and since the associates have no right to bind each other by contract,<sup>6</sup> the overwhelming weight of authority is against this contention.<sup>7</sup>

<sup>1</sup> *Jewett v. Thames Bank*, 16 Conn., 511; *Richardson v. Butterfield*, 60 Mass. (6 Cush.), 191.

<sup>2</sup> *Allen v. North Des Moines M. E. Church*, 127 Iowa, 96; 102 N. W., 808; 108 Am. St. Rep., 366; 69 L. R. A., 265; *Jewett v. Thames Bank*, 16 Conn., 511; *Richardson v. Butterfield*, 60 Mass., 191; *Bigelow v. Congregational Society of Middletown*, 11 Vt., 283; 15 Vt., 370.

<sup>3</sup> *Wilkins v. St. Mark's Protestant Episcopal Church*, 52 Ga., 351; *Jones v. Watson*, 63 Ga., 679; *Thurmond v. Cedar Springs Baptist Church*, 110 Ga., 816; 36 S. E., 221. See *re Ticknor's Estate*, 13 Mich., 43; *German Catholic Church v. Kaus*, 9 Am. L. Rec., 627; 6 Ohio Dec. Reprint, 1028; *Guild v. Allen*, 28 R. I., 430; 67 Atl., 855.

<sup>4</sup> *Goesele v. Bimeler*, Fed. Cas. No. 5,503; affirmed 55 U. S. (14 How.), 589, 607; *Nachtrieb v. Harmony Settlement*, Fed. Cas. No. 10,003; *Gass v. Wilhite*, 32 Ky. (2 Dana), 170. But see *Teed v. Parsons*, 202 Ill., 455; 66 N. E., 1044.

<sup>5</sup> *In re Maguire's Estate*, 13 Phila., 244.

<sup>6</sup> *German Roman Catholic Church v. Kaus*, 6 Ohio Dec. Reprint, 1028; 9 Am. Law Rec., 627.

<sup>7</sup> *Burke v. Roper*, 79 Ala., 138; *Woodward v. Cowing*, 41 Me., 9; 66 Am. Dec., 211; *Clark v. O'Rourke*, 111 Mich., 108; 69 N. W., 147; 66 Am. St. Rep., 389; *Schradi v. Dornfeld*, 52 Minn., 465; 55 N. W., 49; *Phoenix Insurance Co. v. Burkett*, 72 Mo. App., 1; *First National Bank of Plattsmouth v. Rector*, 59 Neb., 77; 80 N. W., 269; *Field v.*



The relation of the members of communistic societies toward each other is of especial importance in this connection. These bodies of devout men and women are generally quiet, sober and industrious; and the fruits of these commendable qualities are exhibited to the public eye in their beautiful villages and cultivated grounds, and in the apparent comfort and abundance with which they are surrounded.<sup>1</sup> Their views and ways of life, peculiar though they may seem, are not for that reason in conflict with the policy of the law.

In this country all opinions are tolerated and entire freedom of action allowed, unless this interferes in some way with the rights of others. Each individual must determine for himself what limit he shall place upon his aspirations, and, if he chooses to smother his ambitions, the public has no right to interfere.<sup>2</sup>

One of the very blessings of a free government is that under its mild influences the citizens are at liberty to pursue that mode of life and species of employment best suited to their inclination and habits.<sup>3</sup> A contract by which a person becomes a member of such a society and surrenders all his property to it and agrees to work for it without expectation of individual gain is therefore entirely valid,<sup>4</sup> and cannot be set aside on account of extravagant assertions made when

Field, 9 Wend., 394; *Burton v. Grand Rapids School Furniture Co.*, 10 Tex. Civ. App., 270; 31 S. W., 91.

<sup>1</sup> *Anderson v. Brook*, 3 Me., 243, 248.

<sup>2</sup> *State v. Amana Society*, 132 Iowa, 304, 317; 109 N. W., 898; 8 L. R. A. (N. S.), 909; 11 Ann. Cas., 231.

<sup>3</sup> *Waite v. Merrill*, 4 Me., 102; 16 Am. Dec., 238.

<sup>4</sup> *Order of St. Benedict v. Steinhauser*, 234 U. S., 640; reversing 194 Fed., 289; 114 C. C. A., 249, affirming 179 Fed., 137; *Gasely v. Zoar Separatist Society*, 13 Ohio St., 144; *Goesele v. Bimeler*, Fed. Cas. No. 5,503; affirmed 550 S., 589; *Waite v. Merrill*, *supra*; *Schwartz v. Duss*, 187 U. S., 8; *Ellis v. Newbrough*, 6 N. M., 181; 27 Pac., 490.

it was entered into <sup>1</sup> nor will it permit a person who voluntarily withdraws in terms <sup>2</sup> or by entering upon a competing business with that of the society <sup>3</sup> nor his heirs or personal representatives after he has died in communion with the society <sup>4</sup> to recover a part of the property thus yielded up by him. He will retain rights in the common property only as a member,<sup>5</sup> but cannot be unjustifiably expelled and thus subjected to a loss of all his rights. The dissolution of the relation by the wrongful act of the majority of the association, "necessarily dissolves, *inter sese*, viz. as between the expelled and the remaining partners, the covenants as to the indivisibility of their joint property. If this were otherwise, a majority could at any time expel the minority, and retain all the joint property."<sup>6</sup> The services of each will be considered as being contributed for the benefit of all, while all are bound to maintain each, in health, sickness and old age, from the common or joint fund, created and preserved by joint industry and exertion. Such society may be incorporated <sup>7</sup> and since it must sustain itself of necessity

<sup>1</sup> *Schriber v. Rapp*, 5 Watts, 351; 30 Am. Dec., 327.

<sup>2</sup> *Waite v. Merrill*, *supra*, *Gasely v. Zoar Separatist Society*, 13 Ohio St., 144; *Ruse v. Williams*, 14 Ariz., 445; 130 Pac., 887; *Speidel v. Henrici*, 120 U. S., 377; *Baer v. Nachtrieb*, 60 U. S. (19 How.), 126.

<sup>3</sup> *Burt v. Oneida Community*, 137 N. Y., 346; 33 N. E., 307; 19 L. R. A., 297.

<sup>4</sup> *Order of St. Benedict v. Steinhauser*, *supra*; *Goesele v. Bimeler*, Fed. Cas. No. 5; 503 affirmed 55 U. S., 589; *Schriber v. Rapp*, 5 Watts, 351; 30 Am. Dec., 327. (Pa.).

<sup>5</sup> *White v. Miller*, 71 N. Y., 118; 27 Am. Rep., 13, reversing 7 Hun., 427; *Gass v. Wilhite*, 32 Ky. (2 Dana), 170; 26 Am. Dec., 446; *Goesele v. Bimeler*, *supra*; *Gasely v. Zoar Separatist Society*, *supra*.

<sup>6</sup> *Nachtrieb v. Harmony Settlement*, Fed. Cas. No. 10,003. Reversed on a different construction of the facts. *Baker v. Nachtrieb*, *supra*. See *Teed v. Parsons*, 202 Ill., 455; 66 N. E., 1044 as to whether such a society is a partnership.

<sup>7</sup> *Anderson v. Brock*, 3 Me., 243.

by the labor of its members, may enter into business contracts such as contracts for the sale of cabbage seed,<sup>1</sup> and may own, control and manage large property holdings and extensive business enterprises.<sup>2</sup>

The question has frequently arisen whether amounts of money advanced or services rendered to a church are covered by express or implied contracts or are donations to it. It is common knowledge that churches are dependent for their support on voluntary donations by members and others. Such donations usually take the form of money. There can be no question that such a gift when fully executed vests the donation in the church. While, therefore, money received for a church and deposited in a bank in the name of the person who collected it will not be treated as belonging to the church so that a creditor of the church can reach it,<sup>3</sup> money actually contributed to it will be vested in the church even against the assignee in bankruptcy of the donor<sup>4</sup> or though the donation consisted in paying bills for the church<sup>5</sup> or incurring large expenditures for it,<sup>6</sup> and will not give the donors any control over the property purchased or maintained with it.<sup>7</sup> Where, therefore, land is purchased by a religious corporation with money contributed by people outside of the church, the

<sup>1</sup> *White v. Miller, supra.*

<sup>2</sup> *State v. Amana Society*, 132 Iowa, 304, 318; 109 N. W., 898; 8 L. R. A. (N. S.) 909; 11 Am. Cas., 231.

<sup>3</sup> *Peoples Bank v. St. Anthony's Roman Catholic Church*, 38 Hun., 330. See *Church of Redeemer v. Crawford*, 43 N. Y., 476; reversing 5 Rob., 100.

<sup>4</sup> *Carpenter v. Buttrick*, 41 Mich., 706; 3 N. W., 196.

<sup>5</sup> *Jackson Baptist Church v. Comb's Executor*, 130 Ky., 255; 113 S. W., 119.

<sup>6</sup> *Whitsitt v. Preëmption Presbyterian Church*, 110 Ill., 125.

<sup>7</sup> *Follett v. Badean*, 26 Hun., 253; *Busby v. Mitchell*, 23 S. C., 472. See *Fourth Parish in West Springfield v. Root*, 35 Mass., 318.

donors will be considered as donors merely of the money and hence will not be permitted to impose restrictions on the land.<sup>1</sup> Similarly, where a church is sold for debt and a surplus results, such surplus will be held by the church under the same conditions as those under which the land was held.<sup>2</sup>

However, a donation need not necessarily take the form of money. It may, on the contrary, and often does, assume the form of services. It is clear that services rendered to a church society without expectation of financial returns will not entitle the donor after he has experienced a change of heart to recover compensation. They are as much gifts as is the money deposited in the collection plate during divine services. A person who plays the organ for a small congregation is therefore not entitled to payment for this service in the absence of an express contract to that effect.<sup>3</sup> Neither can a treasurer of a large congregation claim commissions for handling and investing its funds after he has repeatedly received and accepted the thanks of the congregation for his services.<sup>4</sup> Nor can an attorney who is one of the church trustees recover compensation for legal services rendered to the trustees where the work is done under circumstances which justify the belief that no charge was intended.<sup>5</sup>

However, if churches were to rely on unsolicited donations, they would soon be in bad financial straits. Most of their members will not come forward voluntarily with

<sup>1</sup> *Holmes v. Wesley M. E. Church at Belleville*, 42 Atl., 582; 58 N. J. Eq., 327.

<sup>2</sup> *Harper v. Straus*, 53 Ky. (14 B. Mon.), 39.

<sup>3</sup> *Van Buren v. Reformed Church of Gausevoort*, 62 Barb., 495.

<sup>4</sup> *Episcopal Church of Christ Church Parish v. Barksdale*, 1 Strobb. Eq., 197 (S. C.).

<sup>5</sup> *Cicotte v. St. Ann's Church*, 60 Mich., 552; 27 N. W., 682.

their contributions but will wait until they are solicited. While such solicitation may be carried on entirely by word of mouth, and while any agreement thus reached will be valid so far as the statute of frauds is concerned,<sup>1</sup> the most usual method by which the purpose is accomplished is that indicated by the name subscription itself. Such a subscription will be connected with the words at the top of the paper, though it consists of a complete sentence inserted in the space reserved for signatures. It is but natural that courts should be desirous to uphold such written promises<sup>2</sup> and that any action to the contrary should be taken with regret.<sup>3</sup>

The great difficulty that has been encountered in this connection consists in finding a consideration for the promise that is made by the subscribers. Of course a recital of a consideration of one dollar will not avail when the money has not been actually paid.<sup>4</sup> Some other consideration must therefore be discovered. Some courts, considering a refusal to pay such subscriptions as breaches of good faith and as unwarrantable disappointments of reasonable expectations, have gone to great lengths to unearth a consideration by which such promises can be supported. In their anxiety to uphold such subscriptions they have, where no fraud or deception is involved, sought to construe the mutuality of promises as between the various subscribers into

<sup>1</sup> *Capelle v. Trinity M. E. Church*, Fed. Cas. No. 2,392; 11 N. B. Reg., 536; *M. E. Society of Shelburne v. Lake*, 51 Vt., 353; *Stewart v. Second Presbyterian Church*, 84 Pa. St., 388; see *Barnes v. Perine*, 12 N. Y., 18; affirming 15 Barb., 249.

<sup>2</sup> *M. E. Society of Shelburne v. Lake*, *supra*.

<sup>3</sup> *Leonard v. Lent*, 43 Wis., 83, 87; *M. E. Church of Sun Prairie v. Sherman*, 36 Wis., 404; *Albany Presbyterian Church v. Cooper*, 112 N. Y., 517, 524; 21 N. Y. St. Rep., 503; 20 N. E., 352; 3 L. R. A., 468, affirming 45 Hun., 453; 10 N. Y. St. Rep., 143.

<sup>4</sup> *Albany Presbyterian Church v. Cooper*, *supra*, at 521 of the official report.

a sufficient consideration.<sup>1</sup> This has been done on the principle that

when several persons promise to contribute to a common object, desired by all, the promise of each may be a good consideration for the promise of others, and this although the object in view is one in which the promisors have no pecuniary or legal interest, and the performance of the promise by one of the promisors would not in a legal sense be beneficial to the others.<sup>2</sup>

It is argued that churches are necessarily supported by the coöperation of many persons who have a common and unselfish interest in their success, that contributions therefor are in the nature of a response to previous contributions by others, or are invitations to such future contributions, or partake of the nature of both, and that to allow a contributor to withdraw his contribution after he has placed others, more conscientious than himself, in a position where they are at least under a moral obligation to pay the same would be manifestly unjust.<sup>3</sup> It has been declared that it is not to be endured that a subscriber to a fund for the support of a minister "should be permitted to defeat this laudable object, by withdrawing his subscription, when, by that subscription, he has induced many others to associate with him".<sup>4</sup> Accordingly it has been held in a few jurisdictions that the real consideration for the promise of one person "is the promise which others have already made, or which he expects them to make, to contribute to the same object."<sup>5</sup>

<sup>1</sup> *George v. Harris*, 4 N. H., 533.

<sup>2</sup> *Albany Presbyterian Church v. Cooper*, *supra*, at 521.

<sup>3</sup> *Upper Iowa M. E. Conference v. Noyes*, 165 Iowa, 601; 146 N. W., 848.

<sup>4</sup> *Somers v. Miner*, 9 Conn., 458, 466.

<sup>5</sup> *Peirce v. Ruley*, 5 Ind., 69; *Petty v. Church of Christ*, 95 Ind., 278; *Upper Iowa, M. E. Conference v. Noyes supra*; *Second Precinct in Pembroke v. Stetson*, 22 Mass. (5 Pick.), 506; (but see *Cottage St. M.*

It is obvious that such a construction would solve all the difficulties that stand in the way of the legality of such a contribution. It rests on the doctrine, accepted by some and rejected by other jurisdictions, that a third person, the mere beneficiary of a contract, can sue to enforce it. It

proceeds on the assumption that a stranger both to the consideration and the promise, and whose only relation to the transaction is that of donee of an executory gift, may sue to enforce the payment of the gratuity for the reason that there has been a breach of contract between the several promisors and a failure to carry out as between themselves their mutual engagements.<sup>1</sup>

Nor can the efforts made by the persons who handle subscription lists ordinarily be tortured into a consideration for the promise made by one or more of their subscribers. It is true that such persons are often considerably encouraged in their thankless task by liberal subscriptions made by certain individuals. It may very well be that they, upon the receipt of such promises, will double or treble their efforts. However, the time and labor thus expended by them is ordinarily intended by them as a gratuity toward the church and cannot furnish a consideration for the subscription in the absence of evidence that what they did or undertook to do was done upon the invitation or request of the subscribers.<sup>2</sup>

It being an unquestionable and unquestioned axiom of the common law that no action can be maintained to enforce a gratuitous promise, however worthy the object intended to be promoted, and that the performance of such a

E. Church v. Kendall, 121 Mass., 528, 530); Congregational Society in Troy v. Perry, 6 N. H., 164; Capelle v. Trinity M. E. Church, Fed. Cas. No. 2,392; 11 N. B. Reg., 536.

<sup>1</sup> Albany Presbyterian Church v. Cooper, *supra*, at 522.

<sup>2</sup> *Ibid.*

promise rests wholly on the will of the person making it who therefore can refuse to perform, although his refusal may disappoint reasonable expectations, or may not be justifiable in the forum of conscience,<sup>1</sup> it follows that so long as a subscription is entirely of this nature, is entirely one-sided, there can be no right of enforcement. "There can be no relation without correlation. An engagement to subscribe for the benefit of an association is necessarily a mere proposal, and therefore revocable, until the association is formed."<sup>2</sup> Until the donee has done something on the faith of the promise made, it will be treated by those courts who do not recognize the doctrine of mutual promises as a *nudum pactum*, a mere unaccepted offer<sup>3</sup> which may be withdrawn by the person who has made it and which will be legally considered as withdrawn by his death<sup>4</sup> or insanity.<sup>5</sup> Says the Arkansas Court: "A gratuitous subscription will be considered as only a continuing offer to make a gift, and until accepted by the promisees, and acted upon in such manner as to raise a consideration, it may be withdrawn."<sup>6</sup>

Where, however, no withdrawal is effected before action is taken on the matter by the church an entirely different question is presented.

<sup>1</sup> Albany Presbyterian Church, *op. cit.*

<sup>2</sup> Phipps *v.* Jones, 20 Pa. (8 Harris), 260; 59 Am. Dec., 708.

<sup>3</sup> First Universalist Society in Newburyport *v.* Currier, 44 Mass. (3 Met.), 417; Cottage Street M. E. Church *v.* Kendall, 121 Mass., 528; Albany Presbyterian Church *v.* Cooper, *supra*.

<sup>4</sup> Pratt *v.* Elgin Baptist Society, 93 Ill., 475; 34 Am. Rep., 187; Twenty-third St. Baptist Church *v.* Cornell, 117 N. Y., 601; 23 N. E., 177; 6 L. R. A., 807; Phipps *v.* Jones, 20 Pa. St., 260; 59 Am. Dec., 708.

<sup>5</sup> Beach *v.* First M. E. Church, 96 Ill., 177.

<sup>6</sup> Rogers *v.* Galloway Female College, 64 Ark., 627, 636; 44 S. W., 454; 39 L. R. A., 636; Barnes *v.* Perine, 12 N. Y., 18; affirming 15 Barb., 249; 9 Barb., 202.



Where one promises to pay a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing, upon the faith of the promise, the promise, which was before a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promissor.<sup>1</sup>

The subscription which was invalid at the time it was made for want of a consideration, will therefore be made valid and binding by such subsequent action.<sup>2</sup> Such action may consist of building<sup>3</sup> or completing a church<sup>4</sup> or making plans and specifications for such work.<sup>5</sup> The continuance of the services of a clergyman,<sup>6</sup> the acceptance of an assumption of the church debt by the trustees,<sup>7</sup> the borrowing of money on the faith of the subscription,<sup>8</sup> though such action only involves a change of creditors,<sup>9</sup> are other examples of such action. In a Massachusetts case where the subscriber had given a note which recited that the money was borrowed from the church, the court even assumed that the defendant had actually paid the subscription and received the money back on the note and gave judgment for the holder of it.<sup>10</sup>

What has heretofore been said has had reference to sub-

<sup>1</sup> Cottage St. M. E. Church *v.* Kendall, 121 Mass., 528, 530.

<sup>2</sup> Albany Presbyterian Church *v.* Cooper, *supra*, at 524.

<sup>3</sup> McDonald *v.* Gray, 11 Iowa, 508; 79 Am. Dec., 509.

<sup>4</sup> Reformed Protestant Dutch Church *v.* Brown, 17 How. Pr., 287 (N. Y.); 29 Barb., 335; affirmed 24 How. Pr., 76.

<sup>5</sup> Wilson *v.* Savannah First Presbyterian Church, 56 Ga., 554.

<sup>6</sup> Somers *v.* Miner, 9 Conn., 458; First Religious Society in Whites-town *v.* Stone, 7 Johns., 112.

<sup>7</sup> First M. E. Church *v.* Donnell, 110 Iowa, 5; 81 N. W., 171; 46 L. R. A., 858.

<sup>8</sup> United Presbyterian Church *v.* Baird, 60 Iowa, 237; 14 N. W., 303.

<sup>9</sup> Illiopolis M. E. Church *v.* Garvey, 53 Ill., 401.

<sup>10</sup> Fisher *v.* Ellis, 20 Mass. ( 3 Pick.), 322.

scriptions which are absolute in form. Of course, where such promises are conditional and the condition is not a mere condition subsequent<sup>1</sup> or has not been waived,<sup>2</sup> it must be performed before liability on the part of the subscriber will attach.<sup>3</sup> When, therefore, a person signs a subscription paper on condition that the church building be repaired, the subscription will not become effective until this is done.<sup>4</sup> But a subscription of \$20,000 on condition that \$10,000 be raised from other sources is not fulfilled by a mere naked promise by certain persons that they will contribute enough to make the gift binding.<sup>5</sup>

The question of consideration is not the only difficulty that has been encountered by the courts in connection with subscription papers. It is quite a general custom at the dedication of a new church to receive subscriptions to pay the various bills which stand against it. Outside of these special occasions subscription papers are quite frequently passed around at ordinary church meetings. Since these meetings are customarily held on a Sunday, the question of the validity of the contract entered into in consequence of them under Sunday laws forbidding all Sunday activity except works of necessity or charity, is sharply presented.

<sup>1</sup> *Newmyer's Appeal*, 72 Pa. (22 P. F. Smith), 121.

<sup>2</sup> *Pierce v. Kellogg*, 3 Day, 455, note; *Petty v. Church of Christ*, 95 Ind., 278; *Reformed Protestant Dutch Church v. Brown*, 29 Barb. (N. Y.), 335; 17 How. Pr., 287; aff. 24 How. Pr., 76; *Hutchins v. Smith*, 46 Barb., 235.

<sup>3</sup> *Leland Norwegian Lutheran Congregation v. Larsen*, 121 Iowa, 151; 96 N. W., 706; *Tompkins v. Dinnie*, 21 N. D., 305; 130 N. W., 935; *Stuart v. Second Presbyterian Church*, 84 Pa., 388; *Ev. Lutheran St. Martin's Gemeinde v. Prouss*, 122 N. W., 719; 140 Wis., 349; *Davis v. Second Universalist Meeting House in Lowell*, 49 Mass. (8 Met.), 321.

<sup>4</sup> *McAuley v. Billenger*, 20 Johns. (N. Y.), 89.

<sup>5</sup> *St. Paul's Episcopal Church v. Fields*, 81 Conn., 670; 72 Atl., 145. See *Rogers v. Galloway Female College*, 64 Ark., 627; 44 S. W., 454; 39 L. R. A., 636.

There can be no question but that such subscriptions are not works of necessity.<sup>1</sup> While the time chosen is certainly the most convenient for this purpose, mere convenience cannot be made to spell necessity. Such a construction would in its results not uphold but actually abrogate the statutes. A subscription contract made on a Sunday, if it is to be upheld at all, must therefore be upheld as a work of charity. Its validity will depend upon the meaning of that term. And that meaning is in no doubt. Charity in this Christian country of ours is not only inseparably connected with but is actually the product of the Christian faith. The word charity "takes on shades of meaning from the Christian religion, which has largely affected the great body of our laws, and to which we must trace the laws which punish what the Christian regards as the desecration of the first day of the week."<sup>2</sup> All our Sunday laws, in the last analysis, rest upon the desire of Christian people to have one day in the week in which they can assemble for public worship. Taking up collections and receiving subscriptions at such meetings is a custom as old as the churches themselves. It would certainly be remarkable, to say the least, if a statute passed at the request of the various churches should render void one of their immemorial practices. No one would contend that the practice of receiving a free-will offering on a Sunday is unlawful. It follows that "if collections which are paid as the solicitors pass through the congregation, do not fall within the statute, neither do contributions promised to be paid at a future time, because the circumstances and purposes under and for which they are made are in nowise different."<sup>3</sup>

<sup>1</sup> Dale v. Knepp, 98 Pa., 389; Allen v. Duffie, 43 Mich., 1; 4 N. W., 427; 38 Am. Rep., 159.

<sup>2</sup> Cooley J. in Allen v. Duffie, 43 Mich., 1, 7; 4 N. W., 427; 38 Am. Rep., 159.

<sup>3</sup> Bryan v. Watson, 127 Ind., 42, 44; 26 N. E., 666; 11 L. R. A., 63.

To condemn either collections or subscriptions as unlawful would have other serious consequences.

The minister who preaches, the organist and precenter who furnish the music, and the sexton who cares for the building on Sunday, would be violating the law every day they performed service for their religious society, and not only would be precluded from recovering compensation, but might be punished for services which are proper in themselves, and for which the day is specially set apart.<sup>1</sup>

It follows that while taking collections and subscriptions to carry on the work of a religious organization may not, strictly speaking, be deemed a part of religious worship, they are means for its support, and come within the exception of the statute.<sup>2</sup> Says the Pennsylvania court:

The means which long established and common usage of religious congregations show to be reasonably necessary to advance the cause of religion are not forbidden and may be deemed works of charity within the meaning of the statute. It is not essential that they be purely charitable, it is sufficient if they so far partake of that character as to be recognized by the congregation as part of its active goodness.<sup>3</sup>

Such contracts have therefore been upheld in all the states in which the question has been presented to the courts.<sup>4</sup>

<sup>1</sup> *Allen v. Duffie, supra.*

<sup>2</sup> *First M. E. Church v. Donnell*, 110 Iowa, 5, 6; 81 N. W., 171; 46 L. R. A., 858.

<sup>3</sup> *Dale v. Knepp*, 98 Pa., 389, 392.

<sup>4</sup> *Bryan v. Watson*, 127 Ind., 42; 26 N. E., 666; 11 L. R. A., 63, overruling *Catlett v. Trustees*, 62 Ind., 365; *First M. E. Church v. Donnell*, 110 Iowa., 5; 81 N. W., 171; 46 L. R. A., 858; *Allen v. Duffie, supra*; *Dale v. Knepp, supra*. So has the convening of a business meeting of a congregation on a Sunday been upheld in *Arthur v. Norfield Parish Congregational Church Society*, 73 Conn., 718; 49 Atl., 241. See also *Richmond v. Moore*, 107 Ill., 429.

It remains to consider a few minor questions that have arisen in connection with church subscriptions. Since, according to the general rule, several persons jointly concerned in a common purpose cannot maintain a legal action against all or any of the others for work and labor performed for their joint benefit,<sup>1</sup> though this rule is not followed in one state,<sup>2</sup> it is of great importance that a church should incorporate before it takes up a subscription. This is of importance also in other respects as a note given to an unincorporated body may be declared to be void for that reason.<sup>3</sup>

Of course, even if the church is incorporated, the person who solicits the subscription should be properly authorized to do so, as failure so to authorize him may be fatal to its validity.<sup>4</sup> The various contracts are on the one hand "not so joint, and the several promises so dependent on each other as to relieve all the rest by indulging one"<sup>5</sup> nor are they, on the other hand, joint in the sense that each subscriber is responsible for the whole sum subscribed by all.<sup>6</sup> The contract of subscription will not be terminated by a change of the religious faith of the subscriber,<sup>7</sup> nor by a mere constructive removal out of the parish<sup>8</sup> nor will the abandonment of a building already begun on the part of the minority of a congregation absolve such minority from its liability.<sup>9</sup>

<sup>1</sup> Cheeny v. Clark, 3 Vt., 431; 23 Am. Dec., 219.

<sup>2</sup> Chambers v. Calhoun, 18 Pa. St. (6 Har.), 13.

<sup>3</sup> Boutell v. Cowdin, 9 Mass., 254.

<sup>4</sup> M. E. Church of Sun Prairie v. Sherman, 36 Wis., 404; Leonard v. Lent, 43 Wis., 83.

<sup>5</sup> Wilson v. Savannah First Presbyterian Church, 56 Ga., 544, 556.

<sup>6</sup> Riddle v. Stevens, 2 S. & R., 537.

<sup>7</sup> First Congregational Society of Woodstock v. Swan, 2 Vt., 222.

<sup>8</sup> First Society of Waterbury v. Platt, 12 Conn., 181.

<sup>9</sup> Michels v. Rustemeyer, 20 Wash., 597; 56 Pac., 380.

To sum up: The relation in America of church members with each other and with any corporation which the state has created for their benefit rests on a purely contract basis and is not, as is the case generally in Europe, conferred by birth, residence or other similar considerations. While it bears some analogy to a partnership, particularly where a communistic society is involved, it is not a partnership in the true sense of the word, since the various members cannot bind each other by contract and since the purposes of the association are not commercial. Since church bodies are not ordinarily endowed and since they, with the exception of communistic societies, do not as such pursue any worldly avocation, it follows that the worldly means necessary for their work must be collected by voluntary donations. Such donations, accordingly, will be upheld by the courts, where they are fully executed, whether they consist of money, property or services. The donor, after fully executing his gift, will not be allowed to change his mind and recover it, or recover compensation. Even where he merely signs, in connection with others, a subscription paper, he will be held liable forthwith on such subscription in a few states, though the weight of authority is to the effect that he will be bound on it only after the society has taken some action on the faith of his donation. That he has signed the subscription paper on a Sunday will not better his position, as such signature will be construed as a work of charity which is excepted out of the operation of the Sunday laws. Each subscriber will be held liable only for the sum set opposite his name and cannot evade this liability, after it has once attached, by a change of his faith or by a removal. For technical reasons it will be well not only to incorporate the society before taking subscriptions, but also properly to authorize the person who solicits them.

## CHAPTER XII

### CLERGYMEN

It goes without saying that, in this land of religious liberty, a clergyman is not the paid officer of the state or of any subdivision of it. His position before the law is analogous to that of the officers of social, literary, fraternal, athletic, and similar organizations.

But while his position is analogous to that of such officers, it does not resemble it in all respects. For historical and other reasons the clergyman is accorded a higher recognition than is given to the director of a *Turnverein* or the grand master of a lodge. While the state does not teach religion, it recognizes its high ethical value. It is but natural that those who give up their lives to a purpose so highly useful should receive a great amount of recognition.

And such recognition is in fact accorded. There is, therefore, a relation, recognized by the law of the land, not merely between a bishop and the church property in his diocese, not merely between the clergyman and his congregation, but even between the clergyman and the public at large. These various aspects of the matter, as well as the relation or lack of relation between the clergyman and his bishop, will now be taken up in their order. We will first consider the clergyman's relation to the public.

A clergyman occupies a prominent place in his community. He is the teacher of the young and the counselor of the old. He is largely responsible for the preservation of good morals by both. His example, whether good or

bad, is followed to a large extent. His mode of life is the subject of discussions on street corners and in clubhouses. He is separated from the world by his public ordination and carries with him constantly, whether in or out of the pulpit, superior obligations to exhibit, in his whole deportment, the purity of the religion which he professes to teach. He is thus, by the very position which he has assumed, a public character and, with his congregation, is as much a subject of public comment as a general with his army or a judge with his jury. He is "a public man in such sense that public comment in a proper manner upon his sayings and doings in his public capacity is justified."<sup>1</sup>

But while he is a public man, he is also a member of an honored profession. His, in fact, is one of the three ancient professions that have been recognized from time immemorial. It is elementary that the law is very jealous in protecting a professional man. Certain imputations when applied to a professional man will be presumed to have caused damage, though no such presumption would exist in any other case.

Criticisms of a clergyman therefore have their limitations. There is a boundary between criticism and comment and libel and slander. The character of the American clergyman is no less sacred and worthy of protection than is that of his English colleague. Words which must deprive him of that respect, veneration, and confidence, without which he can expect no hearers, subject the person who uttered them, if untrue, to an action for libel and slander. The position of the clergyman is far more delicate than that of a lawyer or doctor. Imputations which will cause little or no damage to a medical man may forever shatter all con-

<sup>1</sup> McClain, J. in *Klos v. Zahorik*, 113 Iowa, 161; 84 N. W., 1046; 53 L. R. A., 235.



fidence in a clergyman. Consequently the right of the clergyman to damages for libel has been upheld in numerous cases.<sup>1</sup>

While the acts of a clergyman may therefore be commented upon, the commentator must confine his attention to them, and may not draw on his imagination for charges with which to soil the clergyman's character.

But the law does not merely recognize a clergyman as a public character, but actually makes him a public officer for certain limited purposes. Clergymen, whether they minister to a Christian, Jewish, or other congregation,<sup>2</sup> are given the right in the United States to solemnize marriages. This was not always the case. The early settlers in the colony of Massachusetts came smarting under the arbitrary censures of the English ecclesiastical courts and were not disposed to invest their clergy with any civil powers. Accordingly by an ordinance passed in 1646 the clergy was forbidden to solemnize marriages. This rule, thereafter, was gradually relaxed and the authority which ministers had in England to solemnize marriages was thus restored to the American clergyman.<sup>3</sup> The statutes by which this end was achieved were liberally construed so as to cover dissentient,<sup>4</sup> Baptist,<sup>5</sup> and Presbyterian ministers,<sup>6</sup> clergymen who for years had not been connected with any congregation,<sup>7</sup> and

<sup>1</sup> See note in 28 L. R. A. (N. S.), 152.

<sup>2</sup> *In re Reinhardt*, 6 Ohio N. P., 438; 9 Ohio Dec., 441.

<sup>3</sup> *Milford v. Worcester*, 7 Mass., 48, 53, 54.

<sup>4</sup> *Leavitt v. Truair*, 30 Mass., 111.

<sup>5</sup> *Commonwealth v. Spooner*, 18 Mass. (1 Pick.), 235.

<sup>6</sup> *Londonderry v. Chester*, 2 N. H., 268, 276. But see *Ligonia v. Baxter*, 2 Me., 102, where a very strict construction was adopted. This was, however, a pauper case and not one which brought legitimacy of offspring into question.

<sup>7</sup> *Londonderry v. Chester*, *supra*.

even negroes, before the Civil War.<sup>1</sup> The due ordination of the minister<sup>2</sup> and the recording of his credentials were allowed to be established by very slight proof,<sup>3</sup> even by the mere fact that he had solemnized a marriage.<sup>4</sup>

The English law, by which a minister is a public officer for many if not all purposes, was thus re-established in America to a limited extent. It has therefore been held that a minister, in undertaking to perform a marriage ceremony, does not act strictly as such, but rather as a minister of the law or quasi-officer deriving his authority from the statute.<sup>5</sup> A marriage certificate signed "L. B. Emsley M. of Gospel," though it abbreviated the word "minister," has therefore been held admissible in evidence over the objection that it did not appear on its face that the signer held any office which authorized him to perform such ceremony.<sup>6</sup> It follows that "a clergyman in the administration of marriage is a public civil officer, and in relation to this subject is not at all distinguished from a judge of the Superior or County Court or a Justice of the Peace in the performance of the same duty."<sup>7</sup> The New Hampshire court, therefore, after citing the above words, concludes that a clergyman's acts in the performance of the marriage ceremony are as valid as "the official acts of an inspector of the revenue, a deputy sheriff, or an attorney."<sup>8</sup>

<sup>1</sup> *State v. Court of Common Pleas*, 1 West. L. J., 163; 1 Ohio. Dec. Reprint, 20.

<sup>2</sup> *State v. Winkley*, 14 N. H., 480.

<sup>3</sup> *State v. Kean*, 10 N. H., 347.

<sup>4</sup> *Goshen v. Stonington*, 4 Conn., 209, 218.

<sup>5</sup> *Sikes v. State*, 30 Ark., 496, 503.

<sup>6</sup> *Erwin v. English*, 61 Conn., 502, 507.

<sup>7</sup> *Goshen v. Stonington*, 4 Conn., 209, 218.

<sup>8</sup> *State v. Winkley*, 14 N. H., 430, 496. See also *Milford v. Worcester*, 7 Mass., 48, 54, 55.

But while a clergyman is an officer and a public man, he is not above the law. A priest who is called to an almshouse to administer the last rites of religion to a dying inmate may not eject the keeper of the house from the sick room, though he claims that secrecy as between himself and the dying man is essential in the performance of his religious duty. There is nothing in his priestly character, or in the offices of religion which he performs, which gives him the control of such a room or any authority to exclude or remove from it any person lawfully there.<sup>1</sup> Nor will a clergyman in the absence of any statute exempting him from patrol duty be excused for his refusal so to serve.<sup>2</sup>

While thus, independently of any statute, a clergyman has the same rights and is subject to the same duties as any other man, it should be not forgotten that a great many changes have been wrought in this respect by the various legislatures in the United States. Through statutes the clergyman has been relieved from various duties which might possibly disturb him in the delicate relations which he maintains with the members of his congregation. Thus he has been relieved from jury and military duty, and the statutes by which this result has been accomplished have been liberally construed so as to cover clergymen not connected with any congregation.<sup>3</sup>

By the common law, confessions made to a priest or minister were not regarded as privileged. A clergyman was therefore continually in danger of being called upon to divulge such confessions in court. To remedy this condition statutes have been passed putting such confessions on an equality with statements made to an attorney. They

<sup>1</sup> *Cooper v. McKenna*, 124 Mass., 284; 26 Am. Rep., 667.

<sup>2</sup> *Elizabeth City Corp. v. Kenedy*, 44 N. C., 89.

<sup>3</sup> *King v. Daniel*, 11 Fla., 91; *Commonwealth v. Buzzell*, 33 Mass., 153.

must, however, be made to the clergyman in his professional character. The mere fact that a person who hears a confession is a clergyman will not exclude it from the consideration of court or jury.<sup>1</sup>

While a clergyman has thus been exempted from various duties he has also been put under some slight disabilities. By constitutional provisions in several states he is prohibited from holding any public office. Thus the constitution of Delaware provides: "No ordained clergyman or ordained preacher of the gospel of any denomination shall be capable of holding any civil office in this state, or of being a member of either branch of the legislature, while he continues in the exercise of the pastoral or clerical functions."<sup>2</sup> The effect of this provision on statutes authorizing ministers to perform the marriage ceremony would present an interesting problem. The evil possibilities that lurk in it would be a cogent reason for repealing such and similar constitutional provisions.

The law is not unmindful of the immense influence which may be exerted over aged and sick persons by priests and ministers. Statutes have therefore been passed invalidating deeds and wills drawn up by clergymen who were in a position to influence the grantor or testator. These statutes have received a reasonable construction. It has been held that a priest who is also a notary public may take the acknowledgment of a deed and be a witness as to a mistake in the deed.<sup>3</sup> A statute forbidding a minister who has attended a deceased person to take under his will has been held not to be applicable to a clergyman who did not attend the deceased till after the will was made.<sup>4</sup>

<sup>1</sup> *Mitsunaga v. People*, 54 Colo., 102; 129 Pac., 241; *Alford v. Johnson*, 146 S. W., 516 (Ark.).

<sup>2</sup> Art. 7, sec. 8.

<sup>3</sup> *Partridge v. Partridge*, 220 Mo., 321; 119 S. W., 415.

<sup>4</sup> *Succession of Villa*, 132 La., 714; 61 So., 765.

Before however a person is thus recognized by the law as a clergyman, he must have received recognition by his church. If he is a member of a denomination of an independent character, such as the Baptist or Congregational church, this recognition will naturally be by some particular congregation of that church. If he belongs to a denomination of a connectional character, such as the Catholic or Methodist church, this recognition will be by his bishop. Accordingly, his relation with the one or the other becomes important. We will first consider his relation with the congregation.

In considering the legal relation between a clergyman and his congregation, the view which churches and ministers entertain of this relation from an ecclesiastical viewpoint cannot be controlling. Courts are sworn to administer the law of the land, not the law of some particular class of men. Hence, whatever the clergyman's rights in an ecclesiastical court may be, when he "seeks the aid of the civil courts he is to be treated precisely as any other citizen, and his rights determined by the same standard."<sup>1</sup> Consequently, it becomes necessary for the courts to discover and apply to the relation of minister and congregation some rule of law applicable to the circumstances.<sup>2</sup>

This rule of law cannot be gathered from the law of public officers. "The office of minister of a church is in no way connected with the administration of justice, neither is it a right or franchise, which belongs to the commonwealth."<sup>3</sup> No temporal official powers are conferred on a minister by his ordination and induction. By these ceremonies, in the view of the courts, he is simply set apart,

<sup>1</sup> *Tuigg v. Sheehan*, 101 Pa., 363, 368.

<sup>2</sup> *Albany Dutch Church v. Bradford*, 8 Cow., 457.

<sup>3</sup> *Commonwealth v. Murray*, 11 S. & R., 73, 74.

installed, and inaugurated into a purely ecclesiastical office and tendered the fellowship of those churches which assisted in the ceremonies.<sup>1</sup> Even if the congregation is incorporated he is not, in the absence of express statute, an officer of it, so as to bind it by his acts.<sup>2</sup> Whatever the views of churches may be, and whatever language judges may occasionally use, the legal relation between a minister and his congregation is not of an official character.<sup>3</sup>

Since there is no official relation, if there is any legal relation at all, it must be by contract, express or implied. And this is in fact the theory on which suits involving this relation have uniformly been brought. The usual tactics employed by a congregation when difficulties have arisen have been to starve out its minister, by withholding all support from him. This has forced the minister to sue for his salary and to support his action by proof that a contract for the same existed between himself and the congregation.

To this contract the ordinary rules of law will apply. There must be an offer and an acceptance. Both must be unconditional. The minds of the parties must meet, or there can be no agreement.

The means by which, in independent churches, the contract between the minister and congregation is made is generally by call and acceptance. The congregation extends the call, the minister acts upon it. If he rejects it, no contract comes into being. If, however, he accepts it, a contract comes into being which binds both the minister and

<sup>1</sup> *Baker v. Fales*, 16 Mass., 488. That a minister is a public officer for the purpose of performing the marriage ceremony is an anomaly and cannot, on reason, be reconciled with any consistent theory of the separation of state and church.

<sup>2</sup> *Allen v. North Des Moines M. E. Church*, 127 Iowa, 96; 102 N. W., 808.

<sup>3</sup> *Union Church v. Sanders*, 1 *Houst.*, 100; 63 *Am. Dec.*, 187. See *Neill v. Spencer*, 5 *Ill. App.*, 461, 470.

the congregation according to its terms.<sup>1</sup> Both call and acceptance must be unqualified.<sup>2</sup> Where, therefore, a minister though preaching in a congregation, yet refuses to accept its call, no contract comes into being.<sup>3</sup>

The terms of the call, after acceptance, become the terms of the contract. The call necessarily contains the offer of salary and specifies the views and wishes of those tendering it.<sup>4</sup> Its express terms control the entire relation of the parties, as much as the express terms of a business offer will control the construction of the contract made by a seasonable acceptance of it. If the rules and regulations of the particular denomination are referred to in the call, these, on familiar principles, become as much a part of the call as if they had been recited in full.<sup>5</sup>

But even when they are not referred to, they may, by implication, become a part of the contract. By themselves, without reference to the laws and customs of the denomination to which the particular congregation belongs, such instruments are frequently quite unintelligible. Being instruments "of a purely ecclesiastical character having relation to the spiritual concerns of the church rather than to its temporal affairs,"<sup>6</sup> they frequently contain words and phrases which convey no meaning apart from the con-

<sup>1</sup> *Humbert v. St. Stephen's Church*, 1 Edw. Ch. 308, 315; *Albany Dutch Church v. Bradford*, 8 Cow., 457; *Connitt v. New Prospect*, 54 N. Y., 551; affirming 4 Lansing, 339; *Jennings v. Scarborough*, 56 N. J. L., 401; 28 Atl., 559.

<sup>2</sup> *Hopkins v. Seymour*, *N. Y. Daily Register*, May 16, 1884.

<sup>3</sup> *West v. First Presbyterian Church of St. Paul*, 41 Minn., 94; 42 N. W., 922; 4 L. R. A., 692; *Neill v. Spencer*, *supra*.

<sup>4</sup> *Travers v. Albey*, 104 Tenn., 665; 58 S. W., 247; 51 L. R. A., 260.

<sup>5</sup> *Albany Dutch Church v. Bradford*, 8 Cow., 457, 500; *Connitt v. New Prospect*, 54 N. Y., 551; affirming 4 Lans., 339.

<sup>6</sup> *Paddock v. Brown*, 6 Hill, 530, 533.

stitution, by-laws, and customs of the particular church to which the congregation belongs. These must be referred to therefore in order to ascertain the intention of the parties,<sup>1</sup> and they thus become a part of the contract. Hence canons,<sup>2</sup> rules,<sup>3</sup> and customs<sup>4</sup> of churches have been considered by the courts in construing contracts between ministers and congregations.

As the public laws subsisting at the time and place of the making of a contract and in force when it is to be performed enter into and form a part of it, so the ecclesiastical laws and usages of a particular religious denomination enter into and form part of every contract under which the status of a pastor of a church of that denomination is created.<sup>5</sup>

This principle is strikingly illustrated by cases arising in Presbyterian circles. According to the Presbyterian theory a call is but a tentative proposition, which becomes effective only by the concurrence of the presbytery to which the particular congregation belongs. The call, to be valid, must pass through the hands of the presbytery. It is in effect a petition to the presbytery, which may be granted or refused. Only after it is granted does it become an offer to the person to whom it is directed. It follows that no contract relation is created by a call which has not received the assent of the presbytery, however much its recipient

<sup>1</sup> *Helbig v. Rosenberry*, 86 Iowa, 159; 53 N. W., 111.

<sup>2</sup> *Bird v. St. Mark's Church of Waterloo*, 62 Iowa, 567; *Jennings v. Scarborough*, 56 N. J. L., 401; 28 Atl., 559; *Ackley v. Irwin*, 125 N. Y. S., 672; 69 Misc., 56; *Chase v. Cheney*, 58 Ill., 508, 536; 11 Am. Rep., 95.

<sup>3</sup> *Albany Dutch Church v. Bradford*, *supra*; *Connitt v. New Prospect*, *supra*.

<sup>4</sup> *Young v. Ransons*, 31 Barb., 49; *Gibbs v. Gilead Ecc. Society*, 38 Conn., 153; but see *McCrary v. McFarland*, 93 Ind., 466.

<sup>5</sup> *Arthur v. Northfield Parish Congregation Church*, 73 Conn., 718, 727; 49 Atl., 241.



may have attempted to accept it.<sup>1</sup> Such assent, even if given, may be withdrawn before the call is accepted and will thereupon reduce the call to what it was before such assent.<sup>2</sup>

The particular agencies through which a congregation acts in extending a call depend largely upon the customs of the particular church to which the congregation belongs. This matter is also, to some extent, regulated by statutes which are anything but uniform. The few judicial utterances on this subject will be found to be quite diverse. In a New York case it has been said that the church calls, the trustees sanction the call, and the congregation votes the salary.<sup>3</sup> In another New York case it has been held that a vestry alone can call a pastor and fix his salary.<sup>4</sup> Under the old parish system of Massachusetts, it has been said that the church can only nominate the pastor, while the parish calls him.<sup>5</sup> Where a statute provided that the congregation was to fix the salary, the conference to which it belonged<sup>6</sup> or the trustees of the congregation<sup>7</sup> have been denied this power. On the other hand, a contract by a minister with a *de facto* board of trustees, he being ignorant of the illegality of their election, has been upheld.<sup>8</sup> Since

<sup>1</sup> First Presbyterian Church v. Myers, 5 Okla., 809; 50 Pac., 70; 38 L. R. A., 687. Woodside's Appeal, 4 Pennypacker, 124.

<sup>2</sup> West v. First Presbyterian Church, 41 Minn., 94; 4 L. R. A., 692; 42 N. W., 922.

<sup>3</sup> Lawyer v. Cipperly, 7 Paige, 281.

<sup>4</sup> Humbert v. St. Stephen's Church, 1 Edw. Ch., 308.

<sup>5</sup> Burr v. First Parish in Sandwich, 9 Mass., 277.

<sup>6</sup> Landers v. Frank St. M. E. Church, 97 N. Y., 119; overruling 15 Hun., 340.

<sup>7</sup> Walrath v. Campbell, 28 Mich., 111.

<sup>8</sup> Ebaugh v. German Reformed Church, 3 E. D. Smith, 60; Vestry of St. Luke's Church v. Phillip Mathew, 4 Desc., 578.

such contracts are generally made without a view to their legal consequences, it will often be quite easy to discover in them flaws of one kind or another. These, however, where the relation is of any extended duration, will generally be made innocuous by acquiescence or ratification, or become entirely immaterial by new contracts.

The liability of persons who subscribe the call on behalf of the congregation has been the subject of judicial inquiry. Clergymen have sought to hold such individuals personally liable for their salary. When the congregation is incorporated and the corporate agents have acted in the due discharge of their duties and signed as agents merely, it is clear that only the corporation can become liable. Even where the congregation is unincorporated, attempts to hold the individual signers of the call have uniformly been repulsed by the courts.<sup>1</sup>

The exact relation of the minister to his congregation, after the call is accepted, has been the subject of anxious inquiry. Opinion wavers all the way between making him an officer and a mere hireling. An Illinois court has spoken of him as an officer<sup>2</sup> while a Connecticut court has pointed out that he is called an officer merely on a principle of supposed analogy.<sup>3</sup> It has been said that his relation to the congregation is not the ordinary relation of master and servant<sup>4</sup> and that he is not the employee of the congregation.<sup>5</sup> The United States Supreme Court has found the golden mean between these contentions by deciding that

<sup>1</sup> Paddock *v.* Brown, 5 Hill, 530; Neill *v.* Spencer, 5 Ill. App., 461; Van Vlieden *v.* Welles, 6 John, 85.

<sup>2</sup> Neill *v.* Spencer, *supra*.

<sup>3</sup> Whitney *v.* Brooklyn, 5 Conn., 405.

<sup>4</sup> Ackley *v.* Irwin, 125 N. Y. S., 672; 69 Misc., 56.

<sup>5</sup> Travers *v.* Albey, 104 Tenn., 665; 58 S. W., 247; 51 L. R. A., 260.

“the relation of rector to his church is one of service and implies labor on the one side with compensation on the other.”<sup>1</sup> This service, however, is of a personal nature.<sup>2</sup> A clergyman is not a laboring man so as to come under the prohibition of an act of Congress inhibiting “the importation and emigration of foreigners and aliens under contract or agreement to perform labor in the United States,”<sup>3</sup> but is a professional man<sup>4</sup> and as such entitled to respect, veneration, and confidence.<sup>5</sup> In short, his employment is very much like the retainer given to an attorney. While it is an employment to which the ordinary rules of law apply, so as to make it incumbent on a minister illegally discharged before his period of service has expired to make every reasonable effort to obtain other employment before he will be entitled to recover his full salary for the time he has been idle,<sup>6</sup> it is an employment of a dignified character and not merely one for menial service.

Congregations quite frequently, if not generally, own the parsonage occupied by their minister. Such a parsonage is not a sacred building like the church edifice, but is rather in the nature of an endowment or source of pecuniary revenue to aid in the support of the worship in the church proper. Its use is not spiritual but temporal.<sup>7</sup> When, how-

<sup>1</sup> *Church of the Holy Trinity v. United States*, 143 U. S., 457, 458. See *Meyers v. Baptist Society in Jamaica*, 38 Vt., 614.

<sup>2</sup> *Congregation of Children of Israel v. Perres*, 42 Tenn., 620.

<sup>3</sup> *Church of the Holy Trinity v. United States*, 143 U. S., 457.

<sup>4</sup> *Stack v. O'Hara*, 12 Pitts. Legal Jour. (N. S.), 65; *O'Hara v. Stack*, 90 Pa., 477; *Stack v. O'Hara*, 98 Pa., 213; *Ritchie v. Wildemer*, 59 N. J. L., 290; 35 Atl., 825.

<sup>5</sup> *M'Millan v. Birch*, 1 Bin., 178, 184.

<sup>6</sup> *Wallace v. Trustees*, 201 Pa., 292; 50 Atl., 762; *Wallace v. Snodgrass*, 34 Pa. Sup. Ct., 551.

<sup>7</sup> *Everett v. First Presbyterian Church*, 53 N. J. Eq., 500; 32 Atl., 747.

ever, a clergyman is installed by a congregation and put into possession of its parsonage, he is entitled to such possession as part of his employment for the time during which such connection continues.<sup>1</sup> This right is based upon the same principles which apply to the occupancy of premises by a servant.<sup>2</sup> It is personal to the clergyman, and his possession is connected with, and in consideration of, his services as pastor. The ordinary law of landlord and tenant does not apply to it. His right of occupation terminates with his death, at the latest, so that his administrator can acquire no right to sublease it.<sup>3</sup> It follows that a clergyman who is deposed but nevertheless stays in possession of the parsonage becomes liable for rent.<sup>4</sup>

The minister's rights and duties in regard to the other property of his congregation deserve consideration. He certainly is not the owner of the church or of any other property which the congregation may have.

The property of the church, its revenues, its glebe, its parsonage if it have any, its church edifice, and the like belong to the corporation, and the clergyman has no rights or estate in any of them, other than such as are conferred by express contract, except perhaps the control and possession of the church during divine service.<sup>5</sup>

A minister, provided he is not a mere intruder,<sup>6</sup> and pro-

<sup>1</sup> *Jennings v. Scarborough*, 56 N. J. L., 401; 28 Atl., 559; *Fernsler v. Seibert*, 1 Atl., 154 (Pa.); *Richter v. Kabat*, 72 N. W., 600; 114 Mich., 575.

<sup>2</sup> *Chatard v. O'Donovan*, 80 Ind., 20; 41 Am. Rep., 782.

<sup>3</sup> *East Norway Lake Church v. Froislie*, 37 Minn., 447; 35 N. W., 260.

<sup>4</sup> *Bradbury v. Birchmore*, 117 Mass., 569.

<sup>5</sup> *Youngs v. Ranson*, 31 Barb., 49, 55.

<sup>6</sup> *Trustee v. Stewart*, 43 Ill., 81; *Lutheran Church v. Maschop*, 2 Stockton Ch., 57. See *East Norway Lake Church v. Froielie*, 37 Minn., 447; 35 N. W., 260.

vided that he has not been deposed by the congregation,<sup>1</sup> is therefore entitled to the use of the church of his congregation during the customary time for holding divine service<sup>2</sup> and his rights in this regard may be vindicated in injunction suits<sup>3</sup> and in actions of trespass<sup>4</sup> and mandamus.<sup>5</sup> Without such right he could not fulfil the duty which he has assumed. He cannot, however, without express authority, sue for the congregation<sup>6</sup> or execute a deed for it.<sup>7</sup>

The question of the duration of a minister's employment in cases where no definite term either for years or for life has been fixed has led to a division of the authorities. Most courts apply the rule that "an indefinite hiring is *prima facie* a hiring at will" and allow the relation to be dissolved at the will of either party.<sup>8</sup> Under this rule the clergyman may show that there was a mutual understanding that the call was for life, but he will have the burden of proving such understanding. If he is unable to show such an understanding he will not be able to hold the congregation for salary after it has duly exercised its option to dissolve the relation.<sup>9</sup>

Other courts in cases arising largely in the early period

<sup>1</sup> Conway v. Carpenter, 80 Hun., 428; 30 N. Y. S., 315.

<sup>2</sup> Lynd v. Menzies, 4 Vroom, 162.

<sup>3</sup> Ackley v. Irwin, 130 N. Y. S., 841; 71 Misc., 239.

<sup>4</sup> Conway v. Carpenter, 73 Hun., 540; 26 N. Y. S., 255.

<sup>5</sup> Whitecar v. Michenor, 37 N. J. Eq., 6.

<sup>6</sup> Roman Catholic Congregation of St. Patrick's Church v. Consumers Ice Co., 44 La. Ann., 1021; 11 So., 682; Cox v. Walker, 26 Me. (13 Shep.), 504.

<sup>7</sup> Apostolic Holiness Union v. Knudson, 21 Idaho, 589; 123 Pac., 473.

<sup>8</sup> Stubbs v. Vestry of St. John's Church, 96 Md., 267; 53 Atl., 917.

<sup>9</sup> German Ev. Congregation v. Pressler, 17 La. Ann., 127; Hatchett v. Mt. Pleasant Baptist Church, 46 Ark., 291; Perry v. Wheeler, 75 Ky., 541; Fadness v. Braunberg, 73 Wis., 257; 41 N. W., 84; Bartlett v. Hipkins, 76 Md., 5; 23 Atl., 1089; 24 Atl., 532; Morris Street Baptist Church v. Dart, 67 S. C., 338; 45 S. E., 753.

of our jurisprudence, while the connection between church and state still continued, have reached the conclusion that such a call is one for the life of the clergyman subject merely to certain implied conditions. Thus the Massachusetts court in 1807 reached this conclusion over the objection that a constitutional right on the part of the parish to elect their ministers *at all times* would be impaired by such a construction.<sup>1</sup> The court in support of its conclusion pointed to a settlement made on this particular minister as proof that the relation was intended to be permanent. It also reasoned that an employment for a shorter period would reduce the respect for, and curtail the usefulness of, the minister and prevent young men of talent from entering the profession.

In view of this conflict in the decisions a greater degree of definiteness in the calls of the various denominations would seem to be desirable. Leaving a matter of such importance open cannot but lead to contentions of a disagreeable character both in ecclesiastical and in civil courts.

Where the contract is for life (either by its express terms or by the construction of the court) the question of its express or implied conditions becomes important. It is clear that there are numerous reasons not affecting the minister's religious or moral character which may render his services ineffectual for good and even productive of evil in a congregation. Such reasons may be the condition of his family, his blood relationship with certain of his parishioners, or his own weaknesses, foibles, manners, eccentricities, infirmities of temper, or mere indiscretions.<sup>2</sup> These, in the

<sup>1</sup> *Ivery v. Tyringham*, 3 Mass., 160. See also *Peckham v. Haverhill*, 33 Mass., 274; *Whitney v. Brooklyn*, 5 Conn., 405; *Jennings v. Scarborough*, 56 N. J. L. 401; 28 Alt., 559; *Arthus v. Norfield Parish*, 73 Conn., 718; 49 Atl., 241; *Duessel v. Proch.* 78 Conn., 343; 62 Atl., 152.

<sup>2</sup> *Connitt v. New Prospect*, 54 N. Y., 551, 559.

absence of an express condition to that effect, are no legal ground for dissolving his relation with his congregation.<sup>1</sup> Immoralities, to justify severing such relations, must be of the grosser sort, such as intemperance, lying, unchaste behavior, and the like.<sup>2</sup>

But immoral or criminal conduct is not the only breach of an implied condition of a minister's contract with his congregation. He has assumed certain duties. A wilful neglect of them is as much a breach of his contract as immoral behavior. Thus a rabbi of an orthodox synagogue by his contract assumes the duty to serve his congregation on the seventh day of the week. If he devotes this day in whole or in part to secular business, he not only gives great offense to his congregation, but actually breaks his contract, so that the congregation is at liberty to discharge him.<sup>3</sup> Similarly, ministers called to teach the doctrines of one denomination of Christians must preach these doctrines and cannot, without breaking their contract, adopt and promulgate the doctrines of some other church. It follows that a congregation may remove its minister at any time on account of (1) an essential change of doctrine, (2) a wilful neglect of duty, (3) immoral or criminal conduct.<sup>4</sup> In thus removing a minister a congregation, however, should be careful to set out the real cause of dismissal, as the cause assigned will be the only one which a court will consider when the matter is brought before it.<sup>5</sup>

In addition to a removal for cause, the relation between

<sup>1</sup> *Whitney v. Brooklyn*, 5 Conn., 405.

<sup>2</sup> *Thompson v. Roboboth*, 22 Mass., 469.

<sup>3</sup> *Congregation of Children of Israel v. Peres*, 42 Tenn. 620.

<sup>4</sup> *Sheldon v. Easton*, 41 Mass., 281; *Duessel v. Proch.*, 78 Conn., 343; 62 Atl., 152.

<sup>5</sup> *Whitmore v. Fourth Congregation in Plymouth*, 68 Mass. (2 Gray), 306.

clergyman and congregation may, like any other contract relation, at any time be terminated by mutual consent. This is usually accomplished by a resignation on the part of the clergyman and an acceptance of this resignation on the part of the congregation. Such a resignation may be a valid consideration for a sum of money voted to him by the congregation.<sup>1</sup> The fact that the clergyman's bishop has not been consulted, as required by church regulations, will not prevent the resignation from becoming effective by acceptance on the part of the congregation.<sup>2</sup> To be effective, however, it must be a resignation *in praesenti*. The mere intention of the minister to resign at some future time will be of no effect.<sup>3</sup>

The question has arisen whether a minister who has merely been suspended is entitled to his salary during the period of such suspension. There is no distinction between his contract and any other contract for civil services. Hence if performance of the contract becomes impossible by reason of any law, civil or ecclesiastical, which is binding on both parties, their liability under it is at an end.<sup>4</sup> The right of a minister to receive his salary "is dependent upon the continued performance of his duties as minister; and if he becomes disqualified by suspension or deposition from office, for any ecclesiastical offense, the right to receive the salary will cease as the consequence of the judgment against him."<sup>5</sup> Hence a pastor cannot recover his salary for the period of such suspension<sup>6</sup> and will even be enjoined from entering his church while the suspension is in force.<sup>7</sup>

<sup>1</sup> Worrell *v.* First Presbyterian Church, 23 N. J. Eq., 96.

<sup>2</sup> Congregation of St. Francis *v.* Martin, 4 Rob., 62.

<sup>3</sup> Youngs *v.* Ransom, 31 Barb., 49, 59.

<sup>4</sup> Wallace *v.* Snodgrass, 34 Pa. Super. Ct., 551.

<sup>5</sup> Satterlee *v.* United States, 20 App. D. C., 393.

<sup>6</sup> Albany Dutch Church *v.* Bradford, 8 Cow. 457.

<sup>7</sup> German Ev. Congregation *v.* Pressler, 17 La. Ann. 405.



A different situation arises, however, where, without such suspension or deposition, the doors of the church are simply shut against him and he is thus prevented from performing his clerical duties. Where the beneficiary of a contract is directly responsible for its not being carried out, he remains subject to his obligations, though no services have been rendered. His conduct estops him from relying on the other party's failure to perform his contract. It follows that a clergyman may recover his salary under such circumstances.<sup>1</sup>

Since the services of a minister are of a personal character, it follows that equity will not assume any control over the question of the dismissal of a minister. An unjustified dismissal is merely a breach of contract on the part of the congregation for which the remedy at law is more adequate than any remedy which equity can devise. An attempt by the court to force a congregation to retain a minister who has become distasteful to it could only result in confusion worse confounded.<sup>2</sup>

The question whether a minister can recover from his congregation on a *quantum meruit* has come before the courts in controversies between ministers and congregations of diverse denominations. The facts in the various cases differ so much that it will be best to divide the cases according to the respective denominations.

The best-considered, best-reasoned case in this connection has arisen in connection with the Methodist Episcopal church. The New York Religious Incorporation act provided that the voters of a congregation should have the exclusive power to fix the salary of their ministers. The

<sup>1</sup> Whitney v. First Ecclesiastical Society in Brooklyn, 5 Conn., 405; Thompson v. Roboboth, 22 Mass. 469.

<sup>2</sup> Duessel v. Proch, 78 Conn. 343; 62 Alt. 152; Ziankas v. Hellenic Orthodox Church, 170 Ill. App., 334; Barton v. Fitzgerald, 65 So., 390 (Ala.).

discipline of the church provided that the ministers' salary should be fixed by a committee of the quarterly conference. The discipline was complied with in this case and hence no express contract could come into existence. On the question whether there was an implied contract the court says :

It is apparent that the minister who renders service does so not upon an agreed salary, but upon allowance for the support of himself and family, to be raised by voluntary and not enforced contributions, and those coming not wholly and perhaps not at all from the society or church to which he is appointed. Neither the discipline of the church nor its principles recognize any contract relation between the minister and the society. Its entire policy is opposed to it. It regards its ministers, not as hirelings, but as pilgrims and sojourners, and its societies as voluntary contributors to a general fund. From the fact, therefore, that service is rendered and service received, no implication can arise of any promise of compensation. Both parties must, in the absence, at least, of some valid express agreement, be deemed to have acted under the obligation of duty imposed by the rules to which they have assented.<sup>1</sup>

Under the Presbyterian form of government it appears that, in case a vacancy occurs in a church, it may apply to the presbytery for permission to employ a "stated supply" and shall pay such a supply "a fair and just compensation." No call is extended to such supply and no express contract made with him. The Oklahoma court has been presented with such a situation and has decided that a church which accepted a supply under such circumstances "became obligated to pay him a fair and just compensation for his services."<sup>2</sup>

<sup>1</sup> *Landers v. Frank St. M. E. Church*, 97 N. Y., 119, 125; overruling 15 Hun., 340. See *Baldwin v. First M. E. Church (Wash.)*, 140 Pac., 673; *contra Jones v. Trustees*, 30 La. Ann., 711.

<sup>2</sup> *Meyers v. First Presbyterian Church of Perry*, 11 Okla., 544, 555; 69 Pac., 874.

In Baptist societies the custom appears to be to contract with a clergyman for his services and to pay him such subscriptions as can be raised. Under these circumstances, if the church should refuse or neglect to raise subscriptions it could not thereby defeat the right of its minister to recover, but would drive him to remedy by *quantum meruit*. Where, however, subscriptions have been raised and collected, that which was before uncertain has been made certain and the clergyman may sue as upon an express contract.<sup>1</sup>

Between churches connected with the Evangelical Association of North America and their pastors there appears to be, under the discipline of the church, no contract relation. The discipline, however, clearly contemplates the payment by each congregation to its pastor of an adequate support, and suitable officers and agencies are provided to obtain by voluntary contributions from the members the funds necessary for that purpose. Under these circumstances the Illinois court has held that a reasonable compensation is sufficiently secured to create in the incumbent a property right in the office of pastor which a court of equity will recognize and protect.<sup>2</sup>

The relation between a clergyman and the members of his congregation deserves a passing notice in this connection. While a member has the undoubted right to complain of the minister to his ecclesiastical superior, such complaint must be made in good faith.<sup>3</sup> Similarly a member may make inquiry concerning his minister and, if he receives a libelous reply and publishes the same in good faith, he will be protected.<sup>4</sup> The clergyman, according to the rules of

<sup>1</sup> *Meyers v. Baptist Society*, 38 Vt., 614; *Pendleton v. Waterloo Baptist Church*, 2 N. Y. S., 383; 49 Hun., 596.

<sup>2</sup> *Schweiker v. Husser*, 146 Ill., 399, 436; 34 N. E., 1022.

<sup>3</sup> *O'Donaghue v. McGovern*, 23 Wend., 26. (N. Y.).

<sup>4</sup> *Redgate v. Rouch*, 61 Kansas, 480; 59 Pac., 1050; 48 L. R. A., 236; *Pendleton v. Hawkins*, 11 App. Div., 602; 76 St. Rep., 626; 42 N. Y. S., 626.

his church, will sometimes be called upon to pronounce the sentence of excommunication on certain of his members. Such act if done in good faith will not lay the minister open to an action of slander, however much he may have to hurt the feelings of the excommunicated person.<sup>1</sup> Thus the reading from the pulpit of an excommunication of a married woman for a transgression of the commandment, "Thou shalt not commit adultery," the woman having given birth to a fully developed child five months after her marriage, has been held to be privileged.<sup>2</sup> However, if the clergyman goes farther and advises his people to shun the excommunicated person in business transactions and not to come near to his home or employ him as a physician, he steps outside of his privilege and will be liable to an action of slander or libel.<sup>3</sup>

We have thus far considered the legal effects of the contract between minister and congregation. What has been said in this connection applies to churches which vest large powers in the individual congregations. It does not apply to churches which vest such powers in some superior church dignitary or dignitaries. When this is done the clergyman is appointed by the bishop or some ecclesiastical body outside of the congregation. No express contract is made between him and the congregation. It is quite doubtful whether there is an implied contract. The question of the legal relation between the bishop and his appointee therefore becomes important and will now be considered.

Attempts have been made by priests to hold their bishop for their salary. These attempts have met with no favor in the courts. It has been held that the relation between

<sup>1</sup> *Servatius v. Pickee*, 34 Wis., 292.

<sup>2</sup> *Farmworth v. Storrs*, 59 Mass., 412. See *Landis v. Campbell*, 79 Mo., 433; 49 Am. Rep., 239.

<sup>3</sup> *Fitzgerald v. Robinson*, 112 Mass., 371; *Morassee v. Brochu*, 151 Mass., 567; 25 N. E., 74; 8 L. R. A., 524.

bishop and priest is not that of hirer and hired, but rather that of superior and inferior agents of the same church.<sup>1</sup> The bishop is the priest's superior and according to the established order of things in the economy of church government regulating the degrees of subordination and the methods of administration, it is his province to designate the place for the priest to exercise his functions and to prescribe, under certain limitations, the rules for his guidance and control. To hold the bishop personally liable at law for the priest's services would be as unjust as holding the general agent of a railroad company liable for the pay of the railroad employees engaged by him in the course of his agency. Men are constantly going into positions under appointments by superior agents who are universally understood not to assume any personal liability by such appointment.<sup>2</sup>

Since there is no contract relation between priest and bishop after the priest has been assigned to a charge, there can be none before such assignment. Whatever duty a bishop may have to appoint a priest to some charge is a religious duty only. For its performance or non-performance he is answerable only *in foro conscientiae* or to his ecclesiastical superior. It is a matter in which the ecclesiastical discretion of the bishop is and must be the determining factor. In the exercise of that discretion he is answerable only to the laws of the church. If for a breach of this clearly ecclesiastical duty there should be a remedy by law it must follow that a man may have an action for the refusal of a clergyman to baptize him. If there is a contract

<sup>1</sup> *Rose v. Vertin*, 46 Mich., 457; 41 Am. Rep., 174; *Twigg v. Sheehan*, 101 Pa., 363; 47 Am. Rep., 727; *Baxter v. McDowell*, 155 N. Y., 83; 49 N. E., 667; 40 L. R. A., 670; *Leahy v. Williams*, 141 Mass., 345; *Stack v. O'Hara*, 2 Pa. Co. Ct. Rep., 348; 18 Weekly Notes Cas., 131.

<sup>2</sup> *Rose v. Vertin*, *supra*.

duty on the part of the bishop to assign a priest to a charge, it must follow that there is a similar obligation on the part of the priest to accept such charge. No one will contend that a bishop has any such civil right. The priest, so far as the courts are concerned, can lay down his office and its duties at pleasure. For doing so he can be visited only with ecclesiastical censure and such punishment as the church canons prescribe.<sup>1</sup>

The priest, so far as the courts are concerned, is thus completely without remedy as against his bishop. The bishop may appoint him or not in his discretion. He may after he has appointed him assign him to another charge. He may even enjoin him from exercising priestly functions<sup>2</sup> and remove him absolutely without trial, and the courts will be in no position to afford him any relief.<sup>3</sup>

Since he has no contract with his congregation and with his bishop, the question arises whether he has any remedy against the church as a whole. Even this must be answered in the negative. The church, even if it is capable of being sued, has assumed no legal liability for his support.

That it is the duty of a religious denomination to provide a support for its teachers is a fact that is recognized with a few exceptions all over Christendom. . . . However binding such a duty may be *in foro conscientiae*, when it comes to its enforcement in a court of law the plaintiff must show a contract. . . . The duty of the church to support its priests bears some analogy to the obligation recognized by several religious denominations to support their own poor. Yet it has never been supposed that this duty involved a contract relation which would sustain an action at law for its non-performance.<sup>4</sup>

<sup>1</sup> Twigg v. Sheehan, *supra*, at 369; Stack v. O'Hara, *supra*.

<sup>2</sup> Bonacum v. Harrington, 65 Neb., 831; 91 N. W., 886.

<sup>3</sup> Stack v. O'Hara, 98 Pa. 213; Hennesey v. Walsh, 15 Am. Law Reg., 264; O'Donovan v. Chatard, 97 Ind., 421; 49 Am. Rep., 462.

<sup>4</sup> Twigg v. Sheehan, 101 Pa. 363, 368; 47 Am. Rep. 727.

A priest is thus in fact without any legal remedy. This is not the fault of the law. The law stands ever ready to enforce any contract which he may have made. It is rather the fault of the priest. He has entered into a relation which, by its very nature, excludes all possibility of a contract. His duty is obedience to his bishop. He may, therefore, in the discretion of the bishop be suspended and removed and, if he resists, such removal or suspension will even be enforced by the courts.<sup>1</sup>

Since there is no contractual relation between the bishop and the priest, it follows that the bishop is not responsible for any debts contracted or any tort committed by the priest. A bishop cannot, therefore, be held liable for a deficiency in a bank which has been conducted by one of the priests under his charge.<sup>2</sup> Neither is he responsible to a young lady member of a congregation, to which he has appointed a priest, for a rape committed on her in the vestry of the church by such priest, though he knew of the priest's vicious and degenerate tendencies and gross sexual proclivities.<sup>3</sup>

For one limited purpose only is the priest the agent of the bishop. Bishops generally hold the title to church property. Where possession by the bishop is essential, it will be held that the priest is his agent for such purpose and that his possession is the possession of the bishop.<sup>4</sup> It follows

<sup>1</sup> *People v. Steele*, 2 Barb., 397; 1 Edm. Sel. Cas., 505; 6 N. Y. Leg. Observer, 54.

<sup>2</sup> *Leahy v. Williams*, 141 Mass. 345; 6 N. E. 78.

<sup>3</sup> *Carini v. Beaven*, 106 N. E., 589 (Mass.). In justice to the priest and bishop in this case it should not be overlooked that this case arose and was decided on demurrer. See also *Magnusson v. O'Dea*, 135 Pac., 640; 75 Wash., 574.

<sup>4</sup> *Heiss v. Vosburg*, 59 Wis., 532; 18 N. W., 463; *Chatard v. O'Donovan*, 80 Ind., 20; 41 Am. Rep., 782.

on well-known elementary principles that such a priest cannot maintain an adverse possession against the bishop.<sup>1</sup> This brings us to the question of the relation between the bishop and the property of the congregations of his diocese. In this branch of the law the existing cases have arisen almost exclusively in the Roman Catholic church.

The Roman Catholic church in this country has been until recently on a missionary basis. With the exception of some parishes in the territory acquired by the Louisiana Purchase there are therefore few Catholic parishes in the United States. The theory was that the mission was conducted from abroad. It followed that the property necessary for the purposes of the church must be subject to the control of the church in general, rather than to that of any individual congregation or congregations. To achieve this condition of affairs the aim has been to place all the property of all the churches in the name of the bishop or archbishop of the diocese to which the particular church belongs. Consequently the property of Catholic churches is universally vested in some church dignitary either in his personal capacity or as a corporation sole.

The question then arises as to the nature of this title. Is it legal or equitable or both? There can be no question that the bishop or archbishop is the holder of the legal title.<sup>2</sup> The property ordinarily stands absolutely in his name. It is customary, and in fact required by church regulation in at least some of the dioceses, to eliminate from deeds to bishops all words of trust and all words indicating the official character of the grantee. Where the bishop is not a corporation sole he is required to make a will by which he devises such property to certain persons with a direction to

<sup>1</sup> *Middleton v. Ellison*, 95 S. C., 158; 78 S. E., 739.

<sup>2</sup> *Gabbert v. Olcott*, 22 S. W., 286; affirmed, 86 Tex., 121; 23 S. W., 985.



convey it to the person appointed as his successor.<sup>1</sup> The devisee, under such circumstances, is not held responsible for any negligence of the devisor.<sup>2</sup> While thus the legal title of the bishop is undisputed, the equitable ownership of the property presents an interesting question.

This question has received very serious consideration. While some courts have held that the bishop, if a trustee, is an active trustee, entitled to enjoin members of the congregation with whose funds the property has been bought from erecting a building<sup>3</sup> or to recover damages from such members for tearing down a building on it,<sup>4</sup> while such property in the absence of a "legally enforceable trust" for a religious association has been held not to be exempt from taxation,<sup>5</sup> and while courts have refused to declare a trust or give directions to the bishop in cases where no misconduct of any kind on the part of the bishop was alleged and plaintiffs constituted a very small minority of the congregation;<sup>6</sup> the rule established by the best-considered cases is that the bishop is a mere dry, passive, silent trustee without any interest or power;<sup>7</sup> while each separate congregation, as distinct from the other congregations in the same diocese,<sup>8</sup>

<sup>1</sup> Heiss *v.* Vosburg, 59 Wis., 532; 18 N. W., 463; Foley *v.* Kleibusch, 123 Mich., 416; 82 N. W., 223.

<sup>2</sup> Louisville *v.* O'Donoghue, 162 S. W., 1110.

<sup>3</sup> Foley *v.* Kleibusch, *supra*.

<sup>4</sup> Heiss *v.* Vosburg, *supra*.

<sup>5</sup> Katzer *v.* Milwaukee, 104 Wis., 16; 79 N. W., 745; 80 N. W., 41.

<sup>6</sup> Hennesey *v.* Walsh, 55 N. H., 515; Determan *v.* Luehrsimann, 74 Iowa, 275; 37 N. W., 330.

<sup>7</sup> Carrick *v.* Canevin, 90 Atl., 147 (Pa.); O'Hear *v.* DeGoesbriand, 33 Vt., 593; 80 Am. Dec., 653; Krauczunas *v.* Hogan, 221 Pa., 213; 70 Atl., 740; Mazaika *v.* Krauczunas, 229 Pa., 47; Mazaika *v.* Krauczunas, 233 Pa., 138; 81 Atl., 938. See also Kenrick *v.* Cole, 61 Mo., 572.

<sup>8</sup> Mannix *v.* Purcell, 46 Ohio St., 102; 19 N. E., 572; 2 L. R. A., 753; 15 Am. St. Rep., 562; Searle *v.* Bishop of Springfield, 203 Mass., 493; 89 N. E., 809.

is the real, actual, beneficial owner of the property,<sup>1</sup> which ownership is of such value that it may form the consideration for a contract<sup>2</sup> and gives the congregation the right to sell unqualified by any right in the trustee.<sup>3</sup> This rule also applies where a similar situation arises in the Episcopal church.<sup>4</sup>

It follows that money raised for the special purpose of building a local church and placed in the hands of the bishop does not pass absolutely to him, but is a trust fund which the congregation can reclaim at any time by action.<sup>5</sup> It further follows that a voluntary assignment by a bishop for the benefit of creditors does not cover such property<sup>6</sup> and that a deed<sup>7</sup> or mortgage<sup>8</sup> given to a purchaser who has notice of the facts (and who could purchase church property without such notice) passes no beneficial title. It further follows that on the death of the bishop the court may appoint a trustee in his stead.<sup>9</sup>

It has remained for the Pennsylvania Supreme Court to draw the final inference. The question whether a bishop can be ordered to convey his legal title to another trustee has been answered by the court in the affirmative in *Krauczunas v. Hoban*.<sup>10</sup> This case and its sequels, involving, as

<sup>1</sup> *Carrick Borough v. Canevin*, 90 Atl., 147; *O'Hear v. DeGoesbriand*, 33 Vt., 593; 80 Am. Dec., 653. See also *Kenrick v. Cole*, 61 Mo., 572; *Krauczunas v. Hoban*, 221 Pa. 213, 221; 70 Atl. 740.

<sup>2</sup> *Arts v. Suthrie*, 75 Iowa, 674; 37 N. W., 395.

<sup>3</sup> *Krauczunas v. Hoban*, *supra*.

<sup>4</sup> *Neeley v. Hoskins*, 84 Me., 386; 24 Atl., 882. See also *Armour v. Spalding*, 14 Colo., 302; 23 Pac., 789.

<sup>5</sup> *Amish v. Gelhaus*, 71 Iowa, 170; 32 N. W., 318.

<sup>6</sup> *Mannix v. Purcell*, *supra*.

<sup>7</sup> *Fink v. Umscheid*, 40 Kan., 271; 19 Pac., 623; 2 L. R. A., 146.

<sup>8</sup> *O'Donnell v. Holden*, 21 W. L. Bull., 254; 10 O. Dec. Rep., 475.

<sup>9</sup> *In re St. George v. Lithuanian Roman Catholic Church*, 90 Atl., 918.

<sup>10</sup> 221 Pa. 213; 70 Atl. 740.

said by the court, no "possible result worth a moment's controversy," in which neither side appreciated "the insignificance of the stake for which they were contending,"<sup>1</sup> has been before the Supreme Court not less than five times, and on this account, as well as on account of the bitterness and earnestness with which it has been contested and the care with which it has been decided, deserves a somewhat more extended statement in this connection.

Before 1906 the title of the congregation in question was vested in the "The Right Rev. Michael Hoban, trustee for the St. Joseph Lithuanian Catholic Congregation." In 1906 trouble arose, which resulted in a resolution by the congregation authorizing certain of its members to bring action against the bishop to secure a reconveyance by him of the property. The Supreme Court in 1908 decided that

the entire beneficial ownership in the property here sought to be involved is, and has been from the beginning, in the St. Joseph's Lithuanian Catholic Congregation of the City of Scranton; the defendant [Bishop Hoban] is trustee of the legal title to the property for the exclusive use of said congregation, without any interest therein or any right or power to control its use or disposition; the congregation has the right to substitute other trustees in his stead, and, having done so by a majority vote at a regularly called meeting for that purpose, it is entitled to the process of the court to compel a conveyance from the defendant to the trustees of its own selection.<sup>2</sup>

The canon of the Catholic church in regard to this matter was held to be in conflict with a statute which provided that property taken by anyone for the use of any church "shall not be otherwise taken and held, or inure, than subject to the control and disposition of the lay members of such

<sup>1</sup> *Mazaika v. Krauczunas*, 229 Pa., 47, 52.

<sup>2</sup> *Krauczunas v. Hoban*, 221 Pa., 213, 226; 70 Atl., 740.

church,"<sup>1</sup> and a conveyance by the bishop to the plaintiffs in trust was directed, which direction was followed by him.

Simultaneously with this conveyance, however, he excommunicated the plaintiffs and placed the church under an interdict "until the members of the congregation shall turn these faithless men out and place the Church once more under the care of the Bishop of the Diocese of Scranton, according to the laws of the Catholic Church."<sup>2</sup>

Under the potent influence of this interdict a movement was at once begun within the congregation, which soon resulted in an excited meeting at which some sixteen hundred voters were present. A resolution was adopted to choose and designate Bishop Hoban "trustee for said St. Joseph's Lithuanian Catholic Congregation of the City of Scranton, Pennsylvania, to hold as such trustee all the property of said Congregation and the title thereto in accordance with the laws, rules and usages of the Catholic Church."<sup>3</sup> The validity of this resolution and of the meeting in which it was passed was at once attacked in the courts. The chancellor, finding himself confronted by a mass of testimony of very vague character which he was disinclined to consider, ordered an election of the congregation to be held in open court. This accordingly was done and the voting continued for ten days. Its result was favorable to a reconveyance, which was ordered. The case was appealed to the Supreme Court, which held the election conducted by the chancellor to be of no avail and remanded the case for further proceedings. In an effort to end the controversy the court, after pointing out the utter inability of the bishop to intermeddle in the affairs of the congrega-

<sup>1</sup> *Krauczunas v. Hoban*, *supra*, at 225.

<sup>2</sup> *Mazaika v. Krauczunas*, 233 Pa., 138, 146; 81 Atl., 938.

<sup>3</sup> *Mazaika v. Krauczunas*, *supra*, at 149.

tion by virtue of his trusteeship and the complete power of the congregation to do with the property as it pleased, said :

It is apparent that a victory for either side would be utterly barren of any substantial results. It is a mistake to suppose that a trustee or trustees appointed simply to hold the legal title to church property correspond in any way to trustees elected or appointed to exercise active duty in controlling the affairs of the congregation ; and we cannot avoid the conclusion that this unfortunate and expensive litigation has been entered upon because of this clear misconception.<sup>1</sup>

The case now went back to the chancellor, who was thus forced to take it up at the point where he had " abdicated " his judicial functions by ordering the election in court. The bishop again triumphed in the lower court but the case was appealed and in 1911 the Supreme Court was for the third time confronted with it. The court held that the action of the congregation was taken either in total misapprehension of the law regulating ownership of church property or else was a conscious attempt to evade the law. In either event the court held that equity should not interfere and hence the bill was dismissed. In speaking of the trustee the court said :

The office of trustee simply of legal title is not created by ecclesiastical authority, but created by the law. Such trustee can exercise no control whatever over the property held in trust. Being an officer created by law, and answerable only to the law, he can derive neither authority nor power from any other source. His duties, privileges, authority, and responsibility, *qua* trustee, can neither be enlarged nor impaired by ecclesiastical interference, and any attempt to so interfere would be quite as illegal as though forbidden in express terms.<sup>2</sup>

<sup>1</sup> *Mazaika v. Krauczunas*, 229 Pa., 47, 53.

<sup>2</sup> *Mazaika v. Krauczunas*, 233 Pa. 138, 152 ; 81 Atl. 938.

The congregation was now in a fine dilemma. The trustees, to whom the bishop had conveyed his title, would not convey it back to the bishop and the courts would not compel them to do so. Bishop Hoban was no less determined to obtain such title and was using the interdict for this purpose. Between these two contending parties the congregation was deprived of all opportunity to worship in its church. Some of its members now tried the expedient of calling a priest not in connection with the Roman Catholic church. This again brought the matter before the court in a proceeding to enjoin such priest from using the church. Again the bishop triumphed in the lower court. Again the matter was carried, in 1913, to the Supreme Court. The court held that this proceeding was an attempt to accomplish by indirection what could not be done directly and that therefore the plaintiffs had no standing to ask equitable relief. It advised the plaintiff to seek relief by petitioning the ecclesiastical authorities for a rescission of the interdict, but refused to interfere at the instance of those obeying the interdict to prevent those defying it from having a form of worship in the church nearest to that which the interdict forbade.<sup>1</sup>

This finally induced the bishop to revoke the interdict and to reinstate the trustees. When despite this action the non-Catholic worship continued, an injunction against it was granted and upheld by the court, on the ground that the objection that existed to such a move while the interdict was still in force had now been cleared away.<sup>2</sup>

These cases, taken together, establish as clearly as can be done the relation of the bishop toward the property of the congregations of his diocese. Outside of what ecclesias-

<sup>1</sup> *Novickas v. Krauczunas*, 240 Pa., 248; 81 Atl., 686.

<sup>2</sup> *Novicky v. Krauczunas*, 245 Pa., 86.

tical pressure he may be able to bring to bear and outside of the difficulties which he can cause by his refusal to convey, the property of a Catholic congregation is as much at its disposal as if it stood in its own name. The bishop is merely the dry trustee of the legal title.

To sum up: The American clergyman in the performance of the marriage ceremony is recognized as a public officer and in the performance of his other duties is recognized as a public man subject to public comment and some slight disabilities and exempt from certain public burdens. His rights against and duties to his congregation rest on a purely contractual basis. Where he is appointed by a bishop such bishop owes him no duty and is not in any way responsible for his acts. Where the property of an individual congregation stands in the name of the bishop such bishop is a mere dry trustee, who may be compelled to convey his legal title to any other trustee. While the relation of the bishop to the property of the congregation in his diocese is thus subject to the law of trusts, the relation of the clergyman to his congregation is subject to the law of contracts, and his relation to the public is subject to the public municipal law and to statutory regulation. Since no legal principle applies to the relation between priest and bishop, such relation is subject merely to the ecclesiastical law of the church to which both owe fealty.

## CHAPTER XIII.

### OFFICERS.

There are two classes of church officers generally recognized but known under many different names. Ecclesiastical officers proper, such as deacons, ordinarily confine their attention to the spiritualities of their church and do not concern themselves with its temporalities. Church trustees, on the other hand, under whatever name they may go, are concerned chiefly if not exclusively with the management of the church property and with the ways and means of raising the funds necessary for its work. Occasionally both offices, however, may be found united in one person or one board.

It is obvious that this chapter cannot concern itself to any great extent with the merely ecclesiastical officers of a church. Such officers, since they do not make contracts, or acquire property for their principal, will hardly ever be involved in any lawsuit. Their relation with the church will be such as they make it. Even this relation, however, will rarely come before the courts, since it does not involve any property rights.

An entirely different situation is presented in connection with the office of the church trustees. Such trustees, as the name indicates, are concerned with the property of the church. Their office originated when the incorporation of church societies was quite difficult and when in consequence the custom developed of placing the title of church property in the name of individuals for the church. It was



fixed by law in many states when these individuals were incorporated under the trustee corporation theory.<sup>1</sup> The name remains to this day even in those states which have adopted the aggregate theory of church corporations and which in consequence have reduced the trustees to the position which a board of directors holds in other corporations. Under all these varying circumstances the trustees, or officers corresponding to them, are charged with the management of the church property<sup>2</sup> and as such will quite frequently be brought before the courts. The remainder of this chapter will therefore be principally concerned with them.

Before treating of the official duties and personal liabilities of church officers it will be well to say a few words concerning the mode by which they become officers. Occasionally they are appointed by certain designated individuals. Not much controversy can arise in such a case. The appointee will simply become an officer if he receives and accepts the appointment from such individuals. Where, however, as is most frequently the case, the office is conferred by an election, a far more complicated question is presented. The meeting at which such an election is held may be attacked as not properly noticed, or as otherwise improperly convened. And even when the meeting is conceded to have been convened properly the election held at such a meeting may be objected to on various grounds. In tracing the officer's title to his office it will therefore be well to go back of his election and attempt to outline the necessary measures that must be taken leading up to it.

Among these measures a proper notice of the proposed meetings to the members of the church is of the first importance. If such a notice were not necessary the door

<sup>1</sup> See chapter 2.

<sup>2</sup> *Alexander v. Bowers*, 79 S. W., 342 (Tex. Civ. App.).

would be opened wide to chicanery and fraud. A small active minority of the society could contrive to hold clandestine meetings and could thus force its will on the majority.<sup>1</sup>

To prevent such a result and to render the acts of any such body assembled as a congregation valid, not only notice must be given, "but the authority must be by some one authorized to assemble the body."<sup>2</sup> While no notice is necessary when it is merely proposed to organize a congregation<sup>3</sup> or when the meeting is merely an adjournment of a regularly called annual meeting<sup>4</sup> the notice prescribed by statute or by-law or customarily given when the statutes or by-laws are silent on this matter should in all other cases be conscientiously given in order that every member of the society may have the opportunity to be present and express his preference.

The particular mode by which such notice is given will of course vary considerably with the different statutes, by-laws and customs by which the society is governed. When the statute merely requires "public notice" such requirement will be met by a three-time announcement from the pulpit<sup>5</sup> and even by a notice attached to the church door and read by a member of the congregation at the end of the services.<sup>6</sup> Where, however, the statute requires a warn-

<sup>1</sup> *Dahl v. Palache*, 68 Cal., 248; 9 Pac., 94. *In re African M. E. Union Church*, 28 Pa. Super. Ct., 193. See *Wiswell v. First Congregational Church*, 14 Ohio St., 31, 36.

<sup>2</sup> *State v. Aucker*, 31 S. C. Law (2 Rich. Law), 245, 284; *Ladd v. Clements*, 58 Mass. (4 Cush.), 476.

<sup>3</sup> *Franke v. Mann*, 106 Wis., 118; 81 N. W., 1014; 48 L. R. A., 856.

<sup>4</sup> *Wiswell v. First Congregational Church*, 14 Ohio St., 31, 40.

<sup>5</sup> *Craig v. First Presbyterian Church of Pittsburg*, 88 Pa. St., 42; 32 Am. Rep., 417.

<sup>6</sup> *West Koshkonong Congregation v. Ottesen*, 80 Wis., 62; 49 N. W., 24. See *Spiritual and Philosophical Temple v. Vincent*, 127 Wis., 93; 105 N. W., 1026.

ing for a certain time in advance, such warning must be given and a custom to the contrary cannot be set up, though this custom be hoary with age.<sup>1</sup> While such a statute will be reasonably construed,<sup>2</sup> the formalities prescribed by it<sup>3</sup> or prescribed by a by-law in the absence of a statute<sup>4</sup> should be scrupulously observed, though such by-laws, being passed by the society, may, unlike the statute, be waived by it.<sup>5</sup> When there is neither statute nor by-law, it has been held by the New Hampshire court that the question will depend upon the custom of the society,<sup>6</sup> while the Massachusetts court has held that a meeting thus convened is not binding unless all the members had actual notice of it.<sup>7</sup> In no case, however, will a person outside of the congregation be allowed to raise an objection to a meeting on account of insufficient notice. "The statutory provision regarding such notices does not concern the public at large, but is a mere regulation for the benefit of the members of the society themselves."<sup>8</sup> Nor will even a member of the society be allowed to raise the question when

<sup>1</sup> *Hicock v. Hoskins*, 4 Day, 62 (Conn.). See *People ex rel. Smith v. Pec*, 11 Wend., 604; 27 Am. Dec., 104.

<sup>2</sup> *Christ Church v. Pope*, 74 Mass. (8 Gray), 140, 144.

<sup>3</sup> *Congregational Society of Bethany v. Sperry*, 10 Conn., 200; *Tuttle v. Cary*, 7 Me. (7 Greenl.), 426; *Reformed Methodist Society of Douglas v. Draper*, 37 Mass., 349; *Canadian Religious Association v. Parmenter*, 180 Mass., 415, 425; 62 N. E., 740; *Wiggin v. First Freewill Baptist Church in Lowell*, 49 Mass. (8 Met.), 301.

<sup>4</sup> *Weber v. Zimmerman*, 22 Md., 156; *Gray v. Christian Society*, 137 Mass., 329; *Small v. Cahoon*, 207 Mass., 359; 93 N. E., 588.

<sup>5</sup> *Bucksport v. Spofford*, 12 Me. (3 Fairf.), 487.

<sup>6</sup> *Groton Congregational Church v. Blood*, 62 N. H., 431.

<sup>7</sup> *Wiggin v. First Freewill Baptist Church*, 49 Mass., (8 Meet.) 301, 312.

<sup>8</sup> *East Norway Lake Norwegian Ev. Luth. Church v. Froislie*, 37 Minn., 447, 451; 35 N. W., 260. See *First Parish in Sutton v. Cole*, 20 Mass. (3 Pick.), 332.

he has received actual notice of the proposed meeting<sup>1</sup> but has made no objection to it.<sup>2</sup> In cases where the meeting has been held long ago and in consequence much evidence in regard to it has disappeared, the court may even presume a proper notice.<sup>3</sup> "For the purpose of upholding proceedings, *ut res magis valeat quam pereat*, many deficiencies, not inconsistent with what does appear, are supplied by presumption and intentment of law."<sup>4</sup>

But it is not enough that the meeting be properly called. It must also be properly conducted. This again will depend upon the statute, under which the society is acting or the by-law or custom which it has adopted or developed. The conduct of such meetings will not be of any great difficulty when the society is at peace with itself. It will, however, be an extremely difficult matter when a factional war has broken out in its midst. It is at such times that rules and regulations adopted or customs developed during peace times will be subjected to a severe test. The question who is or who is not entitled to vote during such controversies may decide the policy and destiny of the society for many years to come. It is of course true that only members of the society are entitled to vote. It is further true that no one can become a member except by mutual consent. Says the Massachusetts court:

The relation of a member to a parish is founded on contract; and can be created in no way but by the agreement of the parties. Any person wishing to become a member must express

<sup>1</sup> Hubbard *v.* German Catholic Congregation, 34 Iowa 31.

<sup>2</sup> Helbig *v.* Rosenberg, 86 Iowa, 159; 53 N. W., 111; People *ex rel.* Smith *v.* Peck, 11 Wend., 604 (N. Y.); 27 Am. Dec., 104; First Parish in Sutton *v.* Cole, *supra*, at 241; Dempsey *v.* North Michigan Conference, 98 Mich., 444; 57 N. W., 267.

<sup>3</sup> East Norway Lake Norwegian Ev. Luth. Church *v.* Froislie, *supra*.

<sup>4</sup> Bucksport *v.* Spofford, *supra*, at 491.

his wish in writing, and the society, by a direct vote or by the act of an authorized agent, must accede to the application. Then the agreement is complete, creates the membership, and gives a right to vote and take part in the proceedings of the society.<sup>1</sup>

This, however, in view of the looseness that prevails in many churches in receiving members, will leave many questions unsolved which will rise up at times of strain and stress to perturb the congregation.

But even conceding that certain persons are members of the church, it does not necessarily follow that they are entitled to vote. Minors may become members of religious corporations. Yet, despite this fact, they should not be permitted to affect the property rights of others as long as they are not trusted by the law to control their own.<sup>2</sup> So also may the statute under which a corporation is organized restrict the right to vote to free white male citizens who are pewholders,<sup>3</sup> or to such members as are communicants<sup>4</sup> or have paid a certain contribution in the manner provided for by the statute.<sup>5</sup> Under such circumstances members of the church who cannot bring themselves within the statutory requirements should be excluded by the moderator of the meeting from casting their ballot. Such action, however, should be taken before their votes are accepted. The question whether unauthorized persons have

<sup>1</sup> First Parish in Sudbury *v.* Stearns, 38 Mass., 148, 153.

<sup>2</sup> *McIlvain v. Christ Church of Reading*, 2 Woodw. Dec., 293, 300; 28 L. I., 126; 8 Phila., 507. See *Weckerly v. Geyer*, 11 Serg. & R., 35 (Pa.).

<sup>3</sup> *Torbert v. Bennett*, 24 Wash. Law Rep., 149.

<sup>4</sup> *Weckerly v. Geyer*, 11 Serg. & R. (Pa.), 35.

<sup>5</sup> *Juker v. Commonwealth*, 20 Pa. (8 Harris), 484; *State v. Crowell*, 9 N. J. Law (4 Halst.), 390. A by-law cutting down such requirement is invalid. *Raynor v. Beatty*, 9 W. N. C., 201 (Pa.).

availed themselves of the franchise would be liable to such uncertainty in the proof, that the very nature of the subject shows that the evil should be corrected at the time, instead of being left to remote periods afterwards.<sup>1</sup> It would certainly be difficult if not impossible after the votes are cast to ascertain which of the ballots to withdraw from the box and reject.<sup>2</sup>

It would be idle to attempt to conduct any election by ballot, if after the election was closed, the inspectors could, when they ascertained who had the greatest number of votes, institute an inquiry whether any of those who voted for the successful party were legal voters, and in this way change the result of the election.<sup>3</sup>

An acceptance of such a vote has therefore been treated as a judicial determination on the part of the moderator that it is legal and valid.<sup>4</sup> Through all the reasoning of the courts a desire to uphold the results of elections and other determinations of religious societies is apparent. While elections at which legal voters were excluded,<sup>5</sup> or at which tickets marked contrary to the provisions of the by-laws were received,<sup>6</sup> or at which the proper moderator did not preside,<sup>7</sup> or at which the determination was reached by subscription instead of by vote,<sup>8</sup> have been held to be invalid, other meetings in which a proper vote was challenged where-

<sup>1</sup> First Parish in *Sutton v. Cole*, 20 Mass., (3 pick.) 232, 343.

<sup>2</sup> *Hartt v. Harvey*, 10 Abb. Pr., 321; 32 Barb., 55; 19 How. Pr., 245.

<sup>3</sup> *People ex rel. Hartt v. White*, 11 Abb. Pr., 168; 179 (N. Y.).

<sup>4</sup> *Re Williams*, 107 N. Y. Supp., 1105; 57 Misc., 327.

<sup>5</sup> *Wiswell v. First Congregational Church*, 14 Ohio St., 31.

<sup>6</sup> *Commonwealth v. Woelper*, 3 Serg. & R. (Pa.), 29; 8 Am. Dec., 628.

<sup>7</sup> *People ex rel. Smith v. Peck*, 11 Wend., 604; 27 Am. Dec., 104; *Dayton v. Carter*, 206 Pa., 491; 56 Atl., 30.

<sup>8</sup> *In re African M. E. Union Church*, 28 Pa. Super. Ct., 193.

upon the voter subsided,<sup>1</sup> or when the election was by "hand vote" instead of by ballot,<sup>2</sup> or whose chairman exceeded his authority,<sup>3</sup> or whose result was not properly registered<sup>4</sup> or properly certified,<sup>5</sup> or whose result was not affected by the illegal votes,<sup>6</sup> have been upheld by the courts.

Nor does the number of votes cast at such an election as compared with the number of persons entitled to vote make any difference. The number of votes cast is to be considered "as constituting the number of legal voters belonging to the church."<sup>7</sup> This principle is strikingly illustrated in a series of cases growing out of the dissension which rent the United Brethren in twain during the last decade of the last century. The question of adopting a new constitution had been submitted to the 200,000-odd members of the church, but little more than 50,000 voted on the proposition at all. An overwhelming majority of the votes cast being in favor of the new constitution, it was declared adopted by the church authorities, which declaration was seconded, with one exception, by the numerous civil courts to which appeal was made by the dissatisfied minority.<sup>8</sup> It has therefore

<sup>1</sup> *Jones v. Sacramento Avenue M. E. Church*, 198 Ill., 626; 64 N. E., 1018.

<sup>2</sup> *Christ Church v. Pope*, 74 Mass. (8 Gray) 140.

<sup>3</sup> *People ex rel. Blomquist v. Nappa*, 80 Mich., 484; 45 N. W., 355.

<sup>4</sup> *In re Buffalo First Presbyterian Church*, 106 N. Y., 251; 12 N. E., 626; 8 N. Y. St. Rep., 679.

<sup>5</sup> *People ex rel. Smith v. Peck*, 11 Wend. 605 (N. Y.).

<sup>6</sup> *First Parish in Sudbury v. Stearns*, 38 Mass., 148; *People ex rel. Lanchantin v. Lacoste*, 37 N. Y., 192; *People ex rel. Hart v. Phillips*, 1 Denio, 388; *Craig v. First Presbyterian Church*, 88 Pa. St., 42; 32 Am. Rep., 417; *Commonwealth v. Morrison*, 13 Phila., 135; 6 Wkly. Notes Cas., 346; *People v. Tuthill*, 31 N. Y., 550.

<sup>7</sup> *Lamb v. Cain*, 129 Ind., 486, 516; 29 N. E., 13; 14 L. R. A., 518.

<sup>8</sup> *Brundage v. Deardorf*, 55 Fed., 839 s. c.; 92 Fed., 214; 34 C. C. A., 304; *Horsman v. Allen*, 129 Cal., 131; 61 Pac., 796; *Kuns v. Robertson*, 154 Ill., 394; 40 N. E., 343; *Lamb v. Cain*, 129 Ind., 486; 14 L. R. A.,

been said that in all elections the non-voting must be counted as willing to be bound by the action of the majority of those who vote and that a refusal to vote is "an ineffectual kind of opposition."<sup>1</sup>

However, even if the election has been very irregular, this fact will not necessarily affect the *de facto* as distinguished from the *de jure* status of the officers. Provided that he is not a mere intruder without color of right<sup>2</sup> whose claims have been resisted from the beginning and whose possession of the church property has been obtained by force<sup>3</sup> he will be considered and treated as a *de facto* officer possessed of all the powers of a *de jure* officer.

Persons who are in the open and peaceable exercise of the powers and duties of officers in a corporation are presumed to have been duly elected and to be entitled to the positions they occupy. Strangers cannot be permitted to contest their title or to impeach the validity of their acts, by showing irregularities in their election or in any of the antecedent proceedings of the corporation.<sup>4</sup>

While therefore it is not enough that the claimant claims that he is an officer, or that some people think that he is an officer, or that he assumes to act as such, it is sufficient if he acts as an officer under color of having been rightfully elected or appointed.<sup>5</sup> Persons

518; 29 N. E., 13; *Russie v. Brazzell*, 128 Mo., 93; 49 Am. St. Rep., 542; 30 S. W., 526; *Rike v. Floyd*, 6 Ohio C. C., 80; affirmed 53 Ohio St., 653; 44 N. E., 1136; *Philomath College v. Wyatt*, 27 Ore., 390; 31 Pac., 206; 37 Pac., 1022; 26 L. R. A., 68; *Schlichter v. Keiter*, 156 Pa. St., 119; 27 Atl., 45; 22 L. R. A., 161; *Itter v. Howe*, 23 Ont. App. Rep., 256. *Contra*: *Bear v. Heasley*, 98 Mich., 279; N. W., 270; 24 L. R. A., 615. This last case is the exception.

<sup>1</sup> *Schlichter v. Keiter*, *supra*, at 145.

<sup>2</sup> *Zion M. E. Church v. Hillery*, 51 Cal., 155; *Berriam v. New York Methodist Society*, 4 Abb. Pr., 424 (N. Y.).

<sup>3</sup> *Reformed Methodist Society v. Draper*, 97 Mass., 349, 353.

<sup>4</sup> *Reformed Methodist Society v. Draper*, 97 Mass., 349, 352.

<sup>5</sup> *East Norway Lake Norwegian Ev. Luth. Church v. Halvorson*, 42 Minn., 503, 506; 44 N. W., 663, 665.



may therefore be *de facto* officers though they are chosen on a movable instead of a fixed date,<sup>1</sup> or under an illegal by-law,<sup>2</sup> or at a meeting not properly noticed,<sup>3</sup> or fraudulently conducted,<sup>4</sup> or improperly presided over,<sup>5</sup> or though they are merely hold-over officers<sup>6</sup> or have been appointed by a court instead of being elected by the congregation.<sup>7</sup> Such persons may establish their *de facto* status by *parol* evidence,<sup>8</sup> may accept service for the corporation,<sup>9</sup> bind it by contract<sup>10</sup> and begin suit for it.<sup>11</sup> They have the power to pass on their office unimpaired to their *de-jure* successors<sup>12</sup> and cannot be dispossessed of it except by such successors duly qualified<sup>13</sup> or by the state in a direct action to try their right to hold the office.<sup>14</sup>

<sup>1</sup> *People v. Runkel*, 9 Johns, 147 (N. Y.).

<sup>2</sup> *St. Luke's Church v. Mathews*, 4 S. C. Eq. (4 Desaus), 578.

<sup>3</sup> *Green v. Cady*, 9 Wend., 414; *First Presbyterian Society v. Langley*, 25 Ohio St., 128; *West Koshkonong Congregation v. Ottesen*, 80 Wis., 62; 49 N. W. 24; *Reformed Methodist Society v. Draper*, *supra*.

<sup>4</sup> *All Saints Church v. Lovett*, 1 N. Y. Super. (1 Hall), 191.

<sup>5</sup> *Vernon Society v. Hills*, 6 Cow., 23; *All Saints Church v. Lovett*, *supra*.

<sup>6</sup> *Reformed Dutch Church of Prattsville v. Brandow*, 52 Barb., 228. In this case there had been no election for nine years. See *Congregational Society of Bethany v. Sperry*, 10 Conn., 200; *Hendrickson v. Decow*, 1 N. J. Eq., 577; *People v. Runkel*, 9 Johns, 147.

<sup>7</sup> *Lovett v. German Reformed Church*, 12 Barb., 67.

<sup>8</sup> *Walrath v. Campbell*, 28 Mich., 111.

<sup>9</sup> *Berriam v. New York Methodist Society*, 4 Abb. Pr., 424 (N. Y.).

<sup>10</sup> *Batterson v. Thompson*, 8 Phila., 251; 1 Leg. Gaz. R., 171.

<sup>11</sup> *Zion's Church v. Light*, 7 Pa. Super. Ct., 223; 42 W. N. C., 251.

<sup>12</sup> *Smith v. Erb*, 4 Gill, 437 (Md.).

<sup>13</sup> *Appeal of Nolde*, 2 Monag., 169 (Pa.); 15 Atl., 777, affirming 4 Lanc. Law Rev., 347.

<sup>14</sup> *Jackson v. Nestles*, 3 Johns, 115; *Berriam v. New York Methodist Society*, 4 Abb. Pr., 424; *Concord Society of Strykersville v. Stanton*, 38 Hun., 1; *Zion's Church v. Light*, 7 Pa. Super. Ct., 223; 42 W. N. C., 251. See *Connitt v. Reformed Protestant Dutch Church*, 54 N. Y., 551, 568; affirming 4 Lans., 339.

Passing now to the duties of church officers, these duties which refer to the church property naturally receive the greatest attention by the courts. It is fundamental and elementary that church trustees are entrusted with the care, management and in many cases with the legal title of the church property. When the church is unincorporated the real estate which it may have an interest in of necessity must be held by some person or persons in trust for it. The same holds good in States in which the trustees are the only members of church corporations. In such States they are

the legal owners of the property which the act of incorporation authorizes them to hold, to be used for the purposes specified in the charter. They are the sole temporal administrators, and cannot be controlled by the clergy in their administration. They are responsible to the congregation only, who may choose others, if those in authority shall misuse or abuse the powers conferred by the legislature.<sup>1</sup>

But their situation is not greatly different so far as possession of the church property is concerned in states in which the aggregate theory of such corporations has supplanted the trustee theory.

There is one principle common to the trustees of all incorporated churches. They have the possession and custody of the temporalities of the church. They are considered *virtute officii* entitled to the possession and are lawfully seized of the grounds, buildings and other property belonging to the church. Though they hold the church property in trust for the congregation, still, it is their possession, and the courts are bound to protect them against every irregular and unlawful intrusion made against their will, whether by the pastor, members of the congregation, or by strangers.<sup>2</sup>

<sup>1</sup> Church of St. Francis of Pointe Coupee v. Martin, 43 La. (4 Rob.), 62, 67, 68. See chapter 2.

<sup>2</sup> German Evangelical Congregation of Lafayette v. Pressler, 17 La. Ann., 127, 129; People v. Runkle, 9 Johns, 147, 156 (N. Y.)

Since, however, church buildings actually stand empty the greater part of the time, the possession which the law thus casts upon the trustees is largely a constructive one. They are in possession "by reason of having the right of possession."<sup>1</sup> Though their possession consists only of the ordinary use which is made of church property, for divine services and Sunday-school purposes,<sup>2</sup> it will nevertheless carry the same legal consequences as actual continuous possession of ordinary residence property,<sup>3</sup> will include such of the land on which the building is standing as is used for purposes connected with it,<sup>4</sup> and will be notice to a purchaser of it.<sup>5</sup> Such possession may be maintained by a clergyman as the agent of such trustees<sup>6</sup> and may be defended by the trustees against the trespass of strangers<sup>7</sup> representatives of the members<sup>8</sup> and even the clergyman of the congregation<sup>9</sup> by action of trespass *quare clausum fregit*,<sup>10</sup> by injunction proceedings<sup>11</sup> and even through indictments for a forcible entry and detainer.<sup>12</sup>

<sup>1</sup> *People v. Runkle*, 8 Johns 464, 469.

<sup>2</sup> *Whitsitt v. Preëmption Presbyterian Church*, 110 Ill., 125.

<sup>3</sup> *Randolph v. Alexander*, 8 Tenn. (Martin & Yerger), 58, 60; *Macon v. Shephard*, 21 Tenn. (2 Humph.), 335.

<sup>4</sup> *First Parish in Shrewsbury v. Smith*, 31 Mass. (14 Pick), 297, 301.

<sup>5</sup> *Macon v. Sheppard*, 21 Tenn. (2 Humph.), 335.

<sup>6</sup> *Probst v. Domestic Missions of Presbyterian Church*, 3 N. M., 373; 5 Pac., 702; *Heiss v. Vosburg*, 59 Wis., 532; 18 N. W., 463.

<sup>7</sup> *First Parish of Shrewsbury v. Smith*, 31 Mass. (14 Pick), 297.

<sup>8</sup> *Howard v. Haywood*, 51 Mass. (10 Met.), 408.

<sup>9</sup> *German Evangelical Congregation of Lafayette v. Pressler*, 17 La. Ann., 127; *People v. Runkle*, 8 Johns, 464, s. c. 9 Johns, 147 (N. Y.).

<sup>10</sup> *Howard v. Haywood*, 51 Mass. (10 Met.), 408; *First Parish of Shrewsbury v. Smith*, 31 Mass. (14 Pick), 297; *Green v. Cady*, 9 Wend., 414; *Walker v. Fawcett*, 29 N. C., 44.

<sup>11</sup> *German Evangelical Congregation of Lafayette v. Pressler*, *supra*.

<sup>12</sup> *People v. Runkle*, 8 Johns; 464, s. c.; 9 Johns, 147 (N. Y.).

Real property, however, is not generally the only earthly possession which churches enjoy. While churches owning stocks and bonds and other forms of investments are rare, almost all, even the humblest, will own articles of personal property such as altar pieces, communion plate, record books and the like. There can be no question that such articles in the absence of a by-law giving their control to some particular officer are to be kept and controlled by the trustees. This has been held or intimated in cases involving communion plate,<sup>1</sup> church records,<sup>2</sup> melodeons,<sup>3</sup> corporate seals<sup>4</sup> and funds collected for a particular purpose by a committee<sup>5</sup> or by a ladies' society or a similar instrumentality of the church.<sup>6</sup> Such personal property does not enjoy the protection of the ancient Spanish law which regarded it as holy, sacred and religious, and may, therefore, be sold,<sup>7</sup> though courts will hesitate to affirm such sale when it has been effected by execution.<sup>8</sup>

It will sometimes be a question of intention whether bells used by a church are its property or are real or per-

<sup>1</sup> *Page v. Crosby*, 41 Mass. (24 Pick), 211; *Stebbins v. Jennings*, 27 Mass. (10 Pick), 172.

<sup>2</sup> *Sawyer v. Baldwin*, 28 Mass. (11 Pick), 492; *First Parish in Sudbury v. Stearns*, 38 Mass. (21 Pick), 148. See *Youngs v. Ransom*, 31 Barb., 49, 61.

<sup>3</sup> *Shipton v. Norrid*, 1 Colo., 404.

<sup>4</sup> *Protestant Episcopal St. Stephen's Church v. Blackhurst*, 11 N. Y. Supp., 669.

<sup>5</sup> *M. E. Church of Cincinnati v. Wood*, 5 Ohio, 283; *First Church of Christ Scientist v. Schreck*, 127 N. Y. Supp., 174; 70 Misc. Rep., 645.

<sup>6</sup> *First Baptist Church in Franklindale v. Pryor*, 23 Hun., 271; *Bristol v. Burr*, 120 N. Y., 429; 24 N. E., 937; affirming 12 N. Y. St. Rep., 638. See *First Constitutional Presbyterian Church v. Congregational Society*, 23 Iowa, 567; *Eis v. Croze*, 149 Mich., 62; 112 N. W., 943; *Kendall v. Calder*, 2 Posey Unreported Cas., 732 (Tex.).

<sup>7</sup> *Ternant v. Bondreau*, 45 La. (6 Rob.), 488.

<sup>8</sup> *Lord v. Hardie*, 82 N. C., 241; 33 Am. Rep., 683.

sonal property<sup>1</sup> or whether even the church building itself is real or personal property.<sup>2</sup> Whatever its nature, however, it will be under the control of the trustees. So also will horse-sheds built on church land by individuals under a license from the trustees<sup>3</sup> be under their control and may be torn down where they obstruct access to the property.<sup>4</sup> When other bodies, such as school societies,<sup>5</sup> Sunday-school associations,<sup>6</sup> clubs<sup>7</sup> and other congregations,<sup>8</sup> are permitted to use the property of the church they will be considered as mere licensees or tenants at sufferance whose privileges may be withdrawn by the trustees.

However, the control which trustees exercise over church property is not the only duty with which they are charged. Though the power of church corporations to make contracts is quite limited as compared with the power of commercial corporations, it is a power which nevertheless will frequently have to be exercised. Indeed, the trustee may, by taking the proper steps, "bind the body upon all contracts within the scope of its corporate powers."<sup>9</sup> They

<sup>1</sup> Fourth Parish in West Springfield *v.* Root, 35 Mass. (18 Pick), 318; Congregational Society of Dubuque *v.* Fleming, 11 Iowa, 533.

<sup>2</sup> Poor *v.* Oakman, 104 Mass., 309; Lefebre *v.* Detroit, 2 Mich., 586; Little *v.* Willford, 31 Minn., 173; 17 N. W., 282; Beach *v.* Allen, 7 Hun., 441.

<sup>3</sup> Wheaton *v.* Cutler, 84 Vt., 476; 79 Atl., 1091; Bachelder *v.* Wakefield, 62 Mass., 243.

<sup>4</sup> Lakin *v.* Ames, 64 Mass. (10 Cush.), 198.

<sup>5</sup> Reformed Church of Gallupville *v.* Schoolcraft, 65 N. Y., 134; reversing 5 Lans., 206.

<sup>6</sup> St. Mathews Church *v.* Schaffer, 25 Pa. C. C., 113; 17 Mont. Co., 122.

<sup>7</sup> Read *v.* Church of St. Ambrose, 137 Pa., 320; 20 Atl., 1002; 27 W. N. C., 203; 11 L. R. A., 727; Hamblett *v.* Bennett, 88 Mass (6 Allen), 140.

<sup>8</sup> Cammeyer *v.* United German Lutheran Churches, 2 Sandf. Ch., 186; Landis Appeal 102 Pa. St., 467; Allen *v.* Paul, 24 Gratt., 332 (Va.).

<sup>9</sup> Miller *v.* Milligan, 9 Am. L. Rec., 419; 6 Ohio Dec. Reprint, 1000, 1004.

cannot, however, bind the corporation for an adverse interest of their own.<sup>1</sup> Even if they have no such adverse interest they cannot bind the corporation to any contract which is beyond its powers. If they act, nevertheless, they will signally fail to bind their principal, but will wake up to the uncomfortable realization that by such unauthorized action they have bound themselves personally.<sup>2</sup> It can, therefore, readily be seen that a knowledge of the powers possessed by their principal is a matter of the utmost importance to them.

It does not require any deep reflection to determine that these powers will not be the same in all cases, arising as they do out of forty-eight jurisdictions. In fact they vary greatly in the various states of the Union and will even differ considerably in single jurisdictions, being affected by the articles, constitutions, and by-laws adopted by the various churches. The first inquiry in any case, therefore, must be whether any proposed action is within the powers of the trustees under the particular statutes, and corporate instruments applicable to it. Only if they act within the powers so outlined will they be able to escape personal liability. If they go outside of them the result achieved so far as it concerns the corporation will be as void as an unconstitutional statute passed by Congress or a state legislature. Where, therefore, the trustees are by by-law limited in their expenditures, they cannot bind the church beyond the limit so imposed.<sup>3</sup> Where the discharge of a debt is the object in view of a sale authorized by a congregation, the trustees cannot execute a mortgage on the property instead, since that merely creates a lien for the se-

<sup>1</sup> *United Brethren Church of New London v. Van Dusen*, 37 Wis., 54.

<sup>2</sup> *Dennison v. Austin*, 15 Wis., 334.

<sup>3</sup> *Wyncoop and Watkins v. Bellvue Congregational Society*, 10 Iowa, 185.

curity of the debt, leaves the congregation still liable for it and places it no nearer to a liquidation of its indebtedness than it was before.<sup>1</sup>

But such authority to do the act proposed will not of itself protect the trustees from personal liability. They must not only do acts which are within their power but they must do them according to the method outlined by the law under which they act. They cannot therefore make a contract in their own names and then shoulder the liability on the corporation and thus defeat a personal action brought by the other party to the contract.<sup>2</sup> They cannot with impunity yield to looseness in the performance of their official duties. They cannot bind the corporation by action taken at casual meetings on street corners, at club houses, in hotels and at other places.<sup>3</sup> The corporation is not represented by such accidental meetings of its governing body.<sup>4</sup> As well might it be contended that a city council or a state legislature could pass ordinances and statutes binding on the citizens while gathered together at the festive board or at a Fourth of July celebration. To exercise their corporate functions the trustees must, therefore, "meet as a board so that they may hear each other's views, deliberate and then decide."<sup>5</sup> They must act as a whole, as a body.<sup>6</sup> "The

<sup>1</sup> *Hubbard v. German Catholic Congregation*, 34 Iowa, 31.

<sup>2</sup> *Hodges v. Green*, 28 Vt., 358; *St. Patrick's Roman Catholic Church v. Gavalon*, 82 Ill., 170; 25 Am. Rep., 305.

<sup>3</sup> *M. E. Church of Sun Prairie v. Sherman*, 36 Wis., 404.

<sup>4</sup> *United Brethren Church of New London v. Van Dusen*, 37 Wis., 54, 59.

<sup>5</sup> *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch., 186, 229; *Columbia Bank v. Gospel Tabernacle Church*, 127 N. Y., 361, 368; 28 N. E., 29.

<sup>6</sup> *Worrell v. First Presbyterian Church of Millstone*, 23 N. J. Eq., 96; *Miller v. Milligan*, 9 Am. L. Rec., 419; 6 Ohio Dec. Reprint, 1000; *Young and Fulton Lumber Co. v. Taylor Street M. E. Church*, 5 N. P., 378; 7 Ohio Dec., 449; *United Brethren Church of New London v. Van Dusen*, 37 Wis., 54.

powers which a corporation may exercise are vested in the trustees, and can only be exercised by them in their collective capacity, or by such agents, real or ostensible, as they have accredited or by their conduct are deemed to have accredited.”<sup>1</sup> “A call is a call of all the trustees, and a lawful meeting is one which all have at least constructive opportunity to attend.”<sup>2</sup> The trustees must, therefore, not only meet, but they must meet officially at official meetings, and under official authority conferred at official meetings.<sup>3</sup> No trustee should be excluded at such a meeting<sup>4</sup> except possibly where he has openly joined the opposition which has developed in the church.<sup>5</sup> And when a special meeting is called the object of the meeting should be stated in the notice.<sup>6</sup>

Since results obtained at a casual meeting of all or a majority of the trustees do not bind the corporation, it follows irresistibly that the disjointed action of a majority or of all the trustees acting singly will not relieve them of personal responsibility.<sup>7</sup> The direct effect of their appointment or election is to constitute them agents and representatives of the society, to act upon joint, not separate, consideration and advice. Only as agents acting collectively have they legal power to make contracts and to authorize such expenditures

<sup>1</sup> *Thomasen v. Grace M. E. Church*, 113 Cal., 558, 560; 45 Pac., 838.

<sup>2</sup> *United Brethren Church of New London v. Van Dusen*, *supra*, at 60.

<sup>3</sup> *Leonard v. Lent*, 43 Wis., 83, 88; *State v. Aucker*, 31 S. C. Law (2 Rich. Law), 245.

<sup>4</sup> *St. Mary's Church Case* 7 S. R., 516 (Pa.).

<sup>5</sup> *St. Vincent's Parish v. Murphy*, 83 Neb., 630; 120 N. W., 187. See *Cicotte v. Auciaux*, 53 Mich., 227; 18 N. W., 793.

<sup>6</sup> *MacLaury v. Hart*, 10 N. Y. Supp., 125; reversed 121 N. Y., 636; 24 N. E., 1013.

<sup>7</sup> *In re Rittenhouse Estate*, 140 Pa., 172; 21 Atl., 254; *Thompson v. West*, 59 Neb., 677; 82 N. W., 13.



as the purposes of their agency demand.<sup>1</sup> " Their separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers."<sup>2</sup> Such act would not be binding upon the corporation, and cannot of itself create a corporate liability.<sup>3</sup> " The uncertainties that might arise from such a loose mode of transacting business, as well as the advantages of mutual consultation and discussion upon a proper notice to all who have a right to participate, are too obvious to need suggestion."<sup>4</sup> Though the great majority of the trustees is unquestionably in favor of the proposed step, the minority, small though it may be, must be given an opportunity to present its side. " It is the right of the minority to meet the majority, and, by discussion and deliberation, to bring them over, if possible, to their own views."<sup>5</sup> Even though there is no minority, a meeting of the board should nevertheless be held. The trustees " should act on matters after deliberation and may not bind the corporation by individual assents without opportunity for discussion or interchange of views."<sup>6</sup> It has therefore been held that a note<sup>7</sup> or a release<sup>8</sup> signed by the trustees in their respective homes or a verbal authority similarly given to a clergyman to order

<sup>1</sup> *Sawyer v. Methodist Society in Royalton*, 18 Vt., 405; *Rogers v. Danby Universalist Society*, 19 Vt., 187.

<sup>2</sup> *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. (N. Y.), 186, 229.

<sup>3</sup> *First Presbyterian Church v. McColly*, 126 Ill. App., 333, 336.

<sup>4</sup> *Dennison v. Austin*, 15 Wis., 334, 341.

<sup>5</sup> *In re Rittenhouse Estate*, *supra*.

<sup>6</sup> *Cann v. St. Louis Church of Redeemer*, 85 S. W., 994, 1001; 111 Mo. App., 164, 189.

<sup>7</sup> *Dennison v. Austin*, 15 Wis., 334.

<sup>8</sup> *In re Rittenhouse Estate*, *supra*.

plans and specifications for a church building<sup>1</sup> or to a member of the church to conduct a fair in the property of the church<sup>2</sup> will not bind the corporation.

Where the trustees under the trustee-corporation theory are the exclusive members and not merely the officers of the corporation, it further follows that their action must be taken at a meeting of their body which is separate not only from that of persons who have no concern with the church, but even from that of the very body which has elected them as trustees. If they are merely acting as a part of the general body

they are not distinguishable from their associates, and their action is united with that of others who have no proper or legal right to join with them in its exercise. All proper responsibility is lost. The result may be the same that it would have been if they had met separately and it may be different. In the general assemblage influences may be brought to bear upon the trustees, which in their proper board would be unheeded.<sup>3</sup>

It will also be well not to declare any motion or resolution adopted unless a majority of all the trustees (not merely a majority of the trustees present) are in favor of it. The body consisting of a definite and limited number of individuals is distinguishable in this respect from bodies consisting of a large and indefinite number of members<sup>4</sup> Whether the moderator of the meeting can vote and in case of a tie thus produced add the casting vote to his vote already reg-

<sup>1</sup> *Cann v. St. Louis Church of Redeemer*, 111 Mo. App., 164; 85 S. W., 994.

<sup>2</sup> *Constant v. St. Albans Church*, 4 Daly 305 (N. Y.).

<sup>3</sup> *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch., 186, 229.

<sup>4</sup> *People ex rel. Remington v. Church of the Atonement*, 48 Barb., 603, 608.

istered, is a question which will depend upon the statutes, by-laws and customs by which the body is governed.<sup>1</sup>

It will also be well for church trustees to preserve the evidence of what takes place at their meetings by keeping minutes and recording them in a permanent book. Litigation may by such simple means be averted or its bitterness and consequent recriminations lessened. If such record is kept, all important action taken affecting the church should be reduced to the form of a motion or a resolution and preserved as such. However, such formality, unless it is demanded by the statute under which the church is incorporated, is not absolutely necessary. Where such requirement rests solely in the voluntary agreement of the church society that body "has the right to interpret its own requirements and its interpretation long and invariably followed is decisive of the question."<sup>2</sup> The board of trustees may, therefore, under such circumstances, without formal resolutions, execute a deed<sup>3</sup> or a mortgage,<sup>4</sup> and may through a spokesman authorize one of its members to order plans and specifications for a contemplated church building.<sup>5</sup> The evidence of such authority, when it is disputed in the courts, will of course rest in parol and will present a question of fact for the jury instead of a question of law for the court.<sup>6</sup>

In the course of the business of religious societies incorporated or unincorporated, it frequently becomes neces-

<sup>1</sup> *People v. Church of the Atonement*, *supra*; Neilson's Appeal 105 Pa. St., 180; 14 W. N. C., 414; 1 Lanc. L. Rep., 278.

<sup>2</sup> *Feiner v. Reiss*, 90 N. Y. Supp., 568, 573; 98 App. Div., 40.

<sup>3</sup> *Ibid.*

<sup>4</sup> *South Baptist Society of Albany v. Clapp*, 18 Barb., 35, 49.

<sup>5</sup> *Cann v. St. Louis Church of Redeemer*, 121 Mo. App., 201; 98 S. W., 781.

<sup>6</sup> *Cann v. Rector of Church of Holy Redeemer*, *supra*.

sary to contract debts and to execute evidences of such indebtedness in the form of notes or bonds or other papers. Such instruments in analogy to the endorsements by bank cashiers on bills and notes are often executed by the trustees of the corporation or society and the designation of their office is merely tacked on to their names in the signature, in the body of the paper, or in both places. This, however, is a dangerous practice. While a signature of this nature by a duly authorized bank cashier on bills and notes is by commercial usage regarded as the act of the bank and not as that of the individual officer,<sup>1</sup> this usage will not apply to church corporations, since they do not deal in such instruments and are not engaged in such business.<sup>2</sup> "The presumptions of fact applicable to religious corporations are not in all cases the same as the presumptions of fact applicable to other corporations. There is no presumption that a treasurer of a religious corporation has power to borrow money, sign notes, and bind the corporation."<sup>3</sup>

It is therefore absolutely necessary that trustees have express authority to execute such instruments in order to make them a binding obligation of the church. "An executory agreement of a religious corporation cannot be enforced, without proof of authority in the person executing the agreement to execute the same in the name of the corporation, or without showing ratification by the corporation with knowledge of all the facts."<sup>4</sup> While it has been held that a member of a board of trustees may act as an

<sup>1</sup> See for a somewhat analogous case of this nature *Howard v. McClure*, 149 Pa., 170; 24 Atl., 196; 30 W. N. C., 211.

<sup>2</sup> *Hypes v. Griffin*, 89 Ill., 134, 138.

<sup>3</sup> *Wilson v. Tabernacle Baptist Church*, 59 N. Y. Supp., 148; 28 Misc. Rep., 268.

<sup>4</sup> *Wilson v. Tabernacle Baptist Church*, *supra*, at 149.

auctioneer for it at a sale of pews,<sup>1</sup> it has also been held that the pastor or the president of the church trustees has, as such, no power to make contracts<sup>2</sup> or to bind the corporation by action in regard to its cemetery.<sup>3</sup> Nor may the treasurer of a society by virtue of his office overdraw an account which he has opened on his own motion<sup>4</sup> or accept drafts drawn on him by a creditor of the society for a debt due to such creditor and create thereby a new indebtedness to another individual.<sup>5</sup> The mere fact that a note purporting to be made by a religious corporation is signed by its president and secretary does not show that it is the note of the corporation without proof that it was made by its authority. The agency can neither be created or proved by the acts or declarations of the assumed agents alone.<sup>6</sup> Of course, when the treasurer of a religious corporation borrows money to pay indebtedness incurred for the legitimate purposes of the corporation and the corporation actually uses the money, it will be required to repay it, though its trustees at the time the money was used were not aware

<sup>1</sup>Stoddert *v.* Port Tobacco Parish, 2 Gill & J., 227 (Md.).

<sup>2</sup>Montgomery *v.* Walton, 111 Ga., 840; 36 S. E., 202; East Baltimore Lumber Co. *v.* K'Nessett Israel Auishe S'Phard Congregation, 100 Md., 125, 689; 59 Atl., 180; Cann, *v.* St. Louis Church of Redeemer, 111 Mo. App., 164, 188, and cases cited: Hart *v.* Shenrith Israel Congregation, 49 Super. Ct., 523 (N. Y.); Young & Fulton Lumber Co. *v.* Taylor St. M. E. Church, 7 Ohio Dec., 449; 5 Ohio N. P., 378.

<sup>3</sup>First Presbyterian Church of Chicago Heights *v.* McColly, 126 Ill. App., 333; Schaefer *v.* Ev. Lutheran St. Paul's Church, 68 Kans., 305; 74 Pac., 1119.

<sup>4</sup>Columbia Bank *v.* Gospel Tabernacle Church, 127 N. Y., 361; 28 N. E. 29; 38 St. Rep., 915; affirming 57 Super. Ct., 149; 26 N. Y. St. Rep., 170; 6 N. Y. Supp., 537.

<sup>5</sup>Packard *v.* First Universalist Society of Quincy, 51 Mass., (10 Met), 427.

<sup>6</sup>Columbia Bank *v.* Gospel Tabernacle Church, *supra*, at 368.

that they were the proceeds of an unauthorized loan. It cannot repudiate the loan and keep the money.<sup>1</sup>

But it is not enough to protect trustees from personal liability that they are actually authorized by their principal to execute the paper in question. They must go farther and define in the very contract signed by them the position which they occupy and the extent of the obligations which they assume.<sup>2</sup> This policy of the law accords with the viewpoint of the obligees of such instruments who oftentimes advance their money on the word of the individual trustees and regard these trustees as sureties for the church. Such trustees in fact are frequently, if not generally, substantial men, while the church, which they represent, may have little or no property. Even if there is a church building the commercial value of such property is generally very small as compared with its cost. Is it any wonder that creditors prefer to have trustees as their debtors rather than the church? A signer of such a note will therefore be bound by it personally unless he plainly says that he is a mere scribe. Though he adds the name of the church corporation which he represents to indicate the capacity in which he acts, he will be regarded as professing and intending to bind himself personally unless he indicates plainly that he does a mere ministerial act in giving authenticity to the act, promise and contract of another. Notes or bonds executed by individuals as trustees of a certain designated church corporation, while they will be binding on such corporation at the election of the payee<sup>3</sup> need not be so enforced, but may, at the option, or pleasure,

<sup>1</sup> *Wilson v. Tabernacle Baptist Church*, 59 N. Y. Suff., 148; 28 Misc., 268. See dissenting opinion in *St. Patrick's Roman Catholic Church v. Gavalon*, 82 Ill., 170; 25 Am. Rep., 305.

<sup>2</sup> *Cruse v. Jones*, 71 Tenn., (3 Lea.), 66.

<sup>3</sup> *Hypes v. Griffin*, 89 Ill., 134, 137.

or whim of the creditor, be enforced, against the individual signers of the same, in which case the designation of their office will be regarded as a mere *descriptio personae*.<sup>1</sup>

In such an action the signers of such a paper will not be allowed to contradict and vary the terms of their written agreement by proving that the corporation which they represented was intended as obligor rather than themselves.<sup>2</sup> It follows that the holder of such a paper by tearing off the part of it which contains the official designation of the signers does not in the least alter it or make it unenforceable.<sup>3</sup> The same principles will be applied to other contracts, whether they consist of a written settlement<sup>4</sup> or an oral agreement.<sup>5</sup> Unless church trustees intend to bind themselves or to act as sureties for their church it will therefore be advisable in all cases to have the corporation appear in all parts of the instrument as the obligor and to appear so even in the signature while the names of the trustees or other officers should appear as mere agents.<sup>6</sup>

Unless, therefore, the action of the trustees has been duly

<sup>1</sup> Powers *v.* Briggs, 79 Ill., 493; Hayes *v.* Brubaker, 65 Ind., 27; Dayton *v.* Warne, 43 N. J. Law (14 Vroom), 659; Brockway *v.* Allen, 17 Wend., 40; Hills *v.* Bannister & Butler, 8 Cow., 32; Taft *v.* Brewster, 9 Johns, 334; 6 Am. Dec., 280.

<sup>2</sup> Hypes *v.* Griffin, *supra*. If this is true in cases where the designation of office is added to the names of the subscribers it will be more so where such is not the case. Second Baptist Church *v.* Furber, 109 Ind., 492; Colburn *v.* First Baptist Church of Monroe, 60 Mich., 198; 26 N. W., 878.

<sup>3</sup> Burlingame *v.* Brewster, 79 Ill., 515.

<sup>4</sup> Arts *v.* Guthrie, 75 Iowa, 674; 37 N. W., 395.

<sup>5</sup> Adams *v.* Hill, 16 Me. (4 Shep.), 215.

<sup>6</sup> A proper form of such signature would be  
 First Methodist Episcopal Church of .....  
 by .....

Its Trustees.

See Stanton *v.* Camp, 4 Barb., 274.

authorized or ratified by their principal and unless the contract has been executed by them as mere scribes, they will not be able to escape personal liability. No presumptions will be indulged in. There is nothing in the nature of the business to be done, or the duties which devolve upon the officers of a church corporation, "that can require or justify the giving of negotiable instruments binding the society without being authorized by a special vote to that effect."<sup>1</sup> The corporation, just like individuals under similar circumstances,<sup>2</sup> will therefore not be legally responsible on any obligation not authorized or ratified by it. It follows that trustees who have overstepped the bounds of their authority, will, under such circumstances, no matter how carefully the instrument is worded, be liable on it.<sup>3</sup> If they want to protect themselves from personal responsibility they must not only sign as mere agents, but they must also carefully act within the lines of their specific authority.

But even this extreme precaution will not protect the trustees if the body which they represent is unincorporated. They are in fact in all such cases, with the possible exception of a case where the personal obligation is given in connection with a mortgage on the church property<sup>4</sup> personally liable, no matter how they word their signature. For unincorporated societies have no legal existence, cannot sue or be sued, and are in legal contemplation mere myths. In whatever light they may be regarded by their members they

<sup>1</sup> *Packard v. First Universalist Society of Quincy*, 51 Mass. (10 Met), 427.

<sup>2</sup> *Le Saint v. Fisler*, 6 Wkly. Law Bul., 337; 8 Ohio Dec., 216.

<sup>3</sup> *Cattron v. First Universalist Society of Manchester*, 46 Iowa, 106; *People's Bank v. St. Anthony's Roman Catholic Church*, 109 N. Y., 512; 17 N. E., 408; 16 N. Y. St. Rep., 856; 39 Hun., 498; *Palmer v. St. Stevens Church*, 16 Fed., 742.

<sup>4</sup> In such a case the two instruments will be construed together. *Elwell v. Tatum*, 6 Tex. Civ. App., 397; 24 S. W., 71; 25 S. W., 434.



cannot be, in law, responsible principals. Since trustees who have signed a contract for such a society are therefore in no position to produce a responsible principal they cannot avoid personal liability, no matter whether they have signed individually,<sup>1</sup> or whether they have added their official designation to their signature,<sup>2</sup> or whether they have even clearly intimated that they have signed in a purely ministerial character.<sup>3</sup>

But while the board must thus act as a whole and not individually, it must also act by majority vote. It cannot bind the corporation by minority action on a mortgage,<sup>4</sup> much less can any one member of it,<sup>5</sup> or a member of another church committee,<sup>6</sup> or a number of members merely of the corporation<sup>7</sup> take the place of such majority. It will, however, bind even a minority of its own members by a resolution duly adopted,<sup>8</sup> but cannot by such resolution oust and divest such member of the joint possession of the church property.<sup>9</sup> Wherever it is possible, in order to avoid any dissatisfaction and contention, the majority should be a majority of all the members, though a majority of a mere quorum present would seem to be sufficient.<sup>10</sup>

It sometimes happens that boards of trustees are deci-

<sup>1</sup> Phoenix Insurance Co. v. Burkett, 72 Mo. App., 1.

<sup>2</sup> Haines v. Nance, 52 Ill. App., 406; Chick v. Trevett, 20 Me. (7 Shep.), 462; 37 Am. Dec., 68; American Insurance Co. v. Sorter, 1 Cleve. L. Rep., 133; 4 Ohio Dec. Reprint, 226.

<sup>3</sup> Lewis v. Tilton, 64 Iowa 220.

<sup>4</sup> Moore v. St. Thomas Church, 4 Abb. N. C., 51.

<sup>5</sup> Kupper v. South Parish of Augusta, 12 Mass., 185.

<sup>6</sup> Beckwith v. McBride & Company, 70 Ga., 642.

<sup>7</sup> Macon and Atlantic Ry. Co. v. Riggs, 87 Ga., 158; 13 S. E., 312.

<sup>8</sup> Commonwealth v. Oliver, 2 Pars. Eq. Cas., 420.

<sup>9</sup> First M. E. Society of Pultney v. Stewart, 27 Barb., 553.

<sup>10</sup> African Methodist Bethel Church v. Carmack, 2 Md. Ch., 143.

mated by the resignation, death or expulsion of members. It has been contended that a rule which would allow the remaining trustees to act by majority vote of such remaining members would open the door to fraudulent and collusive resignations, would discourage the performance of the duty of filling vacancies and "would tend to frustrate the purposes of the statute, and might end in devolving the authority and duties of eight vestrymen upon a single one."<sup>1</sup> This contention, however, has received no favor. It has therefore been held that one vacancy in a board of thirteen, though the vacant membership was a membership *ex-officio*,<sup>2</sup> or the refusal of a minority of a board to act,<sup>3</sup> and even the ouster of seven out of a board of ten by *quo warranto* proceedings,<sup>4</sup> will not affect the right of the remaining members to act and bind the corporation by such action. In a Massachusetts case it has been held that where the board was increased from eleven to fifteen members and its quorum from eight to eleven members, but the additional members had not been elected, that the quorum still consisted of eight members.<sup>5</sup>

It remains to discuss the duties of church officers in connection with the maintenance of law and order in the church. In this matter the discussion cannot be confined

<sup>1</sup> Moore *v.* St. Thomas Church, 4 Abb. N. C., 51; 55 (N. Y.), holding a meeting of four vestrymen void though their entire number was eight and the office of three was vacant.

<sup>2</sup> Church of St. Louis *v.* Blanc, 47 La. (8 Rob.), 51.

<sup>3</sup> All Saints Church *v.* Lovett, 1 N. Y. Super. Ct. (1 Hall), 191.

<sup>4</sup> People *ex rel.* Cook *v.* Fleming, 59 Hun., 518; 37 N. Y. St. Rep., 157; 13 N. Y. Supp., 715; People *ex rel.* Fleming *v.* Hart, 13 N. Y. Supp., 903; 36 N. Y. St. Rep., 874; People *ex rel.* St. Stevens Church *v.* Blackhurst, 60 Hun., 63; 37 N. Y. St. Rep., 720; 15 N. Y. Supp., 114; Holy Trinity Church *v.* Church of St. Stephens, 60 Hun., 578; 15 N. Y. Supp., 117.

<sup>5</sup> Christ Church *v.* Pope, 74 Mass. (8 Gray), 140.

to church trustees but will cover all church officers and even the employees of the church from the janitor to the pastor. It is certainly of the highest importance to all churches that order and decorum be preserved at their formal business meetings. To accomplish this result some person is usually elected or appointed to serve as moderator. There can be no question but that the work of such an officer, however pleasant it may be ordinarily, will be extremely unpleasant in times of strain and stress.

It is certain that a moderator of a town or parish meeting is often called upon to discharge an unwelcome duty, especially in those cases where contending interests and feelings are in full operation; and where he is obliged to decide on the qualifications of voters, without time for deliberation, and even without a knowledge of many of the facts on which those rights depend; when, to a certain extent, he acts judicially, and must pronounce a decisive opinion.<sup>1</sup>

It is not always an easy matter to decide correctly on the qualifications of voters. Men change their religious opinions and principles quite frequently and may, by a declaration that they cannot any longer with a good conscience attend a certain church, practically cease to be members of it without formally dissolving their connection. They may, by a failure to pay dues, by joining forbidden societies, by falling into gross sins or heresies, forfeit their right to vote without technically ceasing to be members. The moderator therefore, when such a vote is presented, must exercise his discretion in accepting or rejecting it. For such *bona fide* exercise of his judgment he cannot be held responsible in damages.

A man who is placed in a public station as an officer of the

<sup>1</sup> Tuttle v. Cary, 7 Me. (7 Greene), 426, 429.

Commonwealth, or of a corporation, in which, though not strictly a judicial officer, he must necessarily exercise his judgment (such as an inspector or judge of an election), is not liable to an action for an erroneous judgment, provided he act with purity and good faith.<sup>1</sup>

But if it is important to preserve order during the mere business meetings of the church, it is certainly of vastly greater importance to preserve decorum during divine services. The duty to preserve such decorum may make it necessary for church officers to lay hands on a disturber and remove him out of the audience. The disturbance, to justify such action, need not be a wilful one, in the sense of the criminal statute against the disturbance of religious worship.<sup>2</sup> The nonconformity of the disturber with the rules and regulations of the church, by which a disturbance is created, will be sufficient to authorize actual force to remove him if he disregards a request to leave.<sup>3</sup> Such disturbance may consist of persisting for months in loud singing,<sup>4</sup> in conducting funeral services in the church contrary to its rules,<sup>5</sup> in haranguing the clergyman from the pew occupied by the disturber,<sup>6</sup> in insisting on sitting on the side reserved exclusively for the opposite sex<sup>7</sup> and in making grimaces at the officiating clergyman.<sup>8</sup> It may be committed by a member of the church,<sup>9</sup> by a person who has

<sup>1</sup> *Weckerly v. Geyer*, 11 S. & R., 35, 39 (Pa.).

<sup>2</sup> See chapter 10.

<sup>3</sup> *Wall v. Lee*, 34 N. Y., 141.

<sup>4</sup> *Beckett v. Lawrence*, 7 Abb. Pr. N. S. (N. Y.), 403.

<sup>5</sup> *Commonwealth v. Dougherty*, 107 Mass., 243.

<sup>6</sup> *Wall v. Lee*, *supra*, at 146.

<sup>7</sup> *McLain v. Matlock*, 7 Ind., 525; 65 Am. Dec., 746.

<sup>8</sup> *Sheldon v. Vail*, 28 Hun., 354.

<sup>9</sup> *Wall v. Lee*, *supra*; *Hamblett v. Bennett*, 88 Mass. (6 Allen), 140.

been expelled from it<sup>1</sup> or by a stranger.<sup>2</sup> The disturber may be removed by the clergyman,<sup>3</sup> by the sexton,<sup>4</sup> or even by a general member of the church.<sup>5</sup> However, the elected or appointed officers of the church, whose duty it is by usage and custom to preserve order, naturally have the greatest right to act, and should act in preference to others where circumstances permit.<sup>6</sup> In removing the disturber such officers, however, should not use any greater force than is reasonably necessary to accomplish the removal. For any such reasonable force they will not be liable in an action for assault and battery,<sup>7</sup> in an action for false imprisonment,<sup>8</sup> or in a prosecution for a criminal assault.<sup>9</sup> They may, however, become liable for an assault where they strike the disturber and thus commit an act which is not necessary for the purpose of removing him.<sup>10</sup> So also may they become liable for false imprisonment where they retain the disturber in custody longer than is necessary for his removal from the building. In such case their official character, however, may be put in evidence in mitigation of damages.<sup>11</sup>

<sup>1</sup> *Sheldon v. Vail, supra.*

<sup>2</sup> *McLain v. Matlock, supra; Commonwealth v. Dougherty, supra; Beckett v. Lawrence, supra.*

<sup>3</sup> *Wall v. Lee, supra.*

<sup>4</sup> *Hamblett v. Bennett, supra.*

<sup>5</sup> *Wall v. Lee, supra.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Hamblett v. Bennett, supra; Wall v. Lee, supra; Sheldon v. Vail, supra. See Howard v. Hayward, 51 Mass. (10 Met), 408.*

<sup>8</sup> *McLain v. Matlock, supra; Beckett v. Lawrence, supra; Stevens v. Gilbert, 120 N. Y. Supp., 114.*

<sup>9</sup> *Commonwealth v. Dougherty, supra.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *McLain v. Matlock, supra; Beckett v. Lawrence, supra.*

It often becomes the duty of church officers to be active in church trials conducted for the purpose of disciplining or expelling recalcitrant members. Since such trials sometimes deal with sin in its most atrocious forms and often produce intense bitterness, it is not astonishing that libel and slander actions should grow out of them. This, however, need not frighten any church officers who act in good faith and without any malice, however disagreeable the result reached may be to the person who is being disciplined.<sup>1</sup> Malice being the very gist of these actions, the action must fail where no malice is present. All that an officer has to do to protect himself from such an attack is, therefore, to act in good faith and with calm deliberation. If this is done no presumption of malice will be raised against him. "Words spoken or written in the regular course of church discipline or before a tribunal of a religious society, to or of members of the church or society are as among the members themselves privileged communications, and are not actionable without express malice."<sup>2</sup> Since every sect of Christians are at liberty to adopt such proceedings for their regulation as they see fit, not inconsistent with law, or injurious to the rights of others,<sup>3</sup> since churches, therefore, have authority to deal with their members, for immoral and scandalous conduct; and for that purpose, to hear complaints, to take evidence and to decide; and, upon conviction, to administer proper punishment by way of rebuke, censure, suspension and excommunication,<sup>4</sup> and since this liberty would be abridged if

<sup>1</sup> *Church of St. Louis v. Blanc*, 47 La. (8 Rob.), 51.

<sup>2</sup> Hilliard on Torts, p. 355, cited in *Lucas v. Case*, 72 Ky. (9 Bush), 297, 302.

<sup>3</sup> *Jarvis v. Hathaway*, 3 Johns, 180, 183.

<sup>4</sup> *Farnsworth v. Starrs*, 59 Mass. (5 Cush.), 412, 415.

the members of a church tribunal were forced to act under a haunting fear of subsequent libel or slander actions for anything they might say or write, it follows that such proceedings will be treated as "*quasi judicial*" and that those

who complain, or give testimony, or act and vote, or pronounce the result, orally or in writing, acting in good faith, and within the scope of the authority conferred by this limited jurisdiction, and not falsely or colorably, making such proceedings a pretense for covering an intended scandal, are protected by law.<sup>1</sup>

While, therefore, an unjust censure pronounced by a board of trustees against their former treasurer<sup>2</sup> or a notice copied into a church book unnecessarily casting reflections upon a member<sup>3</sup> will not be treated as a privileged communication, charges of untruthfulness and deception,<sup>4</sup> unchaste language,<sup>5</sup> fornication,<sup>6</sup> perjury,<sup>7</sup> forgery<sup>8</sup> and imputations otherwise affecting the plaintiff's moral character,<sup>9</sup> where made in good faith in the course of a church proceeding though by a non-member of the church<sup>10</sup> will not be actionable. Nor will it make any difference that the proceeding may appear to be rather harsh. A charge of fornication against a newly married woman based on the fact that she has within five months after her marriage given birth to a

<sup>1</sup> *Farnsworth v. Starrs*, 59 Mass. (5 Cush.), at 416; *Landis v. Campbell*, 79 Mo., 433, 440; 49 Am. Rep., 239.

<sup>2</sup> *Holt v. Parsons*, 23 Tex., 9; 76 Am. Dec., 49.

<sup>3</sup> *Shelton v. Nance*, 46 Ky. (7 B. Mon.), 128.

<sup>4</sup> *Shurtleff v. Stevens*, 51 Vt., 501.

<sup>5</sup> *Lucas v. Case*, 72 Ky. (9 Bush), 297.

<sup>6</sup> *Farnsworth v. Starrs*, *supra*.

<sup>7</sup> *Remmington v. Congdon*, 19 Mass. (2 Pick), 310.

<sup>8</sup> *Jarvis v. Hathaway*, 3 Johns, 180.

<sup>9</sup> *Hinman v. Hare*, *N. Y. Daily Register*, May 19, 1884, cited in vol. 8, *Abbot's N. Y. Digest*, pages 1032, 1033.

<sup>10</sup> *Remmington v. Congdon*, *supra*.

fully developed child will therefore be considered and treated as privileged.<sup>1</sup>

Nor does the privilege end after the termination of the proceeding by an expulsion of the member. It is a custom in many churches solemnly to announce such an expulsion and its causes from the pulpit as a warning to others. With such custom the law finds no fault. The excommunication of a member may therefore be promulgated by reading the resolution of expulsion in the presence of the congregation, according to the practice of the church, and such act will, of itself, furnish no foundation for an action against the person who so reads it.<sup>2</sup> Such reading is so much within the scope and order of church discipline that it will be supported by the courts even without proof of a particular custom.<sup>3</sup>

To sum up: American church officers, whether they are trustees charged primarily with the temporalities of their church or deacons charged with its spiritualities, are ordinarily elective, though they may be appointive officers. A majority vote of those members of the church constituting a quorum assembled after due notice and cast at an election properly conducted according to the constitution, by-laws or customs of the church, will be sufficient to make them *de jure* officers. Even where there has been a defect in the proceedings the persons elected, provided that they are not mere intruders, will be recognized as *de facto* officers who can be ousted only by a direct proceeding brought by the state for that purpose. The officers known as trustees will be in joint possession of all the property of the church, real or personal, and will be charged with the duty

<sup>1</sup> Farnsworth *v.* Storrs, 59 Mass. (5 Cush.), 412.

<sup>2</sup> Landis *v.* Campbell, 79 Mo., 433, 440; 49 Am. Rep., 239.

<sup>3</sup> Farnsworth *v.* Storrs, *supra*, at 416.



of executing its contracts. To avoid personal liability on such contracts they must not only act as a board by majority vote; they must not only act under express or implied authority from the society and keep within the powers conferred on it; they must not only act as mere agents and indicate this fact clearly; but they must also act for a society which has a legal personality, in other words, is a corporation.

Where an officer of a church society is made the moderator at one of its business meetings, he will not be responsible for any mistake which he has made in admitting or excluding a vote, provided that he has acted in good faith. Where he has removed a person who has disturbed one of its meetings he will not be responsible in an action for assault and battery or false imprisonment, provided that he has used no more force than was reasonably required for the purpose. Where he has acted in disciplinary proceedings of his church he will not be liable to an action of libel or slander, provided that his action, no matter how unpleasant it may have been, was taken in good faith.

## CHAPTER XIV

### DEDICATION AND ADVERSE POSSESSION

THE ordinary method by which religious corporations or trustees for religious societies acquire real estate in the United States is by deed or will. The deed may be a patent from the state, or may represent a gift from an individual, or may be an ordinary business transaction. The will is generally made by some devout member of the church named as the beneficiary. These instruments, while they raise many intricate questions of trusts and charitable uses, and while they are subject to certain limitations in relation to the right of religious societies to acquire real estate, are construed like other similar instruments and upheld or declared void accordingly.

But while a deed or will is the ordinary means of devolving real estate on church organizations, it is by no means the only one. Congregations all over the country are in actual possession of property to which they have no record title. Even more often they hold property under deeds or wills which are void. Frequently expensive improvements have been made on such properties. To deprive churches of this property would frequently work great injustice and hardship. Since such possession cannot be justified under any deed or will, some other legal principles must be discovered, under which it can be upheld.

This has accordingly been accomplished. In cases where the church is incorporated and its possession of long duration, the statute of limitations has been used to vest a title in

fee in it. Where, however, the church is unincorporated<sup>1</sup> or its possession of too short a duration, the statute cannot be applied. To meet the situation the doctrine of dedication, applicable originally only where the public as such is interested in a gift, has been extended to uphold such a possession. The application of these two doctrines to church affairs has given rise to some interesting developments, which it will be the purpose of this chapter to exhibit.

#### ADVERSE POSSESSION

In one form or another limitation laws will be found in all highly developed legal systems. They were made a part of the English law at an early date, first by judicial legislation, later, by express statutory enactment. They now form an essential portion of the jurisprudence of every state in the United States. They have overcome all the prejudice that judges and attorneys, as well as laymen, have expressed against them. They are even favored to such an extent that only a statute, expressly excepting church organizations from their operation, and leaving no loophole of escape, will prevent its application to controversies in which a church is a party.<sup>2</sup>

Since all objections to these statutes have been abandoned, and since they apply generally in favor of and against individuals or corporations, it follows that they may be pleaded by<sup>3</sup> or against<sup>4</sup> religious organizations and may even be set up in a suit between two religious corporations.<sup>5</sup>

<sup>1</sup> *Stewart v. White*, 128 Ala., 202; 30 So., 526; 55 L. R. A., 211.

<sup>2</sup> *Dudley v. Clark*, 225 Mo., 570; 164 S. W., 608, 613.

<sup>3</sup> *Harpending v. Reformed Dutch Church*, 41 U. S., 455; 10 L. Ed., 1029.

<sup>4</sup> *Craig v. Franklin County*, 58 Me., 479, 497; *Propagation Society v. Sharon*, 28 Vt., 603.

<sup>5</sup> Second Precinct in *Rehoboth v. Carpenter*, 23 Pick., 131; *Society v. Bass*, 68 N. H., 333; 44 Atl., 485. See *Reformed Church of Gallupville v. Schoolcraft*, 65 N. Y., 134; reversing 5 Lans., 206.

Far from being prejudiced by such a plea, courts will even declare the plea to be a just, proper, and meritorious defense, as was done in the remarkable cluster of cases involving the title of Trinity Church to certain property in New York City.<sup>1</sup> These cases, on account of the immense value of the property involved, the thorough manner in which they were presented to the courts, and the great care with which they have been decided, deserve a somewhat more extended statement.

The property in question is situated on Manhattan Island between the Hudson River and Broadway and is part of the main business section of the city. It was formerly known as Domine's Bowery and Domine's Hook and comprised about one hundred and ninety acres. One Annetje Jans appears to have been its owner in 1663. Her devisees in 1671, with the exception of one or two, united in a "deed of transport" to Colonel Lovelace, then governor of New York. Under this deed the English government took possession. The land thereafter was successively known as the Duke's Farm, the King's Farm and the Queen's Farm. In 1705 it was granted to Trinity Church by a patent which on its face conveyed the entire estate. The church went into possession and remained undisturbed till about 1785, when one of the descendants of Annetje Jans caused trouble for some years by entering certain parts of the land. He was however finally persuaded, in consideration of seven hundred pounds, to relinquish all his claims. The right of the church to the property was not again disputed till 1830, when one Bogardus, under the claim that he was a descendant of one of these heirs of Annetje Jans who had not joined in the deed of transport, commenced action, claiming a one thirtieth interest in the land. His theory was, that the

<sup>1</sup> *Bogardus v. Trinity Church*, 4 Paige, 178, 203; same case, 4 Sandf. Ch., 633, 734.

church, by the deed of 1705, had become a tenant in common with the Jans heir, under whom he claimed. The church as a defense set up adverse possession since 1705, which plea was upheld in 1833, the Chancellor saying:

If a clear, uninterrupted and exclusive possession of land for one hundred and twenty-five years, under a grant or conveyance purporting upon its face to be a valid conveyance of the whole property, is not sufficient to protect the occupant of the premises, against the claims of those whose ancestors may have once been owners of an undivided interest in the same, the titles to lands in those parts of the state are certainly very unsafe. For it would, in most cases, be found to be impracticable, after such a lapse of time, to trace out and establish a regular chain of title from every person who had once held an undivided interest in the premises.<sup>1</sup>

While an appeal from this decision was pending, which was not decided till 1835, when the decision of the chancellor was affirmed,<sup>2</sup> another suit was begun in 1834 by one Humbert, another descendant of Annetje Jans. The plaintiff admitted the actual possession by the church but claimed that the description in the deed of 1705 had, through the influence of the church, been made so ambiguous as to enable the church fraudulently to appropriate the plaintiff's land under color or pretense of said deed. This suit apparently was but a fishing expedition to procure evidence for the trial of the Bogardus action. The bill was carefully drawn, not so much with reference to what could be proved, but rather with the purpose of making out

a *prima facie* claim, which would compel the defendants to exhibit and set forth their title deeds and documents, and thus enable the complainants to avail themselves of any weak point,

<sup>1</sup> Bogardus v. Trinity Church, 4 Paige, 178, 203.

<sup>2</sup> Bogardus v. Trinity Church, 15 Wend., 111.

which they might discover in them, from carelessness in the mode of preparing papers at that distant period, or from the loss or destruction of some connecting links in the chain of documentary evidence during so many ages as have elapsed since this title was originally granted to these defendants.<sup>1</sup>

A demurrer was interposed by the church, which was sustained both by the chancellor in 1838<sup>2</sup> and by the Court for the Correction of Errors in 1840.<sup>3</sup> In discussing the statute Cowen, J., pointed out that, if fraud was allowed to be pleaded as an implied judge-made exception to the statute, the church would be thrown back on evidence not merely

obscured by the ordinary mists of tradition in a settled government, and under a well regulated system of conveyancing; but evidence which comes to us through the mutations of empire, the fury of revolutions, repeated changes in the law of descent, in the law of common assurances, and great defects at all times in the method of perpetuating the evidence of their existence.<sup>4</sup>

The attempt to procure evidence against the church by this subsidiary suit having failed, there was nothing now to do but to try out the Bogardus action on its merits with what evidence the plaintiff had on hand. A replication to the plea of the church was therefore filed, proofs were taken and the cause was finally brought to a hearing in 1846. The church was not in a position to prove its adverse possession by living witnesses farther back than 1770. For the period before that date documentary evidence more or less valuable was the only evidence available. Accordingly, old statutes, leases, works of history, maps, official declarations, pleadings and depositions in old law-suits were col-

<sup>1</sup> *Humbert v. Rector of Trinity Church*, 24 Wend., 587, 787.

<sup>2</sup> *Humbert v. Rector of Trinity Church*, 7 Paige, 195.

<sup>3</sup> *Humbert v. Trinity Church*, 24 Wend., 587.

<sup>4</sup> *Ibid.*, at 610.

lected in a marvelous mass of immensely persuasive evidence. Over five hundred leases, covering over one thousand lots and generally for terms of twenty-one years, were introduced in evidence. It was proved that some four hundred and eighty lots had been sold outright by more than one hundred deeds executed by the corporation. The court, in holding that such possession was a proper and just defense in favor of the corporation and should be as readily conceded to it as it would be to anyone else, said :

The law on these claims is well settled, and it must be sustained in favor of religious corporations as well as private individuals. Indeed, it would be monstrous, if, after a possession such as has been proved in this case, for a period of nearly a century and a half, open, notorious, and within sight of the temple of justice, the successive claimants, save one, being men of full age, and the courts open to them all the time (except for seven years of war and revolution) the title to lands were to be litigated successfully, upon a claim which has been suspended for five generations. Few titles in this country would be secure under such an administration of the law; and its adoption would lead to scenes of fraud, corruption, foul justice and legal rapine, far worse in their consequences upon the peace, order and happiness of society, than external war or domestic insurrection.<sup>1</sup>

All attempts at mulcting the corporation through a suit brought by individuals having thus completely failed, an attempt was made in 1856 to divest the church of its property through an ejectment suit brought by the state. The plaintiff simply relied on a presumption that it was *prima facie* the owner of all land in the state and proved the possession of the defendant. A non-suit, on the ground that the plaintiff had failed to establish its title and that, if it had estab-

<sup>1</sup> Bogardus v. Trinity Church, 4 Sandf. Ch., 633, 762.

lished it, such title was barred by the statute of limitations, was granted at the trial and upheld on appeal.<sup>1</sup> With this case all attacks on the property of the church have come to an end.

In surveying the other cases, in which church property has been protected by the application of the statute of limitations, it will be found that they generally resemble the Trinity Church Case, not in the length of possession or the value of the property, but in the fact that there is generally some instrument giving color of title to the possession. It is elementary that such possession is more favored than mere naked possession. A person or corporation taking possession honestly under a void deed is entitled to more consideration than the mere squatter who simply appropriates the land. Therefore deeds to a church organization void because the grantor had no title,<sup>2</sup> or because the purpose for which the property was bought was not expressed on their face,<sup>3</sup> or because no legislative sanction was obtained as required by the bill of rights,<sup>4</sup> or because the grantee at the time was unincorporated,<sup>5</sup> or because the grantor, a married woman, was not subjected to private examination,<sup>6</sup> or because a necessary party had not been

<sup>1</sup> *People v. Rector of Trinity Church*, 30 Barb., 537; affirmed 22 N. Y., 44.

<sup>2</sup> *Taylor v. Public Hall Co.*, 35 Conn., 430; *Second Precinct in Rehoboth v. Carpenter*, 23 Pick., 131.

<sup>3</sup> *Gump v. Sibley*, 79 Md., 165; 28 Atl., 977.

<sup>4</sup> *Zion Church v. Hilken*, 84 Md., 170; 35 Atl., 9; *Regents of the University of Maryland v. Trustees of Calvary Church*, 104 Md., 635; 65 Atl., 398; *Dickerson v. Kirk*, 105 Md., 638; *Mills v. Zion Chapel*, 119 Md., 510; 87 Atl., 257.

<sup>5</sup> *Reformed Church of Gallupville v. Schoolcraft*, 65 N. Y., 134; reversing 5 Lans., 206.

*Deepwater Railroad Co. v. Hanaker*, 66 S. E. (W. Va.), 104.



joined,<sup>1</sup> or because the value of the land was greater,<sup>2</sup> or the quantum of it larger than the church, by its charter, was permitted to acquire,<sup>3</sup> have served as foundations for an adverse possession by church corporations and have become important in their chain of title. It follows that a church may acquire by adverse possession more land<sup>4</sup> or land of greater value than the law, under which it exists, permits. The restriction imposed on the corporation is in no way the concern of any private individual but rather a question of governmental policy, with which individuals have nothing to do.<sup>5</sup> The title thus acquired is perfectly good as to the whole world except the state, and as to the state itself not void but only voidable at its option.<sup>6</sup>

But while a written instrument is thus of great importance, it is not absolutely necessary. Title by adverse possession may be acquired without it. A church corporation, like any other individual or corporation, may simply take possession of property and such possession, if maintained for the requisite time, will be protected by the statute of limitations, to the extent of the substantial and actual inclosure.<sup>7</sup> A church corporation, which merely takes possession of the property of another such corporation which is moribund, and holds it for forty years, can therefore not be dislodged by persons claiming to represent the old corpor-

<sup>1</sup> *Brown v. Nye*, 12 Mass., 285.

<sup>2</sup> *Humbert v. Trinity Church*, 24 Wend., 587, 629; *Bogardus v. Trinity Church*, 4 Sandf. Ch., 633, 657; *Harpending v. The Dutch Church*, 16 Pet., 492. In this last case the instrument was a will, not a deed.

<sup>3</sup> *Dangerfield v. Williams*, 26 App. D. C., 508.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Bogardus v. Trinity Church*, 4 Sandf. Ch., 633, 758.

<sup>6</sup> *Humbert v. Trinity Church*, 24 Wend., 587, 630.

<sup>7</sup> *Harpending v. Dutch Church*, 16 Pet., 455, 493.

ation.<sup>1</sup> The title acquired by such adverse possession is so perfect that a quit-claim deed given by the former owner is of no significance and will not be accepted in evidence.<sup>2</sup>

Since church corporations can thus acquire property by adverse possession, it becomes important to know just what, in such a case, will be considered as adverse possession. Clearly the use for twenty-nine years by a seceded minority of a congregation of its church building under its leave and license is not adverse, and hence cannot form even the inception of a title.<sup>3</sup> To be effective as a bar, such possession must be exclusive of the original owner, continuous as to time, and under a claim of right. The incidents of such possession will depend upon the nature of the property. Acts sufficient to constitute adverse possession of an empty lot will be insufficient, where a business block is in question. In regard to a church building, its continuous control and use by the officers of the corporation for the purposes of public worship, will be treated as an actual possession as much as if they actually resided on the premises<sup>4</sup> and such possession may even extend to adjoining uninclosed and vacant land.<sup>5</sup>

The most interesting and important application of the doctrine of adverse possession, however, is in regard to trusts. Church property is generally quite well encumbered with uses. Where the original grantors have not created express trusts, courts have come to the rescue with

<sup>1</sup> *First Presbyterian Society v. Bass*, 68 N. H., 333; 44 Atl., 485.

<sup>2</sup> *Bose v. Christ*, 193 Pa., 13; 44 Atl., 240.

<sup>3</sup> *Landis Appeal*, 102 Pa., 467. See *Stewart v. White*, 128 Ala., 202; 30 So., 526; 55 L. R. A., 211.

<sup>4</sup> *Macon v. Shepard*, 21 Tenn., 334; *Randolph v. Meek*, 8 Tenn., 58.

<sup>5</sup> *Mather v. Ministers of Trinity Church*, 3 S. & R., 509; *Second Methodist Episcopal Church v. Humphrey*, 66 Hun., 628; 21 N. Y. Supp., 89.

the doctrine of implied trusts. Many states have gone so far as to attach a trust to all property acquired by religious associations. These trusts have sometimes proved to be a burden rather than a benefit. Instead of protecting the congregation they have prevented its growth. Some relief has been found by applying the statute of limitations for the purpose of eliminating such trusts. While it has been held, that a church trustee cannot hold adversely to the church,<sup>1</sup> except where he has unequivocally repudiated the trust,<sup>2</sup> it is quite well established that the congregation may hold adversely to the trustee where the latter is a mere dry trustee without any actual power or duty.<sup>3</sup>

But the cases do not stop here. A religious society may acquire absolute possession and title of the property, which has come to it encumbered by a trust, by defiantly diverting it to a different use or appropriating it to a different religious community.<sup>4</sup> This possession, during the period of limitation, will of course be a precarious one, subject to be disturbed at any time, by an action to enforce the trust. But after the period of limitation has expired under these circumstances adverse possession will create a new title, stripped of the trust and fully marketable, so that specific performance of a contract to take a mortgage on the same, may be obtained.<sup>5</sup>

However, to make such a possession adverse, the acts and declarations of the church must unambiguously show an

<sup>1</sup> *Krauczunas v. Hoban*, 221 Pa., 213; 70 Atl., 740; *Ebbinghaus v. Killian*, 1 Mackey, 247.

<sup>2</sup> *Church v. Newington*, 53 N. H., 595.

<sup>3</sup> *Dees v. Moss Point Baptist Church*, 17 So. (Miss.), 1; *First Baptist Church of Sharon v. Harper*, 191 Mass., 196; 77 N. E., 778. See also *Dudley v. Clark*, 164 S. W., 608.

<sup>4</sup> *Burrows v. Holt*, 20 Conn., 459, 465.

<sup>5</sup> *Rother v. Sharp St. Station*, 85 Md., 528.

intention to hold the property hostile to and clear of such trust. A declaration in the articles of incorporation of a congregation that all property of the church is vested in the corporation with full power of the latter to sell, convey, or otherwise dispose of it, will be sufficient for this purpose and will, after the necessary time has elapsed, fully clear the title.<sup>1</sup> A vote of a congregation declaring that henceforth their property shall be held for a purpose inconsistent with a Presbyterian use, and that any trust for that purpose is hereby denied and repudiated, followed by an undisturbed possession of sixty years, will accomplish the same result.<sup>2</sup> Where property is held by trustees in trust for a religious society, such trust may even be eliminated, by an absolute deed from the trustees to the society, followed by twenty years possession.<sup>3</sup>

But the statute of limitations will not be sufficient in all cases to accomplish the desired result. The possession may have been for a period shorter than that prescribed by the statute. Or the church may be unincorporated and hence incapable of taking the presumptive grant on which the doctrine of adverse possession rests. In either case the statute will not apply. Therefore the United States Supreme Court in a leading case, in which the possession of the church had been continued for some sixty years, refused to put its decision on the ground of adverse possession, saying: "Nor can any presumption of grant arise from the subsequent lapse of time; since there never has been any such incorporated Lutheran church capable of taking the donation."<sup>4</sup> Yet the court would not allow the

<sup>1</sup> *Sharp St. Station v. Rother*, 83 Md., 289; 85 Md., 528, 530.

<sup>2</sup> *Attorney General v. Federal Street Meeting House*, 69 Md., 1, 62.

<sup>3</sup> *Pine Street Congregational Society v. Weld*, 78 Mass., 570.

<sup>4</sup> *Beatty v. Kurtz*, 2 Pet., 566, 582.

property to be taken away from the church. It extended the doctrine of dedication to cover the case and thus secured to the church the full enjoyment of the property, while leaving the legal title and possibly a contingent remainder in the original owner. This brings us to the second part of this chapter.

#### DEDICATION

Originally the doctrine of dedication was confined to property used by the public as a street. A person who allowed his land to be used for a street was not permitted to reclaim it from such public use at his pleasure. Later by analogy the doctrine was extended to public squares, public cemeteries, public school grounds and the like.<sup>1</sup> Its extension to property devoted to church purposes in England, where there is an established church, which is as much a part of the machinery of government as townships, cities, and counties are with us, was not unnatural. In all these cases the purpose was a strictly public one. Public, municipal or ecclesiastical officers would assume such control over the property as was called for by the circumstances. When we come to America, however, after the early church establishments had been swept away, a different situation is presented. Church purposes in the United States are strictly private purposes.<sup>2</sup> They are, of course, of more than passing interest to the general public. In a modified sense they may even be called public purposes. Says the Missouri court in a dedication case:

It is presumed that in the nineteenth century, in a Christian land, no argument is necessary to show that church purposes are public purposes. . . . To deny that church purposes are

<sup>1</sup> *Sturmer v. County Court*, 42 W. Va., 724, 730; 26 S. E., 532; 36 L. R. A., 300.

<sup>2</sup> *Liondais v. Municipality No. 2*, 5 La. Ann., 9.

public purposes, is to argue that the maintenance, support and propagation of the Christian religion is not a matter of public concern. Our laws, although they recognize no particular religious establishment, are not insensible to the advantages of Christianity, and extend their protection to all in that faith and mode of worship.<sup>1</sup>

Though, therefore, the beneficiaries in the case of a verbal gift of land to an American church are limited and though there is no public officer to manage the property thus donated, the doctrine of dedication has been extended to such a case.<sup>2</sup>

This doctrine is put on the ground of estoppel. It is obviously unfair that a person, who has allowed his property to be used and improved by a congregation, should be allowed to assume control of it at his pleasure. It makes no difference just how this permission has been given.

A dedication may be made without writing; by acts *in pais* as well as by deed. It is not at all necessary that the owner should part with the title which he has; for dedication has respect to the possession, and not the permanent estate. Its effect is not to deprive a party of title to his land but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. The principle upon which estoppel rests is, that it would be dishonest, immoral and indecent, and in some instances sacrilegious, to reclaim at pleasure property which has been solemnly devoted to the use of the public, or in furtherance of some charitable or pious object. The law therefore will not permit any one thus to break his own plighted faith; to disappoint honest expectations thus excited, and upon which reliance has been placed. The prin-

<sup>1</sup> *Hannibal v. Draper*, 15 Mo., 634, 639.

<sup>2</sup> *Benn v. Hatcher*, 81 Va., 25, 29.

ciple is one of sound morals, and of most obvious equity, and is in the strictest sense a part of the law of the land.<sup>1</sup>

But the mere appropriation by an owner of his land to the uses of a church is not sufficient to constitute a dedication. A manufacturing company which builds a city and, as part of it, a church for the use of its working men, but which retains full control over the property, will not be deemed to have effected a dedication.<sup>2</sup> The king of Spain, who acquired property and built a church in 1792 out of the funds in the royal chest, and who thereafter managed the property and sold it in 1807 to a private purchaser, has been deemed to have conveyed a complete title to the purchaser.<sup>3</sup> Something more than a mere appropriation to church purposes is therefore necessary. There must be an unequivocal act of donation, which shows an intent of the owner to divest himself to some extent of the ownership or power of control over his property and to vest an independent interest in some other person or body. Such intention may appear from a writing with or without seal, or from a plat or may rest in whole or part on parol declarations.

Probably the most persuasive evidence of an intention of a donor to dedicate property to religious purposes will be afforded by a plat. It is elementary that streets marked on such a plat are dedicated to the public. There is no reason, since the doctrine of dedication has been extended to churches, why the same rule should not apply where some particular lot is marked so as to indicate clearly an intention to devote it to some church purpose. Thus in the leading case of *Beatty v. Kurtz*<sup>4</sup> a plat made in 1769 had

<sup>1</sup> *Hunter v. Sandy Hill*, 6 Hill (N. Y.), 407, 411, 412. See *Benn v. Hatcher*, 81 Va., 25, 29.

<sup>2</sup> *Attorney General v. Merrimac Manufacturing Co.*, 80 Mass., 586.

<sup>3</sup> *Antone v. Eslavas Heirs*, 9 Port. (Ala.), 527.

<sup>4</sup> 2 Pet., 566.

one lot marked "for the Lutheran church." The church, an unincorporated body too weak to maintain a minister, built a log schoolhouse on the lot, which was used occasionally for public worship. It also used the lot as a cemetery. The maker of the plat had repeatedly declared his willingness to give a deed to the congregation, but none in fact was ever executed. After his death his heirs claimed the lot. The Supreme Court of the United States, however, sustained an injunction issued against them on the ground that by the plat and the subsequent declarations of the owner the lot was clearly dedicated to religious purposes and could not be reclaimed. Similarly lots in a plat crossed with red lines and marked "church grounds", while on the margin of the plat was a notation that these lots were "intended for church grounds", have been held to be dedicated to public worship.<sup>1</sup>

But plats are not the only instruments which may serve as a foundation for a dedication. Deeds, though invalid for one reason or another, may be clear evidence of an intention to dedicate property to religious purposes. Deeds, void because the grantor, a married woman, had not been subjected to separate examination,<sup>2</sup> or because the grantee, a reli-

<sup>1</sup> *Hannibal v. Draper*, 15 Mo., 634. See also *Lavalle v. Strobel*, 89 Ill., 370, 382, and *St. Paul's Church v. East St. Louis*, 245 Ill., 470, in which inscriptions, "English Graveyard" and "English Church," on six lots in a plat, were held sufficiently to prove a donation of these lots to the English-speaking inhabitants of the locality. In Louisiana a plat containing a large square marked "Place de l'annunciation" on which the plan of a church clearly appeared, which plan was marked "Eglise de l'annunciation," has been held not to create a dedication, either because the purpose was not a public one, *Liondais v. Municipality No. 2*, 5 La. Ann., 9, or because the dedication had not been accepted, *Xiques v. Bujac*, 7 La. Ann., 498. The question before the Louisiana court was whether the property should be used as a common or should be divided into building lots by the heirs of the person, who had executed the plat.

<sup>2</sup> *Deepwater Railroad Co. v. Hanaker*, 66 W. Va., 136; 27 L. R. A., 388; 66 S. E., 104.



gious society, was unincorporated,<sup>1</sup> may therefore be effective as showing an intention to donate the property for religious purposes, and as estopping the owner from reclaiming it. Such a dedication may even attach to an absolute deed to individuals, where the consideration for the deed was raised by voluntary subscriptions, the understanding all the time being that the church was to be the beneficiary.<sup>2</sup>

Nor is even an instrument under seal necessary for this purpose. An ordinary written contract may be fully sufficient to establish a dedication. Thus a subscription paper subscribed by a number of contributors, one of whom donated a piece of land, on which to build the church, while the others donated money with which to build it, will be effective to prove a dedication of the land in question.<sup>3</sup>

In all the cases so far considered there had been a writing of some kind. This, however, is not necessary. A dedication for the use and benefit of a religious society may be made wholly by parol.<sup>4</sup> An owner of land who represents to a congregation that he will donate the land, provided they build a church on it, will therefore, after the church is built, not be permitted to reclaim the land, though no deed nor written contract of any kind has been executed.<sup>5</sup>

The question whether an acceptance of a dedication is necessary has given rise to a conflict in the authorities. The necessity of such acceptance has been denied by the Missouri court and affirmed by the Louisiana court, both in cases in-

<sup>1</sup> Callson *v.* Hope, 75 Fed., 758.

<sup>2</sup> McKinney *v.* Griggs, 68 Ky., 401; 96 Am. Dec., 360.

<sup>3</sup> Baptist Church *v.* Presbyterian Church, 57 Ky., 635.

<sup>4</sup> Hollar *v.* Harney, 4 Ky. Law Rep., 988; McKinney *v.* Griggs, 68 Ky. 401, 405; 96 Am. Dec., 360.

<sup>5</sup> Atkinson *v.* Bell, 18 Tex., 474; Ludlow *v.* St. John's Church, 124 N. Y. Supp., 75.

volving a dedication by designation on a plat.<sup>1</sup> Since all the cases on dedication lay great stress on the subsequent possession of the beneficiaries and many of these cases put their decision directly on the ground of estoppel, there can be no doubt that the decision of the Louisiana court is the correct solution of the difficulty. Without an acceptance of the dedication it is impossible to apply the doctrine of estoppel to the situation. It is not unfair that a dedicator should repossess himself of the property which he has vainly offered as a gift. The beneficiaries must at least have accepted the gift before they can have any equity as against him. It follows that even where a dedication was accepted for a time and then rejected, the full property rights revert in the dedicator, unless the rejection has been by only part of the beneficiaries. Thus where property is dedicated to all religious societies of the locality and four of these societies build churches of their own and cease to use the dedicated property, they will be treated as having renounced all their rights in it and such implied renunciation will be as effective as if it had been expressed in the most solemn form.<sup>2</sup>

What is the proper remedy in case of disturbance of dedicated property? It has been held that, while an express trust excludes a dedication,<sup>3</sup> a dedication may create a charitable trust.<sup>4</sup> There is at any rate a strong resemblance between a dedication and a trust in the separation of the legal and equitable title that results under both.<sup>5</sup> Judges therefore sometimes use the word dedication in speaking

<sup>1</sup> *Xiques v. Bujac*, 7 La. Ann., 498; *Hannibal v. Draper*, 15 Mo., 634.

<sup>2</sup> *Baptist Church of Lancaster v. Presbyterian Church*, 57 Ky., 635.

<sup>3</sup> *Price v. Methodist Church*, 4 Ohio, 514, 545.

<sup>4</sup> *Curd v. Wallace*, 37 Ky. (7 Dana), 190; 30 Am. Dec., 85.

<sup>5</sup> *Hamline v. Webster*, 76 Atl. (Me.), 163; *Beaver v. Filson*, 8 Pa., 327; *Ludlow v. St. John's Church*, 124 N. Y. Supp., 75.

of trusts and the word trust in speaking of dedication. The situation in the two cases being so similar and the estoppel in dedication being an equitable estoppel, it follows that the most appropriate remedy is by an injunction or by other equitable relief. Such, accordingly, has been the form in which these actions have come before the various courts beginning with the case of *Beatty v. Kurtz*.<sup>1</sup> Says Story, J., in this case: "The remedy must be sought, if at all, in the protecting power of a court of chancery, operating by its injunction to preserve the repose of the ashes of the dead and the religious sensibilities of the living."

To sum up: The ordinary method by which church organizations in the United States acquire real estate is by deed or will. Where these fail, either because they are void, or wholly non-existent, the possession of property by a congregation will nevertheless be upheld, if it rests on any meritorious ground whatsoever. In case the congregation is incorporated and has been in possession sufficiently long, the right of the original owner will be held to be barred by adverse possession and the church corporation will be vested with the full title. On the other hand, where the church is unincorporated or its possession has been too short for the purposes of the statute, the original owner, if he has in any manner evidenced an intention to donate the property, will, by such acts of dedication, be held estopped to dispute the possession of the church. He will, however, retain the legal title and even a contingent remainder in the equitable title.

<sup>1</sup>2 Pet., 566.

## CHAPTER XV

### PEW RIGHTS

THERE is perhaps no separate subject of litigation in the United States where the financial consideration directly involved is smaller and the amount of bitter litigation is larger than that relating to pews. This is due to the fact that the owners of pews have frequently relied on their pew rights to prevent some change in the church edifice of which their pew was a part. A great number of pew cases have in consequence come before the various courts. Almost every possible angle of the matter has been investigated and adjudicated. There is hardly a contention that can be raised that has not at one time or another received judicial consideration.

It would seem on first thought that the English cases on this subject would be of substantial assistance to the American courts in reaching their conclusions. This, however, is an entirely erroneous conception. "Not much light is to be got from decisions as to the rights of pew holders in England and elsewhere, where different laws, usages and systems of religious administration have been established."<sup>1</sup> Such difference affects the pew rights in the two countries to such an extent that cases decided in one are of little, if any, help in deciding cases in the other.

It follows that the law on this subject in the United States is a distinctly American product. It represents the applica-

<sup>1</sup> *Aylward v. O'Brian*, 160 Mass., 118, 125; 35 N. E., 313; 22 L. R. A., 206.

tion of the ordinary rules of the common law to a distinctly American situation. In the investigation of this matter the English law can be of benefit only by way of contrast. The law, as slowly worked out by the decisions of the courts, is an integral and even typical part of the exclusively American legal system, which defines the civil status of the American churches. As such, it will be treated in the following pages.

The word pew is said to be derived from the Dutch word "puye" and to signify an enclosed seat in a church.<sup>1</sup> A pew right, therefore, is an exclusive right to occupy a certain part of a meeting house, for the purpose of attending upon public worship, and for no other purpose.<sup>2</sup> To constitute a church in which the pews are rented as distinguished from a "free church" it is not necessary that rights in all the seats be owned by individuals. The majority of the pews may be free without changing the character of the church to that of a free church.<sup>3</sup> It is necessary, however, that seats, to constitute pews, be attached to the building in such a way as to become part of it. A loose seat or bench belonging to an individual in which he has been permitted to worship for many years and which on special occasions has been removed by the trustees of the church will therefore not be recognized as a pew in any sense.<sup>4</sup>

The acquisition of pew rights in the British Isles is closely related to and interwoven with the system of church establishment which is in vogue in that country.

In England, before the Reformation, the body of the church was common to all parishioners. After the Reformation a

<sup>1</sup> *Brumfitt v. Roberts*, L. R., 5 C. P., 225.

<sup>2</sup> *Daniel v. Wood*, 18 Mass., 102, 104.

<sup>3</sup> *Torbert v. Bennett*, 24 Wash. Law Rep., 149.

<sup>4</sup> *Niebuhr v. Piersdorf*, 24 Wis., 316.

practice arose to assign particular seats to individuals. This assignment of seats was made by the ordinary, by a faculty which was a mere license, and was personal to the licensees; and all disputes concerning it were settled by the spiritual courts.<sup>1</sup>

In addition to this faculty, pews in England may be acquired by allotment on the part of the ministers or churchwardens and by prescription. "In the last case the right is appurtenant to a dwelling house and in the others it is merely personal and not transferable or descendible."<sup>2</sup> In any case every parishioner has a right to a seat in the church. It is "the duty of the churchwardens to distribute them in the most convenient way so as to give each parishioner a seat."<sup>3</sup> Since all residents in a certain district are presumptively members of the English church they are thus by mere residence entitled to pew rights in the building maintained in that district by the established church.

It is evident that this system of parceling out pew rights can have no place in America where there is no established church and where church membership with its privileges and burdens is voluntary in every sense of the word. It follows that pew rights are not thrust on a person by virtue of his forced membership in a church, but are a matter of contractual arrangement between the owners of the church building and the occupants of its seating privileges. A contract of some kind is therefore the basis of American pew rights, just as mere membership in the established church is the basis for analogous rights in England. Pew rights in America are therefore all "a matter of bargain, and entirely conventional between the trustees and those in-

<sup>1</sup> *Livingston v. Trinity Church*, 45 N. J. L., 230, 232; 28 Abb. L. J., 111.

<sup>2</sup> *Church v. Well's Executors*, 24 Pa. St., 249.

<sup>3</sup> In the matter of the Brick Presbyterian Church, 3 Edw. Ch., 155, 158.

dividuals who wish to become hearers or members of the society and to have seats in the church.”<sup>1</sup>

The form which this contract usually assumes is that of a deed or certificate issued by the owners of the building to the applicant for pew privileges, though the same result may also be achieved by an allotment, by vote or otherwise, of the pews among the various subscribers to the funds of the church.<sup>2</sup> In granting deeds of pews it is proper to insert such conditions against alienation as to prevent an indiscriminate sale and retain some right to elect and determine with whom the owners will associate and who may associate with them. Otherwise, a number of people of another denomination finding pews to be low in price might purchase them, become a majority, and turn the proper congregation out of its own house.<sup>3</sup> The doctrine that conditions against alienation in a conveyance in fee simple are void will therefore not be applied to conveyances of pews, since such conditions are necessary to preserve the integrity of the society.<sup>4</sup> While a New York court has held an absence of two years on the part of a pew owner not to be a leaving within the meaning of a condition which provided that the pew was to be tendered back in such a case to the society,<sup>5</sup> the Massachusetts court in a case where the owner had left four years before but had kept up his payments for some time, has held that he had forfeited his pew and that the society by receiving the payment had waived its right to declare a forfeiture only *pro tanto*.<sup>6</sup>

<sup>1</sup> In the matter of the Brick Presbyterian Church, 3 Edw. Ch., 155, 159.

<sup>2</sup> O'Hear *v.* De Goesbriand, 33 Vt., 593; 80 Am. Dec., 653.

<sup>3</sup> Attorney General *v.* Federal Street Meeting House, 69 Mass., 1, 47, 48.

<sup>4</sup> French *v.* Old South Society in Boston, 106 Mass., 479: See Heeney *v.* St. Peter's Church, 2 Edw. Ch., 608, 612.

<sup>5</sup> Abernethy *v.* Church of the Puritans, 3 Daly, 1, 7.

<sup>6</sup> Crocker *v.* Old South Society, 106 Mass., 489.

Next in importance to the right to declare a pew forfeited on the breach of certain conditions is the right, usually reserved in pew deeds, to tax the same so as to raise the necessary funds to carry on the work of the church. Where a pew owner, by accepting the deed, has consented to such a clause, he cannot dispute the power of the society to levy such a tax.<sup>1</sup> Where he has obligated himself to "pay the annual sum of ten per cent on the original appraisement of the pew and whatever else shall be further assessed thereon" he cannot avoid an assessment of fifteen per cent.<sup>2</sup> Nor will such an assessment be regarded as an incumbrance within the meaning of a deed of a one-half interest in a pew granted by the pew holder to another.<sup>3</sup> He can, however, insist that the resolution to tax be in accordance with the constitution of the society;<sup>4</sup> that the tax be imposed by such a vote as is prescribed by such constitution;<sup>5</sup> that it be raised for the purpose defined in the deed and for none other,<sup>6</sup> and that the church services as originally contemplated be continued.<sup>7</sup> He may refuse payment where a tax is illegally assessed,<sup>8</sup> and may when such payment has been made, recover it.<sup>9</sup> He does not, however, come under any personal liability for a refusal to pay a tax legally assessed. "A pew owner is not liable in *personam* unless there be some special ground from which to infer a contract or promise to

<sup>1</sup> *Mussey v. Bulfinch Street Society*, 55 Mass., 148; *Curtis v. Quincy First Congregational Society*, 108 Mass., 147.

<sup>2</sup> *Abernethy v. Puritan Society of Christians*, 3 Daly, 1.

<sup>3</sup> *Spring v. Tongue*, 9 Mass., 28.

<sup>4</sup> *Perrin v. Granger*, 33 Vt., 101.

<sup>5</sup> *Perrin v. Granger*, 30 Vt., 595.

<sup>6</sup> *First Methodist Episcopal Society v. Brayton*, 91 Mass., 248; *Mayberry v. Mead*, 80 Me., 27, 12 Atl., 635.

<sup>7</sup> *Ebaugh v. Hendel*, 5 Watts, 43; 30 Am. Dec., 291.

<sup>8</sup> *First Parish v. Dowe*, 85 Mass., 369.

<sup>9</sup> *Second Universalist Society v. Cooke*, 7 R. I., 69.



pay.”<sup>1</sup> The only remedy of the owner of the building in such case will be to declare a forfeiture of the pew right and sell it.<sup>2</sup>

The conditions so far considered are express conditions. They have their foundation in some clause of the instrument by which the pew right is granted away. It must not, however, be supposed that they are the only terms to be found in such instruments. On the contrary, the law unless controlled by clear and explicit clauses to the contrary will import certain implied terms and conditions into such instruments. Certain changes in church property are certain to occur both in the course of human events and through the action of the elements. The congregation may outgrow the church edifice or may disintegrate completely. The building may be suddenly destroyed by fire, wind or water or may gradually succumb to the relentless wear and tear of time. Express provisions for such a change will be found in only very few pew deeds. Yet the corporeal property upon which the pew rights depend has in such cases been practically destroyed. If

the house becomes wholly ruinous, unfit for a place of worship, and cannot be repaired, so as to be useful and convenient for that purpose, it is evident there is no beneficial interest left in the pew holder, for which he can claim a compensation. His right to sit in a house without doors and windows, and when he cannot be protected from the inclemencies of the weather must be wholly valueless.<sup>3</sup>

So also is his right to sit in a house in which no services are conducted because the congregation has disappeared, or

<sup>1</sup> *St. Paul's Church v. Ford*, 34 Barb., 16.

<sup>2</sup> *Manro v. St. John's Parish*, 4 Cr. C. C., 116; *Fed. Cas. No. 9,313*; *Hebron First Presbyterian Church v. Quackenbush*, 10 Johns., 217.

<sup>3</sup> *Kellogg v. Dickenson*, 18 Vat., 266, 274.

has been forced by its own growth to repair to more adequate quarters, of no practical value. Under such circumstances the law therefore implies a condition subsequent according to which the pew holder's rights are terminated without more ado, so far at least as the owner of the house is concerned. Where, therefore, the edifice has so far decayed as to become unfit for the purposes for which it was erected,<sup>1</sup> or in addition to being ruinous has been outgrown by the congregation,<sup>2</sup> and its unfitness for public services is permanent and not merely temporary,<sup>3</sup> it may be sold outright to some third person,<sup>4</sup> or may be pulled down by its owner, but not by anyone else,<sup>5</sup> and the materials or money realized used for the construction of a new building without making any compensation to the pew holders.<sup>6</sup> The same rule applies where the building has been destroyed by fire,<sup>7</sup> or on account of the disintegration of the congregation has stood vacant for a long time. "There seems little difference in principle between the decay of the building rendering the further holding of services impracticable, and the decadence of the society, rendering payment for conducting the services impossible of performance."<sup>8</sup> The congrega-

<sup>1</sup> *Wentworth v. Canton First Parish*, 20 Mass., 344; *Kellogg v. Dickenson*, *supra*.

<sup>2</sup> *Heenev v. St. Peter's Church*, 2 Edw. Ch., 608.

<sup>3</sup> *Gorton v. Hadsell*, 63 Mass., 508.

<sup>4</sup> *Wheaton v. Gates*, 18 N. Y., 395; *Sohier v. Trinity Church*, 109 Mass., 1. In *Van Honton v. First Reformed Dutch Church*, 17 N. J. Eq., 126, the pew deed provided that the pew holders should be entitled to the proceeds of the lot in case the church was destroyed by fire. It was held that they were entitled to nothing since the church was not destroyed but was sold outright.

<sup>5</sup> *Howe v. Stevens*, 47 Vt., 262.

<sup>6</sup> *Kellogg v. Dickinson*, *supra*.

<sup>7</sup> *Witthaus v. St. Thomas Church*, 146 N. Y. Supp., 279.

<sup>8</sup> *Huntington v. Ramsden*, 92 Atl. (N. H.), 336, 338.

tion may even abandon the old church entirely and build a new one,<sup>1</sup> or remove it to a new location<sup>2</sup> without laying itself open to an action for damages by the pew holders. It may, where internal changes in the edifice become necessary, make them,<sup>3</sup> even as against pew holders who have taken their pews as a compensation for building the edifice,<sup>4</sup> and though thereby certain pews are removed farther from the pulpit and decreased in value,<sup>5</sup> without giving the pew holder a right to complain.

Whether the rights of a pew holder are real or personal property depends upon the instrument under which he holds and the law under which such instrument is executed. Where he holds under a mere lease for a term of years his rights on ordinary principles cannot be anything else but personal property.<sup>6</sup> Where the statutes of the state in which the contract is made declare such interest to be personal property, as was the case in Massachusetts in regard to Boston before 1855 and is such in regard to the entire state since that time, the same result will follow.<sup>7</sup> Even

<sup>1</sup> *Fassett v. Boylston First Parish*, 36 Mass., 361; *In re Reformed Church of Saugerties*, 16 Barb., 237.

<sup>2</sup> *Fisher v. Glover*, 4 N. H., 180.

<sup>3</sup> *Gay v. Baker*, 17 Mass., 435; 9 Am. Dec., 159; *Voorhees v. Amsterdam Presbyterian Church*, 8 Barb., 135; 5 How. Pr., 58; affirmed 17 Barb., 103.

<sup>4</sup> *White v. Trustees*, 3 Lans., 477.

<sup>5</sup> *Bronson v. St. Peter's Church*, 7 N. Y. Leg. Obs., 361.

<sup>6</sup> *Livingston v. Trinity Church*, 45 N. J. L., 230, 237; 28 Abb. L. J., 111; *Johnson v. Corbett*, 11 Paige, 265, 276. It has been doubted whether pew rights can be termed tenancies. *Huntington v. Ramsden*, *supra*. For an example of such a lease, see *Gifford v. Syracuse First Presbyterian Society*, 56 Barb., 114.

<sup>7</sup> *Aylward v. O'Brian*, 160 Mass., 118; 35 N. E., 313; 22 L. R. A., 206. Similar statutory provisions exist in some other states. See the statutes of the various states.

without such a statute the Pennsylvania court while admitting that pew rights are "a sort of interest in real estate" has classified them as personal property on the ground that they cannot well be transferred or transmitted generally, are scarcely divisible among heirs and can hardly be said to be the subject of an action of partition or ejectment or of a decree of sale by the probate court for the payment of debts.<sup>1</sup>

It is obvious that the underlying reason for these statutes and the decision of the Pennsylvania court is the small value of these rights on the one hand and the greater ease with which they can be transferred if they are classed as personal property. Since the stringent rules which formerly hampered real estate transfers have been generally relaxed, it is not surprising that the great majority of states still treat such rights as real estate, though it is not overlooked that a pew does not "partake of all the properties of real estate, or entitle its owner to all the rights of a freeholder, or subject him to all the liabilities of such citizen."<sup>2</sup> It has therefore been said that the interest in a pew created by a lease in perpetuity is an interest "in realty and the lessees or pew owners take title to their pews as real property."<sup>3</sup> No convention of the parties to the pew deed can change this result. An instrument in which the pew rights are described as "chattels and effects" will therefore fail to convert them into personal property.<sup>4</sup> Pew rights have therefore been declared to be real estate within the meaning of the New

<sup>1</sup> *Church v. Well's Executors*, 24 Pa. St., 249; *Curry v. First Presbyterian Church*, 2 Pitts., 40. See also, *Livingston v. Trinity Church*, 45 N. J. L., 230, 237; 28 Abb. L. J., 111.

<sup>2</sup> *Randolph, J., in Presbyterian Church v. Andrews*, 21 N. J. L., 325, 331.

<sup>3</sup> *St. Paul's Church v. Ford*, 34 Barb., 16, 18.

<sup>4</sup> *Deutch v. Stone*, 27 Wkly. L. Bul. (Ohio), 20.

York Religious Corporation Act,<sup>1</sup> the Statute of Limitations,<sup>2</sup> and the Statute of Frauds,<sup>3</sup> and will, on the death of the owner, pass to his heirs,<sup>4</sup> subject to his widow's dower rights.<sup>5</sup> It follows that trespass is a proper remedy for disturbing a pew;<sup>6</sup> that specific performance of a contract to convey it may be had;<sup>7</sup> that an action involving it cannot be brought in a justice court;<sup>8</sup> that an execution issued out of a justice court will not affect it;<sup>9</sup> and that no act of notoriety, such as is required in regard to personal property, is necessary in attaching it.<sup>10</sup>

But while the status of pew rights as real estate is thus generally firmly established it must not be forgotten that a pew is "property of a peculiar nature derivative and

<sup>1</sup> *Vilie v. Osgood*, 8 Barb., 130; *Vorhees v. Presbyterian church of Amsterdam*, 8 Barb., 135; 5 How. Pr., 58; affirmed 17 Barb., 103; *In re Reformed Church at Saugerties*, 16 Barb., 237 (N. Y.); *Montgomery v. Johnson*, 9 How. Pr., 232. But see, *Freligh v. Platt*, 5 Cow., 494; *Bronson v. St. Peter's Church*, 7 N. Y. Leg. Obs., 361.

<sup>2</sup> *Price v. Lyon*, 14 Conn., 279; *Brattle Square Church v. Bullard*, 43 Mass., 363; *Aylward v. O'Brian*, 160 Mass., 118; 35 N. E., 313; 22 L. R. A., 206.

<sup>3</sup> *Price v. Lyon*, *supra*; *Vilie v. Osgood*, *supra*; *Hodges v. Green*, 28 Vt., 358; *Barnard v. Whipple*, 29 Vt., 401; 70 Am. Dec., 422; *First Baptist Church of Ithaca v. Bigelow*, 16 Wend., 28, 30.

<sup>4</sup> *Bates v. Sparrell*, 10 Mass., 323; *Johnson v. Corbett*, 11 Paige, 265; *McNabb v. Pond*, 4 Brad. Surr., 7.

<sup>5</sup> *Bronson v. St. Peter's Church*, 7 N. Y. Leg. Obs., 361; *Howe v. School District*, 43 Vt., 282, 291.

<sup>6</sup> *Jackson v. Rounseville*, 46 Mass., 127; *Day v. Baker*, 17 Mass., 435; *Union Meeting House v. Rowell*, 66 Me., 400. See *Presbyterian Church v. Andrews*, 21 N. J. L., 325; *White v. Marshall*, Harp. (S. C.), 122.

<sup>7</sup> *Freligh v. Platt*, 5 Cow., 494.

<sup>8</sup> *Presbyterian Church v. Andrews*, *supra*.

<sup>9</sup> *Deutch v. Stone*, 27 Wkly. Law Bull., 20 (Ohio).

<sup>10</sup> *Perrin v. Leverett*, 13 Mass., 128.

dependant,"<sup>1</sup> which is separate and distinct from the fee,<sup>2</sup> is not subject to the same rules and principles as the pew owner's property in his farm would be,<sup>3</sup> and amounts to only a limited usufructuary interest<sup>4</sup> or an incorporeal hereditament "in the nature of an easement."<sup>5</sup> The pew holder has "a right issuing out of a thing corporate or concerning or annexed to or exercisable with the same." His estate eludes our corporeal senses and like the cardinal virtues exists but cannot be seen or handled.<sup>6</sup> He does not own the material of which his pew is composed,<sup>7</sup> has no interest in the space above or below it,<sup>8</sup> and no title to the church edifice or to the land upon which it stands.<sup>9</sup> He cannot put labels on his pew,<sup>10</sup> box it up with boards,<sup>11</sup> remove it,<sup>12</sup> change or decorate it,<sup>13</sup> or use it for purposes

<sup>1</sup> Attorney General *v.* Federal Street Meeting House, 3 Gray, 1, 45, 47.

<sup>2</sup> City Bank *v.* McIntyre, 8 Rob., 467, 470; Woodworth *v.* Payne, 74 N. Y., 196; 30 Am. Rep., 298; affirming 5 Hun., 551; Kellogg *v.* Dickinson, 18 Vt., 266; *In re* Reformed Church of Saugerties, 16 Barb., 237.

<sup>3</sup> Gay *v.* Baker, 17 Mass., 435, 438.

<sup>4</sup> Heeney *v.* St. Peter's Church, 2 Edw. Ch., 608, 612; Freligh *v.* Platt, *supra*; Voorhees *v.* Amsterdam Presbyterian Church, 17 Barb., 103, 109.

<sup>5</sup> Presbyterian Church *v.* Andrews, 21 N. J. L., 325, 328. See Hartland Union Meeting House *v.* Rowell, 66 Me., 400; Solomon *v.* Congregation B'nai Jeshurun, 49 How. Prac., 263.

<sup>6</sup> Marshall *v.* White, 16 S. C., 122.

<sup>7</sup> Cooper *v.* Sandy Hill First Presbyterian Church, 32 Barb., 222, 230; Kellogg *v.* Dickinson, *supra*; Wentworth *v.* Canton First Parish, 20 Mass., 344; Gay *v.* Baker, 17 Mass., 435; 9 Am. Dec., 150.

<sup>8</sup> Presbyterian Church *v.* Andrews, 21 N. J. L., 325, 339; Gay *v.* Baker, *supra*.

<sup>9</sup> Abernethy *v.* Church of the Puritans, 3 Daly 1; First Baptist Church *v.* Witherell, 3 Paige, 296; 24 Am. Dec., 223.

<sup>10</sup> Howard *v.* Hayward, 51 Mass., 408.

<sup>11</sup> Jackson *v.* Rounseville, 46 Mass., 127.

<sup>12</sup> Antrim First Presbyterian Society *v.* Bass, 68 N. H., 333, 337; 44 Atl., 485.

<sup>13</sup> Church *v.* Well's Executors, 12 Harris, 249.

incompatible with its nature,<sup>1</sup> such as interrogating the clergyman or interrupting the services.<sup>2</sup> He cannot "set up a grocery, or a grog shop or apply it even to any other useful purpose, or shut it up and pervert the use of it to anybody."<sup>3</sup> He cannot prevent the leasing of the church to a convention,<sup>4</sup> prevent it from changing its preaching,<sup>5</sup> or affect its policy in the seating of the sexes.<sup>6</sup> Where the church property is held subject to a condition subsequent he cannot even enjoin the owner from performing acts which will make such condition effective.<sup>7</sup> His right to use the pew is so strictly limited to the time when services are conducted that he subjects himself to an action of trespass if he enters it at any other time.<sup>8</sup> His rights thus are not absolute or unlimited but subordinate to and qualified by the superior rights of the owner of the building,<sup>9</sup> and may even be affected by by-laws passed after he has acquired his right.<sup>10</sup>

Whether or not a congregation can abolish pew rights altogether and transform itself into a "free church" without making compensation to the pew owners is a question

<sup>1</sup> *Freligh v. Platt*, 5 Cow., 494; *Daniel v. Wood*, 18 Mass., 102, 104.

<sup>2</sup> *Wall v. Lee*, 34 N. Y., 141, 149.

<sup>3</sup> *Curry v. First Presbyterian Church*, 2 Pitts., 40, 42.

<sup>4</sup> *Warner v. Bowdoin Square Baptist Society*, 148 Mass., 400; 19 N. E., 403.

<sup>5</sup> *Trinitarian Church v. Union Congregational Society*, 61 N. H., 384.

<sup>6</sup> *Solomon v. Congregation B'nai Jeshurun*, 49 How. Pr., 263.

<sup>7</sup> *Erwin v. Hurd*, 13 Abb. N. C., 91.

<sup>8</sup> *Leeds First Baptist Society v. Grant*, 59 Me., 245.

<sup>9</sup> *Perrin v. Granger*, 33 Vt., 101; *Kellogg v. Dickinson*, 18 Vt., 266; *In re Reformed Church of Saugerties*, 16 Barb., 237; *Abernethy v. Church of Puritans*, 3 Daly, 1; *Antrim First Presbyterian Society v. Bass*, *supra*.

<sup>10</sup> *Curry v. First Presbyterian Congregation*, 2 Pitts., 40.

which, curiously enough, has not been directly decided. Considering pew rights as resting on contract it would seem that the conclusion must be that no such action can legally be taken. The New Jersey court, however, has reached a different conclusion in a case in which the right of a congregation to declare the pew of an expelled member forfeited without any clause of the pew deed to that effect, was in question. In order to justify its decision, however, it has in this solitary instance harked back to the English law and based its decision on the British and not on the American doctrine in regard to pews.<sup>1</sup> However much this decision may be in accord with the English law and however much such a result may be desired and desirable, the conclusion that the case is out of line with the other American cases and is not the law, except possibly in New Jersey, is unavoidable and is apparent from the reasoning which the court adopts to support its decision.

It has been seen that a pew holder's rights are qualified, subsidiary and dependent. It must not, however, be supposed that they are shadowy or insubstantial. They are, on the contrary, "substantial and material rights,"<sup>2</sup> of which he cannot be despoiled. In some respects they are even superior to those of the congregation. The congregation must exercise its general ownership in subordination to them and be restricted to the general purposes for which churches are erected.<sup>3</sup> While, therefore, in a proper case, a church edifice may be abandoned, removed, sold, taken down or altered without giving the pew owner any right to complain or any claim for damages, there is a wide difference between cases of necessity and cases where the con-

<sup>1</sup> *Livingston v. Trinity Church*, 45 N. J. L., 230; 28 Abb. L. J., 111.

<sup>2</sup> *Howe v. School District*, 43 Vt., 282, 291.

<sup>3</sup> *Kimball v. Second Parish of Rowley*, 41 Mass., 247, 249.



gregation acts from motives of mere expediency or convenience.

If for convenience or from expediency, and not from necessity, the pew is destroyed, the owner has a right to indemnity. Neither the corporation, nor a majority of the congregation, can, for mere purposes of improvement or embellishment, deprive the pew owner of his property; certainly not without compensation.<sup>1</sup>

In a case where a congregation acts from motives of expediency or convenience its rights over the pews are analogous to the power of eminent domain exercised by the state over the property of its citizens. The pew may be taken down but only on condition that the pew holder be compensated for his loss.<sup>2</sup> "Though the parish have a right to take down a meeting house which may be in good condition in order to build one in better taste or of larger dimensions, yet in such case they must make compensation."<sup>3</sup> This compensation may be in the form of money<sup>4</sup> or in the form of a new pew. In the latter case the new pew should correspond in location and value to the old one,<sup>5</sup> but need not be of the identical number<sup>6</sup> unless the old pew deed expressly so provides.<sup>7</sup>

But the most striking illustration of the superior rights of pew holders is afforded by cases where execution is levied

<sup>1</sup> *Voorhees v. Amsterdam Presbyterian Church*, 17 Barb., 103, 109.

<sup>2</sup> *Cooper v. Sandy Hill First Presbyterian Church*, 32 Barb., 222, 229, and cases cited.

<sup>3</sup> *Howard v. North Bridgewater First Parish*, 24 Mass., 138, 139.

<sup>4</sup> *Kimball v. Rowley*, 41 Mass., 247.

<sup>5</sup> *Mayer v. Temple Beth El*, 23 N. Y. Supp., 1013; 52 St. Rep., 638.

<sup>6</sup> *Colby v. Northfield and Tilton Congregational Society*, 63 N. H., 63.

<sup>7</sup> *Samuelson v. Congregation Kol Israel Aushi Poland*, 65 N. Y. Supp., 192; 52 App. Div., 287; 99 St. Rep., 192.

against a church building or a mortgage is sought to be foreclosed against it. While pews granted after the execution and delivery of a mortgage on the building are of course subject to the mortgage,<sup>1</sup> a different rule applies where they are granted before such time. In such case the pew holders have "an individual interest in the meeting house"<sup>2</sup> which is distinct from that represented by the owners and is not embraced in the mortgage. "Each pew holder has an undivided right in the use and enjoyment of the church, and a distinct and separate right to the use of his pew."<sup>3</sup> When therefore such a mortgage is foreclosed the rights of the pew holders must be respected. The creditor cannot convert the house into a place of traffic, as by doing so he would trample on the rights of the pew holders. He must preserve it in its present condition and can at most satisfy his debt by taking over its rents and profits.<sup>4</sup> In regard to general creditors of the owners of the house the pew owner is in every case entitled to a preference,<sup>5</sup> while a judgment creditor, whose judgment is subsequent to the granting of the pews, is in no better position. Such creditor cannot levy execution against the building,<sup>6</sup> nor any part of it, such as the pulpit, since the pew holders take with the pews that which renders them valuable.

The sellers can have no right to take away the windows of the meeting house, or the walls, or the pulpit or the singers' loft. The proprietors of pews are entitled to various privileges,

<sup>1</sup> *Severance v. Whittier*, 24 Me., 120.

<sup>2</sup> *Bigelow v. Middleton Congregational Society*, 11 Vt., 283, 287. This was said by the court in regard to an execution.

<sup>3</sup> *New Orleans City Bank v. McIntyre*, 8 Rob., 467, 472.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Montgomery's Appeal*, 1 Pitts., 348.

<sup>6</sup> *Bigelow v. Middleton Congregational Society*, *supra*.

such as passing through the aisles, being addressed from the pulpit, etc. There is no property in the pulpit distinct from the right of enjoying the house for public worship.<sup>1</sup>

It follows that the rights of those in whose name a church is held are legal in their nature, while the pew holders are the equitable owners<sup>2</sup> and as such entitled to enjoin an attempted conversion of a church building into a schoolhouse.<sup>3</sup>

The relations of the pew holders toward each other deserve a passing notice. While several persons who are tenants in common of a church edifice may also be the owners of the pews of the church,<sup>4</sup> and while a single pew may be owned by several persons as tenants in common of that pew,<sup>5</sup> it is well established that the ownership by individuals of separate pews does not make them tenants in common of the church edifice<sup>6</sup> so as to enable them to join in an equitable action.<sup>7</sup> The owners of pews "hold and possess their particular seats in severalty, in subordination to the more general right of the trustees in the soil and freehold."<sup>8</sup> Each pew owner therefore is the absolute owner of his particular pew right and hence may freely sue the owner

<sup>1</sup> *Revere v. Gannett*, 18 Mass., 169.

<sup>2</sup> *Craig v. Franklin County*, 58 Me., 479, 496; *Attorney General v. Federal Street Meeting House*, 3 Gray, 1, 45, 47; *Massachusetts Baptist Missionary Society v. Bowdoin Square Baptist Society*, 212 Mass., 198, 203; *Sohier v. Trinity Church*, 109 Mass., 1, 20; *Small v. Cahoon*, 93 N. E. (Mass.), 588.

<sup>3</sup> *Howe v. School District*, 43 Vt., 283.

<sup>4</sup> *North Bridgewater Second Congregational Society v. Waring*, 41 Mass., 304.

<sup>5</sup> *Murray v. Cargill*, 32 Me., 517.

<sup>6</sup> *Craig v. Franklin County*, *supra*; *St. Paul's Church v. Ford*, 34 Barb., 16.

<sup>7</sup> *Cooper v. Sandy Hill Presbyterian Church*, 32 Barb., 222.

<sup>8</sup> *Shaw v. Beveridge*, 3 Hill, 26, 27.

of another pew in any form of action applicable to the circumstances.<sup>1</sup>

In regard to the proper remedy for disturbing a pew, the courts have declined to allow the use of such extraordinary remedies as mandamus<sup>2</sup> and injunction,<sup>3</sup> and have left the complainant to the ordinary remedies provided by the common law. In considering these remedies, however, they have reasoned differently and have in consequence arrived at different results. Perhaps the majority of the courts have adopted the view that trespass is the proper remedy on the ground that so long as pews are considered in point of law as real estate there is no reason why the form of action given by the common law to redress a wrong done to the right of possession of real estate is not the legal and proper remedy.<sup>4</sup> Other courts, however, have refined a little more deeply, pointing out that a pew right, though it is real estate, has no actual substantial existence, is incapable of manual possession and cannot be invaded by physical force and that for this reason an action on the case is the proper remedy.<sup>5</sup> These considerations make it clear that this question is not merely close to the line that separates trespass from case but actually occupies the zone formed by the

<sup>1</sup> O'Hear *v.* De Goesbriand, 33 Vt., 593; 80 Am. Dec., 653.

<sup>2</sup> Commonwealth *v.* Rosseter, 2 Binney, 360; 4 Am. Dec., 451; Crocker *v.* Old South Society in Boston, 106 Mass., 489.

<sup>3</sup> Cooper *v.* First Presbyterian Church, *supra*; Sohier *v.* Trinity Church, *supra*.

<sup>4</sup> Jackson *v.* Rounseville, 46 Mass., 132; Shaw *v.* Beveridge, 3 Hill, 26; 38 Am. Dec., 616; Kellogg *v.* Dickinson, 18 Vt., 266; O'Hear *v.* De Goesbriand, 33 Vt., 593; 80 Am. Dec., 653; Howe *v.* Stevens, 47 Vt., 262; Jones *v.* Town, 58 N. H., 462; 42 Am. Rep., 602; Union Meeting House *v.* Rowell, 66 Me., 400.

<sup>5</sup> Marshall *v.* White, Harp., 122; Perrin *v.* Granger, 33 Vt., 101; Presbyterian Church *v.* Andrus, 21 N. J. L., 325; Daniel *v.* Wood, 18 Mass., 102.

overlapping of these boundary lines at certain points. It has therefore been said that "the owner of the pew may maintain case, trespass, or ejection, according to the circumstances, if he is improperly disturbed in the legitimate exercise of his legal right to use his pew."<sup>1</sup> On the whole it will be well to avoid all difficulty by having a count both in trespass and in case where such practice is permissible.

To sum up: While pews in both England and America are enclosed seats attached to a church building, the right of their holders rest on an entirely different foundation in the two countries. In England such right inheres in all the members of the established church of the parish in which the particular church edifice is situated while in America it rests entirely on agreement and hence is limited to such persons as have contracted for it. This contract usually assumes the form of a deed. Since it is necessary to protect the church society from undesirable pew holders, conditions in such deed against alienation and for a forfeiture of the pew in certain contingencies will be upheld by the courts. Since pews in many cases are the principal source of revenue of the church, conditions by which the right to tax them are reserved will also be upheld, though they will be construed not to impose a personal obligation. Since church buildings will become dilapidated or will be destroyed, sold, altered or abandoned, a condition will be read into the deed according to which the pew holders will be entitled to compensation in case changes are made as a matter of convenience but will be entitled to nothing in case they occur otherwise. Their rights in every case, whether they be viewed as personal property as is done in Pennsylvania and some other states which have passed statutes on the subject, or whether they be viewed as real

<sup>1</sup> *Hartford Baptist Church v. Witherell*, 3 Paige, 296; 24 Am. Dec., 223.

estate, as is generally the case, are of an incorporeal nature subordinate to and qualified by the superior rights of the owners of the building, and will entitle their holder to nothing more than the right to occupy his pew during the time set aside for public worship. While the rights are thus generally quite subordinate, they are superior to those of subsequent mortgagees or subsequent judgment creditors. Such creditors must respect not only the pews but also all the accessories which give them value, such as the pulpit, the singers' loft, the windows and the altar. They will therefore be unable to sell the building on foreclosure but will have to be satisfied with taking over its rents and profits. As between themselves, pew owners are owners in severalty, and in case of a disturbance may vindicate their rights by actions of trespass or by actions on the case.

## CHAPTER XVI.

### CHURCH CEMETERIES.

ONE of the most usual sights in any rural community in the United States is a church edifice with a cemetery in the immediate neighborhood. This condition of affairs, where a church society antedates the municipal corporation within whose limits it exists, can even occasionally be found in populous cities. Such cases, however, are fast disappearing. The demands of commerce and the doctrines of modern sanitation are too strong to be resisted. When a cemetery situated in the heart of a city is not abandoned on account of the monetary inducements held out by commercial interests, the law-making power of the city council and even of the state legislature is invoked. By forbidding the interment of any more bodies in such cemeteries the danger to health is minimized and the property is put in a position where it will eventually become available for commercial purposes.

But the slow process by which this result is accomplished will not always serve the exigencies of a growing city. A cemetery may be directly in the way of a proposed public improvement. It may be necessary to widen a street and for this purpose to condemn a strip of land used as a burying ground. In such cases the imperative needs of the living must take precedence over the deference due to the dead. Land consecrated for a cemetery will be taken by eminent domain under such circumstances, just like other property. The remains of the dead will have to be disinterred and monuments erected in their memory taken down permanently or re-erected in the place to which such remains are removed.

It is obvious that these changes must give rise to very delicate questions of law. Some of the dead will be found buried in rows in the order in which they have died. Others will be found buried in lots for which a consideration has been paid. Still others will have costly monuments, amounting in some cases to mausoleums, erected over their remains. The rights of the church society or religious corporation and of the next of kin and of the public at large in the remains of these dead, and in the monuments which mark their graves, and in the graves themselves, must be determined under these circumstances. This accordingly has been done in a series of carefully considered cases, whose results will be set forth in the following pages.

The legal right of the relatives of a deceased person in his body has passed through a series of mutations in the laws of the various nations whose legal systems have come down to us. In ancient Egypt a son could mortgage his father's corpse. In portions of Europe during the middle ages a creditor could seize the dead body of his debtor. Conceptions such as these, as well as the opinion of the ancient school of cynics that it is utterly immaterial whether dead bodies are burned, buried, or devoured by wild beasts, do not fit into the jurisprudence of a Christian country. The Christian religion, believing as it does, in the resurrection of the dead, cannot but regard and treat with reverence the remains to be resurrected. This feeling has been impressed upon the laws of all Christian nations and has borne fruit in statutes and ordinances protecting corpses from desecration.

This part of the law, however, has passed through a peculiar development in England. The English ecclesiastical courts have divided jurisdiction over this matter with the common law courts, by assuming complete control over the bodies of deceased members of the Established Church.



They have, however, left to the common law courts the protection of the monuments erected over their graves. Says LORD COKE:

In every sepulchre that hath a monument, two things are to be considered: viz., the monument and the sepulture or burial of the dead. The burial of the cadaver that is *caro dato vermibus* (flesh given to worms), is *nullius in bonis* and belongs to ecclesiastical cognizance; but as to the monument, action is given, as hath been said, at the common law for the defacing thereof.<sup>1</sup>

Under this system the church has the exclusive control over the dead bodies of its members. While it permits the heirs and next of kin to erect monuments and otherwise *embellish* the grave, it does not—in theory at least—allow them to control the corpse, or choose the funeral ceremonies or place of burial.<sup>2</sup> Neither will the temporal courts enforce any such demand for such control as may be made by the heirs or next of kin of the deceased. In case of the desecration of a corpse they will be completely helpless and the ecclesiastical courts will be the only tribunal at which to find relief.

This system works well enough in England, where the ecclesiastical courts are recognized as part of the judicial system of the country, but breaks down completely in America where ecclesiastical tribunals have no civil jurisdiction. While the various states in the Union grant to all religious organizations the largest and broadest latitude and liberty to adopt all or any proper rules or regulations to the end that their votaries may worship God according to the dictates of their own conscience, they jealously watch and resist any and all attempts on the part of any church to usurp powers

<sup>1</sup> Third Institute, p. 203.

<sup>2</sup> Lewis, J., in *In re Donn*, 14 N. Y. Supp., 189, 190.

or authority outside of or beyond its legitimate functions. The control of the dead bodies of its members is not necessary for the complete enjoyment of religious freedom on the part of any religious society and hence is outside of its scope.<sup>1</sup> It follows that it has no such control.

It is necessary, however, that some one should have legal control over these bodies so as to be in a position to protect them from desecration. It is plain that no more natural guardian of such bodies can be found than the next of kin of the deceased. To them such custody is therefore exclusively committed. While a corpse is not property in the sense that it is subject to barter and sale,<sup>2</sup> it is property for the limited purpose of enforcing "the sacred and inherent right to its custody, in order decently to bury it, and secure its undisturbed repose," which right rests "on the deepest and most unerring instincts of human nature."<sup>3</sup> The remedies existing in England through the ecclesiastical courts being unavailable in this country, the common law powers of the ordinary courts—narrowed in England by the "fungous excrescence" of the ecclesiastical courts—have therefore been widened so as to include the protection, not only of the monuments erected in memory of the dead, but also of what remains of their bodies.

It has therefore been held, in a case in which a corpse had been buried for fifty years in a cemetery which was condemned to allow a street to be widened, that such body was "private property" within the clause of the New York Constitution which forbids such property to be taken without just compensation. The court said that the "posthumous man" was legally standing in court distinctly individualized with his daughters, his next of kin, by his side, entitled

<sup>1</sup> Lewis, J., *In re Donn*, 14 N. Y. Supp., 189, 190.

<sup>2</sup>*Ibid.*

<sup>3</sup>*In the matter of Beekman Street*, 4 Brad. Surr. (N. Y.), 503, 529.

to require that the tribunal which ejected him from his grave should also set aside the necessary funds for his decent reinterment.<sup>1</sup>

It must not, however, be supposed that this control by the next of kin is a captious one, subject only to their own fleeting fancy. The children of a mother interred for eleven years according to her own wishes by her husband (a non-Catholic), in a Catholic cemetery, will therefore, not be allowed to disinter her remains after her husband's death for the purpose of placing them by his side. The wishes of both the father and mother expressed during their lifetime, will be sufficiently regarded by the courts to prevent the necessarily unseemly disinterment of the body of the mother.<sup>2</sup>

While thus the ordinary courts in America have a jurisdiction over dead bodies which is not possessed by the ordinary English courts, their jurisdiction in regard to the grave itself and its adornments is coextensive with the jurisdiction possessed by the English courts. These courts from time immemorial have considered the tombstone, the armorial escutcheons, the coat and pennons and ensigns of honor—whether attached to the church edifice or to the tomb, or unattached—as “heir-looms,” and have classified them as real estate descending at the death of the owner to his heirs. The American courts, while having little or no occasion to classify this particular kind of property, have with great care protected it and the bodies in connection with which it has been created. Therefore the Pennsylvania Supreme Court, in holding that a mechanics' lien taken out against a church building does not cover the adjoining cemetery said:

<sup>1</sup> In the matter of Beekman Street, 4 Brad. Surr. (N. Y.), 528.

<sup>2</sup> *In re Donn*, 14 N. Y. Supp., 189.

It is not possible to believe that the congregation, in making the new erection, intended to hazard a change of ownership or uses, so far as respects the burying ground. Nor is it probable that the honest mechanics engaged in erecting the new building imagined they were acquiring a lien on the grave-yard, with its tombstones and monuments and mouldering remains. It is fair to presume that neither party intended either to disturb the repose of the dead or do violence to the feelings of the living.<sup>1</sup>

But while both the repose of the dead and the feelings of the living are thus respected and protected, circumstances will arise where such repose must of necessity be disturbed. Public improvements may demand the space occupied by a cemetery. The financial situation of the congregation which owns the property may become such that a voluntary or execution sale of it becomes unavoidable. The growth of a city may demand the removal of a cemetery as a sanitary necessity or as a commercial convenience. In such cases the repose of the dead is generally already disturbed. A cemetery situated among tall office buildings in the immediate proximity of crowded streets can hardly be considered as a fit resting-place for the dead. A removal of their remains in a proper way to a more suitable location, while in a sense it may violate their sepulchre, wound the feelings of their kindred and disturb the memorials erected by them,<sup>2</sup> under the circumstances becomes entirely proper even as a matter of sentiment.

It is Gray and Goldsmith, and not Coke or Blackstone, who can best decide whether the calm repose of the rural cemetery, the solemn stillness of the country church yard, be not preferable, in every element of proper value, to any "easement"

<sup>1</sup> *Bean v. Lancaster First M. E. Church*, 3 Clark (Pa.), 286.

<sup>2</sup> *Beatty v. Kurtz*, 27 U. S. (2 Pet.), 566, 585.

or place of deposit, however perpetual, amid the din, and dust, and turmoil of a crowded, trading city.<sup>1</sup>

But the removal of a cemetery under such circumstances is proper not only as a matter of sentiment, but also as a matter of law. Rights of burial under churches or in cemeteries are "so far public that private interests in them are subject to the control of the public authorities having charge of police regulations."<sup>2</sup> The right to bury is, therefore, purchased and held subject to the restriction that it must be so exercised as not to injure others. Though such injury may at the time be remote, the purchaser is bound to know that it may become otherwise. When this contingency happens, the right of the legislature to take such action as is necessary for the comfort and preservation of the community cannot be questioned.<sup>3</sup> It has therefore been held that a city may under penalty forbid the further burial of dead bodies in such cemeteries,<sup>4</sup> and may even order their removal, though it has actually conveyed the property to the present holder under a covenant for quiet enjoyment.<sup>5</sup>

While thus the right and duty of a cemetery owner to vacate it in a proper case is perfectly plain, his right to determine who may be buried in it is equally clear. Without such right, church societies might find their cemeteries interminable sources of trouble. Not only might the peace of the society be disturbed by the burial of a person objectionable to its members, but the society itself might thereby actually be disrupted. To prevent such a result religious organiza-

<sup>1</sup>In the matter of Beekman Street, 4 Brad. Surr. (N. Y.), 503, 515.

<sup>2</sup>Sohier v. Trinity Church, 109 Mass., 1, 21.

<sup>3</sup>Kincaid's Appeal, 66 Pa. St., 411, 423.

<sup>4</sup>City Council v. Baptist Church, 4 Strob. Law (S. C.), 306; Coates v. New York, 7 Cow. (N. Y.), 585.

<sup>5</sup>Brick Presbyterian Church v. New York, 5 Cow. (N. Y.), 538.

tions may not only establish cemeteries exclusively denominational, but may also guard and protect them by such rules and regulations as make effective the objects and purposes of their organization.<sup>1</sup> These rules and regulations will enter into and become a part of every contract for a lot in such cemetery unless the proof is clear and convincing that a contract of a different kind was properly made with the lot owner by a duly authorized agent of the organization.<sup>2</sup>

When a party applies for a burial plot, at the office of a distinctly Roman Catholic cemetery, it is with the tacit understanding that he is either a Roman Catholic, and as such eligible to burial, or at least that he applies on behalf of those who are in communion with the church. The entire business is transacted on that basis.<sup>3</sup>

It follows that the mere payment of fees and charges confers the privilege of burial only "in the mode used and permitted by the corporation."<sup>4</sup> While, therefore, the trustees of a church society who hold a cemetery as a "free" burial ground cannot prevent the burial of a church member beside her husband where there is space left for that purpose;<sup>5</sup> a person who has separated himself from the society,<sup>6</sup> or who according to its decision had ceased to be a member of it,<sup>7</sup> is not entitled as a matter of right to be buried in such cemetery, though he had contributed to it while still a member. Nor may even a member of such organization bury his profligate son in such cemetery over the objection of the or-

<sup>1</sup> People, *ex rel.* Coppers *v.* Trustees, 21 Hun (N. Y.), 184, 198.

<sup>2</sup> Windt *v.* German Reformed Church, 4 Sandf. Ch. (N. Y.), 471, 474.

<sup>3</sup> People, *ex rel.* Coppers *v.* Trustees, 21 Hun. (N. Y.), 184, 194.

<sup>4</sup> Windt *v.* German Reformed Church, 4 Sandf. Ch., 471, 474 (N. Y.).

<sup>5</sup> Antrim *v.* Malsbury, 43 N. J. Eq., 288; 13 Atl., 180.

<sup>6</sup> St. John's Church *v.* Hanns, 31 Pa. St., 9.

<sup>7</sup> McGuire *v.* Trustees of St. Patrick's Cathedral, 3 N. Y. Supp., 781; affirmed 54 Hun., 207; 7 N. Y. Supp., 345.

ganization,<sup>1</sup> nor be buried himself with ceremonies which are objectionable to it.<sup>2</sup>

The nature of the title which the owner of a lot in a cemetery holds is a very peculiar one and is not very dissimilar to rights in pews.<sup>3</sup>

Every person purchasing either a pew in a church edifice, or a grave in a church yard, appendant to a church, does so with the full knowledge and implied understanding that change of circumstances may, in time, require a change of location; and that the law looking to such exigency, authorizes the corporation when it arrives to sell the soil in absolute fee, discharged of all easements, and to make some other more appropriate investment or disposition of the proceeds.<sup>4</sup>

While it may therefore be theoretically possible for a church corporation to give an absolute grant in fee of the small plots of ground sold as cemetery lots, and while courts, where expensive improvements had been erected over a particular lot, have held that a "base" fee in such lot had been vested in the holder either by the deed given to him<sup>5</sup> or through the vote of the territorial parish which was the owner at the time,<sup>6</sup> the universal holding is that the "certificate" or "receipt" which the purchaser of a lot receives, creates only a mere license,<sup>7</sup> or easement,<sup>8</sup> or usufructory right<sup>9</sup> or

<sup>1</sup> *Dwenger v. Geary*, 113 Ind., 106; 14 N. E., 903.

<sup>2</sup> *People, ex rel. Coppers v. Trustees*, 21 Hun., 484, 194 (N. Y.); reversing 7 Abb. N. C., 121.

<sup>3</sup> *Sohier v. Trinity Church*, 109 Mass., 1, 22; *Price v. Methodist Church*, 4 Ohio, 515.

<sup>4</sup> *Richards v. North West Protestant Dutch Church*, 32 Barb. (N. Y.), 42, 46; 20 How. Pr., 317, 322; 11 Abb. Pr., 30, 38.

<sup>5</sup> *Matter of Brick Presbyterian Church*, 3 Edw. Ch. (N. Y.), 155.

<sup>6</sup> *Lakin v. Ames*, 64 Mass. (10 Cush.), 198.

<sup>7</sup> *Dwenger v. Geary*, 113 Ind., 106; 14 N. E., 903; *Partridge v. First Independent Church*, 39 Md., 631; *Rayner v. Nugent*, 60 Md., 515; *Page v. Symonds*, 63 N. H., 17; 56 Am. Rep., 481; *McGuire v. Trustees*

[<sup>8</sup> <sup>9</sup> See page 442.]

privilege of interment<sup>1</sup> and entitles the holder of such privilege only to have the bodies interred in such ground

remain undisturbed so long as the cemetery shall continue to be used as such, and so long also, if its use continue, as such remains shall require for entire decomposition; and also the right, in case the cemetery shall be sold for secular purposes, to have such remains removed and properly deposited in a new place of sepulture.<sup>2</sup>

It will thus be seen that this privilege, or easement, or license, is neither unlimited on the part of the usufructory nor arbitrary on the part of the cemetery owners. While such owner may protect the approaches to his lot,<sup>3</sup> he can do so only for the purpose of protecting his right of burial since he has no other right to protect.

One who buys the privilege of burying his dead kinsmen or friends in a cemetery acquires no general right of property. He acquires only the right to bury the dead, for he may not use the ground for any other purpose than such as is connected with the right of sepulture.<sup>4</sup>

Nor may the cemetery owner decide to disinter the dead and devote the property to other uses without making due com-

of St. Patrick's Cathedral, 3 N. Y. Supp., 781; affirmed 54 Hun., 207; 7 N. Y., Supp., 345; Kincaid's Appeal, 66 Pa. St., 411; Craig v. First Presbyterian Church, 88 Pa. St., 42; 32 Am. Rep., 417.

<sup>8</sup> Richards v. North West Protestant Dutch Church, 32 Barb., 42; 20 How. Pr., 317; 11 Abb. Pr., 30 (N. Y.).

<sup>9</sup> Windt v. German Reformed Church, 4 Sandf. Ch., 471 (N. Y.); Price v. Methodist Church, 4 Ohio, 515; in the matter of Beekman Street, 4 Brad. Surr. (N. Y.), 503.

<sup>1</sup> Catholic Cathedral Church v. Manning, 72 Md., 116; 19 Atl., 599.

<sup>2</sup> Windt v. German Reformed Church, 4 Sandf. Ch., 471, 474 (N. Y.).

<sup>3</sup> Burke v. Wall, 29 La. Ann., 38; 29 Am. Rep., 316; Lakin v. Ames, *supra*; Matter of Brick Presbyterian Church, 3 Edio. Ch., 155 (N. Y.).

<sup>4</sup> Dwenger v. Geary, 113 Ind., 106, 112; 14 N. E., 903.



pensation.<sup>1</sup> If in the course of time it becomes necessary to vacate the ground as a burying ground he must give the lot owners due notice and the opportunity of removing the bodies and monuments to some other place of his own selection.<sup>2</sup> Whether the right of the usufructory is considered as a base fee or as an easement, he will be entitled as compensation only to an amount sufficient to cover the costs of removing the dead and re-interring them in a proper place.<sup>3</sup> If he has erected a monument this will be regarded as personal property which he may remove, but for the cost of re-erecting which he will not be compensated.<sup>4</sup>

To sum up: While the English common law protects only the monument erected over a grave, leaving the body itself to the care of the ecclesiastical courts, the American law, unembarrassed by an ecclesiastical legal system, will effectually prevent the desecration of both. This protection, however, will not be extended so far as to come in conflict with the vital interests of the living. A cemetery will therefore have to yield to the police power and the power of eminent domain. Even commercial considerations may form a proper reason for its removal. Where such removal takes place, the lot-owner must be compensated by providing him a new proper place of burial and by paying the costs of properly removing the remains to the same. While the cemetery is permitted to remain, its owners may by rules and regulations limit the license to bury to such as have died as members in good standing of some particular church, and such licensees in turn may protect their rights by preventing the proper access to their lots from being cut off.

<sup>1</sup> *Burke v. Wall, supra.*

<sup>2</sup> *Kincaid's Appeal, supra, at 421; Windt v. German Reformed Church, supra; Richards v. North West Protestant Dutch Church, supra; Partridge v. First Independent Church, supra.*

<sup>3</sup> *In the Matter of Beekman Street, 4 Bradf. Surr. (N. Y.), 503.*

<sup>4</sup> *Partridge v. First Independent Church, 39 Md., 631.*

## CHAPTER XVII

### METHODIST EPISCOPAL DEED

THE vast number of religious denominations within the United States are distinguished not only by the different doctrines preached by them but even more so by the differing forms of church government to be found among them. Every possible form of government, from absolute autocracy to ideal democracy can without difficulty be discovered among these bodies. The relation of their members with each other and with their common representatives will naturally be vitally affected by this form of government. In some denominations the congregation is the chief cornerstone of the structure of church government, while in others the clergy, or a general body composed of both lay and clerical delegates, or even a single individual or group of individuals, will occupy this position.

But it is not only the relation of member to member or of the members to the congregation, the conference, the synod or the individual or group recognized as leader that is affected by the particular form of government under which a particular church operates. Such government, on the contrary, goes deeper and affects vitally the property held by such congregations. Thus the property of Baptist, Congregational, Lutheran or other independent churches will generally, in the absence of restrictive trust provisions, be absolutely in the congregation or, if the congregation is unincorporated, in trustees for its members. On the other hand, the property used by Catholic congregations will usually be found to be held by their bishop either as a cor-

poration sole, or as an individual in trust for the various congregations of his diocese.<sup>1</sup>

But perhaps the most instructive example of the way in which property rights are affected by the form of church government is afforded by the Methodist Episcopal Church. This large and influential church body considers its relation to the property of its various congregations of such vital importance that it prescribes in its discipline certain clauses which it strongly recommends to be inserted in every deed taken by a Methodist Episcopal congregation. The main purpose of these clauses is to secure the rights of the conference which has jurisdiction over any particular congregation to appoint its clergyman. This policy was determined upon because it was seen that to allow the trustees of a church to select its clergyman would put an end to itinerant preaching, the great characteristic of the Methodist Episcopal Church. The policy was adopted when Methodism was in its infancy. Says Wesley:

I built the first Methodist preaching house in Birstal in 1739, and knowing no better I suffered the deed of trust to be drawn up in the Presbyterian form; but Mr. Whitefield hearing of it, wrote me a warm letter asking, "Do you consider what you do? If the trustees are to name the preachers they may exclude even you from preaching in the house you have built. Pray let this deed be immediately cancelled."<sup>2</sup>

In consequence of this policy a great many deeds in the Methodist Episcopal form may now be found recorded in the various recorders' offices throughout the country. Of these a sufficient number have been involved in litigation to justify an attempt to collate the legal principles which

<sup>1</sup> See chapter two of this book.

<sup>2</sup> Cited in *People ex rel. Griffin v. Steele*, 2 Barb. (N. Y.), 397, 408; 1 Edw. Sel. Cases (N. Y.), 505; 6 N. Y. Leg. Obs., 505.

are applicable to them. This will be the purpose of the following pages.

The form prescribed by the discipline of the church for this deed has not always been the same. It appears to be much shorter at the present day than it was one hundred and even fifty years ago. However, the principle is the same. No attempt will therefore be made to trace these changes. The older and longer form of the deed, being the one which naturally is most often drawn into litigation, will of necessity be the text, while the balance of this article will be a commentary on this text.

Turning now to the deed itself it will be found that it is a trust deed carefully drawn up for the purpose of subserving the great aim of the Methodist Episcopal Church, namely the spread of the gospel through itinerant preaching and the preservation of union in the church. The property conveyed by it is generally granted upon the following trusts :

1. That the trustees will erect or cause to be erected on the land conveyed a house or place of worship for the use of the members of the Methodist Episcopal Church in the United States of America, according to the rules and discipline, which, from time to time, may be agreed on and adopted by the ministers and preachers of said church at their General Conference in the United States of America.

2. That they shall at all times permit such ministers and preachers belonging to said church as shall, from time to time, be duly authorized by the General Conference of the ministers and preachers of said Methodist Episcopal Church or by the Annual Conference authorized by the said General Conference to preach and expound the holy word of God therein.

3. That when one or more of said trustees shall die, or cease to be a member of said church, according to the rules

and discipline, then it shall be the duty of the stationed minister or preacher (authorized as aforesaid) who shall have the pastoral charge of the members of the said church to call a meeting of the remaining trustees and the vacancy is to be supplied by choosing in the designated mode, one or more persons, who shall have been a member or members of said church for one year.

4. Provided that in case the trustees or any of them shall be bound for any sum of money on account of said premises, and obliged to pay the same, they are authorized to raise it by mortgage or sale of the premises, after notice given to the pastor or preacher who has the oversight of the congregation, attending divine service on the said premises; and any surplus arising from such sale is directed to be placed in the hands of the Steward of the Society belonging to or attending divine service on said premises to be disposed of by the next Annual Conference, according to its best judgment, for the use of said society.<sup>1</sup>

The first question which naturally arises in connection with this deed is that of its validity. In this inquiry we are not concerned with the question of the capacity of the grantor to grant and of the legal grantees (the trustees) to take the conveyance. It will be assumed that the grantor is capable of doing what he attempts to do and that the trustees are natural persons who are under no such disabilities as will prevent them from taking the legal estate under the grant. The only question that remains to be solved therefore, is whether the beneficiaries of this trust are described with sufficient certainty to be capable of taking under the deed. This in turn is a question of construction, not of one part or clause of the deed, but of the entire deed and of all that is contained within its four corners. Only after

<sup>1</sup> *Gibson v. Armstrong*, 46 Ky. (7 B. Mon.), 481, 488. For more extended statement of deed see *Brooke v. Shacklett*, 54 Va. (13 Grat.), 301.

the question of the identity of the beneficiaries has been properly solved will it be possible adequately to pass upon the question of the validity of the instrument.

It cannot be denied that the first impression created by this deed is that the declaration of trust is not

for the benefit of a local society or congregation of Methodists worshipping or expected to worship at a particular place, but for the benefit of the Methodist Episcopal Church in the United States as an aggregate body or sect to the exclusion of any peculiar rights of property in the land conveyed to such local society or congregation.<sup>1</sup>

Taking this view of the matter the deed has been held to be void for indefiniteness in Minnesota,<sup>2</sup> Michigan,<sup>3</sup> and Pennsylvania.<sup>4</sup> In West Virginia and Maryland<sup>5</sup> somewhat similar trust provisions have been held to be void but the West Virginia court has saved the situation by holding that a trust may result in favor of those who contributed the money with which the land was bought.<sup>6</sup> It will be noted that the states just named, except Pennsylvania, are such as reject the English charity doctrine. By the great weight of authority, therefore, such deeds are valid and enforceable.<sup>7</sup>

A careful examination of the deed makes it reasonably certain that the local congregation and not the general church body is intended as the beneficiary. In the third

<sup>1</sup> Brooke v. Shacklett, 54 Va. (13 Grat.), 301, 314.

<sup>2</sup> Little v. Willford, 31 Minn., 173; 17 N. W., 282.

<sup>3</sup> M. E. Church of Newark v. Clark, 3 N. W., 207; 41 Mich., 730.

<sup>4</sup> Methodist Church v. Remington, 1 Watts., 219 (Pa.).

<sup>5</sup> Carskadon v. Torreyson, 17 W. Va., 43; Isaac v. Emory, 64 Md., 333; East Baltimore Station M. E. Church v. Jackson Square Ev. Luth. Church, 84 Md., 173, 177; 35 Atl., 8.

<sup>6</sup> Carskadon v. Torreyson, *supra*, at 111.

<sup>7</sup> Goode v. McPherson, 51 Mo., 26; Crawford v. Nies, 113 N. E., 408 (Mass.).

clause the words "said church" occur three times, while the same word occurs once in the second clause, which of necessity refers back to the first clause. There can be no question that in the third clause the local church is referred to where it is made the duty of the minister who has charge of "said church" to call a meeting of it. It follows naturally that these words used in the beginning of the clause, which provides that when a trustee ceases to be a member of "said church" another shall be elected in his place, refer to the local congregation so that a trustee will become disqualified by severing his connection with the local church though he should join another congregation of the same faith.<sup>1</sup> Since the words "said church" as used in the third clause refers back to the second clause it would follow that the use of the same words in the second clause refers back to the first clause which contains the main trust provision. Notwithstanding, therefore, the apparent comprehensiveness of the terms in which the use is declared in favor of the members of the Methodist Episcopal Church generally, the actual use, that is, the use of the premises by occupancy, for accommodation, and the immediate control of them as a place of worship must be taken to be intended to be secured to the local congregation or society, subject to the rules and regulations prescribed by the higher authorities of the church.<sup>2</sup> "The grant is not and could not be to the Methodist Episcopal Church, meaning thereby the church at large; but it is to the local society or particular congregation."<sup>3</sup> It is a conveyance

for the use of a particular congregation of that church, in the limited and local sense of the term—that is, for the members,

<sup>1</sup> *Gibson v. Armstrong*, 46 Ky. (7 B. Mon.), 481, 489.

<sup>2</sup> *Ibid.*, at 490.

<sup>3</sup> *Anderson and Bowers v. Nulton*, cited in 17 W. Va., 106.

as such, of the congregation of the Methodist Episcopal Church, who, from their residence at or near the place of public worship, may be expected to use it for that purpose.<sup>1</sup>

It is a conveyance under which

the immediate control and peculiar use of the property is to be and remain with the local society, by the contribution of whose members in the main the church house was erected, and to whose use the surplus proceeds of the property, in the event of a sale, are to be appropriated.<sup>2</sup>

It is, therefore, not the members of the general body of the Methodist Episcopal Church, nor the contributors to the fund with which the property was purchased as such, nor the individual members of the local congregation as individuals, who are the beneficiaries. It is rather these individuals as members of the local congregation, however much they may change or fluctuate, who are the *cestui que trust* end of the deed.<sup>3</sup>

However, by deciding that the local congregation is the beneficiary of the deed the courts do not solve all the difficulties, for such local congregation is intended to be associated with the general body named in the deed. This fact will of course present no difficulty as long as that general body remains united. It cannot be denied, however, that no matter how firmly it is knit together it may be rent apart by schisms and may even divide amicably into two or more parts. There can be no question that in case of a schism in the general body the property will belong to that part of the congregation (if such schism extends down to it) which ad-

<sup>1</sup> *Hoskinson v. Pusey*, 73 Va. (32 Gratt.), 428, 431.

<sup>2</sup> *Brooke v. Shacklett*, 54 Va. (13 Grat.), 301, 316.

<sup>3</sup> *Newman v. Proctor*, 73 Ky. (10 Bush.), 318; *Mason v. Hickman*, 4 Ky. Law Rep., 313; *Jefferson M. E. Church v. Adams*, 4 Oregon, 76.



heres to the body which represents the legitimate succession of the general body.<sup>1</sup> A more difficult question, however, is presented where the general body voluntarily divides itself into two or more parts. Such a division indeed took place in the Methodist Episcopal Church in 1845, and was an event of the greatest importance, not only in the history of the church but also in the history of the United States. It was an event that cast its shadow before. It was a precursor of the political division dividing the same territory substantially in the same way which took place in 1861 and which was not closed till streams of blood had flowed for four years. It was brought about by the same forces which later plunged the country into the Civil War. But unlike the separation of 1861, it was an amicable division. It corresponded to the separation between Abraham and Lot in times of old. It was not effected by a clash of arms, by bitter polemical warfare, but was decided in very much the same spirit in which a court of justice decides an important case. Being of great public concern and of vast importance in its bearing on the rights, interests and feelings of a large portion of the community, it was made the subject of the fullest examination. The zeal, ability and research of the most eminent men of the bar and of the church were enlisted in its discussion. No facts or arguments that could elucidate the subject were left unstated or unurged.<sup>2</sup> It was a separation which was judicially noticed by the courts<sup>3</sup> and whose legality was recognized not only by the state courts,<sup>4</sup> but

<sup>1</sup> See chapter seven of this book.

<sup>2</sup> *Brooke v. Shacklett*, 54 Va. (13 Grat.), 301, 324.

<sup>3</sup> *Malone v. Lacroix*, 143 Ala., 657; s. c. 144 Ala., 648; 41 So., 724; *Humphrey v. Burnside*, 67 Ky. (4 Bush.), 215.

<sup>4</sup> *Gibson v. Armstrong*, 46 Ky. (7 B. Mon.), 481; *Brooke v. Shacklett*, *supra*; *Hoskinson v. Pusey*, 73 Va. (32 Grat.), 428; *Venable v. Coffman*, 2 W. Va., 310.

by the federal courts,<sup>1</sup> including the United States Supreme Court.<sup>2</sup> It was a separation by which two bodies were substituted for one. The Northern body retained the northern territory and the old name, while the Southern body was left in possession of the territory south of Mason and Dixon's line, and, to distinguish itself from the Northern church, added the word "South" to the old name.

Nor did the analogy to civil conditions as they existed in 1861 end at this point. No one can read the history of the Civil War without becoming aware that there were border states which presented delicate and difficult questions to both sides of that great conflict. Similarly there were border states, of which Kentucky and Virginia are prominent examples, which had to be treated with great consideration by the church when the division of 1845 was made. No good purpose could be served by drawing an arbitrary line and thus forcing congregations and conferences in these border states into a connection to which they were adverse. Such border conferences were therefore allowed to decide for themselves to which part of the divided church they would choose to belong. Nor did the liberty of choice end here. It was recognized that such conferences might contain border congregations who would be dissatisfied by the choice made by their conference. These congregations were therefore in turn given the right by a vote to separate their connection with the conference and join a conference which belonged to the other church. Of course a choice once made became conclusive and fixed the place of the conference or congregation in that part of the divided church favored by it.<sup>3</sup>

<sup>1</sup> *Bascon v. Lane*, Fed. Cases, No. 1,089.

<sup>2</sup> *Smith v. Swormstedt*, 57 U. S. (16 How.), 288.

<sup>3</sup> *Brooke v. Shacklett*, 54 Va. (13 Grat.), 301, 327.

The plan of separation was a plan of peace, to end strife. And the relations of the conferences, churches, stations, and societies along the defined and specified border, being once settled by the choice of those authorized so to act, by adhering to the one side or the other, was final and conclusive, and could never after be changed, or counteracted, under, or by virtue of, that plan and authority.<sup>1</sup>

It follows that a border conference which had in 1845 decided to adhere to the Northern Church could therefore not change over to the Methodist Episcopal Church South in 1861.<sup>2</sup> By this fair and equitable method a separation was effected which bore in its train the minimum of friction and the maximum of good feeling.

However, it must not be supposed that all difficulties were overcome. Feeling naturally ran high in the border states. Not only conferences divided on the question of adherence to the Methodist Episcopal Church or the Methodist Episcopal Church South, but also congregations. Where a conference divided the matter was not at all serious. The minority under the plan of separation would simply leave it and attach itself to the church of its choice. However, where the division extended down into individual congregations, the difficulty could not be so satisfactorily adjusted. It was in such cases that the Methodist Episcopal deed received its severest test.

It has been seen that in the division the Northern body retained the old name while the Southern body added the word South to it. The question was soon presented whether a deed made before the separation in reference to the Methodist Episcopal Church could in Southern territory inure for the benefit of the Methodist Episcopal Church

<sup>1</sup> *Venable v. Coffman*, 2 W. Va., 310, 323, 324.

<sup>2</sup> *Hoskinson v. Pusey*, 73 Va. (32 Grat.), 428.

South. This question has been answered in the affirmative by all courts to which it has been presented. It has been said by the Virginia court that since the division was lawful it is obvious

that the members of the local societies in the Southern organization of the church stand in the same relation to the general conference, the annual conferences, the bishops, pastors, rules and discipline of the Methodist Episcopal Church South, that they occupied before the division, in respect to those of the Methodist Episcopal Church.<sup>1</sup>

In the leading case of *Gibson v. Armstrong*<sup>2</sup> the Kentucky court has held that under a deed made before the separation in favor of the Methodist Episcopal Church a congregation which had by majority vote joined the Methodist Episcopal Church South was entitled to the property as against a minority which adhered to the Northern body. The court points out that the fact that the northern portion retained the name used in the deed while the southern portion added the word South to it made no difference and that the situation was the same as if one had added the word North and the other the word South. The same result has been reached by other Kentucky cases,<sup>3</sup> and by the United States Supreme Court,<sup>4</sup> and, as recently as 1904, by the Alabama Court.<sup>5</sup>

It is clear that after the separation congregations in the territory of one of the new churches can not attach them-

<sup>1</sup> *Brooke v. Shacklett*, 54 Va. (13 Grat.), 301, 323.

<sup>2</sup> 46 Ky. (7 B. Mon.), 481.

<sup>3</sup> *Lewis v. Watson*, 67 Ky. (4 Bush.), 228, 231; *Humphrey v. Burnside*, 67 Ky. (4 Bush.), 215.

<sup>4</sup> *Smith v. Swormstedt*, 57 U. S. (16 How.), 288.

<sup>5</sup> *Malone v. Lacroix*, 143 Ala., 657; s. c. 144 Ala., 648; 41 So., 724.

selves to the opposite church without losing their property.<sup>1</sup> Neither can they join any other church body with out suffering the same consequences. The very purpose of the deed under which they hold their property is to prevent such a schism. When therefore such a division takes place the property will be adjudged to be in that part of the divided congregation which maintains the true position of subordination and connection with the general church body named in the deed and recognizes its discipline, submits to its government and receives its pastor.<sup>2</sup> The rebellious part cannot tear the house of worship dedicated as a Methodist Episcopal church away from them. By their rebellion they cease to be members of it and have as little right to it as would inure in a congregation of Baptists.<sup>3</sup> Even if all the members repudiate the constitutional dependence and connection of the congregation they cannot take the property with them but leave it as dedicated to the use and control of the church mentioned in the deed.<sup>4</sup> It has therefore been held that when the African Methodist Episcopal Church broke away from the Methodist Episcopal Church South it could not take with it the property dedicated to the colored members of the Southern church but instantly by such secession surrendered all claim to its use or occupancy except at the will or sufferance of the legal owners.<sup>5</sup> A resolution on the part of the Methodist Episcopal Church South advising the various congregations to allow the adherents of the newly formed African church to use its property has

<sup>1</sup> *Brooke v. Shacklett*, 54 Va. (13 Grat.), 301, 327; *Venable v. Coffman*, 2 V. Va., 310, 323; *Hoskinson v. Pusey*, 53 Va. (32 Grat.), 428.

<sup>2</sup> *Brooks v. Shacklett*, *supra*, at 324.

<sup>3</sup> *Godfrey v. Walker*, 42 Ga., 562, 573.

<sup>4</sup> *Lewis v. Watson*, 67 Ky. (4 Bush.), 228, 233.

<sup>5</sup> *Godfrey v. Walker*, *supra*, at 572; *Lewis v. Watson*, *supra*, at 231.

therefore been constructed as a mere license which may be revoked at any time.<sup>1</sup>

In determining which part of a divided congregation is entitled to the property, the question which is willing to permit the duly authorized minister or preacher of the general church body named in the deed to preach in the church is of the greatest importance under the second clause. While the conference under this clause may without implying renunciation of constitutional union and dependence "forbear to exercise its discretionary and sometimes, perhaps, unwelcome power, and prudently defer to the more satisfactory choice of the local church itself,"<sup>2</sup> while, therefore, the clause is intended merely to prevent the exclusion from the pulpit of duly accredited preachers in good standing and has no reference to title and was not intended to affix any limitations or condition to the deed,<sup>3</sup> it is obvious that it cannot in any degree detract from the character and effect of the deed as a dedication of property to the use and benefit of the religious congregation, in conformity with its provisions.<sup>4</sup> On the contrary, the appointment by the accustomed conference of a preacher for one of the portions of a divided congregation and the acceptance of this preacher by such portion constitutes a mutual recognition which will go a great way in determining the question which of the two bodies is the true church. It is just as certain in case of division that the exclusive use is secured to that portion of the society which receives the preacher authorized as mentioned in the second clause, as it is that the use is secured to no other preacher but such as is thus authorized.

<sup>1</sup> *Brown Mason v. Monroe Hickman*, 80 Ky., 443, 447; *Mason v. Hickman*, 4 Ky. Law Rep., 313.

<sup>2</sup> *Lewis v. Watson*, 67 Ky. (4 Bush.), 228, 233.

<sup>3</sup> *Kilpatrick v. Graves*, 51 Miss., 432, 447.

<sup>4</sup> *Brooke v. Shacklett*, 54 Va. (13 Grat.), 301, 317.

This is the great point of external union with the general organization, which fixes the dependence and subordination of the local societies. It is, moreover, the especial means of securing the great principle of an itinerant ministry which characterizes this church, and is regarded as the chief instrument of its success.<sup>1</sup>

It is clear from the foregoing that the Methodist Episcopal deed, where its validity is conceded, as it is in most states, fully accomplishes its purpose of permanently dedicating the property covered by it to the uses and purposes of the Methodist Episcopal church. This must, however, be understood as not impressing an indelible stamp upon the particular piece of property so that it cannot under any circumstances be sold and the proceeds reinvested in a more suitable plot of ground. It is the policy of Methodism to mount its preachers on horseback and send them out to build churches which suit the present needs and to remove them or sell them for the purpose of rebuilding them at a different place when the need has changed.

This policy is incorporated into the discipline of the church, which discipline is in turn by reference incorporated into the Methodist Episcopal deed. It follows that every grantor of ground for a church edifice, who consents in his deed that the property may be used according to the regulations of the church discipline, even in the absence of the fourth clause in the deed which provides for a mortgage or sale of the property, "agrees, when the necessity arises for the removal, that there may be a sale of the land which he grants, and another investment in a more convenient place."<sup>2</sup> Much more will a power of sale be secure where the fourth clause is duly added.<sup>3</sup> Such a sale has therefore been up-

<sup>1</sup> *Gibson v. Armstrong*, 46 Ky. (7 B. Mon.), 481, 494.

<sup>2</sup> *Kilpatrick v. Graves*, 51 Miss., 432, 438.

<sup>3</sup> *Bennett v. Baltimore M. E. Church*, 66 Md., 36; *Holmes v. Belleville Wesley M. E. Church*, 41 Atl. 102; 58 N. J. Eq., (13 Dick.), 327; *Centenary M. E. Church v. Parker*, 43 N. J. Eq., 307; 12 Atl., 142.

held by the courts even as against the original grantor without consideration,<sup>1</sup> or, though it was made over the protests of the minority of the congregation<sup>2</sup> or covered only a joint interest in the land and building,<sup>3</sup> or where the trust was considered to be void<sup>4</sup> and has been decreed by the court, where by the local law such a decree was necessary in connection with the sale of any church property.<sup>5</sup> Of course such a sale made by the preacher to an Episcopalian minister will be void though such preacher was given power by the deed to appoint his successor.<sup>6</sup> Neither can the money realized by such a sale be taken and held by a trustee individually after he has seceded from the church.<sup>7</sup>

Since property may thus be sold and the proceeds re-invested in another piece of ground which is more suitable, it necessarily follows that it is

within the legal and equitable construction of the trust, to allow the trustees, as the society increases in members, and its exigencies require, to enter upon the lots granted, in order to erect a new and larger edifice than the one originally erected. The kind of building adapted to the convenience of the society, and the part of the lot on which it shall be built, are matters necessarily and legally left to the sound discretion of the trustees, aided by the advice of the congregation.<sup>8</sup>

Since the erection and maintainance of such a place of wor-

<sup>1</sup> *Strong v. Doty*, 32 Wis., 381.

<sup>2</sup> *Fair v. Bloomingdale First M. E. Church*, 57 N. J. Eq., 496; 42 Atl., 166.

<sup>3</sup> *Alexander v. Slavens*, 46 Ky. (7 B. Mon.), 351.

<sup>4</sup> *East Baltimore Station M. E. Church v. Jackson Square Ev. Luth. Church*, 84 Md., 173; 35 Atl., 8.

<sup>5</sup> *Sellers M. E. Church Petition*, 139 Pa., 61; 21 Atl., 145; 27 W. N. C., 383.

<sup>6</sup> *Combe v. Brazier and Mathews*, 2 S. C. Eq. (2 Des.), 431.

<sup>7</sup> *Cincinnati M. E. Church v. Wood*, 5 Ohio, 283.

<sup>8</sup> *Price v. Church*, 4 Ohio, 515, 548.



ship for the members of the Church, according to the rules and discipline of their conference or government is the *main* if not the *only* object of the grant, the trustees may, where the ground surrounding the church has been used for the purposes of interment and a new church has become necessary,

so far interfere with the interments made on the lots, as may be necessary to lay the foundation of the new church; and in executing their work, they may disinter, and decently remove, the remains of any dead within such limits—forbearing any act calculated to shock the feelings of surviving friends or the public.<sup>1</sup>

It remains to say a few words concerning a few minor points which have been raised in connection with this deed. Ordinarily a statement of a substantial consideration will be found incorporated in it. Such a statement will be construed as showing that the grantor was not the donor of a charity but the vendor of the land for a valuable consideration. A reversion to him will therefore be out of the question<sup>2</sup> except where a reverter clause is expressly inserted.<sup>3</sup> Nor is the lack of technical words of limitation a valid objection to it. The benefits received in the way of religious instruction and consolation by a person who regularly attends upon the ministrations of a Methodist Episcopal society constitute a meritorious consideration for a Methodist Episcopal deed given by such attendant which will induce equity to supply the defect of the lack of the word "heirs" in the conveyance.<sup>4</sup> This lack of technical words of limita-

<sup>1</sup> Price v. Church, 4 Ohio, 515, 548.

<sup>2</sup> Gibson v. Armstrong, 46 Ky. (7 B. Mon.), 481, 490; Holmes v. Belleville Wesley M. E. Church, 58 N. J. Eq. (13 Dick.), 327; 41 Atl., 102.

<sup>3</sup> Henderson v. Hunter, 59 Pa. (9 P. F. Smith), 335; Sellers M. E. Church Petition, 139 Pa. St., 61; 21 Atl., 145; 27 W. N. C., 383.

<sup>4</sup> Cape Island Visitors M. E. Church v. Town, 47 N. J. Eq. (2 Dick.), 400; 20 Atl., 488.

tion, while it has led an eminent Pennsylvania judge to say that "to a professional mind it is unnecessary to intimate that this formula was adopted in ignorance of the common law, which suffers not the fee to pass by deed without technical words of inheritance,"<sup>1</sup> and while it has forced a Methodist Church in New Jersey to apply to the equity court for relief after the law court, on account of the lack of the words "heirs" in its deed, had given judgment against it in an action of ejectment,<sup>2</sup> is of practically no importance under modern statutes which have done away with the necessity of the use of such words of limitations and which are in force in most if not all of the states of the Union.<sup>3</sup>

What effect the incorporation of the church will have on the deed is not subject to much question. While it has been held in an old case that the title of the trustee does not pass to the corporation as soon as that is formed but remains with the trustees,<sup>4</sup> the title under modern statutes will generally pass on somewhat the same principle as is implied in the statute of uses.<sup>5</sup> However, it will be well even where the law appears to be clear to procure a deed from the trustees to the corporation and thus put the question of title at rest beyond the shadow of a doubt.<sup>6</sup>

Whether the method of transmitting the legal title to the property from one trustee to another prescribed by the deed is lawful has been doubted in a New Jersey case,<sup>7</sup> while it

<sup>1</sup> Gibson, J. in *Methodist Church v. Remington*, 1 Watts, 219, 224.

<sup>2</sup> *Cape Island Visitors M. E. Church v. Town*, 47 N. J. Eq. (2 Dick.), 400; 20 Atl., 488.

<sup>3</sup> *Sellers M. E. Church Petition*, 139 Pa. St., 61; 21 Atl., 145; 27 W. N. C., 383.

<sup>4</sup> *Georgetown Methodist Soc. v. Bennett*, 39 Conn., 293.

<sup>5</sup> *Cape Island Visitors M. E. Church v. Town*, *supra*.

<sup>6</sup> *Upper Nyack M. E. Church v. Bennet*, 26 N. Y. Supp., 341; 73 Hun., 585.

<sup>7</sup> *Fair v. Bloomingdale First M. E. Church*, 57 N. J. Eq., 496, 498; 42 Atl., 166.

has been held in another case that when such change is prescribed to be made according to certain specified rules new trustees cannot be validly elected under these rules as subsequently changed by the church. Says the court: "When a grantor appoints trustees and expressly stipulates that such trustees shall be continued in a certain way, by a specified tribunal, and that they shall have certain qualifications, such stipulations are the law of the trust. No power can impair such a contract."<sup>1</sup> It will be well, therefore, for all churches holding under such deeds to become incorporated and to procure a conveyance from the trustees by the forms prescribed by the discipline at the time the deed was given. After this is done this question will be forever at rest, since the corporation is a continuous body which is unaffected by any change of its membership.

To sum up: By the great weight of authority a deed in the Methodist Episcopal form is a valid instrument fully capable of accomplishing the purpose for which it has been devised. Its beneficiary is not the general Methodist Episcopal Church named in it but the local congregation for whose immediate use and through whose financial efforts the property covered by it has been acquired. Adherence to the general body on the part of the local congregation, however, will be necessary under the deed, as the local congregation can preserve its identity only by such means. If the general church divides itself amicably into two parts, adherence to that part which as to any particular congregation is by the articles of division made the successor of the former general body becomes necessary for the same purpose. A faction in a local church will therefore, no matter how much it may be in the majority as against those who remain true to the general church, lose all rights to the property by breaking away from the general church

<sup>1</sup> *Savage v. Fortner*, 2 Chest. Co. Rep., 271 (Pa.).

named in the deed or from its successor under articles of separation. The same holds good in case of a schism in the general body. In such case the local church, in order to hold its property, must at its peril cast its lot with that part of the general body which represents the legitimate succession. Even a majority of such local congregation cannot carry the property over to the part which has seceded from such general body. The means by which adherence to or rejection of the authority of the general body on the part of any local congregation will definitely be decided will be the acceptance or rejection of the minister assigned to such local body by the general body.

But while the Methodist Episcopal deed is thus a trust deed which binds the congregations to adhere to the general Methodist body mentioned in it, it does not tie the congregations down to the particular plot of ground covered by it or to the first building erected on it. Not only is the policy of the Methodist Episcopal Church contrary to such a conception of the meaning of the terms of the deed but its discipline expressly referred to in the deed conclusively shows that no such consequence is intended. Where circumstances change the old building may therefore be removed to make room for another or the land may be sold and the proceeds reinvested in other property more favorably located for the purposes of the church.

The land covered by the deed will under no circumstances revert to the grantor unless it contains a reverter clause and the validity of the deed will be upheld by the courts though it recites no consideration and contains no technical words of limitation. Whether or not the method prescribed by it for the substituting of new trustees is effective, it is quite certain that under present day statutes on the incorporation of the congregation the property will pass to the corporation, though it will be advisable to procure a deed from the old trustees, in order to put this matter beyond all possibility of a doubt.

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