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Kenneth R. O'Brien
Daniel E. O'Brien

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PENNSYLVANIA'S WILLS ACT OF 1947 AND SEPARATION OF CHURCH AND STATE

By

REV. KENNETH R. O'BRIEN AND DANIEL E. O'BRIEN*

The first sentence of subdivision 1 of Section 7 of Pennsylvania's Wills Act of 1947 appears to be vulnerable on several grounds.1 It is as follows:

"Any bequest or devise for religious or charitable purposes included in a will or codicil executed within thirty days of the death of the testator shall be invalid unless all who would benefit by its invalidity agree that it shall be valid."

The Wills Act of 1947 supersedes the Wills Act of 1917 which had provided:

"No estate, real or personal, shall be bequeathed or devised to any body politic, or to any person in trust, for religious or charitable uses, except the same be done by will at least thirty days before the decease of the testator . . ."

The Committee on Decedents' Estates Laws of the Joint State Government Commission of the General Assembly of Pennsylvania, on June 1, 1946, issued a

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1The Wills Act of 1947, approved April 24, 1947, became effective on January 1, 1948, applying only to wills of all persons dying on or after that day.

At the present time there are restrictive statutes on testamentary gifts for charitable uses in the following states:

I. As To Both Amount and Time: California, Georgia, Idaho, Maryland, Mississippi, and Montana;

II. As To Time Only: District of Columbia, Florida, Ohio, Pennsylvania;

III. As To Amount Only: Iowa, Louisiana, and New York.

Consult: Scott on Trusts, Section 362.4 Statutory Restrictions In The United States.

It is submitted that the general positions taken in this paper with regard to the Pennsylvania statute have equal applicability to restrictive statutes of other states.
report, entitled: "Proposed Wills Act of 1947." The aforementioned subdivision 1 of Section 7, was enacted into law in exactly the same form as proposed. The Committee, in its report, made "Specific Comments" in support of its proposals. Those relevant to the sentence in question are as follows:

"'For religious or charitable purposes' has been substituted for 'to any body politic, or to any person in trust for religious or charitable uses' for simplicity."

It is submitted that the phrase "any bequest or devise for religious . . . purposes", in its latest set-up, will be the cause of many judicial controversies in the future.2

It may be contended that Section 7, as applied to certain religious activities, is unconstitutional, as in contravention to the provisions of the First and Fourteenth Amendments of the Constitution of the United States pertaining to freedom of religion.

It may be contended that Section 7, so applied, is null and void under the principles of Inter-Church-And-State Common Law on the ground that the State has no jurisdiction over such religious activities. Such a statute, in the language of medieval jurists, would be "impertinent to be observed" by the secular courts.

Let us consider, for example, a hypothetical will, by a member of the Church of Jehovah's Witnesses, which bequeaths $1,000 to the Church of Jehovah's Witnesses for the purpose of providing support for their ministers, and $1,000 to the Church of Jehovah's Witnesses for the purpose of providing printed sermons for distribution among their own members, and let us assume that the will had been executed within thirty days of the death of the testator, which occurred after January 1, 1948.

The will is offered for probate. Now suppose an heir should contest the validity of these two provisions on the ground that the two bequests were "for religious or charitable purposes" and void by virtue of the Wills Act of 1947.

2The section "saves" certain gifts for religious or charitable purposes contained in wills executed within thirty days of the death of the testator where all who would benefit by their invalidity agree that they shall be valid. Its main intent, however, is to inhibit many gifts for religious or charitable purposes.

In addition, in the words of the Committee, the section "saves certain gifts . . . where the religious or charitable gift is a carry-over from an earlier will." The Committee further commented, as to these saving provisions:

"If the beneficiaries do not agree, then the situation nevertheless is saved when:

1. The charitable or religious beneficiary is identical or substantially the same in both instruments, and

2. The gifts in both instruments are:

(a) identical, or (b) in cash, or for (c) shares of the residue, or (d) shares of the same assets and payable immediately or subject to identical prior estates and conditions; and in (b), (c), or (d), the later gift shall be good to the extent it does not exceed the prior gift.

"The subsection permits the testator to provide expressly in his new will that it shall not revoke charitable gifts in his former will if he dies within thirty days."
The Church of Jehovah's Witnesses would not contend, in reply, that the bequest for the support of their ministers and that the bequest for providing printed sermons for distribution among their own members are not for a "religious purpose." Without further argument, then, the two bequests would appear to be within the express inhibitory terms of the statute.

The Church of Jehovah's Witnesses might thereupon contend that the State of Pennsylvania had no jurisdiction to legislate any inhibition as to the support of its ministers by the members of the Church of Jehovah's Witnesses or any inhibition as to providing printed sermons for distribution among their own members. Such contention need not be based primarily on constitutional law grounds but can be based on the principles of Inter-Church-And-State Common Law.8

We begin our studies of Inter-Church-And-State Common Law with the Magna Carta, and the relations of Church and State in 1215 the year of the Magna Carta in England.

Pound has commented:

"... the Great Charter... is also a redress of the grievances of the Church, imposing respect for the then fundamental division of powers between the spiritual and the temporal."4

Chapter One of the Magna Carta, provided, "in primis," "that the English Church shall be free":

"In the first place we have granted to God, and by this our present charter confirmed for us and our heirs for ever that the English church shall be free, and shall have her rights entire, and her liberties inviolate; and we will that it be thus observed; which is apparent from this that the freedom of elections, which is reckoned most important and very essential to the English church, we, of our pure and unconstrained will, did grant, and did by our charter confirm and did obtain the ratification of the same from our lord, Pope Innocent III, before the quarrel arose between us and our barons; and this we will observe, and our will is that it be observed in good faith by our heirs for ever. We have also granted to all freemen of our kingdom, for us and our heirs forever, all the

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8Consult: Restatement Of Inter-Church-And-State Common Law, by O'Brien and O'Brien, in THE JURIST, V (Jan., 1945) 73.

underwritten liberties, to be had and held by them and their heirs, 
of us and our heirs forever".5

By the term "English church" was meant the English branch of the Roman 
Catholic Church. There was in England at the time no other religion than the 
Roman Catholic religion. Magna Carta did not purport to grant or guarantee the 
free exercise of any religion other than the Roman Catholic religion. Such a grant 
or guarantee would have been unthinkable in England in 1215. By the Magna 
Carta it was intended that, in the future, the State would not encroach upon the 
jurisdiction of the Catholic Church over its members in spiritual matters. We 
look first to Bracton6 for the Inter-Church-And-State Common Law of the period.

We are not certain as to the date of Bracton's birth. But it is quite probable 
that he was born in the reign of King John, (1199—1216), and died about four 
years before the end of the reign of Henry III, (1216—1272). The whole span 
of his life was spent within the period between the grant of Magna Carta and the 
defeat and death of Simon of Mountfort, Earl of Leicester, at the battle of 
Evesham, (1265).

There is no more authoritative source for the discovery of the true meaning 
of the phrase "freedom of the church" and of the phrase "separation of church 
and state", under the Magna Carta, than Bracton's "De Legibus & Consuetudinibus 
Angliae Libri".

It must be clearly understood that the Magna Carta granted no rights to the 
Catholic Church any more than the First Amendment to the Federal Constitution.

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5The Magna Carta was written in Latin. This translation is from A Commentary On The 

"Magna Carta—Like the Constitution of the United States, it is a great legal document." 
Pound, ibid., p. 62.

6Bracton, in 1245, was a justice in eyre. From then until about 1267, he was active on the 
bench, on missions with his king, and as a churchman, being a member of the Cathedral chapters 
at Wells and at Exeter for some time before his death. Cf. Rooney, in THE JURIST, VI (Oct. 
1946) 437, 463.
grants rights to exercise any religion. Both the Magna Carta and the Federal Constitution are negative in these respects. These rights existed independent of the Magna Carta and the Federal Constitution. The First Amendment guaranteed that Congress would not encroach on the exclusive jurisdiction of the church, (Protestant, Catholic, Jewish, and all other denominations), in respect to the exercise of legislative jurisdiction of religion. Magna Carta likewise guaranteed that the State would not encroach on the exercise of legislative, judicial, or executive jurisdiction of the Catholic Church.

Bracton, in the first half of the thirteenth century, set the common boundary of the field of jurisdiction of the Church and of the field of jurisdiction of the State, in the following terms:

"Ad papam et ad sacerdotium quidem pertinent ea quae spiritualia sunt, ad regem et ad regnum ea quae temporalia . . . ."

As to the respective jurisdictions of the Church courts and the State courts, Bracton declared:

" . . . pertineant ad forum ecclesiasticam . . . in causis spiritualibus vel spiritualitati annexis . . . ."

On page xli of the Introduction to edition of Bracton in the Rolls Series, by Sir Travers Twiss, (1878—1883), the author stated:

"That Bracton had very well defined views respecting the limits of papal authority within the realm of England, and that according to his opinion it couldn't overrule a custom of the Realm in temporal matters, may be gathered from a remarkable passage written by him with a boldness, which would have been hardly becoming in an ecclesiastic, if he had not been at the same time a justiciary of the Crown."

Twiss thereupon translated the passage in question, as follows:

"To the pope and to the priesthood, indeed, appertain the things which are spiritual, but to the king and to the realm those things, which are temporal . . . ."

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He translated the passage as to the jurisdiction of the church courts, as follows:

"... matter, which belongs to the ecclesiastical forum, as in spiritual causes or causes connected with the spirituality ...

Dean Pound, in an article published in 1933, describing the two jurisdictions in England existent in England in Bracton's time, and later, said:

"In the politics and law of the Middle Ages the distinction between the spiritual and the temporal, between the jurisdiction of religiously organized Christendom and the jurisdiction of the temporal sovereign, that is, of a politically organized society, was fundamental."

More recently, Dean Pound stated:

"In the medieval polity there was a basic distinction between spiritual and temporal jurisdiction, and this had been guaranteed both by the last chapter of Magna Carta and in the Confirmation of Charters by Edward I. When, therefore, Parliament undertook to provide for the custody of the seal of a religious house otherwise than the provisions of the law of the church, the Court of Common Pleas in 1450 said simply and plainly that the statute was impertinent to be observed and void.

"Again in 1506, the Court of Common Pleas refused to give effect to a statute of Henry V which would have had the effect of making the king a parson. No one could be made a parson by a temporal act. The king could not be given any spiritual jurisdiction without the assent of the Pope."

Towards the end of his reign, (1509—Jan. 29, 1547), Henry VIII began his contest with the Pope for the supremacy of the English branch of the Catholic

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8Fromiss, VI, p. 165.

"... During the eleventh and twelfth centuries, the dominion of the papacy had been consolidated by a series of able Popes—pre-eminent amongst whom were Gregory VII (1073-1080) and Innocent III (1198-1216)." HISTORY OF ENGLISH LAW, Holdsworth, 3rd ed., Vol. I, p. 581.

As to the great authority of Bracton, the following quotation from a typed-card affixed to the fly-leaf of an edition of Bracton, on exhibition in the law library of the United States Supreme Court, is significant:

"This work is one of the monuments of the English law. It was written about the middle of the 13th century by Henry Bratton, or Bretton (d. 1268), but he is generally known as Bracton. It was the first great institutional work dealing with the English law and had great authority.

"Professor Holdsworth says:

'Bracton set out to write a treatise upon that law (the common law of England) which had no competitor either in literary style or in completeness till Blackstone composed his commentaries five centuries later' ...".


And note that the basic distinction between spiritual and temporal jurisdiction had been guaranteed more especially by the first chapter of Magna Carta. Pound had mentioned only the last chapter.

Consult Bonham's Case And Judicial Review, by Theodore F. T. Plucknett, in 40 Harvard Law Review, (Nov. 1926) 30, 36-41, 48, for more detailed analysis of the two cases mentioned by Pound.
church, a contest which was ultimately to result in the union of the church and the state—the opposite of the doctrine of separation of church and state—with the Church of England, as the established church. This union of church and state was to be accomplished by the usurpation by the state of the jurisdiction of the church, legislative jurisdiction, executive jurisdiction, and judicial jurisdiction. Magna Carta's guarantee of the freedom of the church was to be wholly abrogated in England. The doctrine of separation of church and state was to be developed in the British colonies, and guaranteed by the Federal and State constitutions.

Lord Birkenhead, Lord Chancellor of England, in the leading case of Bourne v. Keane, 1919 Appeal Cases, (House of Lords) 815, gives a portion of this development of the union of church and state in England through the legislative process in the following language:

"No fundamental changes in doctrinal matters were made during the reign of Henry VIII. His disputes with the Pope were mainly on questions of jurisdiction . . ."

"On November 4, 1547, . . . the first Act passed . . . in the first Parliament of Edward VI . . . requiring communion to be administered in both kinds. . . On March 5, 1548, appeared the Order of Communion, which provided:

'The time for the Communion shall be immediately after the Priest himself has received the Sacrament without the varying of any other rite or ceremony in the Mass (until other order shall be provided), but as heretofore usually the Priest hath done with the Sacrament of the Body.'

"This Order relates to the rite of Communion to be administered during the celebration of mass. . . Indeed, inasmuch as before then Communion could take place at any celebration, public or private, the requirements of notice, and of communication only at a public service, tended to diminish the opportunity of communicating afforded to the laity . . .

"The Order of the Communion was a mere temporary measure, and steps were almost immediately taken to provide new services. The First Prayer Book of Edward VI was drawn up in 1548, and was the subject of debates in both Houses of Parliament. Sweeping changes were made in the form of the mass. The fourth rubric made the wearing of the chasuble (which was the sacrificial vesture) optional, and the entire portion of the mass which constitutes the act of formal oblation, together with the prayers which accompany it, were omitted. . . . The name 'mass' was retained both in the title and also where it is mentioned in the preamble to the Act of Uniformity, 1549 (2 & 3 Edw. 6, c. 1), and the general acquiescence of the clergy and laity also point to the conclusion that the new rite was a form of mass. The Book of Common Prayer came into force on Whitsunday, June 9, 1549, and, as this was by the Act of Uniformity the only form allowed by law, it follows that if, contrary to
the view which I respectfully urge upon your Lordships, this service
was not a form of mass, then the celebration of mass was thence-
forth forbidden.

"There were many who refused to obey the new book, and ac-
cordingly further provision to compel its adoption was made by the
Act 3 & 4 Edw. 6, c. 10, which recites the establishment of this book
and refers to the 'old accustomed superstitious service' and requires
(inter alia) all obnoxious images and books to be destroyed.

"My Lords, this First Prayer Book was a compromise which
pleased neither par, and which was obnoxious to the Protestants
for many reasons, but principally because it used words in the
Communion Service which were generally understood to denote the
sacrifice of the Mass . . . the Second Prayer Book (was) published
in 1552 under sanction of the statute 5 & 6, Edw. 6, c. 1. There
can be no doubt that this service was a Communion Service pure
and simple . . . By the Act of Uniformity, 1559 (1 Eliz. c. 2),
the Second Book of Common Prayer of Edward VI, as altered, was
again made obligatory, and s. 4 of the Act prohibited the use of any
other form in any place.

"The effect was to render celebration of mass illegal and there
are many instances of people being arrested for attending mass
. . . and even the services at the ambassadors' chapels were inter-
fered with in order to prevent the attendance there of British sub-
jects. It was not, however, until 23 Eliz. c. 1 that the saying or
singing of masses was expressly declared to be a criminal offense
. . . and remained so until 31 Geo. 3, c. 32 . . .

"My Lords, I think that the plain truth of the matter is that
when the Reformation became an established fact the general notion
was that only one form of religion could be safely allowed . . ."11

Before 1550 there was but one Christian church in England. That was the
Catholic Church. But there was separation of church and state. This separation
of church and state was maintained by mutual recognition of their respective
jurisdictions. As Henry VIII (1509—1547), Edward VI (1547—1553), and
Elizabeth I, (1558—1603), usurped for the State the jurisdiction of the Church,
separation of church and state gave way to union of church and state. By this
time the Christians in England were divided into two bodies, Catholics and
Protestants. The Established Church—to be known as the Episcopal Church—
became the only religious society with legal standing. It was supported by public
funds; its bishops received their offices and powers from the state; its liturgy and
services were prescribed by the state; its official head was the king (or queen) of

11"In the preambles to Henry’s statutes, we can see the gradual elaboration of the main
characteristic of these changed relations of Church and State—the theory of the Royal Supremacy.
The dual control over things temporal and things spiritual is to end. The crown is to be supreme
over all persons and causes. The canon law of the Western church is to give place to the 'King's
Ecclesiastical Law of the Church of England.' These great results were achieved by the Reformation
Parliament which sat from 1529-1536."12

England. All subjects were required to attend the services of the Established Church, and any person preferring any other form of religion was subjected to penalties of the law.

Dissension broke out among the members of the Episcopal Church. Many of these dissident groups migrated to America, carrying with them memories of bitter experiences from the effects of the usurpations by the state of jurisdiction in spiritual matters which belonged exclusively in the church.

Roger Williams, the minister who founded Rhode Island, among others, carried the idea of separation of church and state into the American colonies, and in 1636 strenuously contended that the State had no jurisdiction over spiritual matters. It was he who insisted that this principle of Inter-Church-And-State Common Law should be incorporated, as follows, in a written agreement to be signed by all the settlers of the new colony:

"We whose names are hereunder desirious to inhabit the town of Providence, do promise to subject ourselves in obedience to all such orders as shall be made for the public good by the major consent of the present inhabitants and others whom they shall admit unto them, only in civil matters."

Coke, in his Commentaries on the Magna Carta, is high authority for the proposition that the powers of the Church to legislate, administer and adjudicate, in respect to spiritual matters, existed prior to and were not dependent upon any provisions of the Magna Carta, in the same manner as the powers of the churches in the United States to legislate, administer and adjudicate, in respect to spiritual matters, are deemed by the best reasoned authorities to have existed prior to and not to stem from the First Amendment to the federal Constitution.

In the second Part of Coke’s Institutes of the Laws of England, (Clarke’s 1809 ed., London), at page 2, commenting on Chapter One, is the following:

"(4) Quod ecclesia Anglicanae libera sit.) . . .
"( . . . this charter is declaratory of the ancient law and liberty of England, and therefore no new freedom is hereby granted . . . but a restitution of such as lawfully they (all ecclesiastical persons)

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12 "His (Coke’s) Second Institute, containing his Commentaries on Magna Carta was published in 1642 by order of the Long Parliament. This Commentary was greatly relied upon in the controversies between the colonies and the British government before the Revolution and furnished much of the material for our American bill of rights. It is a foundation document for the history of our constitutional law since the lawyers who framed our first state constitutions, which have been models for those which came after, took the Second Institute for a legal bible." Roscoe Pound, in The Constitutional Guarantees of Liberty, 25 Nebraska Law Review, (Mar. 1944) 55, 69.


"In 1776 the influence of Coke and Locke was no longer the predominant one that it had been. In the very process of controversy with the British Parliament, a new point of view had been brought to American attention . . . The vehicle of the new doctrine to America was Blackstone’s Commentaries . . . ."
had before, and to free them of that which had been usurped and encroached upon them by any power whatsoever; and purposely, and materially, the charter saith ecclesia, because ecclesia non moritur but moriuntur ecclesiastici, and this extends to all ecclesiastical persons of what quality or order soever.

" (5) Et habeat omnia jura sua integra.)

"That is, that all ecclesiastical persons shall enjoy all their lawful jurisdictions, and other their rights, wholly without any diminution or subtraction whatsoever; and jura sua prove plainly, that no new rights were given unto them, but such as they had before, hereby are confirmed; . . . ."

In 1765 the first volume of Blackstone’s Commentaries appeared in England. The fourth volume was published in 1769. This work was to have a profound influence in the colonies. An American edition was brought out in Philadelphia in 1771-72, with an advance sale of 1,400 copies. Before the Revolution nearly 2,500 copies were in use in the thirteen British colonies.

In Book 1, 279, Blackstone, (b. 1723—d. 1780), declared:

"V. The king is, lastly, considered by the laws of England as the head and supreme governor of the national church.

"To enter into the reasons upon which this prerogative is founded is matter rather of divinity than of law. I shall therefore only observe that, by Statute 26 Hen. VIII, c. 1, (reciting that the king’s majesty justly and rightfully is and ought to be the supreme head of the church of England; and so had been recognized by the clergy of this kingdom in their convocation), it is enacted, that the king shall be reputed the only supreme head in earth of the church of England, and shall have, annexed to the imperial crown or this realm, as well the title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of the supreme head of the church appertaining. And another statute to the same purport, was made, 1 Eliz. c. 1 (34).

"In virtue of this authority the king convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations . . . statute Hen. VIII, c. 19 . . makes the king’s royal assent actually necessary to the validity of every canon. . . .

"From this prerogative also, of being the head of the church, arises the king’s right of nomination to vacant bishoprics, and certain other ecclesiastical preferments; . . . I shall only here observe, that this is now done in consequence, of the statute 25 Hen. VIII, c. 20.

"As head of the church, the king is likewise the dernier resort in all ecclesiastical causes; an appeal lying ultimately to him in
chancery from the sentence of every ecclesiastical judge; which right was restored to the crown by statute 25 Hen. VIII, c. 19.\textsuperscript{18}

By 1785 Madison was in the midst of his battle with others of the founding fathers of this republic for the preservation of the principle of separation of church and state in the framework of our own government. He sought no grant by the Federal Government or by a State Government of a right to exercise religion. He was convinced that neither the Federal Government nor a State Government had jurisdiction to legislate, administer, or adjudicate as to religious matters. Such matters he believed to be within the exclusive jurisdiction of the churches.

In his famous Memorial and Remonstrance, he defined religion as "the duty we owe the creator," declaring that it is not within the cognizance of civil government.\textsuperscript{14} Elsewhere, he stated: "The Government has no jurisdiction over it."\textsuperscript{15} And again, he said: "There is not a shadow of right in the general government to intermeddle with religion."\textsuperscript{16} He argued: "Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body."\textsuperscript{17}

The result of the campaign for freedom of religion was the incorporation in the First Amendment of the following provisions: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

Analytically, these provisions of the bill of rights are bills of liberties. The Federal Government, as a politically organized society, guarantees that any attempt by Congress to exercise jurisdiction over such spiritual matters as are under the exclusive jurisdiction of a religiously organized society will be null and void as in contravention to the First Amendment.

An article in the Encyclopedia Britannica, entitled CHURCH AND STATE—SCOTLAND, setting forth the underlying principles governing the relation of Church and State in Scotland, may be profitably compared with the principles, governing the relations of Church and State, in England, and in the United States, as declared in Watson v. Jones. The article states:

\textsuperscript{18}"Henry VIII often inserted in the preambles to his statutes reasoned arguments to prove the wisdom of the particular statute. And, in drawing up these arguments he never hesitated to color facts and events to suit his purposes . . . It was not till an historian arose, who besides being the greatest historian of this century, was both a consummate lawyer and a dissenter from the Angelican as well as other churches, that the historical worthlessness of Henry's theory was finally demonstrated."

HISTORY OF ENGLISH LAW, Holdsworth\textsuperscript{1}, 3rd ed., Vol I. pp. 590, 591. (Holdsworth was herein speaking of Maitland.)

\textsuperscript{14}Madison's Memorial and Remonstrance, 2.
\textsuperscript{15}V Madison 132
\textsuperscript{16}V Madison 176
\textsuperscript{17}Madison's Memorial and Remonstrance.
"If the establishment in England is the most complicated, that in Scotland is the simplest which Christendom includes. In Scotland a 'clean sweep' of the medieval system was effected. The Church was equipped with a new polity, and in the course of history acquired an unprecedented independence. Its constitution as set out in the Church of Scotland Act 1921, exhibits the model of 'a free church in a free State', such as Cavour projected in the middle of the 19th century.

"The 3rd article 'declaratory of the Constitution of the Church of Scotland in Matters Spiritual' runs thus:

"This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate and to adjudicate finally, in all matters of doctrine, worship, government and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its courts, and the mode of election of its office-bearers and to define the boundaries of the spheres of labour of its ministers and other office-bearers. Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of this government as derived from the Divine Head of the Church alone, or give to the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of the spiritual government and jurisdiction . . . ."

"The State exercises no control over legislation or ecclesiastical courts, or patronage. Establishment in Scotland has no practical importance, though unquestionably its sentimental value as a solemn recognition of national Christianity is still great, and its abolition would be regretted by many, probably by most Scottish citizens."18

In 1885 Leo XIII, speaking for the Catholic Church, said:

"God has divided the government of the human race between two authorities, ecclesiastical and civil, establishing one over things divine, the other over things human. Both are supreme, each in its own domain; each has its own fixed boundaries which limit its activities . . . Everything therefore in human affairs that is in any way sacred, or has reference to the salvation of souls and the worship of God, whether by its nature or by its end, is subject to the jurisdiction and discipline of the Church. Whatever else is comprised in the civil and political order, rightly comes under the authority of the State; . . . ."19

On this point Reverend James P. Kelly, J.C.D., says:

"With regard to human law, the Church adheres to the doc-

18 5 Encyclopedia Britannica, 14th ed., p. 675.
19 Ep. encycl. Immortale Dei, 1 Nov. 1885.—See Four Great Encyclicals (1931 edition
trine that all authority is from God, and that in God's plan for the orderly government of the world, He has delegated His authority to two perfect sovereign societies. Each of these sovereign societies is independently and exclusively competent to regulate the affairs of men within its own sphere. These two sovereign powers are the Church and the State. The Church was established by God for the spiritual welfare of man in this world and to lead him to an eternity of happiness in heaven. The State was constituted as the supreme authority for the temporal welfare of man in this world . . . The legitimate civil authority, which we shall call the State, is considered by the Church to have been granted authority from God to legislate, administer and pass judgment within its own sphere, but that sphere is confined to the temporal welfare of man in this world to the exclusion of his own spiritual welfare, and the means established by God to lead man to eternal life."

The juridical results of the struggle for separation of church and state in America are evidenced in the opinion given in the leading case of *Watson v. Jones,* decided in the United States Supreme Court, on April 15, 1872, wherein the judicial jurisdictional boundaries of the two sovereigns within the same territory, the one a church and the other the state, were sharply outlined:

"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 systems of laws, and supported by a preponderating weight of judicial authority is, that, whenever the question of discipline or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicators to whom 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 . . . ."

In *Carter v. Papineau,* in 1916, (222 Mass. 464), the Supreme Judicial Court of Massachusetts declared that the State court has no jurisdiction in a controversy over a spiritual matter, the one in this case involving the refusal by an Episcopalian minister to give communion to a member of that church, at least until the controversy had been carried to a final judgment in the church courts.

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*As to the baptized non-Catholic, through baptism he has fundamentally subjected himself to the jurisdiction of the Catholic Church. However, in virtue of custom or epikeia the tacit exemption of those who are in good faith may be assumed in regard to laws that are not invalidating or disqualifying.*


*20”Marriage, Divorce and Annulments.”—THE JURIST, IV (1944), 246, 247. The Catholic Church holds unswervingly to the doctrine that it is the one true church. However, the members of this Church realize that the secular law considers churches of all denominations to be sovereigns and have exclusive jurisdiction over spiritual matters within their respective spheres. Mr. Justice Frankfurter, in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, at 638, 87 L. ed. 1628, at 1648, is authority for this statement: "There are in the United States more than 250 distinctive established religious denominations."*

Five or six years previously, in England, a member of the Episcopalian Church brought proceedings in the secular courts for refusal to give communion. These proceedings were commented upon in a note in 29 Harvard Law Review (March 1916) 560, on the Carter v. Papineau case, and it was stated:

"In England, the union of church and state gives the secular courts an appellate jurisdiction from the tribunals of the established church. Rex. v. Dibdin, (1910) P.D. 57, Thompson v. Dibdin, (1912) A.C. 533. In America, however, when civil rights are not involved, the secular courts have no jurisdiction over ecclesiastical disputes . . ."22

The two aforementioned bequests—admittedly "for religious purposes"—would be without the inhibition of the restrictive statute if the subject-matters were spiritual matters over which the Church of Jehovah's Witnesses had exclusive jurisdiction. It is believed that the contesting heir would not contend that either one of these two matters was not a spiritual matter. It would then follow that a Pennsylvania court should rule in favor of the Church of Jehovah's Witnesses under the principles of Inter-Church-And-State Common Law.

Assuming that the State did not have jurisdiction over these two matters and still claimed power to restrict the bequests, the Wills Act of 1947, thus applied, would be unconstitutional as in contravention of the Fourteenth Amendment of the Federal Constitution.

"Restatement of Conflict of Laws. Section 43. Exercise of Power By States Of United States Without Jurisdiction.

"Under the Constitution of the United States, the States cannot create interests if they have no jurisdiction.

"Comment. a. Effect of Fourteenth Amendment to Constitution.

"If a State attempts to exercise power by creating interests with respect to persons or things which it has no jurisdiction to create,

22In Bracton's time and in Blackstone's time

"The process by which the ecclesiastical courts enforced obedience to their decrees was excommunication. It was to the spiritual courts what outlawry was to the temporal courts. If the excommunicate did not submit within forty days, the ecclesiastical court signified this to the crown, and thereon a writ de excommunicato capiendo issued to the sheriff. He took the offender and kept him in prison till he submitted. When he submitted the bishop signified this, and a writ de excommunicato deliberando issued.

"The temporal consequences of excommunication were serious. The excommunicate could not do any act which was required to be done by a probus et legalis homo. 'An excommunicated person,' says Bracton, 'cannot do any legal act, so that he cannot act, or sue anyone, though he himself may be sued . . . And if he has obtained a writ it is not valid. For, except in certain cases, it is not lawful either to pray or speak or eat with an excommunicate either openly or secretly.' He is a man who has a 'leprosy of the soul.' The law was substantially the same when Blackstone wrote. 'He cannot,' he says, "'serve upon juries, cannot be a witness in any court, and, which is worst of all, cannot bring an action either real or personal, to recover lands or money due to him.'"

its action is in violation of the Fourteenth Amendment to the Constitution and is void in the State itself. The Supreme Court of the United States may review all cases whether from a lower Federal Court or from a State court of last resort which involves a question of the exercise of power on the part of a State when it has no jurisdiction.” 23

In addition to being unconstitutional under the Fourteenth Amendment, for lack of jurisdiction, apart from other constitutional provisions, the Wills Act of 1947, as applied to said religious activities of Jehovah’s Witnesses, would be unconstitutional as in contravention of the combined forces of the provisions of the First and Fourteenth Amendments as to the free exercise of religion.

Mr. Justice Reed, in his dissent in Murdock v. Pennsylvania, 24 says:

"It is only in recent years that the freedoms of the First Amendment (in 1940, as to freedom of religion, by the Cantwell case, 310 U.S. 296, 60 Sup. Ct. 900, 84 L. ed. 1213) have been recognized as among the fundamental personal rights protected by the Fourteenth Amendment from impairment by the States. Until then these liberties were not deemed to be guarded from State action by the Federal Constitution."

It is submitted that the Murdock case and the Follett case 25 would be adequate authority to support the contentions of the Church of Jehovah’s Witnesses that the Wills Act of 1947, as applied to the bequests by a member of the Church of Jehovah’s Witnesses for the support of its ministers and for distributing printed sermons among its members would be unconstitutional. To hold the Wills Act of 1947, as applied to such bequests, unconstitutional, it would not be necessary to call upon the full scope of the decisions in the Murdock and Follett cases, the two bequests being made by a member of a religiously organized society for the support of ministers of his own church and for distributing printed sermons to fellow members of his own church. In both the Murdock and the Follett cases the Jehovah’s Witnesses were dealing with non-members, over whom the church had no jurisdiction, and the Jehovah’s Witnesses were on premises of non-members, uninvited, over which land the church had no jurisdiction.

The Murdock case came to the United States Supreme Court on a writ of certiorari to the Superior Court of Pennsylvania:

Facts: Robert Murdock, intinerant, an ordained minister of the sect, known as Jehovah’s Witnesses, went from house to house, in the City of Jeannette, Pennsylvania, delivering books of sermons, advocating the doctrines of his religion. At the time of delivery of the religious books, he received sums of money from non-members of his church.

24319 U.S. 105, at 126; 63 S. Ct. 870; 87 L. ed. 1292, at 1306.
25321 U.S. 573; 64 S. Ct. 717; 88 L. ed. 938, (March 27, 1944).
The City of Jeannette had an ordinance, which provided in part:

"That all persons canvassing for or soliciting within said Borough, orders for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefor the following sums according to the time for which said license shall be granted.

"For one day $1.50; for one week . . . $7.00; for two weeks . . . $12.00; for three weeks . . . $20.00; . . ."

The ordinance provided for a fine for violation thereof.

Murdock had no license. He was arrested on a charge of violating the ordinance. He was tried in a local court.

Contentions Of The Minister. The minister contended that the delivery of the books of sermons constituted gifts and not sales; that the sums of money which he received were voluntary contributions for the religious activities of the Church of Jehovah's Witnesses; that he was not a commercial book-seller within the terms of the ordinance; that the distribution of the religious literature was his Church's method of spreading its religious beliefs; that he was preaching the gospel by going from house to house presenting the gospel of the Kingdom in printed form; that he had a right to preach the gospel from house to house; that he was exempt from the requirement of a license; that the ordinance imposing a tax on a minister in the distribution of such religious literature is unconstitutional as restricting freedom of worship in violation of the First Amendment of the Constitution of the United States, which the Fourteenth Amendment makes applicable to the States.

(The minister also claimed that the ordinance was unconstitutional as in violation of freedom of speech and freedom of the press. These claims will not be considered herein. Only freedom of religion will be treated.)

Contentions Of The Town of Jeannette. The town contended that the delivery of the religious books constituted sales and not gifts; that the minister was a book-seller within the terms of the ordinance; that the minister was not exempt from the requirement of a license; that he was engaged in a commercial venture and not a religious activity; that he was not preaching the gospel by going from house to house presenting the gospel of the Kingdom in printed form; that the constitutionality of the ordinance should be measured by the standards governing the sales of ordinary books and by ordinary sellers of merchandise; that the license was required for the selling of books, not for the spreading of religion; that the tax was not imposed upon the performance of a religious activity; that
the tax was not strictly an occupational tax; that it was a tax on a particular method of doing business; that it was regulatory; and that it was a constitutional exercise of sovereign power.

Conviction in the Mayor's Court: The minister was convicted in the local court.

Petition For Allowance Of Appeal To Court Of Quarter Sessions: Murdock petitioned for allowance of appeal from the summary conviction in the Mayor's Court to the Court of Quarter Sessions of Westmoreland County. The petition was refused.

Appeal To The Superior Court Of Pennsylvania: Murdock appeal to the Superior Court of Pennsylvania from the order refusing appeal to the Court of Quarter Sessions. The Superior Court affirmed the order, sustaining the judgment of conviction against the minister's contention that the ordinance deprived him of the freedom of speech, press, and religion, guaranteed by the First Amendment.

Keller, P. J., on July 23, 1942, gave the opinion of the Pennsylvania Superior Court. He said, in part:

"These appellants were arrested on complaints charging them with having violated said ordinance in unlawfully soliciting the sale of, and in selling, certain books and pamphlets, from door to door, in the City of Jeannette, without obtaining a license, as provided in said ordinance. A hearing was had before the mayor of the city and notes of the testimony at the hearing were taken in shorthand and transcribed. They form part of the record considered by the court below and sent up on appeal.

"The testimony establishes that all of the defendants—these appellants—went about from door to door in the City of Jeannette soliciting people in their homes, etc. to purchase, and selling, two books entitled 'Salvation' and 'Creation', respectively, and certain leaflets or pamphlets, all published by the Watch Tower Bible and Tract Society of Brooklyn, N. Y., for which the society fixed twenty-five cents each as the price for the books and five cents each as the price of the leaflets. Defendants paid twenty-five cents each for the books unless they devoted their whole time to the work, in which case they paid five cents each for the books they sold at twenty-five cents. Some of the witnesses spoke of 'contributions' but the evidence justified a finding that they sold the books and pamphlets....

"Their defence was that they were members of a sect, calling themselves 'Jehovah's Witnesses', and that it was against their religious convictions to apply for such a license, and that any prosecutions against them for violating the provisions of the ordinance re-
quiring such a license was an infringement of their rights under the Constitution of the United States and the Constitution of Pennsylvania, and a restriction of the rights of freedom of worship, freedom of speech, and freedom of the press, secured to them by said Constitutions, and in direct violation of the 14th Amendment to the Constitution of the United States. . . .

"Within five days . . . after . . . the Mayor found . . . defendants guilty . . . they applied by petition to the court of quarter sessions for an appeal, which was refused by Judge Gordon, President Judge of Common Pleas No. 2 of Philadelphia County, specially presiding . . .

"The case of Pittsburgh v. Ruffner, 134 Pa. Superior Ct. 192, 4 A. 2nd 224—appeal refused by the Supreme Court of Pennsylvania . . . was concerned with a somewhat similar ordinance . . . We said, inter alia:

'I. The ordinance in question cannot by any stretch of the imagination, be held to be directed against freedom of worship. It is concerned with hawking and peddling merchandise, and with selling merchandise from house to house and in buildings. It does not discriminate against non-residents, nor is it limited to any particular kind of merchandise; . . . This appellant is perfectly free to worship God according to the dictates of his own conscience, separately or with his family and co-religionists, in his own home or theirs, and in church, chapel, assembly or other gathering place . . . The constitutional right of freedom of worship does not guarantee anybody the right to sell anything from house to house or in buildings, belonging to, or in the occupancy of, other persons.

'II. Nor does the ordinance unlawfully infringe upon the constitutional right of freedom of the press . . .

"We have several times since approved the legal propositions enunciated in that case. . . .

"Since the submission of the present case to this court, the Supreme Court of the United States has decided three cases, dealing with the same questions involved in the present appeals, to wit, Jones v. City of Opelika, Bowden et al. v. City of Fort Smith; and Jobin v. State of Arizona, . . .

"The facts in the cases of Bowden et al. v. City of Fort Smith and Jobin v. State of Arizona are so similar to those in the appeals before us, and the discussion of Mr. Justice Reed in holding that similar ordinances of the City of Fort Smith, Arkansas, and City of Casa Grande, Arizona, were not violative of the rights—whether of freedom of worship, freedom of speech, or freedom of the press—of the sectarians calling themselves 'Jehovah's Witnesses', is so appropriate to our cases that we need do little more than cite it as determinative of the federal constitutional questions raised by the appellants. . . .
"The orders are severally affirmed..." (Cunningham, Baldridge, Hirt and Kenworthey, JJ. concurred.)

Petition For Leave To Appeal To The Supreme Court Of Pennsylvania: The minister petitioned for leave to appeal to the Supreme Court of Pennsylvania. This petition was denied.

Petition For Writ Of Certiorari: The minister petitioned the United States Supreme Court for writ of certiorari to the Superior Court of Pennsylvania to review the judgment of conviction for violation of the ordinance.

QUESTION WHICH THE SUPREME COURT OF THE UNITED STATES WAS CALLED UPON TO DECIDE: Did the Superior Court of Pennsylvania err in affirming the conviction of the minister?

DECISION OF THE UNITED STATES SUPREME COURT, (Mr. Justice Douglas): Judgment reversed, cause remanded to the Pennsylvania Superior Court for proceedings not inconsistent with the opinion.

REASONS FOR THE DECISION OF THE UNITED STATES SUPREME COURT: (The decision was on a five to four basis: Chief Justice Stone, Justices Black, Murphy and Rutledge, with Douglas, made up the majority).

Mr. Justice Douglas's principal reasoning was as follows:

The ordinance imposing a flat license tax for the privilege of canvassing or soliciting within a municipality is,—when applied to religious colporteurs selling books and pamphlets, containing printed sermons and religious propaganda, from house to house—an unconstitutional invasion of the rights of freedom of religion and of speech and press. It is an unconstitutional invasion of the right of freedom of religion because the religious colporteurs are, in so acting, engaged in such exercise of religion as is protected by the First Amendment, and the flat license tax prohibits the free exercise of such religious activity.

Mr. Justice Reed wrote the principal dissent, and was therein joined by Justices Roberts, Frankfurter, and Jackson. He reasoned:

The ordinance imposing a flat license tax for the privilege of canvassing or soliciting within a municipality is not,—when applied to religious colporteurs selling books and pamphlets, containing printed sermons and religious propaganda, from house to house,—an unconstitutional invasion of the rights of freedom of religion and of speech and press. It is not an unconstitutional invasion of the right of freedom of religion, because the religious colporteurs are not, in so acting, engaged in such exercise of religion as is protected by the First Amendment. He specifically said: "The rites which are so protected by the First Amendment are in essence spiritual—prayer, mass, sermons, sacrament—not sales of religious goods."

Cf. legislation by Parliament as described in Bourne v. Keane, supra.
It is submitted that all the justices of the United States Supreme Court missed the complete approach to the religious question involved in the Murdock case. Keller, P. J., giving the opinion of the Pennsylvania Superior Court, more accurately delimited the rights of religious colporteurs, in so far as religious freedom is concerned, when he said:

"The appellant is perfectly free to worship God according to the dictates of his own conscience, separately or with his own family and co-religionists, in his own home or theirs, and in church, chapel, assembly or other gathering place. The constitutional right of freedom of worship does not guarantee anybody the right to sell anything from house to house or in buildings, belonging to, or in the occupancy of, other persons."

The provision of the First Amendment, as to freedom of religion, does not give to the members of the more than 250 religious societies in the United States, the right to go from door to door to propagandize their own religion with non-members. Jehovah's Witnesses and other religious bodies assert as a religious interest a claim to enter without permission upon the land of another for the purpose of advancing their particular religions. However, no State has attempted to secure this interest by the enactment of a statute purporting to confer any such right. To create such a right the State would have to have jurisdiction both of the subject-matter and over the persons involved. Murdock claimed that he was exercising his religion when he went from door to door. The juridical approach to such a situation is to first determine what right to do so had been conferred upon him by his church and then determine whether or not that right will be recognized as valid in the State courts. That a church has no power to confer rights or impose duties upon the members of any other of the religious bodies in the United States, who do not consent thereto, is self evident, that church having no jurisdiction over such persons. That a church has no power to give to its members any rights in the land of non-members is also self-evident.

Mr. Justice Frankfurter, in the Struthers case, said:

"Door-knocking and bell-ringing by professed peddlers of things or ideas may therefore be confined within specified hours and otherwise circumscribed so as not to sanctify the rights of those peddlers in disregard of the rights of those within doors."

Mr. Justice Murphy, in the Struthers case, said:

"No doubt there may be relevant considerations which justify considerable regulation of door to door canvassing, even for religious purposes,—regulation as to time, number and identification of canvassers, etc., which will protect the privacy of the home and yet preserve the substance of religious freedom."

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Mr. Justice Black, in the *Struthers* case, said:

"Yet the peace, good order and comfort of the community may imperatively require regulation of the time, place and manner of distribution . . . No one supposes, for example, that a city need permit a man with a communicable disease to distribute leaflets on the streets or to homes, or that the First Amendment prohibits a state from preventing the distribution of leaflets in a church, against the will of the church authorities."

In the *Jeannette* case Mr. Justice Jackson issued the warning:

"In these cases, local authorities caught between the offended householders and the drive of the Witnesses, have been hard put to keep the peace of their communities. They have invoked old ordinances that are crude and clumsy for the purpose. I should think that the singular persistence of the turmoil about Jehovah's Witnesses, one which seems to result from the work of no other sect, would suggest to this Court a thorough examination of their methods to see if they impinge unduly on the rights of others. Instead of that the Court has, in one way or another, tied the hands of all local authority and made the aggressive methods of this group the law of the land."

He continued:

"Secondly, in neither (Murdock and Struthers) opinion does the Court give clear-cut consideration to the particular activities claimed to be entitled to constitutional immunity, but in one case blends with them conduct of others not in question, and in the other confuses with the rights in question here alleged rights of others which these petitioners are in no position to assert as their own . . . The real question is where their rights end and the rights of others begin. . . For a stranger to corner a man in his own home, summon him to the door and put him in the position either of arguing his religion or of ordering one of unknown disposition to leave is a questionable use of religious freedom . . ."

Mr. Justice Reed in the *Struthers* case said, in part:

"The First Amendment does not compel a pedestrian to pause on the street to listen to the argument supporting another's views of religion . . . Once the door is opened, the visitor may not insert a foot and insist on a hearing. He certainly may not enter the home. To knock or ring, however, comes close to such invasions . . . The ordinance seems a fair adjustment of the privilege of distributors and the rights of householders."

Mr. Justice Jackson, in the *Prince* case, said in part:

"It is difficult for me to believe that going upon the streets to accost the public is the same thing for the application of public law as withdrawing to a private structure for religious worship . . . This case brings to the surface the real basis of disagreement among
members of this Court in previous Jehovah's Witnesses' cases...

Mr. Justice Jackson, in the Prince case, continued:

"My own view may be shortly put: I think the limits begin to operate whenever activities begin to affect or collide with liberties of others or of the public. Religious activities which concern only members of the faith are and ought to be free—as nearly absolutely free as anything can be. But beyond these, many religious denominations or sects engage in collateral and secular activities intended to obtain means from unbelievers to sustain the worshippers and their leaders. They raise money, not merely by passing the plate to those who voluntarily attend services or by contributions by their own people, but by solicitations and drives addressed to the public by holding public dinners and entertainments, by various kinds of sales and bingo games and lotteries. All such money-raising activities on a public scale are, I think, Caesar's affairs and may be regulated by the state so long as it does not discriminate against one because he is doing them for a religious purpose, and the regulation is not arbitrary and capricious, in violation of other provisions of the Constitution."

Chafee in Free Speech in the United States, Harvard University Press, 1941, at pages 406 and 407 says:

"House to house canvassing raises more serious problems. Of all the methods of spreading unpopular ideas, this seems the least entitled to extensive protection. The-possibilities of persuasion are slight compared with the certainties of annoyance. Great is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires. There he should be free not only from unreasonable searches and seizures but also from hearing uninvited strangers expound distasteful doctrines. A doorbell cannot be disregarded like a handbill. It takes several minutes to ascertain the purpose of a propagandist and at least several more to get rid of him. Such an importunate caller seems as much subject to regulation as billboard advertising at a critical turn in the highway, which you have to look at whether you want to or not. A man's house is his castle, and what is more important his wife's castle. A housewife may fairly claim some protection from being obliged to leave off bathing the baby and rush down to the door, only to be asked to listen to a sermon or political speech. And this is not all. There is the risk of fraudulent solicitation of funds unless some trained person like the Connecticut licensing official distinguishes between honest and dishonest appeals. The Reverend Mr. Stiggins was unfortunately not
the last clergyman to use his religion for his own benefit. Moreover, hospitable housewives dislike to leave a visitor on a windy doorstep while he explains his errand, yet once he is inside the house robbery or worse may happen. So peddlers of ideas and salesmen of salvation in odd brands seem to call for regulation as much as the regular run of commercial canvassers. If the city government chooses to protect its citizens from the annoyances and risks just described, it can do so only by a complete prohibition of all systematic calls or by giving some official considerable discretion to weed out undesirables. All these social interests seem to be weighed rather lightly in the Handbill Cases and Cantwell v. Connecticut. Freedom of the home is as important as freedom of speech. I cannot help wondering whether the Justices of the Supreme Court are quite aware of the effect of organized front-door intrusions upon people who are not sheltered from zealots and imposters by a staff of servants or the locked entrance of an apartment house.

In this country the state cannot legislate in respect to a matter of "exercise of religion", even to the extent of the merest regulation. For example, we have seen that the State has no jurisdiction over the giving of communion in an Episcopal Church in the United States, and can not enact any regulation in respect to a sacrament, no matter how slight that regulation may be. It is important for jurists to determine the line of demarcation between the jurisdiction of the state, and the jurisdiction of the church, between temporal matters and spiritual matters. Consider the case of the Episcopalian who leaves her home to go to her church, some distance away, intending to receive communion.

The use of the public highways from her home to her church is a temporal matter, subject to the exclusive jurisdiction of the state and the proper political subdivisions thereof. Any rights and duties in respect to the use of these highways are conferred or imposed by the proper legislative departments of the state. The church can not confer any rights nor impose any duties in this respect. It gets no legislative jurisdiction over public highways simply because the citizen of the state uses the streets for the purpose of going to church and exercising his religion, as, receiving communion.

The jurisdiction of the state is not wholly yielded to the Episcopalian church the moment the church-member enters upon the church premises. For example, not all inclusive, the state may have already enacted regulations as to the type of construction of the church and the number of church members permitted to attend church services at any one time, to secure social interests against fire hazards, with consequent danger to life, and destruction to property. The state, exercising legislative jurisdiction, secures the right of the church to exclude all non-members from entering, without permission, therein. It is the law of the state, also, that would prohibit a member of another religion from distributing in a church printed sermons advancing the non-member's religion. In the exercise of such legislative jurisdiction, the state, even though operating within the very church, itself, is not
encroaching upon that field of jurisdiction exclusively in a church, covering such subject-matter, as "prayer, mass, sermon, sacrament".

Freedom of religion, in the sense of the free exercise of religion, a spiritual matter, being secured by legal hands off by the state, i.e. by a disclaimer of jurisdiction, is a freedom, different in kind, from the freedom of speech and the freedom of the press, two freedoms which concern temporal matters, over which the state has exclusive jurisdiction. Any rights under these two freedoms are conferred by the state. Any restriction of these two freedoms comes from the exercise of state legislative jurisdiction, subject to constitutional guarantees and provisions.

Suppose a license tax was imposed by a state on a minister for the delivery of each sermon in his own church to members of his own religion. Under inter-church-and-state common law, such a statute would be void "impertinent to be observed". It would also be unconstitutional as in contravention to the free exercise of religion clause of the First Amendment, coupled with the Fourteenth Amendment.

Under inter-church-and-state common law, the state would have no jurisdiction over such sermons. Therefore, it could not create any legal interests under secular principles of freedom of speech. The doctrines and laws of the church would furnish the delimitations, if any, for the scope of such sermons. Such delimitations could not be nullified or interfered with by the state.

The hypothetical statute would, therefore, be of no force on two distinctly different grounds, considering the subject-matter as "a spiritual matter" within the field of "the exercise of religion." Recourse to the secular doctrine of freedom of speech, in any controversy in the state courts, would be of no avail.

Suppose a license tax was imposed by a state on a minister for the delivery of each sermon on the street to non-members of his church. The use of the streets is a temporal matter over which the state has exclusive jurisdiction. No church has any jurisdiction over the use of the streets. The state law imposing a license tax, under these circumstances, would not necessarily be "impertinent to be observed" as legislation in respect to a subject-matter over which the state had no jurisdiction. Such claimed exercise of religion by the minister would not be protected by the free exercise of religion clause of the First Amendment, though the statute might or might not be vulnerable as in contravention of the due process clause of the Fourteenth Amendment for other reasons.

The secular law would have to be examined to determine whether or not the minister had the right to preach in the streets. All but five states have a clause in their constitutions resembling another section of the New York Constitution:

"Every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right, and no law shall be passed, to restrain, or abridge the liberty of speech, or of the press." [29]

The licensing statute would then have to be examined to see whether or not it unlawfully abridges freedom of speech—\textit{not whether or not it prohibits the free exercise of religion}. The fact that the nature of the speech is "for a religious purpose", (a concept far wider than "exercise of religion"), has no preferential force. Recourse to inter-church-and-state common law and recourse to the free exercise of religion clause of the First Amendment, in any controversy in the state courts, would be of no avail.

Suppose a license tax was imposed by a state on a minister for the delivery of each sermon on the premises of non-members of his church. The use of private property is a temporal matter over which the state has exclusive jurisdiction. No church has jurisdiction over the use of private property of non-members. An owner of real property has, at common law, a legal right of excluding others from it. All others are under a legal duty of keeping out and can be sued in the secular courts, under principles of the Law of Torts, if they do not.

No lay-member and no minister of a religiously organized society has the right to enter without permission upon the land of another for the purpose of religious exercises. The question whether or not the licensing statute prohibits the free exercise of religion is not at issue. And on the determination of the question of law that ministers can not enter without permission upon the land of another for the purpose of religious preaching, there is no legal reason, and it would be gratuitous to determine the question as to whether or not the statute abridges freedom of speech. Recourse to inter-church-and-state common law, recourse to the free exercise of religion clause of the First Amendment, and recourse to freedom of speech claims, in any controversy in the state courts, would avail the minister nothing.

Chafee's analysis of house to house canvassing is confined to the concepts, freedom of speech and freedom of the press. It does not deal with the concept, freedom of religion.

The summoning of occupants of a home, who are non-members of a church or religious society, by a member of that religious society, for the purpose of delivering printed sermons, is a temporal matter over which the state has exclusive jurisdiction. The religious purpose does not make the summoning of the non-member occupants such an exercise of religion as is protected by the First Amendment. Such a member of a religious society has no greater protection in the law in summoning non-members, than an individual, not a member of any religious society, who does the same act.

The summoning of occupants of a home, members of a particular religious society, by another member, minister or layman, of that religious society, for the purpose of delivering printed sermons, may be a spiritual matter over which the church has theretofore exercised exclusive jurisdiction. This depends on whether

\footnote{The State may declare unauthorized entries upon private property, under certain circumstances, a crime.}
or not the religious society has previously conferred a right or imposed a duty, upon its members or ministers, in respect to summoning of the occupant-members and distribution of the printed sermons. Generally speaking, the state will recognize such rights and duties as valid in proceedings in the state courts. Such recognition is in accordance with Inter-Church-And-State Common Law. This law is based, in part, upon the following jural postulates:

I. Churches, in the sense of religious societies, with legislative, executive and judicial departments, must be able to assume that their jurisdiction over their members, and over those who have consented or subjected themselves to the exercise of jurisdiction over them either before or after the exercise of jurisdiction, in purely spiritual matters, and in temporal matters bound to spiritual matters, is exclusive of the jurisdiction of the states in which the churches are located.

II. Ministers of churches must be able to assume that they may acquire from the members of their churches voluntary contributions for their decent support, under the existing social and economic order, without restriction by the states.

III. Ministers of churches must be able to assume that they may advance their religion, by preaching their doctrines, among their own members and consenting non-members, without restriction by the state, except in those cases where the acts or words of the ministers have a tendency to disturb the public peace, corrupt the public morals, damage the social welfare, or imperil the integrity of the state.

IV. Members of churches must be able to assume that they may exercise their religion, within their own religious societies, without restriction by the state, except in those cases where their religious activities have a tendency to disturb the public peace, corrupt the public morals, damage the social welfare, or imperil the integrity of the state.

The United States Supreme Court, in the Murdoch case, should have treated separately the different constitutional objections raised by the minister to the ordinance. The contention that the ordinance, as applied to the activity of the minister, was in contravention to the freedom of religion clause of the First Amendment should have been disposed of adversely to Murdock at the outset. The canvassing from house to house was definitely a temporal matter over which the state had exclusive jurisdiction. The church of Jehovah's Witnesses had no jurisdiction over it and could give the minister no rights therein.

While the purpose for which the canvassing was done, by the great majority of the canvassers, was commercial in the sense that its motive was to make money, the purpose of Jehovah's Witnesses was a religious one. All acts done "for a religious purpose" are not necessarily in "the exercise of religion", guaranteed by the freedom of religion clause of the First Amendment.
After determining that the minister had not made good his contention that the ordinance, as applied to his activity, was unconstitutional as in contravention to the freedom of religion clause of the First Amendment, the United States Supreme Court, after analyzing the contention that the ordinance as applied to the activity of the minister in delivering the printed sermons was unconstitutional as in contravention to the freedom of expression clauses of the First Amendment, might have declared adversely to the minister. This proposition is not herein analyzed. The religious aspect of the question, here, is of only minor importance. The result would be the same if the leaflets were of a political nature. The fact that they were printed sermons give them no preferential standing under the freedom of speech and freedom of the press clauses. The minister would be obliged to establish the propositions that the ordinance was discriminatory against him as a member of the Jehovah's Witnesses in the dissemination of the doctrines of that church, or that the ordinance laid an unreasonable burden on his right to engage in such dissemination. He made neither one of these contentions, in the Murdock case.

The facts in the Follett case differed from those in the Murdock case in only two respects, Follett was not an itinerant and he got his living from the proceeds of the money which he received at the time of the distribution of the religious literature:

Lester Follett is a resident of McCormick, South Carolina. He is an ordained minister of the sect known as Jehovah's Witnesses. He went from house to house, delivering books of sermons advocating the doctrines of his religion. At the time of delivery of the religious books, he received sums of money from those in sympathy with him or his religion, most of whom were non-members. The net receipts, after the cost to him of the books, were for his support as a minister in accordance with the rules of his religion. He had no other means of livelihood. The town had enacted an ordinance, a revenue measure, imposing on book-sellers, in pursuit of a "business", "occupation", or "profession", a license tax of $1.00 a day, on a day to day basis, or $15.00 a year. The minister did not have such a license. The ordinance provided for a fine or imprisonment for selling books without a license.

Follett was arrested on a charge of violating the ordinance. He pleaded not guilty. He was tried before a jury in the Mayor's Court of the Town of McCormick.

The minister contended in much the same manner as Murdock did in the Pennsylvania courts. So did the attorney for the Town of McCormick. The minister was convicted in the trial court and brought his case to the Circuit Court of General Sessions for McCormick County and then to the Supreme Court of South Carolina.

The Supreme Court of South Carolina distinguished the case from the Murdock case. It pointed out that Follett was not an itinerant but was a resident of
the town where the canvassing took place, and that the principle of the Murdock decision was applicable only to itinerant preachers. It stated, moreover, that appellant earned his living "by the sale of books," that his "occupation was that of selling books and not that of colporteur," that "the sales proven were more commercial than religious." It concluded that the "license was required for the selling of books, not for the spreading of religion."

The United States Supreme Court held the ordinance unconstitutional, as in violation of the First and Fourteenth Amendments.

Mr. Justice Douglas, who wrote the opinion of the United States Supreme Court, stated as to the question which the Court was called upon to decide:

"The question is therefore a narrow one. It is whether a flat license tax as applied to one who earns his livelihood as an evangelist or preacher in his home town is constitutional."

In declaring that the constitutional guaranty of religious freedom precluded the exacting of a book-agent's license fee from one who earns his livelihood as an evangelist or preacher in his home town from contributions requested in return for religious literature distributed by him (from house to house of non-members), Mr. Justice Douglas said:

"A preacher has no less claim to that privilege when he is not an itinerant . . . He who makes a profession of evangelism is not in a less preferred position than the casual worker."

Ordinances like those of the Murdock case and the Follett case may be vulnerable from three distinctly different approaches.

It may be argued that the activity of the minister does not come within the terms of the ordinance. This approach involves statutory construction. (This approach is not further considered herein.)

Next, if the activity does come within the terms of the statute in accordance with the rules of construction, it may be argued that it is "an exercise of religion" or a spiritual matter. This being proved, the State, under the principles of Inter-Church-And-State Common Law, would have no jurisdiction over that subject-matter. The Supreme Court of South Carolina declared that the distribution of the books of sermons in the Follett case was an exercise of the religion of the Church of Jehovah's Witnesses. It should be noted that the minister was distributing the books of sermons to non-members of his church. This fact was not considered of any distinguishing importance by the Supreme Court of South Carolina or by the United States Supreme Court. These authors disagree. They feel that, as the Church of Jehovah's Witnesses has no jurisdiction over non-members, this church can confer no right upon its minister to propagate its faith with non-members, especially non-consenting non-members. Under the principles of Inter-Church-And-State Common Law the State will not recognize any such asserted right in the minister as valid in proceedings in the State courts.
Finally, if the activity does come within the terms of the inhibitory statute, it may be argued that it is an exercise of religion and that statutory inhibition would be unconstitutional as in contravention of the freedom of religion provision of the First Amendment.

"There are in the United States more than 250 distinctive established religious denominations."

That large numbers of bequests or devises for religious purposes will be made in the course of a year to one or more of these various religious societies is self-evident. To consider the possibilities of all such cases would be beyond the limits of this article.

An examination of the reported cases of Pennsylvania discloses that the following cases of bequests for Masses were adjudicated under the Act of April 26, 1855, which contained the same first sentence as was in the WILLS ACT OF 1917, set forth on Page 1, supra:

*Ann Dougherty's Estate* (Orphans Court) 12 Phila. 70 (1878); *Rhymer's Appeal* (Supreme Court) 93 Pa. St. 142 (1880); *Kelly's Estate* (Orphans Court) 9 Pa. Dist. 387 (1900); *O'Donnell's Estate* (Supreme Court) 209 Pa. 63 (1904); *Estate of Moran* (Orphans Court) 24 Lanc. L. R. 70 (1906); *Loughran's Estate* (Orphans Court) 2 Pa. Dist. & Co. 223 (1922); *Jenning's Estate* (Orphans Court) 20 Pa. Dist. & Co. 506 (1934).

In all these cases the decisions were arrived at by statutory construction. The present authors considered these cases in an article, entitled: *WHY PENNSYLVANIA RESTRICTS GIFTS FOR MASSES.* The following comment on the case of *Rhymer's Appeal,* followed by the final paragraph is typical:

"This bequest for Masses was for a charitable use. It was a gift to priests, for their support, thus for the advancement of religion, and therefore for a charitable use. But the bequest for Masses had not created a trust. Bequests for Masses rarely create trusts. This bequests for Masses did not come within the inhibition of the Act of April 26, 1855, because to do so, the gift, in addition to being for a charitable use, had to be in trust to an individual, and this bequest was not in trust. In Rhymer's Case the restriction on the gift for Masses was the result of an erroneous decision by the Pennsylvania Supreme Court. The Supreme Court erred through ignorance of the nature of the Mass stipend. Priests, and only priests in their individual capacity, are the donees of Mass stipends. St. Mary's Catholic Church was not a legatee of the bequest for Masses, nor could it be the beneficiary of the bequest for Masses. St. Mary's Catholic Church had been made the donee of a power to distribute the Mass stipends to priests." . . .

"The Pennsylvania judiciary, by a series of erroneous decisions based on ignorance of the nature of the Mass stipend, has practically
rendered ineffective all bequests for Masses made in wills executed within 30 days of the death of the testator. Lack of knowledge on the part of the courts of Pennsylvania as to the nature of the Mass stipend has prevented the judiciary from discovering that gifts for Masses rarely create trusts. In not a single one of the reported cases in Pennsylvania dealing with restrictions on bequests for Masses had a trust been created. Once the fact that the gifts for Masses were not in trust had been established, the Courts would be bound to rule that the gifts for Masses were not within the inhibition of the restricting statute enacted by the legislature. At the earliest possible moment the above series of erroneous decisions by the Pennsylvania judiciary should be reexamined and overruled."

In none of the cases was the point made that gifts for Masses are for a spiritual purpose, and being made by members of the Catholic Church to priests of that church for their support, on condition precedent that Masses be said and applied as requested by the donors, the State would have no jurisdiction to legislate such gifts within the inhibition of the restrictive statute, under the principles of Inter-Church-And-State Common Law.

Nor did anyone, in the above Mass cases, contest the restrictive statute on constitutional grounds as in contravention to the provisions of the First Amendment as to freedom of religion. All of these cases had been decided before the Cantwell case in 1940, when freedom of religion, one of the freedoms of the First Amendment, was recognized as among the fundamental personal rights protected by the Fourteenth Amendment from impairment by the States. Until then this liberty was not deemed to be guarded from State action by the Federal Constitution.

Mr. Justice Reed, in the Murdock case, had said:

"The rites which are protected by the First Amendment are in essence spiritual—prayer, mass, sermons, sacrament."

The present authors submit that Section 7 of the WILLS ACT of 1947, if applied to restrict the aforesaid theoretical bequests by a member of the Church of Jehovah's Witnesses of $1,000 for the purpose of providing support for their ministers, and $1,000 for the purpose of providing printed sermons for distribution among their own members, or if applied to restrict bequests by a Catholic for Masses, would be unconstitutional.

To protect the American doctrine of SEPARATION OF CHURCH AND STATE from further impairment the legislature of Pennsylvania should, at the earliest possible moment, amend subdivision 1 of Section 7 of the WILLS ACT OF 1947 by striking out of the first sentence two words, "religious or", so as to read:

"Any bequest or devise for charitable purposes included in a will or codicil executed within thirty days of the death of the testa-"
tor shall be invalid unless all who would benefit by its invalidity agree that it shall be valid."82

82 Adding, at the appropriate place, the same definition of "charitable purposes" as is incorporated in the "Estates Act of 1947" of Pennsylvania, viz.:

". . . charitable purposes includes but is not limited to the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community,"; and adding:

"Provided, however, that 'charitable purposes' shall not be construed to include spiritual matters over which any church has exclusive jurisdiction or to include the exercise of religion."

The phrase "any bequest or devise for charitable purposes" will thereby include such gifts for the advancement of religion as will not come within the exclusive jurisdiction of a church as a spiritual matter or will not be protected by the constitutional inhibition against laws prohibiting the free exercise of religion.


It should be noted that the phrase "for religious uses" incorporated in the Wills Act of 1947 was taken from the Act of April 26, 1855, long before the date when the United States Supreme Court decided the case of Watson v. Jones, and the more recent Jehovah's Witnesses cases.