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THE CIVIL COURTS AND THE CHURCHES.

It is the purpose of this study to try to ascertain certain principles that govern in the administration of the law in relation to religious bodies. There will be no attempt to include all of the many cases found in the books, but leading ones will be used, as well as others not so well known but believed to be valuable, and some extracts from judicial opinions will be given.

Three familiar historical periods or conditions come to the mind of an American lawyer who considers the present subject.

The first is the unlimited claim of the church to supremacy in Europe before the Reformation. This may be seen with speedy vision by one reference to the text of the *Corpus Juris Canonici* as follows: "Perhaps the most frequently cited canon on the subject is the *cap. Ecclesiæ Sanctæ Mariæ* or *Decretal.* lib. 1, tit. 2, cap. 10, which dates from 1199. It declares that every lay statute affecting churches, whether favorably or unfavorably, is of no strength, unless approved by the church, *nullius firmitatis existit, nisi ab ecclesiâ fuerit approbatum*. It also declares that there can be attributed to laymen no faculty over churches and ecclesiastical persons

as to whom laymen must have the necessity of obeying, not the authority of commanding; *quod laicis (etiam religiosis) super ecclesiis et personis ecclesiasticis nulla sit attributa facultas: quos obsequendi manet necessitas non auctoritas imperandi.*" *

The second conception is the change wrought in England in the reign of Henry VIII. It was then enacted by authority of Parliament, "that the King our sovereign lord, his heirs and successors, Kings of this realm, shall be taken, accepted and reputed the only supreme head in earth of the Church of England, called Anglicana Ecclesia * * * and have full power to correct all heresies and offences. 26 Hen. VIII. c. 1. (A.D. 1534). This declaration was repealed by the Act of 1 and 2 Ph. & M. c. 8, but revived by 1 Eliz. c. 1 and 5 Eliz. c. 1.

To use Mr. Anson's words, "the church was built into the fabric of the state." He reduces the constitutional change to three heads, viz.: (1) The recognition of the ultimate judicial power of the Crown; (2) The recognition of the legislative subordination of the clergy; (3) The sanction given by Parliament to the Liturgy and Articles of Religion as formulated by Convocations.†

Thus questions of theology and cases of heresy were under the jurisdiction of judges appointed by the sovereign.

The third and even more frequent reflection is the absolute absence in America of governmental authority in matters of religious faith and practice.

After the struggle of the Revolution, achieved by the courage, the patriotism, the patience of the people of the thirteen colonies, had ended with the triumphant and acknowledged severance of allegiance to the King, there came the need of ordained organic law. This was effected by the Federal Convention in 1787. Men of varied abilities and diverse views, but some of them deeply thoughtful and happily with genius for leadership, and all with sincere love

* Copied from that treasury of research and thought, "Judicial Power and Unconstitutional Legislation," by the late Brinton Coxé (completed by Wm. M. Meigs) p. 127.

† Anson's Law and Custom of the Constitution, Vol. II p. 401.

of country, composed the membership. After debates and compromises there was evolved that product of toil and thought and noble purpose which stands alone as a monument of constructive statesmanship. From the stately porch and vestibule of the Preamble through its divisions of legislative, executive and judicial powers to its wings and dome of reciprocal recognition of state by state and its averment of national integrity, it has been the admiration of the civilized world. It has sustained in unimpaired strength and symmetry the test and strain of criticism, argument and interpretation, and also the storms of war.

Yet the work of wise men was not perfect and its ratification was accomplished only through contests and discussions in the respective states. When the first Congress met eleven had accepted the Constitution and two had not. The last to ratify was the State of Rhode Island and Providence Plantations on May 29, 1790, but she enjoined upon her senators and representatives to use all their influence to obtain the adoption by Congress of twenty-one amendments which were specified and attached to the act of ratification. A copy of this action was transmitted to each house on the 16th of June. There were subsequent resolutions, with suggestions and considerations of various changes and additions to the Constitution, but the final outcome was the resolution of the Senate and House of Representatives proposing twelve articles to the legislatures of the several states as amendments to the Constitution of the United States. This was passed on the 25th of September, 1789, and ten of the articles were afterwards ratified by the requisite number of states, the last being Virginia on December 15, 1791. The first and the only one of the amendments with which the present study is concerned was the clause at the beginning of Article I. It is in clear and absolute terms that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Thus the whole power over the subject of religion was left to the state governments, and from time to time a similar guarantee has been established by the Constitutions of the respective commonwealths and religious liberty is the law of the land.

In the earlier days of the colonies some who claimed this freedom for themselves failed to see and admit that others were equally entitled to it; but in time the power to coerce men into religious professions or to subject them to ecclesiastical rule was destroyed. The theocracy of New England, the Quakerism of Pennsylvania, the liberal Catholicism of Maryland, the Calvinism of Scotch-Irish Presbyterians in the middle parts of the country, the loyalty to Episcopacy in Virginia and the Carolinas,—in brief, the opinions of men of all creeds, and of no creed, were absolved from legal obligation to the tenets or forms or regulations of any established church. Subject to civic obligations and to the reserved rights of the states, the franchise of unfettered worship of Almighty God according to the individual conscience of each believer was secured in perpetuity.

This fundamental law is fully expressed in the Constitution of Pennsylvania, Art. 1, Sec. 3: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship." Similar provisions are in all or nearly all of the state constitutions.

The effect is that every resident and every man who comes to this land of free asylum is legally at liberty to believe and to practise his belief, but not to interfere with the right of others to the same unrestrained choice of faith and conduct. Further, however, as was said by Mr. Justice Miller in *Watson v. Jones*, 13 Wall. 679, on p. 714, and he states in substance the declaration of other courts: "Religious organizations come before us in the same attitude as other voluntary associations for benevolent and charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraint." The like thought was expressed by Lowrie, C. J., in *McGinnis v. Watson*, 41

Pa. 9, on p. 14, when, after referring to the Constitution of the Commonwealth, he said: "Of course this law was not intended to exempt any religious society from the respect that is due to the organization and moral and social order of the state, or from the necessity of holding its land under the state, and according to its laws." These two quotations need not be reinforced. The statements are not contradicted by any authorities.

From this general view the point of research at once is presented: Upon what grounds have civil tribunals deemed it their duty to take jurisdiction over religious bodies in regard to rights of property or of officers or members?

Primarily, and notwithstanding the constitutional differences between the two countries, the enforcement of trusts is found to be clearly within the power of the courts both in England and in the United States. Apart from the circumstances of any particular case the general rule may be readily shown. When the expressions of judges summarize the principles on which their conclusions are based it is fair to give such fundamental thoughts without details of the facts of the suits in which they were declared, except where those facts are essential to an understanding of the law. Out of the great number of cases only a few will be selected.

The following is an excerpt from the opinion of Lord Davey in the celebrated cases, *General Assembly v. Overtoun and others* and *Macalister v. Young*, Law Reports 1904, Appeal Cases 515 (hereinafter stated more fully). He said, p. 644: "My lords, I disclaim altogether any right in this or any other civil court of this realm to discuss the truth or reasonableness of any of the doctrines of this or any other religious association, or to say whether any of them are or are not based on a just interpretation of the language of Scripture, or whether the contradictions or antinomies between different statements of doctrine are or are not real or apparent only, or whether such contradictions do or do not proceed only from an imperfect and finite conception of a perfect and infinite Being, or any similar question. The more humble, but not useless, function of the Civil Court is

to determine whether the trusts imposed upon the property by the founders of the trust are being duly observed."

In *Watson v. Jones*, supra, at p. 723, it is said by Miller, J.: "* * * It seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced, the formalities which the laws require. And it would seem also to be the obvious duty of the court, 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."

The simplest idea of a trust is "a confidence reposed in some other" *

A voluminous explanation of this indisputable control by the civil courts is to be found in the opinion of Judge Allison of Court of Common Pleas No. 1, Philadelphia, in *Jones v. Wadsworth*, 4 W. N. C. 514. To those who had the privilege of arguing before him and who recall his courteous attention, patience and painstaking study and deliberation, followed by accuracy of decision, no apology is required for the following long extract which may well terminate this part of our subject. He said:

"A trust, in strict technical sense, is an obligation arising out of confidence reposed to apply property according to such confidence. It may be expressed or implied; and it is implied when deducible from the transaction as matter of intent, or when the law attaches to such transaction the incidents of a trust. There must be sufficient words to raise a trust; a definite property, which becomes subject to it, and an ascertained purpose to be accomplished. A trust once established for a lawful purpose becomes 'the child of the law, and more especially the ward of chancery;' not only for defence, but for oversight and guardianship, which is never suspended. If there is an attempt to carry it away or pervert it, the law seeks it out, and restores it to its true position; and when, for this purpose, the remedy at law fails for want of sufficient power, the jurisdiction of equity begins. And this is because a trust is born of confidence. It is the pledge which society gives that the intentions of the dead as well as of the living shall be sacredly maintained. Against a trust time

* See 1 Lewin on Trusts, chap. 1, *13, citing Lord Coke's definition of a use before the statute of uses.

does not run, except to add to its sanctity, and as long as government exists, and the law maintains its supremacy, no power can overthrow or destroy a trust. It can only be when the object for which it was originated becomes extinct; or when there is no one entitled to partake of its benefits; or when it becomes the property of creditors in payment of its debts. These principles, in their strongest sense, apply to all cases of charitable use, and property vested in a religious society is a charitable use, clothed with all the rights and incidents and powers of a trust. The first question to be considered, when a complaint is made that a trust has been violated and the existence of the trust or charitable use is not denied, is, what are the essential elements of the trust, and by what form, or in what manner, has the founder decreed that it shall be administered? These things once ascertained, it is the duty of courts to carry them into effect, to see that the conditions of the trust, whether they relate to the more essential interests, which are designed to be advanced and perpetuated, or to the manner of its administration, are with all fidelity carried into effect.

"The tribunals of law and of equity cannot pause to inquire whether, in their 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, but in the mind of the donors or founders of a trust they are often regarded as of the first importance, as vitally connected with the higher interests which they seek to promote, and as securing, better than could be secured in any other way, the execution of the trust, and thus the form and the substance are alike made essential portions of it."

It thus appears that the jurisdiction based upon trusts is settled. The statements of facts and law are frequently voluminous but from the weight of authority in cases of the enforcement of trusts it is believed that four propositions may be deduced.

1. That although the courts will not inquire into or decide what religious tenets or doctrines are true or false, yet when it becomes necessary in order to see that a trust or charity is administered according to the intention of its founders such inquiry and decision will be made as may give effect to that intention.

2. That for a like purpose the meaning of the name and organization of a religious body will be determined and enforced.

3. That both doctrine and organization may be considered.

4. That in case of a division or schism those (or that faction or fraction) adhering to the laws, usages, doctrines

and customs as adopted by the body before the separation will be recognized in questions as to title to church property.

Clearly cut separate illustrations of the two theories first stated are not numerous, but in many cases the two several points of doctrine and of organization or sectarian status are found to coalesce or to overlap. Organizations have generally been created in order to maintain or promulgate tenets. Yet instances of each, severally, may be found.

First then as to matters of doctrine some notable suits are found in the books. In the effort to be concise there is a risk of erroneous analysis and summary in citing these cases and indulgence for mistakes is asked. Conspicuous among all is the opinion of Lord Eldon in *Attorney General v. Pearson*, 3 Merivale 353 (1817). It is important and leading. It is cited and followed in a series of English cases and has been approved many times by American judges. It has also been criticised on this side of the Atlantic by those who may rightly be called jurists, but it is herein referred to as authority for the position thus formulated, to wit: The will of the founder of a trust is to be observed. If expressed in the deed it is to be therein primarily ascertained. If expressed in doubtful or general words recourse must be had to extrinsic circumstances, such as the known opinions of the founder, the existing state of the law, and the contemporaneous usage. To show these parol evidence may be received and considered.

Pursuing the examination further, we notice that this was a case arising out of a dispute concerning the rights of the minister and congregation of a dissenting meeting-house. The acting trustees by a majority had commenced a suit to eject the minister (Rev. J. Steward), and the minister and a person claiming to be the surviving trustee sought by information and bill in chancery to obtain an injunction to restrain the ejectment, and a declaration that the minister was entitled to receive the annual income of the trust premises and that he might be quieted in his office of minister and in the use of the meeting-house.

The original deed of trust made in 1701 relating to the

foundation was to the expressed intent that the house built upon the granted land was to be for "a meeting-house for the worship and service of God." By a deed of 1720 a grant of an acre of land was made to trustees to permit the rents, etc., to be received by A. (the then minister) during his life and after his decease "by the minister for the time being who should be the stated and settled minister of the congregation or society of Dissenting Protestants belonging to the said meeting-house," towards the support and maintenance of such minister forever. The pleadings contained lengthy statements of the disputes which had taken place, as to the election of trustees and in regard to the doctrines preached by the minister whom it was sought to eject.

The plaintiffs contended, in brief, that the intention of the donor was to promote the belief or doctrine of the Holy Trinity, that the defendants were Unitarians, opposed to Trinitarianism, and that the meeting-house and trust premises had been diverted from the trust. The answer denied the original purpose of the trust as alleged, and stated that Steward had been invited to become minister for three years on his profession of tenets in accordance with those approved by the congregation, and that he afterwards changed these tenets and preached doctrines objectionable to the congregation and that he insisted, against the will of the congregation and of the trustees, in holding the position of minister after the expiration of the three years.

There was a question whether under the law, as it existed at the time of the foundation, a trust for the maintenance of a religious teaching which denied the doctrine of the Trinity could be regarded as lawful; but this is outside of the scope of the present essay.

The Lord Chancellor (Lord Eldon) passing that question, stated this:

"* * What I have now to inquire is whether the deed creating the trust does or does not, upon the face of it (regard being had to that which the Toleration Act at the time of its execution permitted or forbade with respect to doctrine), bear a decided manifestation that the doctrines intended by that deed to be inculcated in this chapel were Trinitarian? Because, if that were originally the case, and if any number of the trustees are now seeking to fasten on this institution the promulgation of doctrines contrary to those which, it is thus

manifest, were intended by the founders, I apprehend that they are seeking to do that which they have no power to do, and which neither they, nor any other members of the congregation, can call upon a single remaining trustee to effectuate."

Afterwards, on finally disposing of the motion, he said:

"From this deed I can collect that the founders were Protestant Dissenters, and thence presume that their object was the maintenance of Protestant Dissenting worship; but I have nothing to inform me what species of doctrine this institution was intended to maintain; except as I may be able to infer from some of the clauses of the deed, and particularly from that clause which alludes to the possibility of the future prohibition by law of the worship thereby intended to be established, and also from that which relates to the binding effect of orders to be made by a majority of the Trustees upon matters relating to the meeting-house *only*; from which it should appear, both that the founders meant to establish an institution which was not then contrary to law, and that they did not mean to invest in the Trustees, or the major part of them, any right to vary the system or plan of doctrinal teaching which was to be maintained in this meeting-house according to their own discretion."

His Lordship then read the deed of 1720 and discussed the other questions in the case and granted an injunction 'till the further order of the court. The case was referred to a master who was to inquire what was the nature and particular object with respect to worship and doctrine for the observance, teaching and support of which each of the funds or estates was created.

This case stands the principal one, and in it is found Lord Eldon's statement, "that if any person 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."

Notwithstanding the criticism of Lord Eldon by jurists on the ground of a right to change doctrines and of religious liberty as Chancellor Walworth expressed himself in *Baptist Ch. v. Witherell*, 3 Paige 296, or as Ch. J. Williams did in *Smith v. Nelson*, 18 Vt. 511, and as Judge Doe did in *Hale*

v. *Everett*, 53 N. H. 9, or as Justice Miller did under his third class of cases,—i.e., of property held by an independent congregation, on page 724 of 13 Wallace in *Watson v. Jones*, it may confidently be averred that, *qua* trusts, *Atty. Gen. v. Pearson* is widely cited and relied on as authoritative in the majority of American opinions.

An oft-cited case is *Shore v. Wilson*, 9 Clark & Fin. 355. The history need not be set out or recital of opinions made except to such an extent as may be germane to the present topic. The final hearing was on an appeal to the House of Lords. The decision depended upon the construction of certain deeds of trust for charities made by Lady Hewley in which were the terms, "godly preachers of Christ's holy gospel," "godly persons," and others therein used. The common law judges were called and among other questions submitted to them was: First, Whether the extrinsic evidence adduced in the cause, or what part of it, was admissible for the purpose of determining who were entitled under the above words?

There was a diversity in the views* of the seven judges on different points, but it was said by Lord Cottenham in moving the judgment of the House that it did not appear to him necessary to consider minutely these differences. He did however approve of the opinion of Mr. Baron Gurney that that part of the evidence which went to show the existence of a religious party by which the phraseology found in the deeds was used, and the manner in which it was used, and that Lady Hewley was a member of that party was admissible; that being in effect no more than receiving evidence of the circumstances by which the author of the instrument was surrounded at the time.

It was held that neither Unitarians nor members of the Church of England, but Protestant Dissenters only, were entitled to the benefit of the charities.

The momentous decision on August 1, 1904, in two appeals from the Second Division of the Court of Session to the House of Lords under two captions *Free Church of*

* "Obscure"? See sec. 2467 Wigmore, Evidence; note.

Scotland (General Assembly of) v. Overtoun and Macalister v. Young, Law Reports 1904, App. Cases 515, seems on first impression so severe, so opposed to all our love of religious liberty, so contrary to the spirit of unity, so wasteful of great material resources for Christian worship and usefulness, that it is difficult to read the report of the facts and the conclusions of law in the case with a calm and restrained mind. The results reached by the high tribunal nullified the will of the vastly preponderating majority of those who by birth, training and conscientious conviction had the deepest interest in the welfare of the two great organizations that were affected by the union of the Free Church of Scotland and the United Presbyterian Church in 1900. In the Free Church the union had been approved by a majority of 643 against 27 in the Free Church Assembly, the Supreme Court of the Church. In the United Presbyterian Church the union was agreed to unanimously. A small number of ministers (24 out of 1100) and a larger number of laymen—that is, office-bearers and members, most of them resident in the Highlands,—disapproved of the union and refused to enter the United Free Church. They were the appellants and pursuers in the first appeal. It will answer our purpose to consider only that appeal. They claimed that they and those who adhered to them alone represented the Free Church of Scotland and were alone entitled to the whole funds and property of the Free Church which were held for behoof of the church by its general trustees, who were the respondents in the action, namely, Lord Overtoun and others. This appeal was concerned solely with the property of the church as a whole.

The syllabus of the case is carefully prepared. An effort to change it would be futile. It is as follows:

"The identity of a religious community described as a Church consists in the identity of its doctrines, creeds, confessions, formularies and tests.

"The bond of union of a Christian association may contain a power in some recognized body to control, alter, or modify the tenets or principles at one time professed by the association; but the existence of such a power must be proved.

"The denomination of Christians which called itself the Free Church of Scotland was founded in 1843. It consisted of ministers and laity

who seceded from the Established Church of Scotland, but who professed to carry with them the doctrine and system of the Established Church, only freeing themselves by secession from what they regarded as interference by the State in matters spiritual. Two main fundamental doctrines which the appellants, the minority of the Free Church, asserted that the seceders in 1843 carried with them and issued in their Claim, Declaration and Protest to their supporters and benefactors in that year to stand for all time were the Establishment principle, and the unqualified acceptance of the Westminster Confession of Faith, and they further asserted that these doctrines were part of the constitution of the Church and could not be altered. In 1843 and subsequent years the response to the appeal for funds was most bountiful, and the Free Church was endowed by the liberality of its members, the property being secured under what was called a "Model Trust Deed." For many years efforts had been made to bring about a union between the Free Church and the United Presbyterian Church, also seceders from the Established Church, but a church pledged to disestablishment. In 1900 Acts of Assembly were passed by the majority of the Free Church and unanimously by the United Presbyterian Church for union, under the name of the United Free Church, and the Free Church property was conveyed to new trustees for behoof of the new church. The United Presbyterian Church was opposed to the Establishment principle, and did not maintain the Westminster Confession of Faith in its entirety. The Act of Union left ministers and laymen free to hold opinions as regards the Establishment principle and the predestination doctrine (in the Westminster Confession) as they pleased. The respondents contended that the Free Church had full power to change its doctrines so long as its identity was preserved. The appellants, a very small minority of the Free Church, objected to the union, maintaining that the Free Church had no power to change its original doctrines, or to unite with a body which did not confess those doctrines, and they complained of a breach of trust inasmuch as the property of the Free Church was no longer being used for behoof of that Church. And they brought this action in the name of the General Assembly of the Free Church, asking substantially for a *declarator* that they, as representing the Free Church, were entitled to the property:

"**Held**, reversing the decision of the Second Division of the Court of Session (Lords Macnaghten and Lindley dissenting), that the Establishment principle and the Westminster Confession were distinctive tenets of the Free Church; that the Free Church had no power, where property was concerned, to alter or vary the doctrine of the Church; that there was no true union, as the United Free Church had not preserved its identity with the Free Church, not having the same distinctive tenets; and that the appellants were entitled to hold for behoof of the Free Church the property held by the Free Church before the union of 1900.

"By Lord Macnaghten: (1) That the Free Church when it came into existence claimed the power of altering and amending its Confession of Faith, and accordingly could declare the Establishment principle an open question, and could relax the stringency of the formula required from ministers and others; (2) That provision for expansion and development was part and parcel of the original trust under which the Free Church funds had been collected, and that there had been no breach of trust.

"By Lord Lindley: That any interpretation of the Scripture or of the subordinate standards bona fide adopted by the General Assembly

of the Free Church, and held by them better to express the doctrine intended to be expressed by the language used in the Confession, was not beyond the power of the Free Church, and that there was no breach of trust."

There were two hearings, the last on June 9, 10, 13, 14, 16, 17, 20, 21, 23, 1904, before the Earl of Halsbury, L. C. and Lords Macnaghten, Davey, James of Hereford, Robertson, Lindley and Alverstone, C. J.

From the conclusion stated in the syllabus only two dissented, but opinions reversing the court below were rendered by the Lord Chancellor, Lord Davey, Lord James, Lord Robertson and Lord Alverstone, C. J.

The union of the two churches had been overwhelmingly approved by many Scotch ministers and laymen, who by inheritance, by education, and by keen intelligence were intellectually as well as conscientiously tenacious of Calvinistic orthodoxy, and further the Scottish Court had sustained the union and, still further, two members of the Court of final resort deemed the union lawful. The reader regards with wonder not the protracted arguments, but the judicial firmness which determined the question what were the religious tenets which formed the bond of union of the association for whose benefit the trust was created. It is only by prolonged examination that the appendices to the Report of the Appeals, Statutes, Acts of Assembly (*e.g.*, Confession, Discipline, etc., etc.) can be studied.

There lingers in the mind of the reader a regret that the two opinions which, (while concurring in the legal propositions established by prior decisions), held that the General Assemblies of the Free Church had power to relax those fetters which the majority of the Law Lords deemed hard and fast, did not prevail. The grave results of the determination of the alleged breach of trust had no weight. The law was applied and the case will stand as a leading example in the administration of law. The rights of a minority in number and in influence were declared and enforced. We may differ, we may deplore, we may feel indignant, but the law as construed in its application to doctrines, creeds, formularies and tests was declared without excuse or sign of

wavering and the majority opinions were not influenced by dread of the effects which were so far-reaching and, to many minds, sadly disastrous. Surely no one can fail to see in this case a marked example of judicial courage.

The following is part of a quotation found in the opinion of the Lord Chancellor, at p. 616, and as an example of clear rhetorical expression it is inserted herein:

" * * * And thirdly, we do not coerce our neighbor by calling for his signature to our profession or articles of faith. We leave him free to adopt or to repudiate that faith, according as his reason, his conscience, and the grace of God may direct him. We but say to him, If you agree with us affix your signature to certain articles, or in some way notify your recognition of their truth; or if you disagree, withhold such signature or declaration. And we say of him, in the former case that he *is* and in the latter case that he is *not* of our religion. We do not compel him to hold our faith; but we ask him to inform us, by certain acts, whether he does hold it or does not; and we ask this, only if he claim to be enrolled as one of our body, and to be in religious communion with us. In the absence of such a test, our establishment would not be a rock, cemented into solidity by harmonious uniformity of opinion, it would be a mere incongruous heap of, as it were, grains of sand, thrown together without being united, each of these intellectual and isolated grains differing from every other, and the whole forming a but nominally united while really unconnected mass, fraught with nothing but internal dissimilitude, and mutual and reciprocal contradiction and dissension. *Hic dextrorsum abit; ille sinistrorsum.*

"This indeed, I should hold to be, in the language of a late prelate, 'a church without a religion.'" Smith, B. in *Dill v. Watson* (1836) 2 Jones Rep. (Ir. Ex.) 48, 91.

Some American examples of trusts may now be given.

The case of *Hale v. Everett*, 53 New Hampshire 9 (1868), is remarkable for the long opinions of Sargent, J., who represented the majority of the Supreme Judicial Court and of Doe, J., dissenting. The first covers 84 pages and the other 150 pages. The citations are so numerous that they may serve for a digest up to the date of the decree.

The discussions in these elaborate essays cover a wide range upon the Bill of Rights, Constitution and Statutes of the State,* and upon the law as to religious names, sects and doctrines. The dissent of that distinguished lawyer who stood alone in his conclusions is marked by his wonted virile mental grasp and power of verbal utterance. It is

* The treatment of the Constitutional and Statutory Law of the State of New Hampshire is not deemed material here.

proof of great study of works on theology as well as law. The tenor of his able, learned and, at times, original arguments appears to be opposition to all action by the court on questions of doctrine and a strenuous demand for the right to change opinions and for what he deemed religious liberty. No brief synopsis can do justice to the extended opinions found in the report of the case. They probably contain the fullest judicial discussion of the subjects involved that has been published in American Reports, traversing the fields of theology and of law, and are worthy of careful study and admiration. The actual decision of the case is now cited in support of the second proposition herein, to wit, a consideration of doctrines by a court of high standing.

The point determined, tersely stated, was that by the law of New Hampshire, upon a most exhaustive review, a corporation under the name of "The First Unitarian Society of Christians in Dover" for which, *eo nomine*, a meeting-house had been built, could not hire, employ, allow, suffer or permit any person to preach and inculcate in the meeting-house of said society doctrines subversive of the fundamental principles of Christianity as generally received and held by the denomination known as Unitarians. (The decree expresses this position fully in its various paragraphs.)

In the syllabus the statement is made that deists, theists, free religionists and other infidels, though they may be Unitarians in some sense, are not Unitarian Christians.

The attitude of Judge Doe in his dissent is in marked contrast with that of Lord Davey in the Scottish Church case (*Assembly v. Overtoun et al.*, *supra*, p. 645), who said: "I appreciate, and if I may properly say so, I sympathize with the effort made by men of great intelligence and sound learning to escape from the fetters forged by an earlier generation. But sitting on an appeal from a Court of Law, I am not at liberty to take any such matter into consideration."

Princeton v. Adams, 10 Cushing 129 (1852). A legacy to a church and society "so long as they maintain their present essential doctrines of faith and practice," which were then Unitarian, was forfeited by a change to a Trinitarian system of faith and practice.

Metcalf, J. " * * Now it is impossible for us to adopt the suggestion made in argument, that these two systems of belief are the same essential doctrines and principles of faith and practice, or to suppose that the testator so regarded them. He was a Unitarian and meant to assist in the teaching of his own faith and not another. And we know of no school either of theology or of jurisprudence in which these two systems of faith were ever considered essentially the same. From the early days of Christianity they have always been deemed, as they have been in our day, antagonistic systems. And courts have decided that funds given to support the teaching of one of them, are misemployed and perverted when applied to support the teaching of the other, and have redressed such misemployment." Citing *Attorney General v. Pearson*, 3 Meri. 353; *Shore v. Wilson*, 9 Clark & Fin. 355; *Attorney General v. Shore*, 11 Simons 592 and 16 Simons, 210, etc.

In *Smith v. Pedigo*, 145 Ind. 361 (1896), McCabe, J., at p. 409, copies from a prior opinion: "And again, in *Lamb v. Cain*, 129 Ind. 510, this court further answered the question thus: 'Where it is alleged, in a cause properly pending, that property thus dedicated is being diverted from the use intended by the donor, by teaching a doctrine different from that contemplated at the time the donation was made, however delicate and difficult it may be, it is the duty of the court to inquire whether the party accused of violating the trust is teaching a doctrine so far at variance with that intended as to defeat the objects of the trust, and if the charge is found true, to make such orders in the premises as will secure a faithful execution of the trust confided. *Watson v. Jones*, supra; *Miller v. Gable*, 2 Denio 492; *Attorney General v. Pearson*, 3 Meri. 353; *Watkins v. Wilcox*, 66 N. Y. 654; *Attorney General v. Town of Dublin*, 38 N. H. 459; *Happy v. Morton*, 33 Ill. 398; *Fadness v. Braunborg*, 73 Wis. 257."

This paragraph from the opinion of Justice Cassoday in *Fadness v. Braunborg*, 73 Wis. 257, at p. 293, well sums up the principle of the great majority of cases:

"Courts deal with tangible rights not with spiritual conceptions unless they are incidentally and necessarily involved in the determination of legal rights. Such trusts when valid and so ascertained must be enforced; but to call for equitable interference there must be such a real and substantial departure from the designated faith and doctrine as will be in contravention of such trusts. *Miller v. Gable*, 2 Denio, 492; *Happy v. Morton*, 33 Ill. 398; *Lawson v. Kolbenson*, 61 Ill. 405; *Attorney General ex rel Abbot v. Town of Dublin*, 38 N. H. 459; *Watson v. Jones*, 13 Wall. 679; *Eggleston v. Doolittle*, 33 Conn. 396; *Keyser v. Sansifer*, 6 Ohio St. 363."

See, *Cape v. Plymouth Church*, 117 Wis. at pp. 155, 156.

2. The effect of name and organization.

This is given in a few words by Sargeant, J., in *Hale v. Everett*, 53 N. H., supra, at p. 81: "Difference in creed or

belief of the Christian doctrines makes the different Christian sects; difference in *name* makes the different denominations, and the name usually indicates or describes the sect."

When the trust was for "a temple for the worship of Almighty God, after the order of the Reformed Dutch Church of North America," it was held a violation to sever the denominational relation by a union with the Presbyterian Church, though the doctrinal belief continued identical; and further the prior acquiescence of the plaintiffs in the suit in the union did not estop them from subsequently bringing a bill in equity to maintain the trust. *Jones v. Wadsworth*, 4 W. N. C. 514 (1877), affirming S. C. 11 Phila. 227. See *Baker v. Ducker*, 79 Cal. 365, *Trustees of First Cong. Church v. Stewart*, 43 Ill. 81 (1867), *Finley v. Brent*, 87 Va. 103 (1890).

This point, however, may be passed briefly in view of what Judge Sharswood said in the oft-cited case of *Roshi's Appeal*, 69 Pa. 462 (1871). His opinion (on p. 468) covers the third proposition of the present essay, thus:

"The principle which governs in all such cases is old and well settled, and has been frequently asserted by this court. 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. Indeed, in many churches, its ecclesiasticism or form of church government is an important if not a fundamental point of doctrine. It is based, in their view, upon a scriptural model or teaching. Thus government by diocesan bishops, and the three orders of the ministry—bishops, priests and deacons—is part of the doctrine as well as the order of the Established Church of England, and her daughter, the Episcopal Church of this country. On the other hand, the Established Church of Scotland, and, for the most part, the reformed churches of the continent of Europe, and all those who have derived their succession from them, hold to the doctrine of the perfect parity of ministers, and government by Presbyteries or Classes and Synods."

4. It follows from the foregoing principles that when in any particular church there is a breach or schism that party which adheres to the original doctrines, usages and government,—in other words, those who maintain the trusts, will be sustained in the event of a suit. In addition

to the cases hereinbefore named some others may be cited in support of this view.

In *Reorganized Church of Jesus Christ v. Church of Christ*, 60 Fed. 937, in the opinion of Philips, District Judge (Circuit Court W. D. Missouri), at p. 953, there is the following statement:

"In case of disorganization and factional divisions of an ecclesiastical body, the settled rule of the civil courts is that 'the title to church property * * * is in that part of it which is acting in harmony with its own law, and the ecclesiastical laws and usages, customs and principles, which were accepted among them before the dispute began, and the standards for determining which party is right.' The right of ownership abides with that faction, great or small, which is 'in favor of the government of the church in operation with which it was connected at the time the trust was declared.' *McRoberts v. Moudy*, 19 Mo. app. 26; *Roshi's Appeal*, 69 Pa. 462; *Baker v. Fales*, 16 Mass. 488; *White Lick Quarterly Meeting of Friends v. White Lick Quarterly Meeting of Friends*, 89 Ind. 136."

The court also cited Judge Strong's lecture on Relation of Civil Law to Church Property, pp. 49, 50,* and the opinion of Justice Caton in *Ferraria v. Vasconcellos*, 31 Ill. 54, 55.

This epitome of the rule in Pennsylvania is to be found in *Krecker v. Shirey*, 163 Pa. 534 (1894) in the opinion of Mr. Justice Williams on page 551: "The title to the church property of a congregation that is divided is in that part of the congregation that is in harmony with its own laws, usages and customs as accepted by the body before the division took place, and who adhere to the regular organization. *McGinnis v. Watson et al.*, 41 Pa. 9; *McAuley's Appeal*, 77 Pa. 397; *Landis's Appeal*, 102 Pa. 467." Other cases in Pennsylvania are to the same effect,—e.g., *Bose v. Christ*, 193 Pa. 13 (1899); *Greek Church v. Greek Church*, 195 Pa. 425 (1900).

See, also, further, among many in different states, these, viz.: *Methodist Episcopal Church v. Wood*, 5 Ohio 283 (1831); *Venable v. Coffman*, 2 W. Va. 310 (1867); *Jones v. Walker*, 8 Baxter's Tenn. 277 (1874); *Rottmann v. Bartling*, 22 Neb. 375 (1887).

* I regret that I have not been able to see a copy of Judge Strong's lecture.—J. W. P.

There are cases in opposition to the foregoing propositions,—*e.g.*, a number in New York, including *Robertson v. Bullions*, 11 N. Y. (1 Kernan) 343; *Petty v. Tooker*, 21 N. Y. 267; *Burrell v. A. R. Church*, 44 Barb. 282; but these have been repeatedly ignored in other states upon the ground that they were based upon the provisions of the statute of New York in relation to religious corporations. See, *Hale v. Everett*, 53 N. H. at p. 74; *Smith v. Pedigo*, 145 Ind. pp. 399, 401. See also *Baxter v. McDonnell*, 155 N. Y. 84.*

The contrary view is also independently and forcibly expressed in the opinion of Williams, C. J., in *Smith v. Williams*, 18 Vt. 511 (1846), a case which it may be said stands almost alone. He said, at page 554:

"It could not, however, be tolerated in this country, to adopt to their extent, the principles laid down in the case of *Attorney General v. Pearson*, 3 Meri. 411 and 7 Sim, 290, or the principles laid down by the Chancellor, Lord Lyndhurst, in *Attorney General v. Shore*, in a note to the latter case. The answer of the defendants in the former case contains reasons much more satisfactory, to my mind, than the opinion of Lord Cottenham or Lord Lyndhurst. No satisfactory answer was, or has been, given to the inquiry propounded by the counsel in that case that, if the chancellor could decree what doctrine should not be taught, he might, with equal propriety, declare what doctrine should be taught. I apprehend it would not be a question of easy solution, on the doctrine of those cases, to determine what deviations from the creed of a founder of a charity for religious uses should be considered a violation of the trust. Most religious societies have been, at times, divided on questions arising out of their articles of faith, and have altered them in many particulars, by some deemed unessential, and by others essential. The situation of our country, our constitutional provisions in relation to religious freedom, forbid that the authority of those cases should be here recognized."

This is persuasive, but if it be the duty of courts to see that trusts are performed, and not nullified, it might well become necessary to decide affirmatively what shall be taught, as it has been in so many instances to decide negatively what shall not be taught. The difficulty of ascertaining doctrines cannot affect the obligation to make such an

* It seems that a change was made in New York by Acts of 1875 and 1876 which deprived the congregation as well as the trustees of a religious body of the power to divert the church property from the promotion and dissemination of the religious views of the persons obtaining and acquiring it to the promulgation and maintenance of any different system of religious belief. See *Isham v. Trustees*, 63 Howard's N. Y. Prac. 465.

attempt, any more than the difficulty of determining questions of contingent remainders or executory devises, or other abstruse legal problems, will excuse a judge from giving intense study and his best conclusion. Many legal contests are ended by a "last guess" of the highest courts.

Compare the opinion of Judge Sharswood in *Schnorr's Appeal*, 67 Pa. 138, at p. 146, which begins with these words:

"When property, real or personal, is vested in a religious society, whether incorporated or not, as a church or congregation for the worship of Almighty God and the promotion of piety and godly living, it is a charitable use whether the donors be one or many."

Referring to the opinion of C. J. Lowrie in the case of *McGinnis v. Watson*, 5 Wright 9, as entirely extrajudicial and quoting it to the effect that a congregation may change a material part of its principles or practices without forfeiting its property, on the ground that to deny this would be imposing a law upon all churches that is contrary to the very nature of all intellectual and spiritual life, and because the guarantee of freedom to religion forbids us to understand the rule in this way, Judge Sharswood said:

"I ask leave most respectfully to enter against it my dissent and protest. * * * Courts which have the supervision and control of all corporations and unincorporated societies or associations, must be guided by surer and clearer principles than those to be derived from the nature of intellectual and spiritual life. The guarantee of religious freedom has nothing to do with the property. It *does not guarantee freedom to steal churches*.* It secures to individuals the right of withdrawing, forming a new society, with such creed and government as they please, raising from their own means another fund and building another house of worship; but it does not confer upon them the right of taking the property consecrated to other uses by those who may now be sleeping in their graves. The law of intellectual and spiritual life is not the higher law, but must yield to the law of the land."

This division of the relation of civil courts to religious bodies has required an examination of many authorities and it is believed that a sufficient number has been selected to show the validity of the alleged jurisdiction in cases of trusts.

A second division,—*i.e.*, where no trust is involved, requires less lengthy consideration.

* Not italicized in original.

The first proposition is at hand, formulated in the opinion of Mr. Justice Miller in *Watson v. Jones*, 13 Wall. 679 (1871). This case is notable for several reasons. The differences between the parties were not in religious but in political beliefs. The reporter, Mr. Wallace, gives an unusually long statement of the facts, and the briefs of counsel are full and able. The opinion is marked by the classification of the questions in controversy in the civil courts regarding property rights under three general heads and these are referred to in support of rulings by courts (both Federal and State) in almost numberless subsequent cases. All these features have combined to make this decision of the Supreme Court of the United States conspicuous and indeed the leading American case.

The first class found in the opinion has been noticed under the head of trusts, *supra*. The second class of Justice Miller is this: When the property is held by a religious body which by the nature of its organization is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority. He said, at p. 725:

"In such case where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they have changed in some respects their views of religious truth."

The cases of *Shannon v. Frost*, 3 B. Mon. 253, "where the principle is ably supported by the learned Chief Justice

of the Court of Appeals of Kentucky," and *Smith v. Nelson*, 18 Vt. 511, are cited by Justice Miller.

This turns on the question of the independence of the religious body,—“if it owes no fealty.” It is in accord with the principle of C. J. Gibson’s opinion in *The Presbyterian Church v. Johnston*, 1 W. & S. 9 (1841) and expressed in the Pennsylvania decisions that followed,—e.g., the statement of Judge Williams in *Krecker v. Shirey*, 163 Pa. 534 (1894) at p. 551: “An independent congregation may be governed by the majority of its own membership, but a congregation connected with any given denomination must submit to the system of discipline peculiar to the body with which it is connected. *Ehrenfeldt’s Appeal*, 101 Pa. 186; *Fernstler et al. v. Seibert et al.*, 114 Pa. 196.”

The theorem laid down seems self evident; but it also appears that the fact must be that the property in such a case must not be derived from donations, subscriptions or other sources given or paid for the maintenance of worship, faith, teachings and discipline in some way expressly, (or by binding implication), the creation of a trust. If there be no allegiance to any other religious body or higher ecclesiastical authority and no trust, a purely voluntary, self-governing association or corporation may change its name or form of government or creed or interpretation of doctrines by the action of the majority, provided the general rules of law which apply to all voluntary associations are not infringed.

It is interesting at this place to notice in the opinion of McCabe, J., in *Smith v. Pedigo*, *supra*, at p. 385, when a majority of an independent church had received an unfavorable decision from the Danville Association, a council of Baptist churches, that even if such action of the association were purely advisory and not judicatory,—

“yet, as both parties submitted their claim to it, on their own statement and version of the controversy, seeking its recognition, the decision of the association is entitled to very great weight as to which faction is the real and true Mount Tabor Church, and while not conclusive upon the courts, its decision, composed as it was of delegates, called messengers, from the whole twenty-two churches composing the association, a majority of whom in council had decided the same way, would be a safer guide for the civil courts on questions of religious doctrine, discipline, faith and practice than any judgment we might form contrary thereto.”

The supporting cases cited were *Mount Zion Baptist Church et al. v. Whitmore*, 83 Iowa 138; *Harrison v. Hoyle*, 24 Ohio 254.

The next sub-division concerning rights to property is considered in *Watson v. Jones* at page 722. It is "where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization." At page 727 the conclusion is given: "In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is, 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." At this point Justice Miller discusses the different rule in the English courts in cases of heresy and ecclesiastical contumacy, and he dissents in this regard from the views of Lord Eldon in *Attorney General v. Pearson*, supra, and in *Craigdallie v. Aikman*, 2 Bligh. 523.

The general question suggested is, can the civil tribunals in America interfere with what is really ecclesiastical administration? The late Judge Redfield wrote much on this question. His notes will be found in *Gartin v. Penick*, AM. LAW REG. Vol. 9, N. S. pp. 210, 225; in *Chase v. Cheney*, Vol. 10, pp. 295, 313; in *Watson v. Jones*, Vol. 11, pp. 430, 457, and in *Hennessy v. Walsh*, Vol. 24, pp. 276, 282. Together they constitute a lengthy and able discussion, written with the sincerity and clearness (and at times positiveness), which characterized the author. His essays, for they go far beyond the customary memoranda of

the annotator, are instructive. To fail to mention them would be to omit an important duty on the part of one who even attempts to outline the law bearing on the present topic. In 24 AM. LAW REG. p. 277, Judge Redfield thus summarizes:

"1. The decisions of ecclesiastical courts (or officers) having by the rules or laws of the bodies to which they belong, jurisdiction of such questions, or the right to decide them, will be held conclusive in all courts of the civil administration, and no question involved in such decisions will be revised or reviewed in the civil courts except those pertaining to the jurisdiction of such courts or officers to determine such questions according to the law or usage of the bodies which they represent. 2. It is a universal rule of law, applicable not only to this subject, but to all subjects connected with legal administration, that one who becomes a member of any church or other society thereby consents to be governed by the rules, or laws, of such organization, and that he cannot justly claim to have suffered wrong or injury by the enforcement of such rules upon himself or his property, upon the maxim, *volenti non fit injuria*. And this maxim applies to cases when the party voluntarily places himself in a position ultimately to have an act done affecting his interests, or done at the will of another, as if he subjected himself directly and immediately to the act; upon the principle that one who puts the slowest agencies at work, which are sure in the end to produce a given result, is as truly the author of the ultimate result as if produced by ever so immediate and direct causes. 3. That the courts will not interfere with the internal policy and discipline of churches or other voluntary societies, so long as they keep within the reasonable application of their own rules, which were known to the members, or might have been learned by them upon reasonable inquiry at the time of connecting themselves with the society or church."

The foregoing extract is quoted by Mr. Justice Trunkey in the opinion in *Stack v. O'Hara*, 98 Pa. 213 (1881) at p. 234. This was a case in which it appeared that a bishop of the Catholic Church removed the plaintiff, a priest of the church, from his congregation and forbade him to exercise his priestly functions. In an action to recover from the bishop damages for being deprived of his living, it was shown that by the law of the Catholic Church a bishop might remove a priest at pleasure and without trial. The plaintiff's contention was that the defendant's action was opposed to the law of the land and invalid. The Supreme Court affirmed the judgment of the lower court in favor of the defendant.

In *Irvine v. Elliott*, 206 Pa. 152 (1903) the suit was brought by a priest of the Protestant Episcopal Church against several defendants, including the bishop of the

diocese, for alleged conspiracy to have the plaintiff (1) deposed from the ministry and (2) to injure his reputation and standing as a Christian minister and for supporting these charges in a trial in an ecclesiastical court which rendered judgment against the plaintiff on whom sentence was accordingly pronounced by the bishop. Per cur. opinion, p. 154.

"* * * This court, as we have said time and again, is not a court of review of the proceedings of ecclesiastical courts. As remarked in *German Reformed Church v. Seibert*, 3 Pa. 282, 'civil courts, if they would be so unwise as to attempt to supervise the judgments of church courts, or matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals.' Also see *McGinnis v. Watson*, 41 Pa. 9, *Stack v. O'Hara*, 98 Pa. 213 and *Tuigg v. Sheehan*, 101 Pa. 363."

Observe the qualification, "within their jurisdiction."

The applications of the rule in the third class of *Watson v. Jones*, and its extensions, are so numerous that it is a pleasure to be able to refer to the long and instructive note in 100 Am. State Rep. 734 (Oct. 1903), to the case of *Morris Street Baptist Church v. Dart*, (67 So. Carolina 338), which the writer of the present article did not read until he had proceeded as far as this stage of his examination of authorities. The citations in the note seem to cover the various contingencies that may be called by the term "ecclesiastical administration." They are included under the first part of this valuable digest thus: I. Jurisdiction when property or civil rights involved, (a) expulsion of members; (b) expulsion of pastors. The note well supplies all needed decisions.

Only one more, and that a celebrated one, will be given. It is *Chase v. Cheney*, 58 Ill. 509 (1871). Mr. Justice Thornton (at p. 537) said: "The civil courts will interfere with churches or religious associations when rights of property or civil rights are involved. But they will not revise the divisions of such associations upon ecclesiastical matters merely to ascertain their jurisdiction." And, on page 540:

"This case may then be briefly summed up. A rector in the church is charged with nonconformity to its doctrines; intentional omissions

in the ministration of its ordinances; and the attempt is made to organize a court composed of his brother clergymen for his trial. He appeals to the civil court and alleges as the chief reason for its interposition the want of authority in the spiritual court to try him and a misconstruction of the canons. The same point was made to that court and its power denied. It was urged with the same earnestness and enforced with the same arguments there as here. That court overruled the objection and decided that it had jurisdiction. Five intelligent clergymen of the church, presumed to be deeply versed in biblical and canonical lore, were more competent than this court to decide the peculiar questions raised. Why should we review that, and not every other decision, which involves the interpretation of the canons? It is conceded that when jurisdiction attaches, the judgment of the church court is conclusive as to purely ecclesiastical offences. It should be equally conclusive upon doubtful and technical questions involving a criticism of the canons, even though they might comprise jurisdictional facts."

Chief Justice Lawrence and Justice Sheldon concurred in the decision (reversing the lower court), but dissented from one principle in the opinion. They assigned (p. 542) as the reason for not revising by the secular courts the spiritual administration by a spiritual court—

"that the association is purely voluntary, and that when a person joins it he consents, that for all spiritual offences, he will be tried by a tribunal organized in conformity with the laws of the society. But he has not consented that he will be tried by one not so organized, and when a clergyman is in danger of being degraded from his office and losing his salary and means of livelihood by the action of a spiritual court, unlawfully constituted, we are very clearly of opinion he may come to the secular courts for protection. It would be the duty of such courts to examine the question of jurisdiction, without regard to the decision of the spiritual court itself, and if they find such tribunal has been organized in defiance of the laws of the association, and is exercising a merely usurped and arbitrary power, they should furnish such protection as the laws of the land will give. We consider this position clearly sustainable upon principle and authority."

This case is the subject of a long commentary by Judge Redfield (10 AM. LAW REG. N. S. 308), and a further learned note by Hon. Melville W. Fuller (now Chief Justice of the United States Supreme Court), who was counsel for the defendant in error. The analogy of "the case of a reference or arbitration" or of a foreign judgment is invoked, —e.g., that awards will be set aside when *ultra vires*; that the foreign court has no jurisdiction; that the party was not served with process or that the same was fraudulently obtained. The long and earnest arguments in these notes and Judge Redfield's prior and subsequent ones (see volumes

of AM. LAW REG. cited supra), may be deemed to support the dissent in *Chase v. Cheney*. Among other authorities, Mr. Fuller quotes, p. 315, some sentences from the opinion in an intense and deplorable controversy, (now happily only a matter of history because of a wise and righteous reunion), between the Old School and New School divisions of the Presbyterian Church,

"The Supreme Court of Pennsylvania in *Commonwealth v. Green*, 4 Whart. 603, in reviewing the proceedings of the Presbyterian General Assembly says: 'We have, as already remarked, no authority to rejudge its judgments on their merits. * * * We are to determine only what was done; the reasons of those who did it are immaterial. If the acts complained of were within the jurisdiction of the Assembly, their decision must be final, though they decided wrong.' And again: 'Had the excluded synods been cut off by a judicial sentence, without hearing or notice, the act would have been contrary to the cardinal principles of natural justice, and consequently void.' And the same court in *Green v. African Methodist Episcopal Church*, 1 S. & R. 254, restored the relator to his 'standing' as a member, overruling the action of the society in that regard."

This further distinction is made by Taft, J., in *Brundage v. Deardorf*, 55 Fed. 839, when he says (p. 847):

"Even if the supreme judicatory has the right to construe the limitations of its own power, and the civil courts may not interfere with such a construction, and must take it as conclusive, we do not understand the Supreme Court in *Watson v. Jones* to hold that an open and avowed defiance of the original compact, and an express violation of it, will be taken as a decision of the supreme judicatory which is binding on the civil courts."

Certainly, the effect of *Watson v. Jones* cannot be extended beyond the principle that a bona fide decision of the fundamental law of the church must be recognized as conclusive by civil courts.*

Wallace v. Trustees, 194 Pa. 178 (1897) and S. C. as *Wallace v. Presbyterian Church, Appellants*, 201 Pa. 292 (1902), may be deemed singular in its course of proceedings. The history of the case is related by Judge Dean and is as follows: In 1892 the presbytery of which the Jamestown, Mercer County, Congregation is a member dissolved

* An extreme instance in a case of excommunicated members may be found in *Nance v. Busby*, 91 Tenn. 303. See note 15 L. R. A. 801.

the pastoral relation between the latter and its pastor, Rev. J. R. Wallace, upon charges preferred before the presbytery by eight members of the congregation, mainly that he was contumacious and treated the church court of session with the utmost disrespect; there was no charge of immorality or neglect of pastoral work. On his complaint of injustice there was a review by the synod, a higher ecclesiastical court; the synod reversed the action of the presbytery. The presbytery then appealed to the General Assembly of the United Presbyterian Church, the church court of last resort, which court in 1893 reversed the action of the synod. The plaintiff then filed his bill in the court of common pleas of Allegheny County, averring that he had been removed from his pastorate without just cause and that the proceedings in the church courts by which he had been removed were not in accordance with the law of the church, that the whole proceeding subsequent to the action of the synod was arbitrary, illegal and void, because in direct violation of the laws and usages of the church; and that he had been wrongfully deprived of his salary, had been injured in his standing and reputation as a Christian teacher and excluded from the reasonable exercise of the profession by which he lived. The trustees of the General Assembly were made defendants and filed a special answer, in substance denying that they were answerable for the acts complained of. The court below sustained this answer and dismissed the plaintiff's bill. He appealed to the Supreme Court from this decree and it was reversed. The opinion of the court by Mr. Justice Dean (on p. 180 of 194 Pa.) thus treats the question of jurisdiction:

"Unquestionably, if the averments of the bill be sustained a court of equity has jurisdiction. No question of faith or doctrine of which the ecclesiastical courts of his church have sole jurisdiction is involved. It is simply whether plaintiff has been illegally deprived of his rights of property. If, in violation of its own laws, the church has ousted him from his pulpit and in effect wrongly deprived him of his living, he can have recourse to the civil courts for restoration of his rights. A church cannot illegally wrest from its servants their property, any more than can an individual. 'When rights of property are in question, civil courts will inquire whether the organic rules and forms of proceeding prescribed by the ecclesiastical body have been followed.' *O'Hara v. Stack*, 90 Pa. 477. The plaintiff's averments, that, in violation of the

laws of the church, he has been deprived of his property are not denied; whether they are well founded is a question on which we pass no opinion; the time for such opinion is after adjudication and decree in the court below."

(The judge then discusses the question whether these were proper parties defendants, which is aside from the present purpose.)

The Common Pleas, Stowe, J., subsequently found as a fact that there were irregularities in the proceedings of the General Assembly which rendered the decision of the latter null and void. (These are specified in the opinion of the Supreme Court, p. 296.) There was a decree reversing the action of the General Assembly of the United Presbyterian Church, declaring it null and void, and restoring the plaintiff to the position of pastor. This was affirmed by the Supreme Court.

It may be averred with "confidence" (usually a foolish word in legal opinions), that in the case of a judgment by any court a fatal defect is the want of jurisdiction in the court which has entered such judgment. Take a marked illustration: The first section of the fourth article of the Constitution of the United States provides that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The Act of Congress of 1790, Rev. St. §905, was enacted for such authentication. Mr. Justice Bradley said in *Thompson v. Whitman*, 18 Wall. 457, upon a review of previous cases, that "the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state," notwithstanding the provisions of the Constitution and law of 1790, and the averments contained in the record itself. This doctrine has been repeatedly affirmed.

In a controversy of a different sort, which has excited much public interest, *Haddock v. Haddock*, 201 U. S. 562, (decided April 12, 1906, four justices dissenting), Mr. Justice White, pp. 572 and 573, stated the question:

"Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a State to persons within its jurisdiction, but on the contrary, because of the power which government may exercise over the marriage relation constitutes an exception to that rule * * ?

"Before reviewing the authorities relied on to establish that a divorce is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary, that when the full faith and credit clause of the Constitution is invoked to compel the enforcement in one State of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject matter or of the person of the defendant, the courts of another State are not required by virtue of the full faith and credit clause of the Constitution to enforce such decree. *National Exchange Bank v. Wiley*, 195 U. S. 257, 269 and cases cited."

It is submitted that, *a fortiori*, the jurisdiction of an ecclesiastical court may be examined by a secular court; for if no jurisdiction exist, the proceedings are *coram non judice*.

This event in Hebrew history is recalled:

"And Jephthah said unto them, I and my people were at great strife with the children of Ammon; and when I called you, ye delivered me not out of their hands. And when I saw that ye delivered me not, I put life in my hands, and passed over against the children of Ammon, and the Lord delivered them into my hand: wherefore then are ye come up unto me this day, to fight against me? Then Jephthah gathered together all the men of Gilead, and fought with Ephraim; and the men of Gilead smote Ephraim, because they said, Ye Gileadites are fugitives of Ephraim among the Ephraimites, and among the Manassites. And the Gileadites took the passages of Jordan before the Ephraimites: and it was so, that when those Ephraimites which were escaped said, Let me go over; that the men of Gilead said unto him, Art thou an Ephraimite? If he said, Nay; Then said they unto him, Say now Shibboleth: and he said Sibboleth: for he could not frame to pronounce it right. Then they took him, and slew him at the passages of Jordan." (Judges 12:2-7.)

To us who enjoy civil and religious liberty, the punishment seems cruel, but in the thought of the warriors who had come from the heat of the battle for a cause deemed righteous the password and the penalty were doubtless justifiable. Yet "Shibboleth" has been adopted as an opprobrious term for all narrow, hard, illiberal orthodoxy, intol-

erance, oppression and persecuting zeal. In our own age and country no religious password is necessary. The law will not permit a compulsory "advance and give the countersign," with a fatal alternative.

Consider some of the varied thoughts of men on the subject of Deity.

A mighty thinker, an educator and benefactor in many ways, ends his reasoning with emptiness, with the "Unknowable." A great scientist, original and profound, professes no cognizance of God, or soul or immortality; his affirmation is a negation; he knows only that on these topics he knows nothing.

A writer, learned, lucid, philosophical, may assert "that the things and events of the world do not exist or occur blindly or irrelevantly, but that all, from the beginning to the end of time, and throughout the furthest sweep of illimitable space, are connected together as the orderly manifestations of a divine Power, and that this divine Power is something outside of ourselves, and upon it our existence from moment to moment depends." And further, "Matthew Arnold once summed up these two propositions very well when he defined God as 'an eternal power that makes for righteousness.'" And yet the writer of the words just quoted might formulate no other creed, nor adhere to or uphold any church.

Other men are sceptics,—avowed, boastful, insistent.

Turning from all these differences and shades of thought, we find a multitude of men of all sorts and conditions, learned and unlearned, of many names and not at absolute agreement with each other in some points, (essentials, or non-essentials, perhaps), but all concurring in certain grounds of faith. They are in accord, for instance, in affirming that there is a God and that he is a being of infinite wisdom, power and love, a father and a friend, and that "the chief end of man is to glorify God and to enjoy him forever." Each sect, it is true, has special forms of doctrine, worship, government, that to its adherents are full of meaning; that to those who hold them, express eternal verities. Sometimes tenets or symbols that are null and void to one

are of precious value to another, as the tenderness of a "voice that is still," once dearly loved, is heard by only one of the living in psalm or prayer or music.

Whatever these diversities may be, religion, to the sincere believer, is an inspiration to right conduct, a solace in adversity or defeat, the consoling, nay the triumphant, "song of the conquered;" and its record of the lives and the deaths of prophets, martyrs and apostles, of the saints of all ages, sublime in courage, patience, endeavor and sacrifice helps and uplifts in present doubts, trials, sorrows or sufferings.

The two great commandments, supreme and dominant love of God and its necessary sequence, love of our neighbor, make the highest rule of conduct, its essence being unselfishness and beneficence. And on, and on, and on, far beyond all known earthly needs and experiences, after the vapor called life shall vanish, is a home, a rest, a glory passing the conception of man.

All this, and immeasurably and unspeakably more, is found in the teachings and the fellowships of churches, despite the faults, the weakness and the mistakes that are also in evidence.

Yet from each man, each set of men, whether of a church, or opposed to every church, or indifferent to all churches, the civil courts, in regard to religious matters, stand apart. Freedom, of conviction and of action, is the prerogative of all, unless rights of property or of persons are invaded, or trusts violated, or ecclesiastical administration is erroneously conducted, or the law of the land is disobeyed,—for this is America.

John W. Patton.