Notre Dame Law Review

Volume 15 | Issue 4 Article 3

5-1-1940

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Recommended Citation

James J. Kearney, *Digest of Church Law Decisions of 1939*, 15 Notre Dame L. Rev. 307 (1940).
Available at: http://scholarship.law.nd.edu/ndlr/vol15/iss4/3

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DIGEST OF CHURCH LAW DECISIONS OF 1939*

This digest is the first annual digest of decisions involving civil church law to be published by the Bureau of Research in Educational and Civil Church Law. It includes every case appearing in eighty-six reporters of the National Reporter System which were published in whole or in part during the calendar year of 1939. Only cases containing problems peculiar to churches are included, and those cases which involve churches solely as litigants are not necessarily included.

Religious Freedom

The problem of religious liberty is of fundamental importance in any treatment of civil church law. Because numerous safeguards surround this inalienable right and because the body of law interpreting it has become relatively stable, questions involving religious freedom seldom come before courts of review.

Ordinance Regulating Canvassing As Infringing Religious Rights

An ordinance of the City of Jeannette, Pennsylvania, which regulated the canvassing for or solicitation of orders within the city, was challenged by members of the sect known as Jehovah's Witnesses. They had been arrested and convicted under the ordinance while they were allegedly preaching the Gospel by calling on people in their homes and exhibiting to them a message of the Gospel in printed form. Nothing was decided as to the validity of the ordinance, which was attacked as interfering with freedom of religion and of the press, however, and the appeal was dismissed be-

*Included in this digest are all the church law cases found in the following reporters: Atlantic 2d, Vols. 2-9; Federal 2d, 99-107; Federal Supplement, 25-29; New York Supplement 2d, 8-15; Northeastern 2d, 17-24; Northwestern, 282-288; Pacific 2d, 84-95; Southeastern, 199-4 (2d); Southern, 184-192; Southwestern 2d, 121-133; and United States Supreme Court Reporter, 59.

cause those convicted had failed to include in the transcript on appeal a copy of the conviction and a copy of the ordinance.[1]

Saluting the Flag As a Religious Rite

In other cases the Jehovah's Witnesses have been more successful in getting the courts to pass upon the question of whether their religious freedom had been impaired by official conduct. The courts of four different states were called upon in 1939 to determine whether the religious belief of such sect was infringed by requiring the children of its members to salute the American flag as part of a patriotic demonstration in the public schools. In each instance the salute was objected to on the ground that its performance was a form of worship of graven images contrary to the teaching of the Bible and inconsistent with the religious belief of the Jehovah's Witnesses.

In the case of *Johnson v. Town of Deerfield*,[2] the Federal District Court sitting in Massachusetts was called upon to determine the validity of a statute calling for the display of a flag in all public schools and a mandatory salute thereof by all pupils at least once a week. In refusing petitioner's request for a declaratory judgment decreeing the statute void as unconstitutional, the court held that it was precluded from declaring that the salute was a religious rite because of a previous decision of the Supreme Judicial Court of Massachusetts, and because of the action of the Supreme Court of the United States in dismissing two appeals from state courts of last resort, involving the same question, on the ground no substantial federal question was involved. The court further held that the right to attend a public school was not an absolute right, but one subject to such reasonable restrictions as the law might impose. In reaching its conclusion the court distinguished the case of *Gobitis v. Minersville School Dis-*

1 Com. v. Stewart, 137 Pa. Super. 445, 9 A. 2d 179 (1939).
2 25 F. Supp. 918 (1939).

trict,[3] wherein the result was favorable to the Jehovah's Witnesses, on the ground that the resolution in the *Gobitis Case* was contrary to the particular provisions of the Pennsylvania Constitution, and the resolution was not supported by enabling legislation as in the instant case.

The Supreme Court of Florida was called upon to decide a similar issue in the case of *State ex rel. Bleich v. Board of Public Instruction for Hillsborough County,*[4] which was a proceeding in mandamus to compel the school officials to permit the reentry into the public school of children who had been expelled because of their refusal to salute the flag. The court, in denying the petition for mandamus, said that such a salute was "patriotism in action. It has no reference to or connection whatever with one's religious belief. . . . One is in no sense inconsistent with the other and saluting the flag does not approach a religious rite. . . . To symbolize the flag as a graven image and ascribe to the act of saluting it a species of idolatry is too vague and far fetched to be even tinctured with the flavor of reason." Two judges dissented from a denial for a rehearing on the ground that although they agreed that the school authorities had the power to require students to salute the flag in patriotic exercises they questioned whether the school officials had the power to expel a student who refused. The dissenters felt that some substitute for the salute could have been demanded which would not have been objectionable, and which would have prevented the martyrization of students refusing to perform "an act, not essential to the public welfare or the support of the government."

The New York Court of Appeals indicated sympathy for the opinion expressed by the dissenting judges in the Florida case, when they held that saluting the flag was not an act of worship but they felt that more tact could have been dis-

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3 21 F. Supp. 271 (1938).
4 190 So. 815 (Fla., 1939).

played in dealing with the expulsion of the child.[5] The case arose out of the prosecution of the *parents* of a child of school age for their refusal to send the child to school as required by statute. It appeared that the child had been sent to school as required but on each occasion she had been expelled because of her refusal to salute the flag. The court expressly decided that the prosecution was improperly brought against the parents and by inference decided that the prosecution would lie against the child if she were insubordinate. Judge Lehman, wrote a separate opinion in which he concurred in the result of the other judges, but he challenged the inference in the majority opinion that the child could be compelled to salute the flag against her moral convictions. He concluded his stirring defense on behalf of the child with, "The flag 'cherished by all our hearts' should not be soiled by the tears of a little child."

The Texas Court of Civil Appeals avoided passing on the question of the propriety of a mandatory salute of the flag by all public school pupils on the ground that the question was moot at the time of the appeal. In the case of *Shinn v. Barrow* [6] pupils of a public school sought to enjoin the enforcement of an order whereby they were suspended from school because of their refusal to salute the flag as required by statute. The appeal which was brought after the expiration of the term of the school year for which the pupils had been suspended was dismissed because the problem had become moot.[7]

Effect of Religious Belief Upon Testamentary Disposition of Body of Decedent

A New York Court in the case of *In re Scheck's Estate, Petition of Kitzen,*[8] was faced with an interesting legal

5 People ex rel. Fish v. Sandstrom, 18 N. E. 2d 840 (N. Y., 1939).

6 121 S. W. 2d 450 (Tex. Civ. App., 1938).

7 It is interesting to note in this case that the court deemed that the plaintiffs had been dismissed as "incorrigibles" and therefore they came under a statute which prohibited expulsion of incorrigibles for longer than one term.

8 14 N. Y. S. 2d 946 (1939).

problem arising out of the following set of facts. The testatrix, of the will under construction, provided in her will that $1,200 should be used for transporting her body to Palestine for burial. In ignorance of these directions her children had her remains buried in this country at an expense of $189.33. The evidence showed that at the time the testatrix made the provision in her will she was living with her second husband in Palestine and was making payments on a burial lot there, but that at her death she was living apart from her husband and had long ago ceased making payments on the Palestine burial plot and had purchased a cemetery lot in this country where her remains were interred. The somewhat equivocal testimony of two Rabbis was to the effect that a disinterment would be contrary to Jewish Tenets and Hebrew Laws. Nothwithstanding all of this testimony the court denied the petition of the distributees of the estate that the body be allowed to remain in this country, since the intention of the testatrix seemed to continue and the result sought by the distributees would greatly increase the amount of distributable assets of the estate available to the petitioners.[9]

Annulment of Marriage Lacking Religious Ceremony

An annulment of an unconsummated marriage entered into before a Justice of the Peace, was granted at the instance of the Catholic party in the case of *Ruberti v. Ruberti,* by the New Jersey Court of Chancery.[10] From the evidence it appeared that the petitioning wife had submitted to the marriage only because of her spouse's promise to have the marriage solemnized according to the rites of the Roman Catholic Church within a year of the first ceremony. The annulment was granted on the ground of the fraud worked upon the petitioner.

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[9] The court also passed on a point, not directly concerned in this Digest, when it said that the disposition of a body in a will is not testamentary in character, requiring a will to alter it.

[10] 3 A. 2d 128 (N. J. Eq., 1933, rec'd for publication Dec. 7, 1938).

RIGHT TO USE PROPERTY FOR RELIGIOUS PURPOSES

Comparable to an individual's right to freedom of religious belief is the right the law accords a man to use his property for religious purposes. During the year 1939 the courts of Nevada, New York and Oklahoma passed upon this question and in each instance the decision was favorable to the religious use.

The Supreme Court of Nevada on an original petition for mandamus to compel the issuance of a permit to erect a Roman Catholic Church in Reno held that a municipal ordinance requiring the consent of property owners in a "residential district" before the erection of a church therein was invalid as violative of due process of law, and not being related to the health, public safety, morals, or convenience and welfare of the community.[11] It was carefully pointed out, however, that the ordinance was void only as to this particular church, and no adjudication as to its general invalidity was attempted.

In *Sweet v. Campbell,* the Supreme Court of New York refused to enjoin the erection of an undertaking establishment and funeral chapel and church on the grounds that it would necessarily be a nuisance.[12] The court, of course, reserved its right to enjoin defendant's establishment if it later should prove to be a nuisance.

In passing upon the construction of a zoning ordinance limiting the space to be left between churches and other buildings the Supreme Court of Oklahoma decided that the ordinance was not to operate retrospectively and therefore it was not applicable to the church in question.[13]

RIGHT TO USE PUBLIC PROPERTY FOR RELIGIOUS PURPOSES

The converse of the foregoing proposition as to the use of one's own property for religious purposes is the highly con-

11 State ex rel. Roman Catholic Bishop of Reno v. Hill, 90 P. 2d 217 (Nev., 1939).

12 9 N. Y. S. 2d 281 (1938).

13 Shaw v. Calvary Baptist Church, 88 P. 2d 327 (Okla., 1939).

troversial question as to the use of public property for religious purposes. Only one case involving this problem arose during the year 1939. It concerned the use by, and loan to, a Catholic College of the auditoriums in the New York State Education Building for a lecture to be given by Father Hubbard, a Jesuit priest. Such use was held not to be in violation of the broad prohibition of the New York Constitution against public aid to denominational schools.[14]

Dedication of Building to Church Uses

On the interesting question as to what is required to dedicate a building as a church we find one important pronouncement by the Pennsylvania Supreme Court. In the case of *Malanchuk v. St. Mary's Greek Catholic Church of McKees Rocks, Pennsylvania,*[15] this court decided that the mere fact that the ritualism of the Greek Uniate Church was to a certain extent followed in a particular church, that such did not amount to a conveyance and dedication of the property to that church. There must be certain evidences of its submission to that church's authority, and its dedication as such a church by prescribed form must be observed, before such dedication occurs.

Legislative Protection of Religious Practices

A. Kosher Meats

The case of *People v. Gordon,*[16] involved the prosecution of a butcher for the sale of chicken which, allegedly, was falsely represented to be Kosher, in violation of a statute making such offense a misdemeanor. It appeared that although the statute did not define "Kosher" that the Kashruth Association, a Rabinnical Association, decreed that all poultry must be marked with a seal or otherwise it did not

14 New York League for Separation of Church and State v. Graves, 170 Misc. 196, 10 N. Y. S. 2d 142 (1939).

15 9 A. 2d 350 (Pa., 1939).

16 14 N. Y. S. 333 (1939); see also People v. Miller, 23 N. E. 2d 556 (N. Y., 1939).

conform to the Kosher requirements. In convicting the defendant, who admitted he had sold the poultry without the seals, which cost a penny apiece from the Kashruth Association, the court incorporated the decree of the Association into the statute, and refused to consider the question of delegation of power and other constitutional questions because no property rights were involved.

B. Sunday Closing Laws

Religious practices commonly receive recognition and protection in legislation designed to make the Sabbath a day of rest. Two Sunday closing laws were involved in litigation in the year just past. The Supreme Court of Idaho in *State v. Cranston,*[17] sustained a conviction of a defendant for selling bread, cheese and butter on Sunday, notwithstanding defendant's contention that times had greatly changed since the original passage of the law. Faced with a similar problem the Supreme Court of Michigan upheld a conviction of defendant for selling groceries and meats on Sunday in violation of a city ordinance, which law was passed under a proper exercise of the police power of the municipality.[18]

Legislative Protection of Property Used for Religious Purposes

A. Zoning Protection Against Liquor Dispensaries

Since the repeal of the Prohibition Amendment the protection afforded Churches and schools against liquor dispensaries in the immediate vicinity has become increasingly important. The Kentucky Court of Appeals passed upon the provisions of the Kentucky Alcoholic Beverage Control Law of 1938 twice in the year 1939. In the case of *Beacon Liquors v. Martin,*[19] the court held that the statute was con-

17 85 P. 2d 682 (Idaho, 1938).
18 People v. Krotkiewicz, 286 Mich. 644, 282 N. W. 852 (1938).
19 131 S. W. 2d 446 (Ky., 1939).

stitutional, notwithstanding it excepted from its operation drug stores, private clubs, and hotels, and irrespective of its providing that upon the consent of the church or school involved a dispensary could be licensed as against contention that such constituted an unwarranted delegation of legislative powers to the school, hospital, and church.

The second case involved the revocation of a retail beer license on the ground that it was within the restricted 200 feet of a "church or other place of worship." In granting the revocation the court in *Dougherty v. Kentucky Alcoholic Beverage Control Board,*[20] greatly clarified the law on this subject. Although the statute used the terms "street or avenue" the court felt that such included country highway. Within the meaning of the statute a building on a corner was held to be on both streets, and since the statute spoke of "premises" and not "entrances" the closing of a side entrance on the street upon which the church was situated was of no avail. In determining the distance between the church and the restricted business the court held the measurement should be made on a direct line from the property lines of each premise and not by measuring the distance by way of the usually traveled route. As to whether the building involved was a "church or other place of worship" the court held that the building which was formerly a public school and which had been used for years as a community Sunday school and for occasional preaching services, was a church within the statute although there was no general church organization having a pastor or board of stewards or deacons or similar officers.

B. Zoning Restrictions Against Gasoline Filling Stations

In *St. John's Roman Catholic Church of Stamford v. Board of Adjustments or Appeals of City of Stamford,*[21] the Church appealed from a grant of a certificate to operate

20 130 S. W. 2d 756 (Ky., 1939).
21 125 Conn. 714, 8 A. 2d 1 (1939).

a gasoline filling station within the restricted area of its school. In granting the church's appeal the court held that the defendant Board acted improperly in varying the city zoning regulations to permit the prohibited business within the restricted area, notwithstanding the station was eight feet over the restricted distance from the school building itself since it was much less than the required distance from the school property.

Tax Exemption

A. Of Church Property

In the *Town of Woodstock v. The Retreat, Incorporated,*[22] the Supreme Court of Errors of Connecticut restricted the tax exemption afforded church property in that state by refusing to hold a retreat house for Unitarian clergyman exempt from taxes. The mere fact there was a chapel in the house did not bring it within the exemption provisions of the statute since the evidence showed it was simply a place of temporary sojourn for the purpose of spiritual rest and refreshment.

The Supreme Court of Maine in the case of *Ferry Beach Park Association of Universalist Church v. City of Saco,*[23] clarified the position of the petitioning association, which conducted summer institutes for the purpose of increasing the missionary power of the Universalist Church, and held that its property was tax exempt since it was used exclusively for religious purposes.

B. Exemption from Inheritance Taxes

A New York Court *In re Bouvier's Estate,*[24] ruled, in accordance with existing authority, that property not left directly to the religious association was not exempted from in-

22 125 Conn. 52, 3 A. 2d 232 (1938).
23 7 A. 2d 428 (Me., 1939).
24 15 N. Y. S. 2d 111 (1939).

heritance taxes, and where testator left his nephew certain sums to be given to named religious beneficiaries, "without in any way limiting the absoluteness of this bequest," such sums were not tax exempt even though the nephew disposed of the property as the uncle indicated he wished him to do in the precatory words of the will.

In *San Jacinto National Bank v. Sheppard,*[25] the Texas statute exempted taxes on legacies to religious and charitable corporations "located" within the state if used therein, and the Texas Court of Civil Appeals refused to exempt from taxation a bequest to "The Christian Restoration Association," a foreign non-profit corporation chartered in Ohio, notwithstanding the association had four workers in Texas.

Right to Possession of Church Property

Even in the absence of an outright schism the right to possession of particular church property among conflicting groups frequently comes before the courts. The case of *Malanchuk v. St. Mary's Greek Catholic Church of McKees Rocks, Pennsylvania,*[26] required a judicial determination as to what type of Greek Catholic Church the church in question was. From the evidence it appeared that the services performed in the Church were in accordance with the Oriental services of the Uniate Rite, affiliated with the Pope at Rome, that at times the pastor was a Uniate priest, that the church contributed to the Uniate Bishop, but that the congregation had failed to conform to the Uniate Rite in the matter of dedication of the church and its altars. In holding that the church was not a church of the Uniate Rite the court held that the mere celebration of services without any submission to the authority of the church was insufficient evidence of its dedication or conveyance to the Uniate Rite.

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25 125 S. W. 2d 715 (Tex. Civ. App., 1938).
26 9 A. 2d 350 (Pa., 1939).

Although a trustee of a church might have a right to prevent an ouster of the congregation from its property a trustee's suit involving facts and defenses similar to those disclosed in previous litigation will be dismissed as controlled by the prior adjudication.[27]

In an action to enjoin trespasses upon church property by defendants who allegedly usurped petitioners' possession of the church, wherein it appeared that a schism had developed in the church out of a difference of opinion as to the interpretation and application of the church's creed, the Supreme Court of Alabama [28] held that the civil courts were without jurisdiction of the subject matter of the suit, and that in any event the church was a necessary party to the proceedings whether it was incorporated or not.

Faced with a similar problem in *Grantham v. Humphries*,[29] the Supreme Court of Mississippi dismissed a bill for a mandatory injunction filed by the former pastor of a Baptist Church, who had "gone Fundamentalist," and had been excluded from the church. Since such was an ecclesiastical and not a civil matter the court refused to entertain the bill, and ruled that the church authorities and their tribunals were supreme in such matters.

Succession of Parent Church to Property of Subordinate Church

The Supreme Court of Nebraska in the case of the *Application of Tyler, Tyler v. German Congregational Church of Zion of Butte*,[30] ruled that the plaintiff organization failed to establish by clear and direct evidence that the allegedly defunct church was under its supervision or control as required by the statute providing for succession by the parent

27 4 S. E. 2d 827 (Ga., 1939).
28 Bailey v. Washington, 185 So. 172 (Ala., 1938).
29 188 So. 313 (Miss., 1939).
30 283 N. W. 512 (Neb., 1939). *Re* the status of the property of a subordinate *lodge* see the case of Brown v. St. Mary's Temple No. 5, S. M. T. United Brothers of Friendship of Texas, 127 S. W. 2d 531 (Tex. Civ. App., 1939).

church to property of the subordinate church upon the latter's ceasing to exist.

RETURN OF CHURCH PROPERTY AFTER MERGER FAILS

Where it appeared that property had been conveyed to effectuate a proposed merger of two Jewish corporate congregations the California court ordered a restoration of the property as originally held before the planned merger fell through.[31]

PROTECTION OF CHURCH'S NAME

To protect the Methodist Episcopal Church, South against the confusion, etc., which might result the Supreme Court of Georgia revoked a charter granted a church corporation, incorporated under the name of "Methodist Episcopal Church, South, *Incorporated.*"[32]

POWER OF CHURCHES

In a widely publicized opinion Justice Hooley of the Supreme Court of New York held that a certificate of incorporation was not a matter of right for all churches, and such certificate would be denied if it appeared that the proposed religious corporation might tend to glorify qualities which were the very antithesis of religion irrespective of the incorporators' right to freedom of religious belief.[33]

CHURCH RADIO STATIONS

By inference the federal court in the case of *Evangelical Lutheran Synod of Missouri, Ohio, and other States v. Fed-*

31 Congregation Mukuom Israel v. Congregation Ahabot Israel, 90 P. 2d 118 (CAL. APP., 1939).

32 Methodist Episcopal Church, South, Inc. v. Decell, 1 S. E. 2d 432 (Ga., 1939).

33 *In re* Long Island Church of Aphrodite, 14 N. Y. S. 2d 762 (1939). Upon rehearing the certificate was granted upon a showing that the proposed corporation was not being organized for any other purpose than a religious conception of love, beauty, and that its practices would not tend to glorify any qualities opposed to the almost universal conception of religion.

eral Communications Commission, (Pulitizer Publishing Co., Intervener),[34] held that churches could maintain radio stations, when it said in the course of its opinion, "The public interest does not necessarily demand that all stations become commercial, or that none be supported by religious bodies."

Acts Ultra Vires Church Association

Where an association was organized: to advance the cause of true religion in Maryland and the District of Columbia by aiding feeble Baptist Churches, to supply destitute neighborhoods with teaching, to encourage the more general diffusion and reading of the sacred scriptures, and to provide opportunity of preaching and devotional exercises during the session of the association, the Maryland court held that it could not accept a testamentary bequest which was for the purpose of building an Orphan's Home within Maryland, since such purpose was ultra vires the purposes of the association.[35]

Power of Church to Sue

In an action on a claim against estate of decedent who gave notes to cover the cost of construction of two churches in India, the Indiana Supreme Court decided that the plaintiff was entitled only to the sums which it had actually spent on the cost of constructing the churches as evidenced by invoices on building materials which were introduced into evidence. The further testimony of a witness that the total cost of the churches was the stated sum agreed to be given by the decedent was inadmissible as hearsay, since the evidence was supplied by the Bishop and the witness had never been to India.[36]

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34 105 F. 2d 793 (1939).

35 Curtic v. Maryland Baptist Union Association, 5 A. 2d 836 (Md. App., 1939).

36 De Langes v. Cones, 19 N. E. 2d 850 (Ind., 1939).

Action on Subscription Contract

In passing upon a subscription contract entered into by decedent the Supreme Court of Wisconsin in the case of *In re McCanna's Estate, Rouech v. St. Jude's Church,*[37] was forced to hold the subscription unenforceable since the contract was accepted only by the Pastor of the Church who by statute did not have the power to bind the church to the contract obligations.

Power of Church Synod Over Church's University

An action for a declaratory judgment was brought in the case of *Synod of Mississippi v. Southwestern,*[38] to determine the right of the plaintiff Synod to appoint members to the Board of Directors of Southwestern Presbyterian University. From the evidence it appeared that by the unanimous vote of the Synods in control of the University the number of board members to be appointed by each synod was raised from three to four, and one of such members was required to be a resident of Memphis. No one of plaintiff's four appointees was a resident of Memphis and because of this the court held its appointment had been invalid since the plaintiff could not elect to adopt only part of the unanimous rule by appointing four members but refusing to appoint one of them from Memphis. It was further held that when once elected the Synods had no control over the Board of Directors.[39]

Power of Church Officers

In addition to the case involving the power of a pastor to accept a subscription contract on behalf of the church, which we have already seen,[40] the courts during the past year have decided three other cases involving the power of church officers.

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37 284 N. W. 502 (Wis., 1939).
38 122 S. W. 2d 442 (Tenn., 1938).
39 *Id.,* p. 446.
40 *Op. cit supra,* note 37.

In the case of *Uvalde Rock Asphalt Co. v. Lacy*,[41] the Texas Court of Civil Appeals affirmed a judgment for defendants in an action to foreclose an alleged assessment lien against an unincorporated religious society. From the evidence it appeared that the assessment ordinance was void, and the certificate issued thereunder was barred by the statute of limitations when some of the trustees of the society executed a renewal certificate, which renewal was void because it was made without the consent of the society or the Quarterly Conference of the Church.

Similarly where an alleged agreement to reconvey premises to plaintiff was entered into between the plaintiff and one of the officers of the defendant church who was without authority to bind the church, an action for specific performance of the agreement could not be maintained.[42]

Where the evidence showed that the local superior of a religious order had only limited authority restricted to the payment of current bills and other necessary expenses the Supreme Court of Arkansas held that the order was not bound by a ten-year insurance contract entered into by the local superior.[43]

Clergyman's Right to Separate Property

In the case of *Townley v. Province of the Holy Name*,[44] the Federal District Court sitting in California was called upon to decide a priest's right, as against the right of the Dominican Order to which he belonged, to property inherited from his godparents. Canon Law and all the rules of the Order provided that all the inheritances from other than blood relatives should pass to the Order, and plaintiff's uncorroborated conflicting evidence was held insufficient to

41 131 S. W. 2d 698 (Tex. Civ. App., 1939).

42 Neth v. St. John's Reformed Church of Hempfield Township, 6 A. 2d 421 (Pa., 1939).

43 McCarroll Agency, Inc. v. Protectory for Boys Under Care of Franciscan Brothers of Cincinnati, Ohio, 124 S. W. 2d 816 (Ark., 1939).

44 25 F. Supp. 654 (1938).

show an intention to vary this clear rule of the Order which the plaintiff voluntarily embraced.

Duties and Liabilities of Churches and Churchmen

A. Contract Liabilities

In the case of *Pyzdrowski v. Tarkowski,*[45] a Pennsylvania Superior Court allowed an action in *assumpsit,* to recover an alleged balance due on a contract for the erection of a church building, from an unincorporated church association. In an lucid review of the statutory history of actions by and against churches the court showed that church societies had gradually been given the right to sue as corporations, and that the right of action against them as corporations had been granted although the members of the congregation had been exempted from liability on all authorized obligations of the church.

B. Tort Liabilities

In one of the outstanding cases of the year the Court of Errors and Appeals of New Jersey passed upon the liability of a church for personal injuries to one not a member of its faith which injuries were incurred in leaving a social hall maintained as an appurtenance to the church. The plaintiff in the case of *Bianchi v. South Park Presbyterian Church,*[46] was injured when she fell down unlighted stairs after leaving a Girl Scout meeting in the social hall maintained by the defendant church. With one Justice dissenting the court held that the twenty-four year old plaintiff was barred by her own assumption of risk or contributory negligence in attempting to go down the treacherous unlit stairway.

In *Flores v. De Galvan,*[47] the second wife of decedent was allowed to recover substantial damages against a cemetery,

45 137 Pa. Super. 118, 8 A. 2d 458 (1939).
46 123 N. J. L. 325, 8 A. 2d 567, 124 A. L. R. 814 (1939).
47 127 S. W. 2d 305 (Tex. Civ. App., 1939).

and one of its trustees, the Bishop of San Antonio, for disinterring her husband's body and allowing it to be reburied in a plot owned by the decedent's first wife.

In *Van Vliet v. Vander Naald*,[48] the Michigan Supreme Court refused to allow a deposed minister of the Reformed Church of America to recover in a libel action against several ministers of said church and the publishers of its official paper. It appeared that the plaintiff was deposed on his confession of having committed adultery with a woman parishioner and the alleged libel arose out of defendant's comment upon plaintiff's petition for reinstatement. In holding for the defendants the court held that the statements made were qualifiedly privileged and there was no showing of malice on the part of defendants.

Acquisition of Property by Church

Although the acquisition of property by a church is closely aligned with the problem of the powers of churches, which has already been discussed, its great importance warrants a separate treatment of this frequently litigated question.

To avoid a lapse of a legacy to a private mission under a California statute prohibiting testamentary disposition of any part of an estate to "Any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses," when the testator had certain kin living and the will was made within thirty days of his death, the court held that the mission was not a society or corporation, and since the property was given it absolutely the bequest was not defeated by operation of the statute.[49]

Bequests for Masses

In the case of *Gallagher v. Venturini*,[50] a New Jersey Court of Chancery held that although a provision in a will

48 290 Mich. 365, 287 N. W. 564 (1939).

49 *In re* Steinman's Estate, Steinman v. Scandinavian Faith Mission, 94 P. 2d 821 (Cal. App., 1939). Note the decision did not hold that the mission's acts were not charitable.

50 124 N. J. Eq. 538, 3 A. 2d 157 (1938).

for the saying of Masses for the testator was not in violation of the Rule Against Perpetuities, it was void for indefiniteness because of the will's failure to set up a trust fund for such purpose.

Identity of Church With That Named in Insurance Policy

In an action on a fire insurance policy the Texas Court of Civil Appeals refused to hold that plaintiff was precluded from recovering on the ground the policy was issued to the "Trustees Pentacostal Church" and the proof showed that the church was owned by the "Pentacostal Church of Bowie, Texas," since the defendant failed to show surprise or a claim of ownership in another.[51] Ancillary to the aforementioned point of law adjudicated in this case was the determination by the court that "occupancy for church purposes," within the meaning of the insurance policy, meant "that manner of use which ordinarily prudent persons would make of such building for conducting religious services."

Identity of Church With Beneficiary Named in a Will

The courts are frequently called upon to identify a beneficiary of a will which is either insufficiently described therein or is incapable of accepting the testamentary gift. In at least six different cases the courts were forced to consider these problems in relation to religious beneficiaries.

It is the rule in New York that bequests to unincorporated associations are void, but in keeping with its policy to avoid a lapse in such a legacy a New York Court in the case of *In re Clendenin's Estate*,[52] allowed the parent corporation of the unincorporated legatee to take a legacy and hold it in trust for the benefit of the named legatee. To defeat a simi-

51 Republic Underwriters v. Meyer, 127 S. W. 2d 538 (Tex. Civ. App., 1939).
52 9 N. Y. S. 2d 875 (1939).

lar lapse another court sitting in New York allowed an unincorporated religious association of Ohio to take a bequest of personal property since such was permitted in Ohio, although prohibited in New York.[53]

The Tennessee Supreme Court in the case of *Sacred Heart Academy of Galveston v. Karsch*,[54] was forced to construe the provisions of a nun's holographic will which left about a millon dollars to "the Blessed Virgin Mary Mother of My God and my most dear Mother, the Superioress of the Sacred Heart Convent, Galveston, Texas, for the use and benefit of the Dominican Sisters, the Community of the Sacred Heart Convent, Galveston, Texas." From the evidence it appeared that the community of the "Dominican Sisters of the Sacred Heart Convent" was not incorporated and, therefore, was unable to take the bequest, but the "Sacred Heart Academy" which was operated by such community of sisters, was incorporated and was capable of accepting the bequest. The court held that the Academy was the proper beneficiary of the bequest which would not lapse because of the improper designation.

Similarly the courts of California and New Jersey disposed of bequests to non-existent religious societies. The former court applying the *cy pres* doctrine to avoid a lapse in the legacy,[55] and the latter court examing extrinsic evidence to discover the true intention of the testator in making the bequest.[56] The Supreme Court of North Carolina, bolstered by a liberal construction statute, likewise upheld a rather indefinite bequest dedicating property to the advancement of Universalism.[57]

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53 *In re* Idem's Will, 8 N. Y. S. 2d 970 (1939).

54 122 S. W. 2d 416 (Tenn., 1938).

55 *In re* Zen's Estate, Los Angeles Orphan's Home Society v. Haas, 91 P. 2d 960 (CAL. APP., 1939).

56 Board of Home Missions of the Presbyterian Church in the United States of America v. Saltmerm, 125 N. J. Eq. 33, 4 A. 2d 69 (1939).

57 Williams v. Williams, 3 S. E. 2d 334 (N. C., 1939).

ESTATES GRANTED CHURCHES UPON CONDITION

On several occasions within the past year courts were called upon to construe grants to churches on condition that the grantee perform, or continue to perform, a named act. Such conditional grants have long been disfavored by courts and during 1939 the courts of North Carolina,[58] Louisiana,[59] New York,[60] and Alabama [61] evidenced their dislike for such conditions by holding in effect that the condition is inoperative unless express provision is made for reversion of the estate to the grantor upon the happening of the condition.

Even where express provision was made for a reversion upon the happening of the condition a New York court decided that the estate granted would be considered a fee upon condition subsequent, which required a timely reentry by the grantor, rather than a base or determinable fee, requiring no reentry to effectuate a reversion.[62]

The Supreme Court of Pennsylvania went still further in holding that even where a condition is established to effect a reversion the heirs of the grantor had to show a "persistent and consistent failure" to conform to the condition, and conduct showing "an utter, wilful disregard of the purposes" of the grant.[63]

Such a burden of proving nonconformance to a condition of continuous use of the land for church purposes was not sustained by a showing that regular church services had not been held for over a year, when the evidence showed that Sunday School classes, Prayer Meetings, and meetings of the

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58 Vestry and Legal Trustees of St. Peter's Protestant Episcopal Church of Washington, N. C., 4 S. E. 2d 328 (N. C., 1939); and Williams v. Thompson, 4 S. E. 2d 609 (N. C., 1939).

59 Board of Trustees of Ruston Circuit, Methodist Episcopal Church, South, v. Rudy, 187 So. 549 (La., 1939).

60 *In re* Tubb's Estate, 9 N. Y. S. 2d 222 (1939).

61 Street v. Pitts, 192 So. 258 (Ala., 1939).

62 Reformed Protestant Dutch Church of Fordham v. Valentine, 12 N. Y. S. 2d 989 (1939).

63 *In re* Patterson's Estate, Appeal of Schrack, 3 A. 2d 320 (Pa., 1939).

Ladies Aid Society had been held with sufficient continuity to preclude a claim for reversion of the estate.[64]

Where a sum was granted to erect a bell tower within ten years of testator's death the Massachusetts Supreme Judicial Court held that the delay on the part of the executors of the estate of the testator's widow in supplying the funds would not operate to cause the bequest to lapse.[65]

Estoppel to Claim Reversion When Condition Broken

When it appeared that the plaintiff, in an ejectment action, bought the property involved from a Baptist Church and conveyed it to a Jewish Congregation on condition that it be used forever as an Orthodox Hebrew Synagogue, and at the instance of the plaintiff the congregation mortgaged the property to defendant who was ignorant of the condition subsequent, a New Jersey Court of Chancery held the plaintiff was estopped to bring ejectment and assert his reversionary interest.[66]

Jurisdiction of Civil Courts Over Religious Disputes

Courts in Alabama,[67] Michigan,[68] Mississippi,[69] and Missouri [70] affirmed the supremacy of church tribunals over ecclesiastical questions, and the Missouri Court of Appeals decided that the adminstrative procedure of the church tribunals must be exhausted before an appeal might be made to the civil courts for relief.[71]

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64 Williams v. Downing, 185 Okla. 633, 95 P. 2d 612 (1939).

65 Miller v. Parish of Epiphany, Winchester, 19 N. E. 2d 46 (Mass., 1939).

66 Beth Hamedresh Hagodol of Newark v. Isserman, 125 N. J. Eq. 354, 5 A. 2d 786 (1939).

67 Bailey v. Washington, 185 So. 172 (Ala., 1938).

68 Van Vliet v. Vander Naald, 290 Mich. 365, 287 N. W 564 (1939).

69 Grantham v. Humphries, 188 So. 313 (Miss., 1939)

70 Olear v. Haniak, 131 S. W. 2d 375 (Mo., 1939).

71 *Id.*

RELIGION IN EDUCATION

In addition to the cases already reviewed which concerned the mandatory salute of the flag, zoning restrictions, and the control of a Synod over a University only a few cases have been decided in 1939 involving religious questions in the schools.

In an action involving the discharge of a public school teacher a Pennsylvania court decided among many other things, that the mere fact a teacher left some of her pupils unattended while she went to church on Ascension Thursday did not sustain a charge of "wilful and persistent negligence." [72]

Although such cases strictly do not involve religious issues the two cases concerning the discharge of teachers upon their marriage,[73] and the case passing upon the validity of an order making a two-year leave of absence mandatory for all teacher maternity cases,[74] are mentioned because of their possible connection with the religious beliefs of some teachers.

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72 Horosko v. School District of Mt. Pleasant Township, 4 A. 2d 601 (Pa. Super., 1939). See also the same case before the Supreme Court of Pennsylvania, 6 A. 2d 866 (Pa., 1939).

73 State ex rel. Kundert v. Jefferson Parish School Board, 184 So. 555 (La., 1938); and Andrews v. Claiborne Parish School Board, 189 So. 355 (La., 1939).

74 Kabatt v. Graves, 10 N. Y. S. 2d 728 (1939).

75 I wish to acknowledge the assistance rendered by Mr. Leon L. Lancaster, graduating senior of the College of Law of the University of Notre Dame.