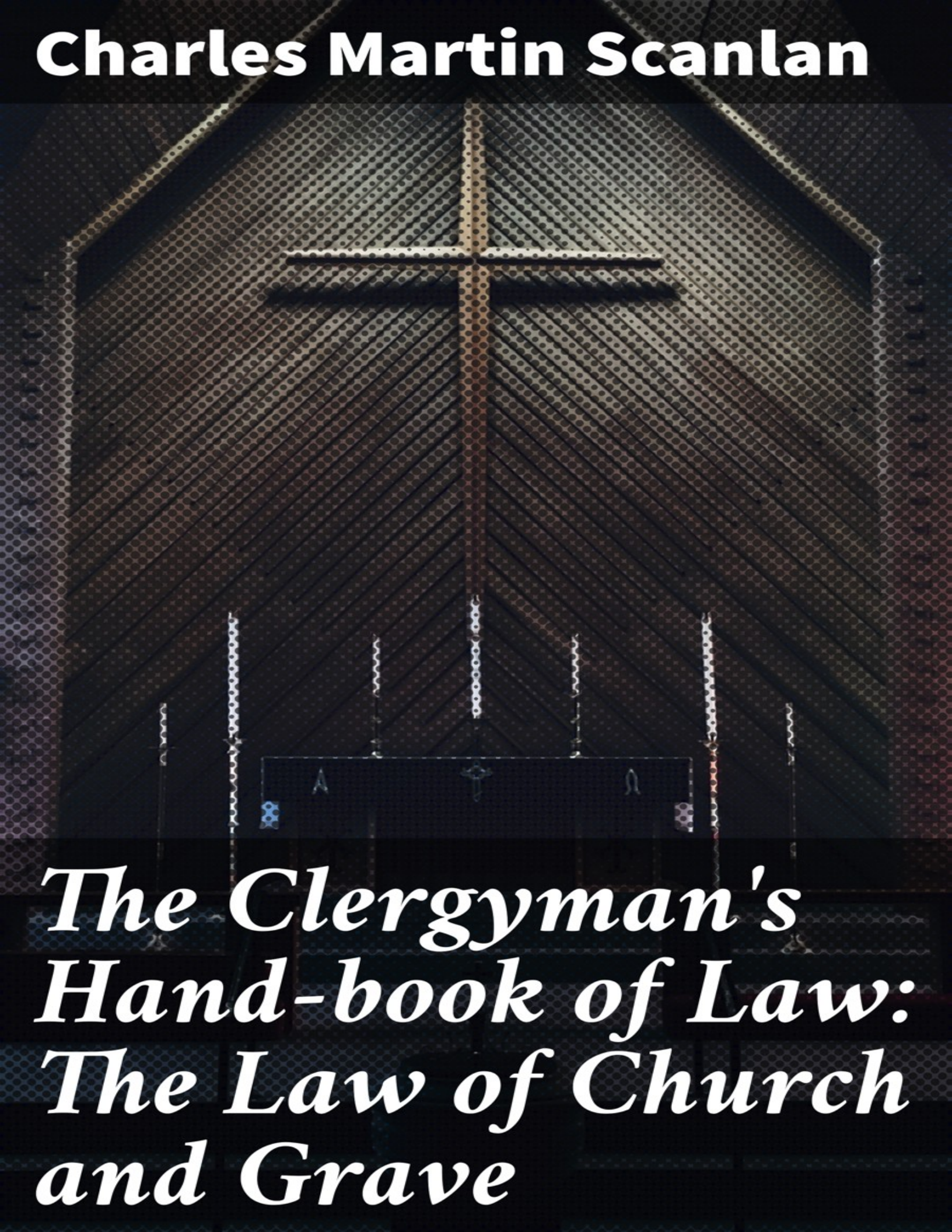
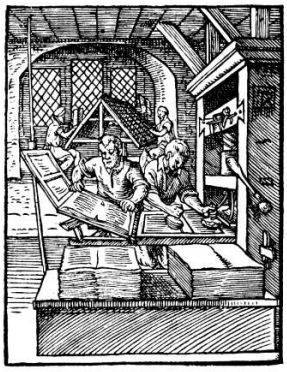
Charles Martin Scanlan



The Clergyman's Hand-book of Law: The Law of Church and Grave

Charles Martin Scanlan

The Clergyman's Hand-book of Law: The Law of Church and Grave



Published by Good Press, 2022

goodpress@okpublishing.info

EAN 4064066101183

Table of Contents

"

Preface

Table of Contents

The three learned professions, medicine, law, and theology, overlap; and a man who does not know something of the other two can not be prominent in his own. Laws relating to Church matters are scattered through such a vast array of law books that it would be a burden for a clergyman to purchase them, and without special training he would not know where to look for the law. Therefore a law compendium covering those subjects relating to Church matters must be of great value to a clergyman.

There is another view of this subject. When she was mistress of the world the laws of the Roman Empire were for the Roman citizens, particularly the patricians; the canon law was the law of the Christian people of conquered countries and the Christian plebeians of Rome. In the United

States we have the same common law for the President and the hod-carrier, for the multimillionaire [pg vi] and the penniless orphan, for the clergy and the laity. Consequently, in this practical age a knowledge of the law of the country with which the clergy come constantly in contact is expedient, if not necessary.

The poet says:

> “What constitutes a state?...
> Men, who their duties know,
> But know their rights, and knowing, dare
> maintain.”

To insure harmony and good order, every Church should obey the laws of the country; but if any law should impose upon the rights of the Church in any way, the ruling authorities, the cardinal and bishops, if the wrong is national, should unite in a petition to the United States Congress, clearly stating the grievance and asking for its redress.[1] If the grievance should be within a State, the bishop or bishops of the State should present the matter to the Legislature of the State. If the President or the Governor has authority to remedy the matter, go direct to him. Such was the practice of the wisest of the Popes.[2] The author never knew of an instance [pg vii] in which a clergyman having a real grievance failed in obtaining a full and fair hearing from the powers that be, from the President downward. This method seems to be more in harmony with the relations of Church and State in a free government, and

more intelligent than to have a convention of working men, who have little time to make a study of Church matters, pass resolutions, the passing of which generally ends the action of a convention.

In the chapters that follow, the author has refrained from giving a great multitude of authorities, but has endeavored to give such as are sufficient to sustain the text. For example, under the first section, and many others, a list of citations covering several pages might be given. That would add to the expense of the volume and would not be within its compass. The book will better fulfil its purpose by clear, brief statements of the rules of law, and if a reader desires to investigate further, the citations given will guide his way.

CHARLES M. SCANLAN.

MILWAUKEE, JANUARY 23, 1909.

Chapter I. Introduction

Table of Contents

1. *Law, Religion.*—From the dawn of the science of law it has been influenced by religion or antagonism to religion. This is very evident in the ancient laws of Babylonia, Egypt, Phenicia, Israel, India, and Ireland. It would be impossible to make a study of the law of any of said countries without gaining a knowledge of its religious system, whether pagan or otherwise.[3]

2. *Religions.*—Ancient nations might be classified into pagan and those that worshiped the universal God. However, some of the nations at one time were pagan and at other times had a fair conception of the supernatural. Also, in Egypt, the class of higher culture and education believed in the one omnipotent and omniscient Being, but [pg 014] the populace, who could be controlled more readily by flattering them in their notions and giving their childish conceptions full sway, worshiped idols.[4]

3. *Authority, Right.*—In those nations where the ruling authority had the proper conception of the Almighty, there was a strong, persistent growth of law upon the basis of natural right; while in the pagan nations laws were arbitrary and despotic.[5]

4. *Philosophical Foundations.*—The laws of Greece, down to the time of Plato, were thoroughly pagan. But, following the philosophical foundations laid by Plato and Aristotle, unintentionally and unwittingly the laws of Greece became imbued with the spirit of natural law.[6]

5. *Rome, Natural Justice.*—Prior to the introduction of Grecian law into Rome, the laws of that nation were pagan. Grecian law from its introduction to the time of Octavius was the civilizing element of the empire. Then it took a turn for the worse, the element of natural justice being reduced and the element of arbitrary rule becoming dominant.[7]

[pg 015]

6. *Canon Law.*—We will now turn to the first period of canon law, which covers the early history of the Church up to the reign of Constantine the Great.[8]

Canon law is composed of the following elements:

1. Holy Scriptures;
2. Ecclesiastical tradition;
3. Decrees of Councils;
4. Bulls and rescripts of Popes;
5. The writings of the Fathers;
6. Civil law.[9]

7. *Early Christians.*—Owing to the persecutions, the early Christians were, in a sense, isolated from the State; they held their property in common, and were governed in matters among themselves by the canon law. However, for

want of freedom of discussion and publication, they were unable, even within a single nation of the empire, to promulgate a system of canon law. The foundation of canon law being laid, its development upon the manumission of the Church was rapid.[10]

8. *Persecutions, Defenses.*—During the religious persecutions the Christians almost had law forced into them by surgical operations. [pg 016] The necessity for their making defenses in the Roman tribunals induced many of them to give Roman law a careful study. Also, the great number of Christians held for trial on all sorts of accusations made that branch of the law of the realm very lucrative for lawyers, and called into the field many Christians. Incidently, men studying for the priesthood made a study of Roman law with a view to avoiding its machinations and continuing their functions as clergymen without being caught in the net of persecution.[11]

9. *Constantine, Blending the Law.*—When Emperor Constantine became a Christian (325 A.D.), there was a great change, and the members of the bar and judges were mostly Christians. It then became necessary for students of law to study the principles of divine right as taught in the Church, and while the books of the civil law were read by students for the priesthood, the Scriptures and the works of the Fathers were read by the students in law, thus blending the law of the two realms to some extent.[12]

10. *"Benefit of the Clergy," Ecclesiastical Court.*—As the old Roman Empire decayed [pg 017] and its power waned,

the new one, “The Holy Roman Empire,” gradually implanted itself in southwestern Europe. The humiliation that the divine law and the clergy suffered in being brought into the common courts gave rise to a system of courts within the Church for the purpose of enforcing her morals, doctrines, and discipline. Those courts were established in all Christian countries and had jurisdiction of all felonies excepting arson, treason, and a few other crimes that from time to time were put under the special jurisdiction of the state courts. Whenever a clergyman was arrested for a crime, he pleaded the “benefit of the clergy,” and his case was transferred from the state court to the ecclesiastical court. Also, when a clergyman was convicted in the state court of any crime for which the punishment was death, he could plead the “benefit of the clergy,” which was a protection against his execution.[13]

11. *Estates, Guardianship.*—Besides the jurisdiction already referred to, the ecclesiastical court had jurisdiction over the settlement of estates and the guardianship of [pg 018] children, which varied in different countries and was very indefinite in some of them.[14]

12. *Middle Ages, Common Law.*—During the Middle Ages there was a constant effort on behalf of the ecclesiastical courts to extend their jurisdiction, and a counter-effort on behalf of the state courts to assume jurisdiction of cases under the ecclesiastical law. In England, from the conquest of William the Conqueror to the Reformation, the extension of the jurisdiction of the ecclesiastical courts brought the new element of English common law into the canon law; and

much of the canon law, following the jurisdiction assumed by the state courts, became the common law of the kingdom of England.[15]

13. *Gratian, Reformation.*—The canon law reached its full development in the twelfth century, when Gratian, the Blackstone of his age, compiled the system, but it subsequently lost its influence when the Reformation prevailed.[16]

[pg 019]

14. *Bologna.*—The great school of jurisprudence, both of canon and civil law, was located at Bologna, Italy, which reached its zenith in the thirteenth century. To it students flocked from Western Europe, and from it were obtained the professors of law in the universities of England and other countries.[17]

15. *Church and State.*—In most of the Christian countries, the Church and State were united, and many of the judges in the civil courts were clergymen.[18]

16. *England, Roman Law.*—On account of England's being subject to Rome in its earliest age, and afterward because of its being conquered by France, the Roman law was pretty thoroughly intermixed with the native English law in the minor matters of the people, and governed in the more important ones.[19]

17. *America, English Law, Civil Law.*—The portions of America that were settled by the English, which included the

original thirteen colonies, were under the English law. In Virginia the Episcopal Church, which was then the church of England, was made the church of state. Canada and that portion of the United States formerly [pg 020] known as Louisiana were governed by the civil law of France. Wherever the French government had no authority or civil officers, the government was directly under the missionaries of the Church.[20]

18. *Religious Tolerance, Established Church.*—The English law and English ideals prevailing in the original thirteen colonies,[21] there was a strong effort made by many of the delegates to the constitutional convention to have the Episcopal Church made the established church of the new republic. Thomas Jefferson and James Madison were probably the strongest opponents of the scheme, and outside of the great Carroll of Carrollton, they were the most earnest advocates of religious tolerance. The necessity for the fathers of this republic to be united, and their being unable to unite upon any church, caused the idea of an established church to be eliminated. Thus was established in our republic the freedom of conscience and the guarantee that no one shall be persecuted on account of his religious convictions.[22]

[pg 021]

19. *Tribunals.*—The ecclesiastical courts as a part of the state system and the "benefit of the clergy," have been abolished in England and America. However, as we shall see further on, tribunals in the nature of the ecclesiastical court

exist in churches and fraternities of all kinds in the United States.[23]

[pg 022]

Chapter II. What Is A Church?

Table of Contents

20. *Church, Religious Society.*—Bouvier's definition of "Church" is: "A society of persons who profess the Christian religion." Chief Justice Shaw's definition is: "The church is neither a corporation nor a quasi-corporation, but a body of persons associated together for certain objects under the law. An aggregate body of individuals associated together in connection with a religious society. The term religious society may with propriety be applied in a certain sense to a church as that of religious association, religious union, or the like; yet in the sense church was and is used in our law, it is synonymous with parish or precinct and designates an incorporated society created and maintained for the support and maintenance of public worship. In this, its legal sense, a church is not a religious society. It is a separate body formed within such parish or religious society whose rights and usages are well known and to a great extent defined and established by law."[24]

[pg 023]

21. *Doctrine, Constitution.*—A church in law is a mere fraternal organization. It may or may not have a written constitution, but it must have some central doctrine as its foundation or constitution.[25] Many of the Protestant

denominations claim that the entire Bible is their constitution. The Jews may be said to consider the Old Testament as their constitution. All revealed truths may be said to be the constitution of the Catholic Church,[26] and when a doctrine concerning faith or morals is authoritatively declared by the Church to be a truth, it becomes a dogma.[27] The Apostles' Creed is an example of several dogmatic truths. The code of the Church is the Ten Commandments. A few sects, by a majority vote, make and change their constitutions at will.

22. *By-Laws.*—By-laws of the different religious organizations differ widely, from the decrees of the great councils of the Catholic Church down to the vote of the congregation of an independent denomination.

23. *Church, Religious Society.*—A church in one sense is more limited than a religious society; the latter comprehending [pg 024] all the members of the same faith. Even in the Catholic Church we hear of the Church of France, the Coptic Church, etc., spoken of in this sense. And in a still more limited sense we use the word as a synonym for parish. However, when the word “the” is used before church written with a capital letter, Catholics understand it to apply to the Roman Catholic Church in its entirety, while some non-Catholics apply it to Christendom.

24. *Church, Christians, Religion.*—The missions established in California prior to its admission into the Union were, in law, practically independent organizations and had no legal connection with the Church. Every society

organized for the purpose of propagating the practice of religion may be a church in law.[28] The courts have made a distinction between Unitarians, who are considered Christians, and Deists, Theists, Free Religionists, and other infidels.[29] A sect or denomination without a given system of faith is not recognized as a religion in law.[30]

25. *Doctrine, Standard.*—To ascertain the tenets and doctrines of a church, resort [pg 025] must be had to history and to prior and contemporary standard writings of its members on theology.[31]

26. *Ecclesiastical Corporations, Religious, Quasi-public Corporations.*—Ecclesiastical corporations, in the sense in which the word is used in England, Germany, and France, are unknown to the United States, their places being supplied by religious societies or corporations considered as private bodies, in contradistinction to public or quasi-public corporations, such as towns, villages, cities, counties, and state. Therefore, the law of private corporations applies to religious societies and churches.

27. *Sect, Sectarianism.*—The Supreme Court of Nevada defines “sect” as follows: “A religious sect is a body or number of persons united in tenets, but constituting a distinct organization or party, by holding sentiments or doctrines different from those of other sects or people. In the sense intended in the constitution, every sect of that character is ‘sectarian’ and all members thereof are sectarians.”[32] In Pennsylvania the court adopted the definitions given in the Standard and in Webster's [pg 026]

dictionaries.[33] The Supreme Court of Missouri, citing Webster's and the Century dictionaries, gave the following additional definition of sectarianism: “Sectarianism includes adherence to a distinct political party, as much as to a separate sect.”[34] The Presbyterians[35] and the “Shakers”[36] have been adjudged sects.

28. *Sectarian.*—“Sectarian” has received more contradictory constructions than any other equally simple word in the English language. In Wisconsin the “King James” Bible was held to be a sectarian book;[37] but in Kentucky it was held that neither the Douay nor the “King James” Bible was a sectarian book.[38] The Missouri court extended sectarian so as to apply to the Republican party.[39] In Illinois an industrial school for girls in which the Catholic Sisters were employed as teachers, was held a sectarian institution;[40] while in Wisconsin, [pg 027] the “Wisconsin Industrial School for Girls,” a private corporation organized and conducted by Protestant ladies, has received appropriations from the State and has had its reports published at state's expense, as a non-sectarian institution.[41] In New York the religious garb of the Catholic Sisters was practically decided to be sectarian;[42] but in Pennsylvania and Wisconsin it was decided that the dress of the Sisters was not sectarian.[43]

29. *Worship, Services, Mass.*—Any act of adoration, reverence, praise, thanks, honor, or veneration given to God, is religious worship.[44] A Sunday-school where the Bible was read and a hymn sung and a state temperance camp-

meeting where a prayer was said and hymns were sung, were held to be places of divine worship.[45] But a priest's house where he had a room fitted up for a [pg 028] chapel, was held to be not a place of worship.[46] It is very difficult to draw a line—no matter what curves you may give it—between the Protestant system of worship, which consists of the reading of the Bible, the singing of hymns, and the reciting of prayers, and such services in the public schools. Also, there would seem to be no *legal* difference between a prayer said or a hymn sung by a Catholic and a Protestant. As we have no established church in this country, we have no standard for prayers, hymns, or music.[47]

More solemn and impressive than her prayers adapted for schools is the Mass of the Catholic Church, defined thus: “The Mass is the unbloody sacrifice of the body and blood of Christ.”[48] It is defined in 26 Cyc, 940, as follows: “A religious ceremonial or observance of the Catholic Church;[49] a Catholic ceremonial celebrated by the priest in open church, where all who choose may be present and participate therein;[50] the sacrifice in the sacrament of [pg 029] the Eucharist or the consecration and oblation of the Host.”[51]

30. *Parish.*—A parish has two meanings. In some States it is a minor division of public territory; but in States where there is no such division of territory, the State using instead “county” or “town,” a parish rather applies to the people belonging to a particular church, who worship at a particular place. It is in the latter sense in which a parish should be construed in church law.[52]

Parishioner.—A parishioner must be defined in harmony with the meaning of the word “parish.”[53]

31. *Clergyman.*—A clergyman is a man in holy orders or one who has been ordained in accordance with the rules of his church or denomination.[54]

32. *Minister.*—A minister is one who acts as, or performs some of the functions of, a clergyman.[55]

33. *Rector or Pastor.*—A rector or pastor is a clergyman who has charge of a parish.[56]

[pg 030]

34. *Religion.*—Religion is still further distinguished, but not very satisfactorily defined, for the reason that etymologists have not agreed upon the derivation of the word. When the matter was brought before our courts and it became necessary to give a definition, the highest court in our country gave the following: “The term ‘religion’ has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character, and of obedience to His will. It is often confounded with *cultus* or form of worship of a particular sect, but it is distinguishable from the latter.”[57] One of our highest courts held that “religion,” as used in the trust provision in a will for the purchase and distribution of religious books or reading as they shall be deemed best, means “Christian.”[58] But the Supreme Court of another State held that “religion” is not equivalent to “Christian” religion, but means the religion of any class of men.[59] Judge

Willis defines “religion” thus: “It is what a man honestly believes in and approves of and thinks it his duty to inculcate [pg 031] on others whether with regard to this world or the next; a belief in any system of retribution by an overruling power. It must, I think, include the principle of gratitude to an active power who can confer blessings.”[60]

[pg 032]

Chapter III. Constitutional Law

Table of Contents

35. *Religious Tests.*—The constitution of the United States provides that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[61]

36. *Test Oath, Attainder.*—No test oath of any kind, whether religious or otherwise, can be required of a citizen of the United States. Therefore the test oath of Congress requiring an officer to swear that he never voluntarily bore arms against the United States, was held unconstitutional. Exclusion from any vocation on account of past conduct is punishment and contrary to the constitution on the subject of bills of attainder.[62] But there is a limitation to this rule to prevent the open violation of the laws of the United States or any State under the cloak of religion.[63]

37. *Establishment of Religion, Free Exercise.*—The first amendment to the United [pg 033] States constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

38. *Sovereignty, States, Bigamy.*—The courts have held that this provision applies to Congress only, and can not be construed to interfere with the sovereignty of the several States; that the constitutional guarantee of religious freedom was not intended to prohibit legislation against polygamy; and that section 5352 of the United States Revised Statutes against bigamy, is constitutional. Also, that on a trial for bigamy in Utah, a man who was living in polygamy was not competent to serve as a juror.[64]

39. *Church of the Latter-Day Saints.*—In 1851 the assembly of the so-called State of Deseret, which subsequently became the territory of Utah, incorporated "the Church of the Latter-Day Saints." In 1887 Congress repealed the act of incorporation and abrogated the charter, which the Supreme Court held was within its plenary powers. The pretense of religious belief can not deprive Congress of the power to prohibit polygamy and all other open offenses against the enlightened sentiments of mankind.[65]

[pg 034]

40. *Crime, Religion.*—The law prohibiting any person who is a polygamist or bigamist, or who teaches, advises, counsels, or encourages the same, from holding any office of honor, trust, or profit, is constitutional; and a crime is none the less so, nor less odious, because it is sanctioned by what any particular sect may designate as religion. A state has the right to legislate for the punishment of all acts inimical to the peace, good order, and morals of society.[66]

41. *Donation, Hostile, Religion.*—On the other hand the United States Supreme Court declared the legal right of donees of a college to make as a condition of the donation that all ecclesiastics, missionaries, and ministers of any sort, should be excluded from holding any station of duty in the college or even visiting the same. The condition being only negatively derogatory and hostile to the Christian religion, did not make the devise for the foundation of the college void.[67]

42. *Christian Scientist.*—A law requiring a person to be a physician to treat the sick, is constitutional; and the defense of a person who has no license to practise, that he is a Christian Scientist, is not good. Also, [pg 035] a parent must furnish a doctor for his sick child, notwithstanding that he believes in prayer cure.[68]

43. *Protestant.*—In the early days, under the constitution of the State, the courts of Massachusetts practically held that the Protestant religion was the religion of that State.[69] Also, the constitution of New Hampshire referred to different Christians, and the court in construing the terms “Roman Catholic” and “Protestant,” held that any one who did not assent to the truth of Christianity as a distinct system of religion, could not be classed as either. The court stated that Mohammedans, Jews, pagans, and infidels, are neither “Catholics” nor “Protestants.” The term “Protestant,” as used in the constitution of New Hampshire, includes all Christians who deny the authority of the Pope of Rome. When the children of Protestant parents renounce that religion, and voluntarily accept another, they cease to be

Protestants.[70] At present under the constitution of New Hampshire, the legislature may authorize towns or parishes to [pg 036] provide for the support of Protestant ministers.[71]

44. *Hospitals, Sisters, Appropriation.*—In 1864, Providence Hospital, of Washington, was incorporated by an act of Congress, for general hospital purposes. In 1897, $30,000 was appropriated for the District of Columbia to put up two isolation buildings in connection with two hospitals in that city, to be operated as a part of such hospitals. Providence Hospital was selected as one, and because it was in charge of Sisters of the Roman Catholic Church, the right of Congress to make the appropriation was disputed. Among other things, Judge Peackham says: “Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or all Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its corporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into.” The appropriation was “for two hospital buildings to be constructed in the discretion of the commissioners of the District of Columbia on the grounds of two hospitals [pg 037] and to be operated as a part of such hospitals.”[72]

45. *Constitution, Rights.*—The provisions in the constitution do not in any way interfere with property rights obtained by a church organization prior to its adoption.[73]

46. *Aid, Contracts.*—Under the constitution of the United States, Congress cannot make appropriations for nor give aid to any denomination. Also, similar provisions are in many of the constitutions of the States. However, many cases arise out of contracts which border upon these various rules, and in some States the constitutional provision of the State is such that the State Legislature may legislate concerning religion and give certain aid and support thereto. Paying rent to a congregation for a school-room is not an appropriation or aid to a church contrary to the constitution.[74]

47. *Protestant Teacher, Tax.*—Formerly every parish in Massachusetts was obliged to elect and support a Protestant teacher, and might erect churches and parsonages. To provide the expenses thereof, a tax [pg 038] might be assessed upon the polls of the inhabitants.[75] Until 1890 New Hampshire permitted a tax to be levied in towns for religious purposes. It is still legal under the New Hampshire constitution to tax the inhabitants for the purpose of supporting Protestant teachers, but not to support a teacher of any other denomination.[76] A section of land in every township in Ohio was set apart for religious societies, in which they all shared equally.[77] Vermont had a similar provision.[78]

48. *Office, God.*—The constitutions of Arkansas, Mississippi, North Carolina, South Carolina, and Texas, prohibit a man from holding office who denies the existence of a Supreme Being; and the constitutions of Delaware,

Maryland, Kentucky, and Tennessee, make all clergymen ineligible to hold a civil office.[79]

49. *Religious Liberty, Bible, Religious Garb, Wages.*—The authorities are not uniform as to what constitutes a violation of religious liberty. The question of whether the reading of the Bible in the public schools is a violation of the constitution, is an open [pg 039] one in some States and in others the courts have passed upon it, some holding that it is a violation of the constitution,[80] and some holding that it is not.[81] The weight of authority seems to permit the reading of the "King James" Bible,[82] and where portions only are read, as in "reading books" prepared for school work, or where the children are not obliged to be present during the exercises, the cases seem to be unanimous that it is not a violation of the constitution.[83] In Pennsylvania the court held that while Sisters in their religious garb might be teachers in the public schools, they could not give instruction in the Catholic religion at the schoolhouse before or after school hours, or at any other time use the school building for religious purposes. Also, in Wisconsin the court decided that while a portion of a parochial school building might be leased for public school purposes and the Sisters be employed therein as teachers, religious exercises and instructions could not be given in [pg 040] such leased premises.[84] In New York it was held not only that Sisters could not wear their religious garb or pray in school, but that they could not collect wages for teaching.[85]

Chapter IV. Statutory Law

Table of Contents

50. *Wisconsin, Mississippi, New York.*—The statutory law of the different States of the Union is so varied and the laws of one State are of so little interest to the people of another that it would be almost useless and beyond the boundaries of this work to give the substance of the various statutes. In some States there is a limitation upon the real estate that a church or charitable organization may hold, and in other States there is no limitation whatever. Wisconsin, perhaps, occupies the extreme of greatest liberality, by not only allowing full freedom in everything relating to religion and charity, but it further excepts from the limitation all rights of alienation of real estate granted or devised to a charitable association or to literary or charitable corporations organized under the law of the State. The State of Mississippi probably stands at the other extreme both in the narrowness of its constitution and statutory law, and prohibits any [pg 042] devise or bequest of any personal property or real estate in favor of any religious or ecclesiastical corporation or any religious or ecclesiastical