Property Rights of Religious Institutions in Wisconsin

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Separation of Church and State in the United States, and hence in Wisconsin, does not mean that the Church must remain completely isolated from the State or vice versa. Freedom of religion and worship in most states requires that each group of worshippers has the opportunity to organize itself into a legal corporation, to acquire, improve and dispose of property, and to remain secure from forces that would prejudicially affect its free exercise of the chosen form of religion.

The permissive and security powers of the State are crucial to, and must be invoked for, the maintenance of religious liberty in our societal system.

"In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all."  

Anson Phelps Stokes has noted that "though constitutions, statutes, and court decisions have on the whole tried to be scrupulously fair and impartial in dealing with all religious bodies, and the State has not recognized any specific form of religion, it has nevertheless been favorable to all agencies which promote the religious spirit and which remain loyal to the government."  

Most American legal authorities

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1 "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it. . . ." John S. Mill, On Liberty 75 (Alden Castell ed. New York, 1947).


3 Stokes, Church and State in the United States 369 (New York, 1950).
ever stand ready, therefore, to protect each religious institution in the
eexercise of its corporate powers,\(^4\) in its right to receive religious be-
quests in trust, and in its exemption from taxation of at least a portion
of its property.\(^5\)

**CORPORATE POWERS**

A major corollary of the principle of separation of Church and
State is that Church and State must engage in some relations with one
another, while each keeps within its sphere, in order to insure the in-
violate nature of religious freedom. This corollary has been operative
in Wisconsin from a time even prior to statehood. It has revolved about
the security of property of religious institutions within the state. As
will become apparent, the property rights of religious institutions in
Wisconsin are fundamental to any discussion of Church-State relations
that focuses upon the corporate existence of religious institutions.

**Legislative Policy**

Before statehood, the territorial legislature of Wisconsin had pro-
vided no procedure for the incorporation of religious societies. In this
respect it did not differ from most other legislative bodies. W. G.
Torpey has explained the unincorporated status of religious societies,
as follows:

> "The simplicity of procedure did not necessitate the adoption of
corporate forms. Further, religious corporations, as they were
known at common law, were not looked upon with favor by the
early inhabitants of America. In their minds religious corpora-
tions were associated to a great degree with the idea of a union
of church and state. Therefore the disposition was to give no
recognition to them in law. As a practical matter, early religious
societies existed for nearly all of the purposes for which they
later were incorporated."\(^6\)

Though not providing for incorporation, the Wisconsin Territorial
Legislature did pass, in 1839, "an act to secure religious societies . . .
in the possession of their churches and other property," which provided,
in part:

> "That all lands conveyed by deed, devise or otherwise to any
trustee or trustees for the use of any religious society within this
territory for the purposes of erecting a house or houses of
worship, for the minister to live in, or for a burying ground,
shall descend in perpetuity to their successors in office appointed
by said societies respectively, according to their respective rules

\(^4\) **Torpey, Judicial Doctrines of Religious Rights in America** 82-117 (Chapel
Hill, 1948).

\(^5\) **Id.** at 171-97, 307-25.

\(^6\) **Id.** at 83. See, also, **Tyler, Religious Societies** 54-9 (New York, 1866). See, 3
**Stokes, Church and State in the United States** 414 (New York, 1950) for
text of President Madison’s famous veto, of 1811, of an act “incorporating the
Protestant Episcopal Church” in the District of Columbia.
and regulations, for ever, for the use and purposes above stated.\(^7\)

The constitutional conventions of 1846 and 1847 were barren of any discussion of the subject of incorporating religious societies, but in 1849 the new state legislature comprehensively provided procedure for incorporation. Section 1 provided:

"It shall be lawful for all persons of full age, belonging to any church, congregation, or religious society, not already incorporated, to assemble at the church or meeting-house . . . and by a plurality of votes to elect any number of discreet persons of their church . . . as trustees, to take charge of the estate and property belonging thereto, and to transact all affairs relative to the temporalities thereof."\(^8\)

By this section the legislature was holding out an open invitation to all unincorporated religious societies to attain corporate status. Sections 2, 3, 4 and 5 delineated the procedure to be followed in the election of trustees. Sections 6, 7, 8 and 9 were devoted to the corporate powers of the trustees, including the powers to sue and be sued, to alter, repair and improve buildings, and to make rules and orders in the management of temporal affairs. Sections 10 through 17 contained detailed miscellaneous provisions concerning the holding and recording of meetings of trustees and the general procedure with which they should be conducted. The trustees of any church were also authorized to execute and record a certificate, stating therein the name of the church, whereupon it "shall be a body corporate . . . with all the rights, powers and privileges of other religious corporations . . ."\(^9\)

Examining the act of 1849 from a Church-State frame of reference, it is apparent that the legislature adopted the policy to encourage the formation of religious societies in such a manner as would protect the freedom of worship, especially with respect to each church's property interests. The state of Wisconsin has never deviated from this policy. It has apparently been concerned with extending certain procedural guaranties to church organizations so that their memberships would be satisfied that justice, or at least certain basic elements of what might be called "due process," prevailed in the decision-making process of church management. But the legislature was to find, apparently, that certain religious bodies could not readily comply with the uniformity required

\(^7\) \textit{Wisconsin Territorial Statutes} 136 (1839). See, Strong v. Doty, 32 Wis. 381 (1873).

\(^8\) \textit{Wis. Rev. Stat.} ch. 47, sec. 1 (1849). Chapter 47 of the 1849 statutes underwent a general revision in 1876. According to a note appended to chapter 91, sec. 1990 of the 1898 statutes, "The revisers of 1878 in their note said: 'Ch. 411, 1876, is taken to have intended a revision of the law for the incorporation of religious societies. The privilege of organizing a corporation is extended to all classes of denominations, it not being supposed the law means to be intolerant of any religious belief or to be partial in its offer of privileges.'"

by the statutes concerning religious corporations without drastically altering their governments. Consequently, the legislature has enacted special provisions pertaining to specified denominations. Thus, today, the statutes provide for special incorporation of each Protestant Episcopal church, Congregational church, Church of Christ or Christian church, and Roman Catholic church.10

Religious corporations, therefore, are constituted in different ways in Wisconsin. The state legislature has provided for several methods acceptable to different ecclesiastical organizations. Thus, provision is made for "rectors, wardens and vestrymen being the trustees of each Protestant Episcopal church,"11 "the adult members, not less than three in number, of any Congregational church,"12 and "the bishop of each diocese, being the only trustee of each Roman Catholic church in his diocese."13 One leading authority has commented:

10 Wis. Stat. secs. 187.04, 187.10, 187.11, 187.12 (1951). Other basic modifications are reflected in sections 187.05 and 187.16. Section 187.05 pertains to incorporation of religious organizations other than churches, namely, "any diocesan council or convention, conference, synod or other body of authorized representatives of any church or religious denomination or association or congregation thereof. . . ." Section 187.16 provides for incorporation of "any corps of the Salvation Army in the state of Wisconsin. . . ." See, also, sec. 187.13 concerning "missionary corporations."

11 Wis. Stat. sec. 187.04 (1951). This section was formerly ch. 91, sec. 1997, of the 1898 statutes which had a note appended thereto, as follows: "In their note to this section the revisers of 1878 said: 'These are retained as peculiar provisions heretofore deemed necessary. But it will be observed of this chapter that it leaves every corporation free to incorporate in its by-laws all the peculiar rules and usages of the sect or denomination to which it belongs, and to order and govern its trustees by such laws as they shall make unto themselves, providing only the opportunity to hold and manage church property under artificial legal existence with the least possible restriction in detail."


13 Wis. Stat. sec. 187.12 (1) (1951). For cases relating to Roman Catholic corporations, see: In re McCanna's Estate, 230 Wis. 561, 284 N.W. 502 (1939); St. Hyacinth Congregation v. Borucki, 141 Wis. 205, 124 N.W. 284 (1910); Katzer v. City of Milwaukee, 104 Wis. 16, 79 N.W. 745 (1899); Heiss v. Vosburg, 59 Wis. 532, 18 N.W. 463 (1884). In St. Hyacinth Congregation v. Borucki, supra, the claim was made that the statutory provision pertaining to special incorporation of congregations of the Roman Catholic Church, as well as other special provisions, were invalid as granting special corporate privileges and powers. For the Court, Judge Siebecker replied: "The statute does no more than to take cognizance of the fact that there are voluntary associations with different systems of government to which members thereof voluntarily consent. The law therefore refrains from imposing any restrictions on the right of the members to frame any form of organization and to adopt any form of government for the conduct of its members and the administration of its affairs not repugnant to the constitutional guaranties establishing freedom of worship and liberty of conscience. . . . The law operates generally and equally throughout the state on all citizens who consent to unite themselves with any of the different voluntary religious organizations." 141 Wis. 205, 215-6, 124 N.W. 284, 288 (1910); see, infra, note 14. See, also, Torrey, Judicial Doctrines of Religious Rights in America 89-90, for a discussion of three forms of incorporation; "the corporation aggregate for congregational types of churches; the revised corporation sole for monarchical types of churches; and the trustee corporation for intermediate churches." According to Carl Zollmann: "it is now apparent that there are three forms of church corporations in full bloom in the states of the Union. Of these the corporation sole serves the necessities of those churches who [sic] believe in vesting their bishops or
“It is characteristic of our American system with its many states and its different historic Church traditions that no single hard and fast incorporation practice has been followed, but that provision has been made to meet varying needs and convictions as long as certain legal safeguards are secured to protect both the State and its citizens.”

Judicial Policy

The supreme court of Wisconsin has been consistent in maintaining that a religious corporation may not divert the use of its property to uses inconsistent with the purposes of the corporation. Most of the prominent supreme court cases concerning religious corporations have involved the question of diversion of church property. In deciding this basic question, arising from variable fact situations, the judiciary has permanently etched its relation with religious institutions upon the public law of Wisconsin. The judges have emerged as protectors of church property rights.

The state supreme court has clearly enunciated its role in case after case. In the oft-cited case of Franke v. Mann, the Court addressed itself to the query whether a majority of the members of a church organization could devote its property to a use inconsistent with the purposes of the corporation. In answering negatively for the Court, Judge Marshall stated that there is no difference between a church and another corporation insofar as neither can divert its property to uses contrary to its incorporating act. With respect to the role of the courts, he said:

“Church corporations are creatures of the law the same as business or municipal corporations, and when it comes to property rights a court of equity has the same power to protect the minority in the one as in the other. If every taxpayer in a city but one were to favor the use of public property for a purely similar dignitaries with large discretion in matters of property. The trustee corporation is adapted to the needs of those churches who [sic!] are somewhat more democratic without being congregational, while the membership corporation represents the triumph of democratic government in church affairs and fills the wants of those churches which vest complete control of church property directly in the congregations.” American Church Law 126-7 (St. Paul, 1933).

3 Stokes, Church and State in the United States 405. The question may be asked whether specific provisions in chapter 187 of the Wisconsin statutes for incorporating certain religious denominations violate the constitutional requirement of uniformity in the application of state law. Article XI, section 1, of the Wisconsin Constitution, it should be noted, provides that: “Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except . . . in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws.” This provision, it would seem, is sufficiently broad to permit the legislature to provide for special incorporation of those churches where the legislature deems that general incorporation would impose an undue burden upon church government. (See, supra, note 13.)

106 Wis. 118, 81 N.W. 1014 (1900).
private use, the one, backed by the power of the court, would prevail. If all the stockholders of a business corporation but one were to favor the use of the corporate property for something entirely foreign to the purposes of the corporation, the one stockholder, with right on his side, and the power of the court to enforce it, would control and prevent the mischief. The power of a religious corporation as to the use of its property is limited by its organic act the same as any other. When it exceeds such limitations its acts are ultra vires, and the court, at the suit of a member of it, will apply the proper preventative or restorative remedy where there are no superior equities in the way.\footnote{16}

A religious society, incorporated under the laws of the state, has been defined, therefore, as a civil corporation, governed by the statutes and such rules of the common law as may be applicable.\footnote{17} But such a corporation may only consist of a single church or congregation, according to the Court's decision in Evenson v. Ellingson.\footnote{18} In that case the Court held that the statutes may not be construed to permit the formation of a religious corporation out of two separate churches and congregations with the trustees of one corporation governing the temporal affairs of both. To hold otherwise, Judge Orton cautioned, would mean that a religious corporation may be formed "by and over fifty or one hundred" churches or congregations.

"The large churches and congregations might elect a majority of such trustees and the officers of the corporation, and might thereby crush out and destroy the weaker churches utterly and take away their property. Besides the place of meeting of such a mammoth corporation to elect trustees or to do any other corporate business, would be distant from and inconvenient to most of the churches and congregations."\footnote{19}

\footnote{16}106 Wis. at 129, 81 N.W. at 1018. "The governing idea in all such cases is that property held by the trustees of a church society has impressed upon it a character in harmony with the creation of the trust, and any change of such character is a violation of such trust." 106 Wis. at 133, 81 N.W. at 1019. "When such use is for the promotion of the doctrines and discipline of some particular denomination, courts will prevent diversion to the support of a different and inconsistent one, if even a single individual legally interested objects." Cape v. Plymouth Congregational Church, 130 Wis. 174, 179-80, 109 N.W. 928, 929 (1906). See, also, 17 Ops. Wis. Att'y Gen. 588 (1928).

\footnote{17}Fadness v. Braunborg, 75 Wis. 257, 284-5, 41 N.W. 84, 92 (1889). It has also been defined, in the general sense, as a body of persons who usually meet in some stated place for the worship of God and religious instruction; a society maintained for the support of public worship. United States National Bank v. Poor Handmaids of Jesus Christ, 148 Wis. 613, 135 N.W. 121 (1913).

\footnote{18}67 Wis. 634, 31 N.W. 342 (1887) ; reaffirmed: 72 Wis. 242, 39 N.W. 330 (1888).

\footnote{19}67 Wis. at 642-3, 31 N.W. at 345. "Such a corporation would be contrary to the policy of our institutions, which is that the affairs of our civil and political bodies corporate shall be transacted near the people, and their meetings held in places easily accessible to the people and electors, and that such bodies shall not embrace more territory than necessary, so that the people shall not be subject to foreign tribunals and shall be able to enjoy their liberties and discharge their civil duties near their homes." 67 Wis. at 643, 31 N.W. at 345.
Such a corporation would likely promote “schism and disagreements,” said Judge Orton, and would always keep the churches “embroiled and troubled.”

Established Wisconsin judicial policy requires that the statutes relating to the incorporation of religious societies be at least substantially complied with in order to create such a corporation. Thus, due public notice of a meeting for the election of trustees and the incorporation of a religious society is necessary to make the procedure valid; and certainty of the time and place of meeting is required.

“These provisions are intended to secure certainty in the notice, and certainty in the place of election, so as to give all members or hearers entitled to vote an opportunity to be present at the election, and to express their views or declare their preferences in that way. They are designed to secure fairness and to prevent fraudulent or improper practices in the election, and are, therefore, imperative in their character...”

The trustees of a religious corporation are, according to the Wisconsin supreme court, “mere agents” to carry out the will of the corporators, or a majority of them, as to all matters within the scope of the corporation. To legally bind a corporation, the trustees must act officially under authority conferred at official meetings. A religious corporation may authorize its select body of trustees, by a vote, to enter into a contract, which may include the authority to borrow money.

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20 Kulinski v. Dambrowski, 29 Wis. 109 (1871).
21 “Public notice of the time and place of holding the first meeting of such corporation shall be given to the members of the church, sect or denomination for two successive Sabbaths on which such church, sect or denomination shall stately meet for public worship, previous to such meeting; such notice may be given by the minister or by one of the elders, deacons, church wardens or vestrymen thereof, or if there be no such officers then by any member...” Wis. STAT. sec. 187.01(4) (1951).
22 Kulinski v. Dambrowski, 29 Wis. 109, 114 (1871). For cases concerning notice of meetings, see also: Spiritual & Philosophical Temple v. Vincent, 127 Wis. 93, 105 N.W. 1026 (1906); Franke v. Mann, 106 Wis. 118, 81 N.W. 1014 (1900); Holm v. Holm, 81 Wis. 374, 51 N.W. 579 (1891); West Koshkonong Congregation v. Ottesen, 80 Wis. 62, 49 N.W. 24 (1891).
23 Kulinski v. Dambrowski, 29 Wis. 109, 115 (1871).
24 Leonard v. Lent, 43 Wis. 83 (1877); United Brethren Church of New London v. Vandusen, 37 Wis. 54 (1875); Dennison v. Austin, 15 Wis. 334 (1862). See, Wis. STAT. secs. 187.01(5), 187.10(5), 187.12(2), and 187.13(3) (1951).
25 In re McCanna’s Estate, 230 Wis. 561, 284 N.W. 502 (1939); Methodist Episcopal Church of Sun Prairie v. Sherman, 36 Wis. 404 (1874); Charboneau v. Henni, 24 Wis. 250 (1869).
26 Dennison v. Austin, 15 Wis. 334 (1862). A note executed by church trustees separately, and at different times and places, for money borrowed for the corporation, without any previous vote at a legal meeting of the board authorizing the loan or the execution of the note, although it describes them as such trustees, will be binding upon them as individuals, but not upon the corporation. Ibid. Even at an authorized official meeting, church trustees cannot act for the corporation to bind it for an adverse interest of their own, as by giving a note to third parties in which is included certain claims in favor of themselves against the corporation. United Brethren Church of New London v. Vandusen, 37 Wis. 54 (1875). But a religious corporation may ratify the un-
and to appoint or remove a minister or pastor.\textsuperscript{27} The supreme court has also held that a religious corporation is liable for its acts, the same as other corporations.\textsuperscript{28} Consequently, the Wisconsin Supreme Court has rejected the general rule that “a religious corporation is like a charitable organization in the sense that, for injuries caused by the negligence of its servants or agents, it is not liable for damages.”\textsuperscript{29} Instead, it has steadfastly adhered to the doctrine that the civil courts of the state will apply civil remedies to the disputes of religious bodies unless the laws of such bodies provide for specific ecclesiastical remedies.\textsuperscript{30}

\textbf{Judicial Concern With Differences of Creed}

Although the Wisconsin supreme court has always been reluctant to inquire into differences of creed or belief within or between religious

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\textsuperscript{28} Thus, the safe place statute [now Wis. STAT. sec. 101.06 (1951)] applies to churches and religious corporations. Zimmers v. St. Sebastian's Congregation of Milwaukee, 258 Wis. 496, 46 N.W. 2d 820 (1951); Jaeger v. Evangelical Lutheran Holy Ghost Congregation, 219 Wis. 209, 262 N.W. 585 (1935); Wilson v. Evangelical Lutheran Church of Reformation of Milwaukee, 202 Wis. 111, 230 N.W. 708 (1930). See, also, Mitterhansen v. South Wisconsin Ass'n of Seventh Day Adventists, 245 Wis. 353, 14 N.W. 2d 19 (1944); Sheehy v. Blake, 72 Wis. 411, 39 N.W. 479 (1888), 77 Wis. 394, 46 N.W. 537 (1890); and Niebuhr v. Piersdorff, 24 Wis. 316 (1869), for discussion of the extent of liability of trustees; and of charitable corporations generally, see: R. W. Hansen, Damage Liability of Charitable Corporations, 19 MARQ. L. REV. 92-105 (1934).


\textsuperscript{30} Evangelical Lutheran St. Paul's Congregation v. Hass, 177 Wis. 23, 187 N.W. 677 (1922). Concerning the action by one faction of a church to oust another faction from control, the Court said: “This action was without notice, without hearing, and without evidence; and, while the civil courts will studiously give full effect to the judgment of an ecclesiastical court when matters ecclesiastical only are involved, when civil rights as to property are involved the civil courts will insist that an accusation be made, that notice be given, and an opportunity to produce witnesses and defend be afforded, before they will give effect to an expulsion or suspension of the kind here attempted.” West Koshkonong Congregation v. Ottesen, 80 Wis. 62, 75, 49 N.W. 24, 28 (1891).
societies, it has found it necessary to undertake such an inquiry in those
cases which involved property or contract rights.\textsuperscript{31} Usually, the out-
come of such cases has hinged upon whether property has been diverted
from its corporate purpose. The court often has found it necessary to
review the history of the religious institutions concerned in the minute
development of their creeds and official acts. The reported statements
of facts of such cases are consequently often complex. This is especially
ture when a proper disposition of the case requires the court to consider
differences of opinion held by the parties as to interpretation of religious
doctrines and beliefs, and whether church discipline has been properly
applied. Thus, the court must scrutinize with care the history of the
congregations, the changes in name, if any, over a period of many years,
and events from prior to incorporation up to the moment the litigation
began. One would guess that these cases try the patience of judges and
that they might desire to be spared the consideration of such cases.

The question yet remains: \textit{why} are Wisconsin courts reluctant to
inquire into differences of creed within or between religious societies?\textsuperscript{32}
Actually, Wisconsin courts are not "reluctant" to inquire, but rather
they "decline" to inquire into differences of creed except when property
rights are involved. To do otherwise, a court in effect would be in-
voking that power of the state government which the judiciary exercises
in support of one creed against another insofar as determination in
favor of one religious faction against another rests upon the interpre-
tation of a religious creed. There is nothing "personal" on the part of
judges in this, it would appear. Religious societies are no different in
this respect from fraternal or agricultural societies, for instance—for
the courts will not inquire into their doctrines either except when
property rights are involved. Thus, it is not within a court's jurisdiction,
it would seem, to inquire solely into the religious side of religious con-
troversies. The separation of Church and State involved in this policy
apparently derives from those provisions of the Wisconsin Constitution
that protect freedom of worship.\textsuperscript{33}

\textsuperscript{31} Kerler v. Evangelical Emanuel's Church of Hales Corners, 235 Wis. 209, 292
N.W. 887 (1932); Wisconsin Universalist Convention v. Union Unitarian &
Universalist Soc. of Prairie du Sac, 152 Wis. 147, 139 N.W. 753 (1913); Martin
v. Board of Directors German Reformed Church of Peace of Washington
Co., 149 Wis. 19, 134 N.W. 1125 (1912); Marien v. Evangelical Creed Congre-
gation of Milwaukee, 132 Wis. 650, 113 N.W. 66 (1907); Cape v. Plymouth
Congregational Church, 130 Wis. 174, 109 N.W. 928 (1906); Franke v. Mann,
106 Wis. 118, 81 N.W. 1014 (1900); West Koshkonong Congregation v. Otto-
sen, 80 Wis. 62, 49 N.W. 24 (1891); Fadness v. Braunborg, 73 Wis. 257, 41
N.W. 84 (1889).

\textsuperscript{32} There is no discoverable Wisconsin judicial opinion in which this question is
answered. It was posed to Marvin B. Rosenberry in an interview (Feb. 10,
1953 at his home: 81 Cambridge Rd., Madison, Wis.) and he has affirmed the
logic of the statement that follows. Judge Rosenberry has served 34 distin-
guished years on the Wisconsin Supreme Court.

\textsuperscript{33} See, Wis. Const. Art I, sec. 18.
Analysis of one of the simpler cases, Marien v. Evangelical Creed Congregation of Milwaukee, may illustrate the nature of judicial inquiry into differences of creed. A religious corporation, the Evangelical Creed Congregation, had purchased real estate upon which church buildings were erected. The property had been acquired for that church as a member of the Wisconsin District of the German Evangelical Synod of North America "for use in support of the creed, tenets, and polity of that organization." A minority of the members of the church commenced an action in the Circuit Court for Milwaukee County, complaining that the officers of the corporation had, by a majority vote, attempted to divert the property and "pervert" the corporation "to the support of an inconsistent and conflicting synod, faith, and creed" known as the Evangelical Lutheran Synod of Wisconsin. The complaint requested the Circuit Court to grant an injunction to restrain the alleged diversion of church property. The defendants entered a demurrer to the complaint which the Circuit Court overruled, and the defendants appealed to the Wisconsin Supreme Court from the order overruling their demurrer.

For the Supreme Court, Judge Dodge delineated the policy of Wisconsin courts with respect to disputes over religious creeds, as follows:

"The only concern of courts with differences of creed or belief within or between religious organizations is when some property or contract rights are involved and demand protection. It is, however, fully established by our own court, in common with most others, that when property has been acquired, whether by gift or purchase, for the maintenance and support of the faith of any recognized denomination or church, every member of the association acquiring it, corporate or unincorporated, has a right to resist its diversion to other antagonistic uses, whether secular or religious, and therefore those who hold the title or control, whether a corporation or the officers of the association, hold it charged with a trust to apply it to the uses for which acquired and not to inconsistent ones."

Judge Dodge then turned his attention more specifically to the complaint and recognized that it alleged that two associations of churches, having their roots centuries ago in Germany, have been extended throughout the United States. One has been known as the German Evangelicals, and the other as the Evangelical Lutherans, each in turn reflected in the Wisconsin District of the German Evangelical Synod of North America, and the separate and distinct Evangelical Lutheran Synod of North America. Judge Dodge took notice of the fact, further-

34 132 Wis. 650, 113 N.W. 66 (1907).
35 132 Wis. at 651, 113 N.W. at 67.
more, that the complaint alleged differences of creed insofar as the latter association:

"... which we shall hereafter designate as the Lutheran church or synod, adopts certain writings in and shortly after the time of Martin Luther as conclusive expression of the creed and inerrant interpretation of the Scriptures, and rejects certain other writings which are adopted by what was called the German Reformed Church as correct interpretation of the Scriptures. The Evangelical Church, upon the other hand, recognizes equally said symbolical books of the Lutherans and of the Reformed Church, but accords to neither conclusiveness as to the doctrines therein promulgated, or as to the interpretations of the Scriptures, but approves them as the work of human minds subject to what may be deemed either by the individual or by the church authorities the true meaning of the Scriptures themselves."36

After analyzing several other differences in creed and discipline of these organizations, as set forth in the complaint, Judge Dodge concluded that the Court thought it "abundantly alleged that the defendants are perverting the property in question from uses of the Evangelical Church and to uses inconsistent therewith and antagonistic thereto."37 Hence, a cause of action was stated "to invoke the power of a court of equity to restrain the misapplication of the property." The Supreme Court held, therefore, that the Circuit Court for Milwaukee County had properly overruled the demurrer to the complaint.38

In conclusion, it may be said that—properly viewed, religious incorporation is a right, rather than a measure of state control, because of the obvious benefits that accrue to religious institutions upon achieving corporate status. That Wisconsin's religious institutions themselves regard incorporation in this light is evident, moreover, from the fact that there exists no discoverable instance of a religious society having ever challenged the state's authority to provide for incorporation, or to inquire into differences of creed when property is involved. Incorporation is a statutory right accorded by the state, and both state and church benefit thereby to the extent that an approximation of orderly and harmonious relations between them is afforded.

36 132 Wis. at 653-4, 113 N.W. at 67.
37 132 Wis. at 655, 113 N.W. at 68.
38 Ibid. Other pertinent cases involving Wisconsin religious societies, not otherwise referred to, are: Evangelische Luth. St. Thomas Gemeinde v. Congregation German Evangel. Luth. St. Matthews Church of Milwaukee, 191 Wis. 340, 210 N.W. 942 (1926); Masbruch v. von Oehsen, 163 Wis. 208, 157 N.W. 775 (1916); Munson v. Bringe, 146 Wis. 393, 131 N.W. 904 (1911); Davenport v. First Cong. Society, 33 Wis. 387 (1873); Trustees German Evangelical Congregation of New Elm v. Hoessli, 13 Wis. 348 (1861). For the disposition of miscellaneous issues, concerning religious corporations, by the Wisconsin attorney general, see: REPT. OF ATT'y GEN. 279 (1904); REPT. OF ATT'y GEN. 175, 176 (1912); 7 Ops. Wis. ATT'y GEN. 473 (1918); 11 Ops. Wis. ATT'y GEN. 189 (1922); and 14 Ops. Wis. ATT'y GEN. 322, 331, 361 (1925).
Two other major rights of religious institutions remain to be considered: the right to receive bequests in trust, and to be exempt from property taxation. Both are statutory rights, also, as distinguished from constitutional rights, although much of the law concerning religious bequests derives historically from the common law.

**Bequests to Religious Institutions**

One of the primary rights of religious institutions in Wisconsin is the right to receive bequests in trust for the support of religious activities. Such bequests have been classified as charitable trusts, and hence the American law concerning religious bequests is an integral part of the American law of charities. The "most perfect definition" of a charity, in the legal sense, has been attributed to Justice Horace Gray of Massachusetts who defined it as:

"a gift, to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or restraint, by assisting them to establish themselves in life, or by creating or maintaining public buildings or works, or otherwise lessening the burden of government."

One would guess that government would seek to encourage charities, including the execution of religious bequests, but this has not always been the case in Wisconsin.

**Early Legislative Policy**

In 1839, the Wisconsin territorial legislature declared that "none of the statutes of Great Britain shall be considered as law of this territory." In effect then, it repudiated the Statute of Elizabeth which had enumerated valid charitable uses or purposes and vested in the Lord Chancellor the final reviewing authority, in the exercise of royal sovereign prerogative, to determine the validity of charitable bequests. And ten years later, after Wisconsin became a state, the

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39 "The term 'devise' is properly restricted to real property, and is not applicable to testamentary dispositions of personal property, which are properly called 'bequests' or 'legacies.' But these terms may be construed interchangeably or applied indifferently to either real or personal property, if the context shows that such was the intention of the testator." BL. L. DiCr. 573 (3rd ed. 1933).

40 ZOLLMANN, AMERICAN LAW OF CHARITIES 138 (Milwaukee, 1924). Note especially Zollmann's discussion of religious charities; *ibid.*, 161-81. "The high value of religion to the state is not the only reason why pious uses are recognized. Religious societies, not being supported by the state, are dependent on the contributions of individuals. The law, therefore, must consider such contributions as in a peculiar degree charitable." *Ibid.*, 164. See also, Zollmann, *Religious Charities in the American Law*, 7 MARQ. L. REV. 131-48 (1922).


42 Wis. Laws of 1839, p. 407.

43 ELIZ. ch. 4.
legislature borrowed from New York a provision which, without in any manner mentioning charitable trusts, abolished all uses and trusts "except as authorized and modified by this chapter." By not including charitable trusts, it appeared that the Wisconsin legislature had not only abolished them but also the English cy pres doctrine of liberal construction of charitable bequests.

Implementation of the cy pres doctrine would have meant, according to Carl Zollmann, that:

"No matter how vague or unlawful the charity contemplated might be, if charity was intended, the courts would carry out this intention by devising a scheme where the charity was vague, or by designating a lawful charity where it was illegal. This doctrine 'had its origin in the strong desire of the ecclesiastical chancellors to uphold every gift to the church, and every act that subjected property to its control.' The English cy pres doctrine, in its inception, thus actually rested on a reasonable basis. The one great and predominant intent of the testator was carried out, though his particular directions were incapable of execution."

Bequests to religious institutions, and other charities, were bound to be declared void for vagueness unless they fulfilled all the requisites of definiteness required of all valid trusts. But this was impossible. Charitable trusts, and thus bequests to religious institutions, necessarily are indefinite as to the beneficiaries, and the cy pres doctrine could not obtain to rescue such a trust in this state. According to William G. Torpey:

"One of the features distinguishing a charitable trust from other trusts is the indefiniteness of the beneficiaries. Persons to be benefited should be uncertain until they are selected to be the particular beneficiaries of the trust. In fact, indefiniteness and uncertainty as to the individuals and members to be benefited are often determining elements of a valid charitable trust."

"Religious uses are," moreover, "strictly analogous to other charitable trusts in the important particular of indefiniteness of beneficiaries."

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44 I N. Y. REV. STAT. p. 727 (1829).
45 Wis. REV. STAT. ch. 57 (1849).
46 AMERICAN LAW OF CHARITIES 71-2. See also, Bl. L. Dict. 497 (3rd ed. 1933).
47 JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 308-9.
48 ZOLLMANN, AMERICAN LAW OF CHARITIES 164. "The individuals who attend the services of any particular church are not limited to its members, but are an indefinite and varying number of persons benefited by having their minds and hearts brought under the influence of religion." Ibid.
By implication, therefore, Wisconsin's policy toward organized religion was seemingly unfriendly with respect to religious bequests. By appearing to except charitable trusts as valid trusts the legislature had also excepted bequests in trust to religious institutions. If this was separation of Church and State it was the kind of separation that posed a serious threat to the security of Wisconsin's religious institutions. The threat appears all the more serious when it is considered that the separation principle precludes the state from engaging in, or supporting religious activities, (as distinguished from other charitable activities), which are wholly dependent upon individual contributions; and many of these, historically and currently, have been made in the form of charitable bequests.

Judicial Construction 1876-1900

It was not until 1876 that the Wisconsin Supreme Court was confronted with the question of the validity of a charitable bequest. In _Ruth v. Oberbrunner_ the Court held invalid a devise of land "for the use and benefit of the order of St. Dominican and St. Catherine's Female Academy" located in the city of Racine. For the Court, Judge Cole made much of the fact that neither organization was incorporated, and consequently the Court had no criterion for ascertaining their nature and purposes. An active charitable trust had not been created, moreover, because the testatrix had not indicated any specific purpose or charitable object.

At the same time, in _Heiss v. Murphey_, the Supreme Court similarly held void a bequest "to the Roman Catholic orphans of the diocese of La Crosse" on the ground that the testator designated no ascertainable beneficiaries. The Court found it impossible to determine whether the "orphans" to be benefited were those who had lost both parents or only one, whether both parents were Catholic or only one, and which one, the father or mother, and whether the "orphans" included only those resident in the diocese at the time of the testator's death or those also who might come into the diocese at a later time. Judge Cole again refused, for the Court, to invoke the aid of liberal construction which he associated with the _cy pres_ doctrine. He said:

49 40 Wis. 238 (1876).
50 "If, then, a bequest, unaccompanied by any designation of the purposes to which it is to be applied, be made to a society whose name and public acts indicate that its objects are religious or charitable, is there an implied trust which limits the use of such objects? When the bequest is to a corporation, there would seem to be some basis for such an implication, because, the objects, purposes and powers of the corporation being in all cases more or less clearly defined by its charter, the bequest may fairly be presumed to have been intended for those specific objects." 40 Wis. 238, 265, quoting Judge Selden in Owens v. The Missionary Society, 14 N.Y. 380, 385-6 (1856).
51 40 Wis. 276 (1876).
"There are doubtless cases in which a devise or bequest to charity as vague and uncertain as the one we are considering has been sustained. But these cases mainly rest upon the doctrine of cy pres, which is a doctrine of prerogative or sovereign function, and not strictly a judicial power... It is not claimed that the courts of this state are clothed with other than strictly judicial power, or that they have succeeded to the jurisdiction over charities which the chancellor in England exercises by virtue of the royal prerogative and the cy pres power... It seems to us that a trust so wanting in all the elements of certainty and precision cannot be enforced by a court acting only in the exercise of judicial power."52

In line with these two decisions the Court, in 1888, declared void for vagueness a gift "to the poor of the city of Green Bay" on the ground that the testator did not specify whether he intended paupers or poor persons who had not as yet become paupers.53 And two years later, in the case of Will of Fuller,54 the Court likewise held invalid a bequest of property "in trust to the deacons of the First Baptist Church of Janesville, Wisconsin, and their successors in office, to be funded with good security on improved land, and the interest to be paid annually to the American Baptist Publication Society, located at Philadelphia, Pa., to aid in the support of a Baptist colporteur and (or) missionary in the state of Wisconsin." Among the reasons the Court assigned for its decision were that the deacons were not incorporated, that they were "constantly changing by death or removal from the city," that the testator did not specify whether the missionary should service the whole or part of the state, and if part, which part, and that the kind of publications he would distribute was not specified.55

An interesting case was presented in McHugh v. McCole56 wherein the Court held void for uncertainty bequests to the Roman Catholic bishop of Green Bay "to be used by him for the benefit and behoof of the Roman Catholic Church," and for masses for the repose of the souls of the testator and certain named members of his family. These provisions, said the Court, were incapable of being executed by a court of equity.

52 Id. at 292-3.
53 Estate of Hoffen, 70 Wis. 522, 36 N.W. 304 (1888).
54 75 Wis. 431, 44 N.W. 304 (1890).
55 75 Wis. at 437, 44 N.W. at 305. "Indeed, the difficulty is the testator has not fully defined his charitable scheme in his will, but has left the whole matter so indefinite and unexpressed that it is impossible for the court to carry it out; and, before a court will carry into execution a charitable scheme, the scheme itself 'must be sufficiently indicated, or a method provided whereby it may be ascertained and its object made sufficiently certain to enable the court to enforce the execution of the trust according to such scheme, and for such object. It must be of such a tangible nature that the court can deal with it.'" 75 Wis. at 437-8, 44 N.W. at 305.
56 97 Wis. 166, 72 N.W. 631 (1897).
"Unless they can be so executed, they must necessarily fail; for it is settled that the doctrine of *cy pres*—as it existed in England and as it has been applied in some of the states . . . , whereby trust provisions are administered and executed as near to the presumed intention of the donor or founder as may be—is not recognized or acted upon by the courts of the state as a part of the judicial power of the state. The doctrine rests upon a prerogative of sovereign power, is not strictly judicial in its nature, and consequently the courts of the state cannot recognize it."57

No legal reason obstructs the execution of bequests for such masses "when made in clear, direct, and legal form," however, and the English rule, by which they were held invalid as gifts for superstitious uses, does not obtain here.

To sum up, these cases held in effect that no trust is valid whether charitable or otherwise and whether it involves real or personal property, unless it is created to satisfy the statutory rule of definiteness required of all valid private trusts in the statute of uses and trusts. They were grounded upon the reasoning "that the doctrine of charitable uses does not obtain to any extent in this state; that a trust not having all the elements of certainty requisite to a private trust cannot be sustained without the aid of the *cy pres* doctrine; that a court of equity cannot exercise any authority over a donation to charitable uses that it cannot in case of a private trust, except by virtue of the prerogative power of the sovereign, the so-called *cy pres* power, and that courts of this state possess no such power."58

Fortunately for religious and other charitable institutions, however, this was not the only line of decisions in Wisconsin. In *Dodge v. Williams*59 the Court upheld as a valid charitable trust a bequest of an estate to three named executors, as trustees, to pay and deliver the sum of $5,000 each to Wisconsin Female College, Ripon College, and Beloit College, for the purpose, among others, of "the education and training of females," and a separate bequest for the organization "at the City of Beaver Dam an institution of learning for the education and training of females." These are valid charitable uses, said Chief Justice Ryan, "clearly within the terms of the statute . . . of Elizabeth," and it was difficult to see how the scheme of the charity could be made more certain." A charitable use is essentially shifting. When a trust defines the beneficiaries with certainty, it is rather private than public.60 The statute of uses and trusts applies only to real property and private trusts, was the reasoning. Here the bequest has created a charitable use, hence

57 97 Wis. at 173, 72 N.W. at 633.
59 46 Wis. 70 (1879).
60 Id. at 98.
a public trust, and, by application of the doctrine of equitable conversion, the real property is converted into personalty. Thus the statute of uses and trusts does not apply. To the same effect was Gould v. Taylor Orphan Asylum,\(^6\) decided at the same time.

These two cases were instrumental in producing another line of cases, prior to 1900, dealing with the question of definiteness. Accordingly, the Court, in 1886, upheld a gift to a church, to relieve the resident poor, as being definite and certain enough to create a valid charitable trust.\(^6\) In 1897 the Court sustained a donation for the support, maintenance, education and aid of such indigent orphan children in Rock County, under fourteen years of age, as the executors may decide to be the most needy and deserving.\(^6\) And in Beurhaus v. Cole,\(^6\) decided the same year, a gift to the City of Watertown for the aged and poor was similarly upheld.

**Harrington v. Pier**

The two lines of decisions developed prior to 1900—beginning with the Ruth and Heiss cases on the one hand, and Dodge v. Williams on the other—were termed by Carl Zollmann as being "as clearly inconsistent as are darkness and light."\(^6\) But the turn of the century brought a turn away from the vacillating policy of the Wisconsin Supreme Court when it decided, in Harrington v. Pier,\(^6\) to return, at least partially, to the English rule of liberal construction of charitable bequests. In upholding a charitable bequest of a testator's net estate to certain trustees, to expend in temperance work in the city of Milwaukee, Judge Marshall, for the Court, adhered to the reasoning in Dodge v. Williams which expressed an entirely different doctrine than that set forth in the Ruth and Heiss line of cases. The significance of this departure may be fully appreciated by Judge Marshall's reference to the controversial *cy pres* doctrine:

"Bequests of personal property to charitable purposes, good by the rules of the common law, except so far as affected by the *cy pres* remedy and doctrine of the statute of 43 Eliz. ch. 4, are good under the laws of this state. When it is said that the doctrine of *cy pres* does not prevail in this state, that does not refer to those liberal rules of judicial construction of charitable trusts by courts of equity, which prior to the statute of Elizabeth were applied in chancery, and of which such statute is only confirmatory, but to the prerogative power exercisable where such statute prevails. Courts here, as anciently, look with favor

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\(^{61}\) 46 Wis. 106 (1879).

\(^{62}\) Webster v. Morris, 66 Wis. 366, 28 N.W. 353 (1886).

\(^{63}\) Sawtelle v. Witham, 94 Wis. 412, 69 N.W. 72.

\(^{64}\) 94 Wis. 617, 69 N.W. 986 (1897).

\(^{65}\) Cross Currents in the Wisconsin Charity Doctrine, 8 MARQ. L. REV. 168, 171 (1924).

\(^{66}\) 105 Wis. 485, 82 N.W. 345 (1900).
upon all donations to charitable uses, and give effect to them where it is possible to do so consistent with rules of law, and to that end the most liberal rules the nature of the case will admit of, within the limits of ordinary chancery jurisdiction, will be resorted to if necessary.\textsuperscript{67}

After salvaging part of the \textit{cy pres} doctrine Judge Marshall stated the rule that so long as the bequest creates a trust and discloses a particular charitable purpose, as distinguished from a gift to charity generally, it is sufficiently definite as a valid charitable trust. The court may even proceed so far as to appoint a trustee, if one is not designated. The trustee may select the actual beneficiaries, within the class specified by the donor, and fill in the details of the scheme within the declared purpose.\textsuperscript{68} With respect to the definiteness of beneficiaries, a question that considerably troubled the pre-1900 court, Judge Marshall said:

“Certainty of beneficiaries who can invoke judicial power to enforce the trust is not only unnecessary, but is inconsistent with the very nature of a trust for charitable uses, in that the beneficiaries, in a general sense, are the members of the public at large. A public charity, within the rule mentioned, is sufficiently definite as to program if its general nature be clearly stated, or if it can be made otherwise certain by the trustees clothed with the power of administering the trust within the limits of the declared purpose. It is sufficiently definite as to immediate beneficiaries, by the power of selection lodged expressly or impliedly in the trustee appointed by the donor, or by the court where there is a trust but no trustee. If the trustee abuse his power, there is a complete remedy by the exercise of the visitorial power of the state. The statute of uses and trusts, as to personal property, at least, does not apply to trusts for charitable uses.”\textsuperscript{69}

A large portion of Judge Marshall's opinion was devoted to harmonizing and distinguishing all the cases in the \textit{Ruth} and \textit{Heiss} line of decisions, except \textit{Will of Fuller}, which was disapproved. The position was taken that the reasoning in all prior cases in conflict with the instant opinion is superseded by the latter.\textsuperscript{70}

\textsuperscript{67} 105 Wis. at 503-4, 82 N.W. at 351.
\textsuperscript{68} 105 Wis. at 504, 82 N.W. at 351.
\textsuperscript{69} \textit{Ibid.}
\textsuperscript{70} Careful analysis of Judge Marshall's full opinion will reveal that Carl Zollmann was in error when he stated that “the first line of decisions was in express terms overruled.” \textit{Cross Currents in the Wisconsin Charity Doctrine}, 8
Recent History

Now that personal property had been indelibly made subject to the liberal charity rule by the Harrington v. Pier decision, the task remained to accomplish the same end with respect to real property. This requires brief consideration of the development of the doctrine of perpetuities in relation to property devised to charitable uses.

Ruth v. Oberbrunner had decided that the doctrine of perpetuities, so far as it refers to the length of time for which a piece of property may be held, is applicable to property granted or devised to charitable uses. The legislature reacted, in 1878, by amending the perpetuity statute to permit grants or devises "to literary or charitable corporations." But every charitable use was not included, such as one involving, for instance, an unincorporated religious society. Dodge v. Williams and Harrington v. Pier established that the doctrine of perpetuities was limited to real estate, and did not include personal property in that the statute abolished the English doctrine of perpetuities as applicable to personalty. Thus the law remained in Hood v. Dorer and Danforth v. Oshkosh, which upheld, respectively, a bequest "for the support and maintenance of superannuated preachers of the church denominated the United Brethren in Christ," and a gift of real estate to the City of Oshkosh as an absolute gift. But in the latter case, Judge Marshall appealed directly to the legislature, in his concurring opinion, to declare that real estate given to a charitable purpose is exempt from the perpetuity rule. Consequently, in 1905, the

Marq. L. Rev. 168, 171 (1924). This can only be said of the decision of Will of Fuller. Thus did Judge Marshall distinguish McHugh v. McCole by viewing the decision in that case as based on the ground that a trust for masses is a private, rather than a valid public or charitable, trust. "So viewed, the decision is in harmony with Dodge v. Williams, and whatever was said inconsistent with such view must yield to the decision itself and to the established doctrine of this state distinguishing trusts for charitable uses from private trusts." 105 Wis. at 513, 82 N.W. at 354.

107 Wis. 149, 82 N.W. 546 (1900). "In disposing of the case the trial judge held the will void on the ground of uncertainty and indefiniteness, relyng upon the case of Will of Fuller . . . . Were the rule of that case to be followed, it is not easy to see how the conclusion reached by the trial judge could be avoided. In the recent case of Harrington v. Pier . . . . however, the doctrine of the Fuller Case was substantially overruled." 107 Wis. at 152, 82 N.W. at 547-8.

It is now, seemingly, up to the legislature, as it was in New York in 1893, to say whether a broad policy as to devises of property to charity shall prevail in this state, or not. It will in the light of the decision in this case, be unmistakable that if the public desire is that men of wealth shall at least be permitted to have a free hand in devoting their property to the benefit of mankind instead of to mere selfish or private ends, legislative aid or command must be had in the matter." 119 Wis. at 311, 97 N.W. at 276.
The perpetuity statute was again amended—this time by inserting as an exemption real estate “given, granted or devised to a charitable use.”

Meanwhile, the Court had not only followed Harrington v. Pier in the Hood and Danforth cases, but expressly approved that decision in Kronshage v. Varrell. The next relevant case was In re Kavanaugh's Estate, perhaps the most important case in Wisconsin's history so far as is concerned the validity of a religious bequest within the large context of Church-State relations.

James Kavanaugh had provided in his will that: “After the payment of my just debts and funeral expenses, I give, devise and bequeath all the rest of my property for masses for the repose of my father's and mother's and sister's and brother's and my own soul.” The county court held this provision void on the basis of the decision in McHugh v. McCole, to the effect that a bequest for masses is too indefinite as a private trust for a court of equity to execute. On appeal, the circuit court for Manitowoc County affirmed the judgment of the county court from which an appeal was taken to the Wisconsin Supreme Court.

The main question before the Supreme Court was whether the bequest for masses is a public charity and sufficiently definite for enforcement by a court of equity. On this point Judge Kerwin, for the majority, said:

“It was shown by competent evidence that the sacrifice of the mass is a public service, not alone for the repose of the souls of the deceased members mentioned, but for the benefit of all mankind, and so understood by all members of the Catholic Church. So while the masses may be intended to benefit the souls of the departed mentioned, the benefits are public as well, therefore come within the designation of a public charity. Masses are religious observances and come within the religious or pious uses which are upheld as public charities.”

Judge Kerwin added that insofar as McHugh v. McCole conflicts with anything said in this opinion “it must be regarded as overruled,” and judgment of the court below, therefore, was reversed.

79 120 Wis. 161, 97 N.W. 928 (1904).
80 143 Wis. 90, 126 N.W. 672 (1910).
81 147 Wis. 166, 72 N.W. 631 (1897).
82 143 Wis. 90, 126 N.W. 672, 675. Judge Kerwin cited the following Catholic statement as authority: "'The mass is the unbloody sacrifice of the cross, and the object for which it is offered up is in the first place, to honor and glorify God; secondly, to thank Him for His favors; third, to ask His blessing; fourth, to propitiate Him for the sins of mankind. The individuals who participate in the fruits of the masses are the person or persons for whom the mass is offered, all of those who assist at the mass, the celebrant himself, and for all mankind.'" 143 Wis. at 98, 72 N.W. at 675. See, also, Zollmann's discussion of masses in his American Law of Charities 177-80.
83 143 Wis. at 103, 126 N.W. at 677.
Judge Kerwin's majority opinion was filed on April 26, 1910. On May 24, Judge Timlin filed a dissenting opinion in which he raised an interesting question on the basis of Article I, section 18 of the Wisconsin Constitution—the religious liberty provision. He doubted whether, under this provision, the state through its courts or legislature could "compel, direct, or regulate" the celebration of masses. And Judge Timlin continued:

"Could the attorney general on relation of any of the beneficiaries of this trust, or on his own motion, maintain an action to compel or direct the saying of these masses? I think not. If he could not, the charitable trust, if one is created, is invalid, because a charitable trust that cannot be enforced is not valid."\[85\]

The constitution, Judge Timlin observed, prohibits any control or interference with the right of conscience.

"It is manifestly no answer to this to say that there is no likelihood that the masses will be refused nor no likelihood that they will be celebrated outside of this state whereby the people of this state will have no benefit from the charity. The question is: Can the state regulate the saying of such masses in this state? If the state can enforce the saying of masses for the spiritual benefit of non-Catholics, who are, according to the majority opinion, with Catholics, the beneficiaries of this charitable trust, the trust is valid; if not, it is invalid."\[85\]

On June 10, Judge Marshall filed an extraordinary concurring opinion, to Judge Kerwin's original opinion, in an attempt to answer Judge Timlin's dissenting idea that "the constitutional right of immunity from interference in religious matters, stands in the way of public enforcement of a trust of the character created."

"The answer to that is that no public enforcement would ever in any event be required, except as to contractual features. The constitution does not exempt religious orders or ministers of the gospel from their obligations of contract. In that field they are amenable to the law of the land the same as individuals in any other field. If one should devise his property to a minister of the gospel or a church society to build a church edifice and the devisee should accept the trust, could such donee be heard successfully to claim immunity from legal coercion to carry out the agreement? That simple proposition, it would seem, shows clearly that if the donee of a trust for masses accepts the offer he thereby makes a promise subject to enforcement like any other promise. He could not for a moment in any court be heard to say, I will not keep my agreement and am entitled to protection in my breach under my constitutional immunity from interference in religious matters. The attorney general in proceeding

\[84\] 143 Wis. at 105, 126 N.W. at 679.
\[85\] 143 Wis. at 106, 126 N.W. at 679.
to enforce such a trust is merely asserting the inviolability of a public trust.\textsuperscript{86}

The Kavanaugh case illustrates that Wisconsin’s policy toward bequests in trust to religious institutions had come a long way since the early period when religious charities suffered by the state’s refusal to accept the doctrine of charitable uses.

The year 1917 saw the legislature enacting into law what the supreme court apparently had already declared to be law. It is to be remembered that the statute dealing with uses and trusts abolished all uses and trusts “except as authorized and modified by this chapter.”\textsuperscript{87} This provision is still law in Wisconsin.\textsuperscript{88} But the legislature in 1917 inserted an exception by providing:

“No trust for charitable or public purposes, whether in real or personal property, shall be invalid for indefiniteness or uncertainty where power to designate the particular charitable or public purpose or purposes to be promoted thereby is given by the instrument creating the same to trustees, or to any other person or persons.”\textsuperscript{89}

The doctrine of Harrington v. Pier continued to be followed in the case of In re Keenan,\textsuperscript{90} where the Court upheld gifts for the benefit of such “indigent sick persons residing in the city of Milwaukee as my said trustees in their wise discretion shall deem worthy of such aid and assistance.” The law would have seemed to have been well settled by this time in view of the consistency with which the Court had followed the doctrine of Harrington v. Pier and the legislative action of 1917. But the situation was not yet stable.

Strangely enough, the Court appears to have reverted to its former position in Tharp v. Smith,\textsuperscript{91} when it held invalid a bequest in trust for the benefit of the “Seventh Day Adventist Church.” The bequest was declared to be used principally for the publication and distribution of tracts and literature, that teach the doctrine of the Church, to be paid to the “proper trustees” of the Church. The Court held it void for indefiniteness for the reasons, among others, that (1) it failed to desig-

\textsuperscript{86} 143 Wis. at 111, 126 N.W. at 679-80.
\textsuperscript{87} Wis. Rev. Stat. ch. 57 (1849).
\textsuperscript{88} Wis. Stat. sec. 231.01 (1951), formerly: Wis. Stat. sec. 2081 (1898).
\textsuperscript{89} Wis. Laws ch. 170 (1917), now: Wis. Stat. sec. 231.11 (7) (a) (1951). In reference to adoption of this provision, Carl Zollmann declared his reservation, as follows: “The inclusion of this specific exception in \textit{this statute} instead of excepting \textit{generally} all charitable trusts is certainly not particularly fortunate as it might be construed as indicating a legislative construction according to which the general subject of charitable trusts would be included in the statute.” Development of the Charity Doctrine in Wisconsin, I Wis. L. Rev. 129, 139 n. 44 (1921).
\textsuperscript{90} 171 Wis. 94, 176 N.W. 857 (1920). See also, Giblin v. Giblin, 173 Wis. 632, 182 N.W. 357 (1921).
\textsuperscript{91} 182 Wis. 107, 195 N.W. 331 (1923).
nate which of the various organizations of the Church should receive the bequest; (2) no such local church existed; (3) the testator was not a member or attendant at any such church; and (4) the *cy pres* doctrine does not obtain in the state.

Even more confusing than the decision, itself, is the fact that the Court cited in support of its decision several incompatible cases, among which were *Will of Fuller* and *Harrington v. Pier*. The latter case took the opposite view and expressly disapproved the former case, a point emphasized by Carl Zollmann's criticism of the *Tharp v. Smith* decision.92

Carl Zollmann, writing in the *Marquette Law Review*, offered the following comment:

"The court in *Tharp v. Smith* very clearly overlooks the patent fact that a certain amount of discretion is inherently vested in every trustee and even confuses this discretion with the *Cy Pres* doctrine which is declared not to be in force in this state. It gathers to its breast an old error which Marshall had exposed clearly in his opinions and revitalizes it. It is to be hoped that the legislature will soon take action to correct the error thus pronounced by the court."93

It may be added to Zollmann's cogent criticism that the reasoning in *Tharp v. Smith* appears all the more confusing in view of the legislature's action of 1917.

Zollmann's expressed hope that the Wisconsin legislature would take further action was not realized until 1933 when that body inserted additional exceptions to the statute of uses and trusts, as follow:

"No trust or other gift for charitable or public purposes whether in real or personal property shall be invalid because of failure by the donor to indicate the method by which the purpose of the trust or gift is to be accomplished.

"In the absence of a clearly expressed intention to the contrary, no trust or other gift for charitable or public purposes whether in real or personal property shall be invalid because the specific method provided by the donor for the accomplishment of the general purpose indicated by him is or becomes for any reason impracticable, impossible or unlawful.

"Where the fulfillment of the special purpose expressed in a trust or other gift for charitable or public purposes is or becomes impracticable, impossible or unlawful, it shall be the duty of the courts by a liberal construction of the trust or gift to ascertain

92 Although Carl Zollmann, in discussing this point, erroneously stated that *Heiss v. Murphy*, also cited, as well as *Will of Fuller*, was overruled by *Harrington v. Pier*, he voiced his consternation, as follows: "Just what induced the court to do this is beyond the author's knowledge... Nothing certainly is gained by citing a case which negatives a proposition in affirmation of it." *Cross Currents in the Wisconsin Charity Doctrine*, 8 Marq. L. Rev. 168, 172 (1924).

93 *Id.* at 172-3. See: Zollmann, Judge Roujet D. Marshall and the Wisconsin Charity Doctrine, 10 Marq. L. Rev. 177 (1926).
the general purpose of the donor and to carry it into effect in the nearest practicable manner to the expressed special purpose; provided, however, that the right of visitation of a living donor shall not be held to be impaired by anything contained in this subsection.\(^{94}\)

"These amendments . . . did little more than declare existing law," Chief Justice Rosenberry stated in 1937.\(^{95}\) Observing that it was unnecessary, therefore, to rely upon the statute, the distinguished jurist, for the Court, cited the authority of the general principles of Harrington v. Pier:

"This court has decided, disregarding the reasons which some others have deemed controlling, that there are inherent in our courts all the strictly judicial powers ever exercised by the chancellor on the High Court of Chancery of England to find means to carry into effect a charitable purpose entertained by a testator or grantor; that such courts lack only the prerogative \textit{cy pres} power enjoyed by the sovereign . . ." \(^{96}\)

"As pointed out in Harrington v. Pier . . . in some of the earlier cases the \textit{cy pres} doctrine was repudiated. It is quite clear that what was repudiated was the prerogative power exercised by the chancellor, not as a judge, but as a representative of the Crown."\(^{96}\)

The temporary defection of the Court in Tharp v. Smith appeared to be redressed completely in Rowell's Estate\(^{97}\) when the Court upheld a bequest, as a valid trust, to the "Salvation Army of Appleton," with the provision that the money "be expended by the Salvation Army for the benefit of the needy people in the city of Appleton." The Court reasoned that this created a bequest and trust to the advisory committee of the Salvation Army in Appleton, and although this local body was unincorporated and was not competent to act as a trustee, the trust could not be held void for that reason. The Court ruled that it may appoint a trustee to carry out the trust.

\(^{94}\) Wis. Laws ch. 413 (1933), now Wis. Stat. sec. 231.11 (7) (b), (c), and (d) (1951).

\(^{95}\) First Wisconsin Trust Co. v. Board of Trustees, 225 Wis. 34, 42, 272 N.W. 464, 468 (1937).

\(^{96}\) 225 Wis. at 42-3, 272 N.W. at 468; quoting, in part, from the majority opinion in Kronshage v. Varell, 120 Wis. 161, 164, 97 N.W. 928, 928-9 (1904). See also: Fairbanks v. City of Appleton, 249 Wis. 476, 24 N.W. 2d 893 (1946); Thronson's Estate, 243 Wis. 73, 24 N.W. 2d 641 (1943); Estate of Mead, 227 Wis. 311, 277 N.W. 694 (1938); Maxcy v. Oshkosh, 144 Wis. 238, 128 N.W. 899 (1910); distinguish, Nelson v. Madison Lutheran Hospital & Sanatorium, 237 Wis. 518, 297 N.W. 424 (1941) where the Court, through Judge Wickhem, said of the \textit{cy pres} doctrine: "So far as this doctrine is recognized in Wisconsin, it is simply a doctrine of liberal construction. It applies only where a general charitable purpose can be found in the terms of a bequest or gift, and the specific purpose of the bequest or gift has become impracticable or impossible." And he added: "A mere casual reading of the section [Wis. Stat. sec. 231.11 (7)] discloses that its operation is dependent upon discovery of a general charitable purpose." 237 Wis. at 525, 527, 297 N.W. at 426, 427.

\(^{97}\) 248 Wis. 520, 22 N.W. 2d 604 (1945).
Summary

Bequests and devises in trust to religious institutions are classified as charitable trusts. The question of the definiteness necessary in charitable trusts "is not an inviting one to the superficial investigator . . . A 'wilderness of cases' exists . . . which repels all but the most persistent inquirer." Wisconsin's experience reflects the truth in the statement that there is "no subject concerning which there is a greater diversity of decisions . . ."98

The Wisconsin supreme court, by salvaging part of the cy pres doctrine, has changed from a position of not recognizing the doctrine of charitable uses as enumerated in the Statute of Elizabeth to one of giving effect to that doctrine. It has changed from a position of narrow construction of charitable bequests and trusts to one of liberal construction by implementing the basic elements of the cy pres doctrine. The legislature has reflected these changes. The intent of the grantor is now held to control the whole bequest, and the court will do all that is within its judicial power to give it effect.

Charitable trusts are public trusts and do not require the definiteness necessary to create a private trust. In fact, indefiniteness of beneficiaries and method of carrying out the trust are necessary elements of a valid charitable bequest. If a religious bequest creates a trust which lacks an ascertainable trustee, the court will appoint one. Thus, a bequest will not fail for the reason that it is made in trust to an unincorporated religious society.

Real property, as well as personalty, given to a religious society may create an enforceable charitable trust. And the doctrine of perpetuities does not impair such a trust. The court will give full effect to the intent of a grantor as against any diversion of the trust.

Bequests for the saying of masses are no longer held to create private trusts, but rather they create valid public trusts to be enforced as any charitable trust. It is the Wisconsin judicial opinion that such bequests are for the promotion of a particular faith and for the benefit of the public generally, as well as individuals. A bequest made in support of a particular faith or mode of worship does not interfere with any constitutional right of conscience, impose a religious test, or contravene public policy.

Separation of Church and State no longer means in Wisconsin, if it ever did, that the State will pursue a policy inimical to the welfare of religious institutions. Although the state of Wisconsin, itself, may not make contributions for religious purposes, it will now safeguard and enforce the right of religious institutions to receive bequests in trust, as

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98 ZOLLMANN, AMERICAN LAW OF CHARITIES 221 (1924).
a contractual right, by applying the rules of liberal interpretation and giving effect to the doctrine of charitable uses.

**Taxation Exemption**

Still another major statutory right of religious institutions in Wisconsin is that concerning taxation exemption of religious property. Insofar as the principle of separation of Church and State comprehends a certain immunity of religious institutions from the force of law, then separation of this character is reflected in the immunity of each religious institution from taxation of a portion of its property. But this is statutory, not constitutional, separation. The Wisconsin Constitution provides only that the rule of taxation shall be uniform, and taxes shall be levied on such property as the legislature shall prescribe. Thus, Wisconsin is one of only sixteen states that does not have a specific constitutional reference to the exemption from taxation of property used for religious purposes.

**Establishing Basic Policy**

Whether specific exemption should be made a constitutional provision was thoroughly considered by the framers of the present constitution. On December 24, 1847, after the voters had rejected the original constitution, Mr. Richardson, a delegate, successfully introduced a resolution in the second convention which provided:

"That the committee on general provisions be instructed to inquire into the expediency of incorporating a clause in the constitution, exempting from taxation the property of the state and counties, both real and personal, and all such property set apart either by virtue of law or by private donation or bequest, for religious, school, and charitable purposes."

On December 30, 1847, the committee reported back to the convention its original draft of the article on "Finance":

99 **Wis. Const.** Art. VIII, sec. 1. It now reads, as amended Nov. 1908, April 1927, and April 1941: "The rule of taxation shall be uniform but the legislature may empower cities, villages or towns to collect and return taxes on real estate located therein by optional methods. Taxes shall be levied upon such property with such classifications as to forests and minerals including or separate or severed from the land, as the legislature shall prescribe. Taxes may also be imposed on incomes, privileges and occupations, which taxes may be graduated and progressive, and reasonable exemptions may be provided." See: Bixby, Note: **Wis. Const.** Art. VIII, Sec. 1—*Partial Exemption of Value As An Inducement to Proper Subdivision*, 1953 Wis. L. Rev. 141, 142-3; and for history of the adoption of the tax provision, see Brown, *The Making of the Wisconsin Constitution*, 1952 Wis. L. Rev. 23, 45-6.

100 **Torrey, Judicial Doctrines of Religious Rights in America** 174 (1948). "In each case, however, there is legislative authorization or implied power to exempt property from taxation by general law." *Ibid.*

101 See, JOURNAL OF THE CONVENTION TO FORM A CONSTITUTION FOR THE STATE OF WISCONSIN 19 (Madison, 1848) for an abstract of the votes rejecting the first constitution.

102 *Id.* at 69. "It was decided in the affirmative," on Dec. 27. *Id.* at 85.
"The property of the state and counties, both real and personal, and such property as the legislature shall deem proper, belonging to educational, charitable, or religious institutions, or set apart for such purposes, shall be exempted from taxation."\(^{103}\)

The article finally came up for consideration on January 5, 1848, when Delegate Lovell spoke against exemption. According to the record of the convention:

"He hoped no specific exemption would be adopted. If such a provision were incorporated in the constitution, it would cut off the action of the legislature on the subject, and it would be left to the worst kind of legislation in the world—judicial legislation. The manner in which a fixed system of exemption from taxation would operate, might be very oppressive. A block of buildings might be erected in Milwaukee, the lower stories of which might consist of stores, while the whole upper part might be devoted to a church. Under the proposed provision, the entire building would be exempted from taxation. The only proper course was to leave the settlement of the question to the legislature . . ."\(^{104}\)

The very next year, in 1849, the new state legislature provided that exemption from property taxation shall include "all houses of public worship, and the lots on which they are situated, and the pews or slips and furniture therein, every parsonage, and all burial grounds, tombs and rights of burial." Apparently recalling Mr. Lovell's cogent criticism, it was added:

". . . but any part of any building, being a house of public worship, which shall be kept or used as a store or shop, or for any other purpose except for public worship or for schools, shall be taxed upon the cash valuation thereof, the same as personal property, to the owner or occupant, or to both; and the taxes thereon shall be collected in the same manner as taxes on personal estate."\(^{105}\)

As if to be doubly certain that religious property would be exempted, the 1849 legislature provided separately that:

"Every church, parsonage, and school house belonging to any religious society, with land belonging thereto, not to exceed in all three acres in any one town, village or township, or if in a city, not to exceed one lot for each of said buildings, shall not be

\(^{103}\) Id. at 113.

\(^{104}\) Journal, op. cit. supra note 101, at 206. Mr. Judd, a delegate, twice had proposed amendments, both of which read: "The property of the state, property of any common school, university, college or seminary of learning, all houses erected for and dedicated to the public worship of God, and the lots which they necessarily occupy for such purpose, and all public burying grounds and such other property as the legislature shall prescribe by law shall be free from taxation." Id. at 203. But the amendments failed adoption in both instances. Id. at 203, 206.

subject to taxation for any purpose except for its own improvement.”

Thus did the legislature act when the convention refused to act. And it is to be noted that the latter provision established a policy that has persisted to the present, that of area limitation.

**Movement for Repeal**

The years 1873-1880 witnessed the only movement, of a concentrated character, to effect repeal of the Wisconsin statutes exempting religious property from taxation, and an equal effort to thwart such an event. The legislature, in 1873, received a number of memorials, petitions, and remonstrances concerning property exemption. While a large number of people seemed to favor a “sweeping repeal of all exemptions,” except as to public property, “an equally respectable number” insisted “that the laws exempting religious, scientific, literary, and benevolent associations from the burden of taxation, are just and dictated by the highest considerations of policy and morals.”

Among the latter was William E. Armitage, bishop of the Protestant Episcopal Church in Wisconsin, who submitted a memorial on February 6, 1873 to the Assembly, which read, in part:

> "The ground on which church property has hitherto been exempted from taxation . . . is a very strong one. . . . Churches, religious institutions, houses of worship, producing no revenues to their occupants like other property, are producers of good morals, good citizenship, domestic and social virtues, habits of integrity and restraint, which are of the utmost value to the state and to every separate community in it. And the state is no loser in giving to bodies of men who, out of their own means, establish and maintain such centres of moral health, and life, the recognition of not taxing the houses they build for them, as it taxes their own dwellings and shops and stores."  

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107 Report of the Select Senate Committee on the Law Exempting Property from Taxation, Senate Journal 292-3 (1873). "It also appeared from memorials . . . that several religious and cemetery societies, while themselves exempt, join in the prayer to tax all property alike, for the reason that the present system in its practical operation is open to much abuse, and production of more harm than good." Ibid. On the national level, “the most important utterance by a representative public officer raising the question of possible changes in policy in this matter was by President Grant . . . , in his seventh message to Congress. ‘I would suggest,’ he said, ‘the taxation of all property equally, whether church or corporation, exempting only the last resting place of the dead, and possibly, with proper restrictions, church edifices.’" 3 Stokes, Church and State in the United States 421 (New York, 1950). For a brief discussion of Wisconsin newspapers’ support of repeal of exemption of church property, in 1880 on the ground of religious freedom, see Phelan, The Financial History of Wisconsin 221-2 (Madison, 1906).

108 Memorial from the Bishop of the Protestant Episcopal Church on Church Taxation, Assembly Journal 262 (1873).
Repeal of exemption would seriously impair "the establishment of religion and its instrumentalities." And the bishop added:

"Our congregations are generally poor, and few of them have rich men in them. . . . And that is a rare church building which does not represent an amount of struggle and effort . . . which deserves to be recognized and helped, as in themselves benefiting the community before the direct benefits of the work begin to tell.

"Now come to one of these struggling little flocks—and there . . . say to them, although you are spending here and getting no money returns, although you are giving for the general and permanent good of the community, you must pay taxes on what you build, just as if this were a store or a mill—and you will cast on them a load difficult, and sometimes impossible for them to bear. If they pay it, it will be out of the minister's pittance, or in some way out of their very life as a corporation."

In view of the conflicting opinions and the absence of reliable statistics, a Senate committee that studied the problem found itself in a "most embarrassing" position. But it estimated that all exempt property of charitable associations in the state approximated $9,000,000, one-half of which was church property, which was termed as of "trifling bearing" when it is considered that the aggregate value of taxable property was $702,000,000 according to the 1870 census.

Still, the committee was cognizant of certain considerations among which was the fact that too often the charitable character of such associations is "a mere pretense and cover" to avoid the burden of taxation. "Doubts of a very grave nature exist," moreover, "whether the exemption of church property is not a compulsory mode of taxing others for the support of places of worship, or equivalent to drawing money from the treasury for the benefit of religious societies, and in violation of section 18, article 1 of our constitution."

Among its recommendations, the committee submitted the following statement:

"That the laws exempting the property of . . . religious, scientific, literary or benevolent associations, be amended so that in clear and unambiguous language, they shall provide for the taxation in the ordinary mode, of all property belonging to such . . . societies, which is not necessary and exclusively used for their immediate and legitimate purposes."

But this recommendation apparently did not satisfy those legislators who wanted repeal of all exemptions, for another Senate committee, two days later, issued the statement that: "The theory of taxation is that all property should pay its just proportion of the taxes; any sys-

109 Id. at 263-4.
110 Report, op. cit. supra note 107, at 293-4.
111 Report, op. cit. supra note 107, at 294.
112 Report, op. cit. supra note 107, at 295.
system of law which operates differently is pernicious, and becomes destructive of the ends of government.”\textsuperscript{113}

All bills introduced in 1873 to change the exemption provisions failed of passage. In 1874, a bill providing repeal of all exemptions was introduced in the Assembly, but the committee to which it was referred recommended that it be indefinitely postponed.\textsuperscript{114} Assemblyman Charles H. Larkin appeared in opposition to the bill, and the committee included in its report his lengthy argument. Some of his remarks were made in answer to the “chief argument brought forward by those who insist on taxing” religious institutions, “that their exemption is contrary to” Article I, section 18 of the Wisconsin Constitution. This provision does not contemplate taxation of religious property, said Larkin. “The obvious intention was to have the state pursue a ‘let alone’ policy toward these institutions, so far as taxation is concerned.”\textsuperscript{115}

“Now if the state tax the edifices which men erect for the worship of God, and if, it may be, sell these edifices for the nonpayment of taxes, it appears to me, that it thereby interferes with the right of worship which the constitution says shall never be infringed.”\textsuperscript{116}

And he added: “If the people of Wisconsin were to proceed to tax out of existence half the churches established in their midst for the worship of God, I think such a course would be arrant hypocrisy.” Such taxes, he concluded, “at best are of doubtful constitutionality, and are certainly antagonistic to the public good.”\textsuperscript{117}

The advocates of repeal were not victorious. The 1878 revision of the statutes did not change the exclusive use and area limitations adopted in 1868. And the wording as stated in 1878 has continued in substantially identical form to the present time. The 1878 provision exempted:

“Personal property owned by any religious, scientific, literary or benevolent association, used exclusively for the purposes of such association, and the real property, if not leased, or not otherwise used for pecuniary profit necessary for the location and convenience of the buildings of such association and embracing the same, not exceeding ten acres; ... and parsonages, whether of local churches or districts, and whether occupied by the pastor permanently, or rented for his benefit. The occasional leasing

\textsuperscript{113} Report of the Select Senate Committee on Bill No. 44S, Senate Journal 334 (1873).

\textsuperscript{114} Report of the Committee on Assessment and Collection of Taxes on No. 282A, Assembly Journal 379 (1874).

\textsuperscript{115} Id. at 381.

\textsuperscript{116} Ibid.

\textsuperscript{117} Id. at 384, 385. Larkin cited the preamble to the Wisconsin Constitution: “We, the people of Wisconsin, grateful to Almighty God. . . .” —and added that if the people continued tax exemption of religious property, they “would . . . be showing their gratitude to Almighty God in a very singular way.” Id. at 384.
of such buildings for schools, public lectures or concerts, or the
leasing of such parsonages, shall not render them liable to taxa-
tion."\(^{118}\)

Advocates of repeal persisted in one final attempt. They submitted
several memorials to the Senate, in 1880, asking for taxation of church
property. After studying the question, the Senate Committee on Char-
itable and Penal Institutions recommended indefinite postponement.
"The framers of our constitution," said the Committee, "wisely sepa-
rated it [the church] from the state, and while making provision for
the latter, left the church to be supported by the voluntary offerings of
the people.'\(^{119}\)

"Our fathers refused to tax the people for the support of the
church, but left religion free as air and water; and it is now pro-
posed that we should tax the church to support the people; to lay
an embargo on men's consciences, and restore the temple to the
money changers."\(^{120}\)

And the Committee concluded:

"When our churches become so crowded that the pews are sold
at a premium high enough to pay the mortgages on the lots and
put money into the pockets of the bloated vestrymen, it will be
time enough to make them contribute to the relief of our banks,
insurance companies, and other needy institutions."\(^{120}\)

Strict Construction

What may be said concerning taxation exemption in general is ap-
plicable specifically to property of religious institutions. The Wisconsin
judiciary has favored a strict construction of the exemption privilege.
Although there is no doubt that the legislature may prescribe what
property shall be taxed,\(^{122}\) which implies the legislative power to pre-
scribe exemptions from both general property taxation\(^{123}\) and special
assessments,\(^{124}\) taxation is the rule and exemption the exception.\(^{125}\)

\(^{118}\) Wis. Rev. Stat. sec. 1038 (3) (1878); now Wis. Stat. sec. 70.11 (4) (1951).
The 1878 provision was composed of several acts, but chiefly that created by
Wis. Laws ch. 130, sec. 2 (1865). Minor changes appeared in Wis. Laws ch.
164 (3) (1869) and ch. 125 (1870).

\(^{119}\) Report of the Senate Committee on Charitable and Penal Institutions on
Memorials Asking for the Taxation of Church Property, Senate Journal 287,
288 (1880).

\(^{120}\) Ibid.

\(^{121}\) Id. at 291.

\(^{122}\) Knowlton v. Supervisors of Rock County, 15 Wis. 600 (1862); State ex rel.
Att'y Gen. v. Winnebago Lake & Fox River Plankroad Co., 11 Wis. 35 (1860);
Knowlton v. Supervisors of Rock County, 9 Wis. 410 (1859).

\(^{123}\) Board of Trustees of Lawrence University v. Outagamie County, 150 Wis. 244,
136 N.W. 619 (1912); Wisconsin Cent. R. R. Co. v. Taylor County, 52 Wis. 37,
8 N.W. 833 (1881).

\(^{124}\) Lamasco Realty Co. v. Milwaukee, 242 Wis. 357, 8 N.W. 2d 372, 8 N.W. 2d
865 (1943).

\(^{125}\) Evangelical Lutheran Church v. Shawano County, 256 Wis. 196, 40 N.W. 2d
590 (1949); Legion Clubhouse, Inc. v. City of Madison, 248 Wis. 380, 21 N.W.
2d 683 (1945).
Hence, the Wisconsin Supreme Court has followed the well established rule that statutes exempting property from taxation are to be strictly construed, and all doubts in respect to specified property are to be resolved in favor of its taxability.\textsuperscript{126} For such exemption to be valid, therefore, it must be clear and express. All presumption are against it, and those claiming exemption must bring themselves clearly within the express terms of the statute. Thus, exemption is not to exist by implications.\textsuperscript{127}

In reference specifically to taxation exemption of religious property, the basic statutory requisites for exemption have remained unchanged since 1868. These are presently, as they were in 1868: (1) religious ownership, (2) exclusive religious use, (3) 10 acres maximum, and (4) necessary land.\textsuperscript{128}

Examination of two cases—one holding religious property to be taxable, and the other upholding exemption—may illustrate the general limits set by the Wisconsin Supreme Court's construction of the statutory right of taxation exemption of religious property.

In 1886, the Congregational Church of Appleton was located on several lots, but one lot owned by the church was vacant, unoccupied, and some distance from the church buildings. Whether the vacant lot was taxable was the issue in \textit{Green Bay & Mississippi Canal Co. v. Outagamie County}.\textsuperscript{129} The Supreme Court held that doubtlessly the lot was taxable. Speaking for the Court, Judge Orton said:

"That church might as well have claimed that lot exempt if it had been located in another city, and it could as well have claimed

\textsuperscript{126}Northern Supply Co. v. Milwaukee, 256 Wis. 509, 30 N.W. 2d 379 (1949); First Wisconsin Trust Co. v. Wisconsin Dept. of Taxation, 248 Wis. 21, 20 N.W. 2d 647 (1945); Milwaukee Elec. Ry. & Light Co. v. Public Service Commission, 236 Wis. 621, 296 N.W. 58 (1941); Armory Realty Co. v. Olsen, 210 Wis. 281, 246 N.W. 513 (1933); United States Nat. Bank v. Poor Handmaids of Jesus Christ, 148 Wis. 613, 135 N.W. 121 (1912); Katzer v. City of Milwaukee, 104 Wis. 16, 79 N.W. 745 (1899); State \textit{ex rel.} Milwaukee St. Ry. Co. v. Anderson, 90 Wis. 550, 63 N.W. 746 (1895), \textit{overruled} on another point in State \textit{ex rel.} Badger Illuminating Co. v. Anderson, 97 Wis. 114, 72 N.W. 386 (1897); State \textit{ex rel.} Bell v. Harshaw, 76 Wis. 230, 45 N.W. 308 (1890); Weston v. Supervisors of Shawano County, 44 Wis. 242 (1878).

\textsuperscript{127}State \textit{ex rel.} Wisconsin Compensation Rating & Inspection Bureau v. City of Milwaukee, 249 Wis. 71, 23 N.W. 2d 501 (1946); Comet Co. v. Dept. of Taxation, 243 Wis. 117, 9 N.W. 2d 620 (1943); Bowman Dairy Co. v. Tax Commission, 240 Wis. 1, 1 N.W. 2d 905 (1942); Ritchie v. City of Green Bay, 215 Wis. 433, 254 N.W. 113 (1934); Wisconsin Gas & Elec. Co. v. Tax Commission, 207 Wis. 546, 242 N.W. 321 (1932); Methodist Episcopal Church Baraca Club v. City of Madison, 167 Wis. 207, 167 N.W. 258 (1918); \textit{distinguish:} Aberg v. Moe, 198 Wis. 349, 224 N.W. 122, 226 N.W. 301 (1929); State \textit{ex rel.} Wisconsin Trust Co. v. Leech, 156 Wis. 121, 144 N.W. 290 (1914). Property not subject to taxation cannot be assessed for taxation. 14 Ors. Wis. Att'y Gen. 159 (1925).

\textsuperscript{128}Wis. STAT. sec. 70.11 (4) (1951), revised and recreated by Wis. Laws ch. 63, 634, 643 (1949). "Leasing such property to similar organizations for educational or benevolent purposes, where all the income derived therefrom is used for maintenance, shall not render the property taxable." \textit{Ibid.}

\textsuperscript{129}76 Wis. 587, 45 N.W. 536 (1890).
any number of vacant lots scattered about the city or out of it... to be exempt from taxation. Such a construction of the statute would exempt all the real property of any such religious association, however or wherever situated, ... and however distant. ... The statute is clear and explicit, and affords no chance for such a loose and liberal construction.\textsuperscript{130}

The statute requires that real property as well as personal property be used exclusively for the purposes of the religious institution. It is not used for church purposes here, nor is the lot necessary for the location and convenience of the buildings. And Judge Orton concluded: "This lot was valued at $5,000. This is too important an omission of taxable property to be overlooked."\textsuperscript{131}

That the exclusive use limitation is a rule of reason, not to be applied indiscriminately, was the doctrine of \textit{Northwestern Publishing House v. Milwaukee}.\textsuperscript{132} The Northwestern Publishing House was engaged in the business of publishing and selling books, periodicals, and other literature "considered beneficial to the Evangelical Lutheran faith." All profits were turned over to the Evangelical Lutheran Synod of Wisconsin. The only real estate owned by the House was one lot, of less than one acre, in Milwaukee, on which was located the printing plant. Taxes levied on this property were paid under protest.

Judge Rosenberry, for the Court, did not find it necessary to determine whether or not the Publishing House and Synod were religious corporations, for it was clear that they were organized for educational and benevolent purposes, he reasoned, and so were within the express terms of the exemption statute.

"The importance to a sectarian body of controlling and managing the publication and distribution of the literature inculcating its doctrines is well understood. Instilling into the minds of the young, stimulating and deepening the convictions of the mature in matters relating to the faith and doctrine of the Lutheran Church by the publication and distribution of printed matter, are certainly educational purposes within the meaning of [the statute].\textsuperscript{133}

Only a very small part of one percent of the Publishing House's income is derived from printing letterheads and envelopes for the convenience of its patrons, and to give continuous employment to its workmen. Also, about 20 square feet of floor space is taken up by a display of a sample church bench, school seat, and some baptismal fonts, for which the House takes orders. Despite these facts, said Judge Rosenberry, the departure from the exclusive use requirement "is so slight as to be

\textsuperscript{130} 76 Wis. at 590-91, 45 N.W. at 537.
\textsuperscript{131} 76 Wis. at 592, 45 N.W. at 538.
\textsuperscript{132} 177 Wis. 401, 188 N.W. 636 (1922).
\textsuperscript{133} 177 Wis. at 408, 188 N.W. at 638.
negligible and therefore to be disregarded." The departure is not sufficient "to warrant us in saying that the property is not used exclusively for educational and benevolent purposes."\textsuperscript{134}

Although the property in both cases was of a religious character, the church lot in the first case was not used for exclusive religious purposes, while the property in the Publishing House case, if not used exclusively for religious purposes, was used nevertheless for exclusive educational and benevolent purposes. The important point is that the latter property was exempt under the statute despite the fact that a small part of it was devoted to other than educational and benevolent purposes. Thus, the exclusive use requirement is applied by the courts as a rule of reason. It is a requirement that should not unreasonably impair the statutory right of exemption of institutions of a religious or charitable character. All presumptions must remain, however, in favor of taxability and against exemption.

\textbf{Parsonages}

Strict construction of the exemption statute is no more in evidence than in the law concerning parsonages,\textsuperscript{135} although this is not reflected in the earliest case on the subject: \textit{Gray v. La Fayette County}.\textsuperscript{136} Gray owned three contiguous lots—a yard, garden, and a house—and, expecting exemption, he leased them to the Baptist Church for less rent than he could obtain otherwise, to be used as a parsonage. Concerning taxability, the Supreme Court held that the property must be considered a parsonage since it was rented for a pastor, and thus came within the statutory exemption of parsonages "whether occupied by the pastor permanently or \textit{rented} for his benefit."\textsuperscript{137} The case turned on the meaning of the word "rented" which the Court liberally construed. The Court was;

\"... impelled to the conclusion that the more reasonable construction of the statute is that the word "rented," ... applies to parsonages rented by church associations as lessees. ... It follows that the property described in the complaint, when the same was assessed for taxation in 1883, was the parsonage of the Baptist Church Association, rented by it for its pastor (who occupied it), and was therefore exempt from taxation in that year.\textsuperscript{138}\"
It is difficult to reconcile the Gray decision with later authority, especially with the leading case of Katzer v. City of Milwaukee which, although distinguishable in its facts, followed a different line of reasoning. In 1892, the Catholic Church diocese of Milwaukee purchased property in Milwaukee as a residence for Katzer, archbishop of the diocese, and the title of ownership was conveyed to him. The Wisconsin Supreme Court held the property to be taxable on the ground that the real estate and parsonage were not owned by and used exclusively for the purposes of the diocese as the statutory exemption requires. The Court relied on the rule that all doubt must be resolved in favor of taxability when the meaning of a tax exemption statute is ambiguous or uncertain. "It is for the legislature to grant these special privileges," said Judge Dodge for the Court.

"The property in question is prima facie owned absolutely by an individual. It is conveyed by warranty deed to the plaintiff, with no intimation that such conveyance is due to his place or office. ... We are, however, urged to recognize the fact that, by what is called ... 'laws of the Roman Catholic Church,' he holds the property upon some trust. What that trust is is not at all defined in the evidence further than that he declares that he holds it in trust for the diocese and to devise it by will to his successor.... Courts can recognize only rights which are regulated and established by law. The obligation of one who holds for another must rest upon and be enforceable by the law; and however strong they may be such obligations ... they are of no force to establish rights to ownership in any other than him who holds the legal title."\(^{140}\)

The Gray decision held that property owned by an individual and rented to a church for a parsonage was exempt. The Katzer decision held that property owned by a clergyman and used by him for his residence was not exempt. In the former case, the Court followed what it termed a "reasonable construction" of the exemption statute, while in the latter case, it employed the doctrine of strict construction. Since Gray, expecting exemption, charged the church less rent, the Gray decision could be considered as favorable to religious institutions. The Katzer decision was certainly unfavorable—especially to the Catholic Church in which bishops and archbishops play singular roles as trustees of each Roman Catholic corporation, a monarchical, or corporation sole, type of religious organization.\(^{141}\)

\(^{139}\) 104 Wis. 16, 79 N.W. 745 (1899), rehearing denied, 104 Wis. 23, 80 N.W. 41 (1899).

\(^{140}\) 104 Wis. at 21-2, 79 N.W. at 746. "Courts have judicial knowledge of the laws of the land, but not of the 'laws of the Catholic Church.'" 104 Wis. at 23, 79 N.W. at 747.

The doctrine of strict construction was followed in 1916 in an opinion of the Attorney General. James Aran had bequeathed $20,000 to the Wisconsin Conference of the Methodist Episcopal Church for the purchase of land and the erection thereon of a suitable home for superannuated Methodist ministers. After three cottages were completed, the Conference found that no ministers desired to come and occupy them. So they were rented to various tenants and all money from the rent was used exclusively "for the support of superannuated ministers living elsewhere." The Attorney General stated that the cottages could not be regarded as tax exempt since they were not parsonages and were not occupied by a clergyman.\textsuperscript{142}

Along the same line, the Attorney General decided, in 1924, that a parsonage owned by ministers was not exempt, being squarely ruled by the \textit{Katzer} decision.\textsuperscript{143} Doubt was likewise resolved against exemption when the Attorney General decided that a dwelling rented by a religious organization for the use of a parish school teacher, who assisted a pastor and in his absence performed some of his duties, is not exempt from taxation.\textsuperscript{144} But the reasoning of the \textit{Gray} case was revived by Attorney General Loomis in 1938.\textsuperscript{145} A large church employed two pastors. One resided in a church-owned parsonage, while the other resided in a church-rented parsonage. On the basis of the \textit{Gray} decision, Attorney General Loomis ruled both parsonages exempt from taxation. The term "rented" in the exemption statute, he reasoned, does not refer to a parsonage owned by the church and rented by it as lessor, but refers to a parsonage rented by the church as lessee and used by a pastor. And he added:

"Sec. 70.11, subsec. (4) does not limit the parsonage exemption to one parsonage for each church. The statute is broadly worded to provide exemption for all parsonages so long as said parsonages are either occupied by the pastor permanently or rented by the church (as lessee) for the benefit of the pastor."\textsuperscript{146}

In 1940, District Attorney John H. Matheson addressed a query on the subject to Attorney General Martin.\textsuperscript{147} The Salvation Army of Janesville had leased for a year from an individual a residence for the use of its commanding officer. Among his activities, the commanding officer conducted regular religious services, performed marriage cere-

\textsuperscript{142} 4 Ops. Wis. Atty Gen. 460 (1915).
\textsuperscript{143} 13 Ops. Wis. Atty Gen. 291 (1924).
\textsuperscript{144} 13 Ops. Wis. Atty Gen. 599 (1924). \textit{Distinguish}, 27 Ops. Wis. Atty Gen. 693 (1938) where the opinion was rendered that residences situated upon the grounds of the Evangelical Lutheran Seminary of Mequon, Wisconsin, and occupied rent free by instructors are exempt under sec. 70.11 (4), Stats., which applies to "any educational institution."
\textsuperscript{145} 27 Ops. Wis Atty Gen. 430 (1938).
\textsuperscript{146} \textit{Id.} at 431.
\textsuperscript{147} 29 Ops. Wis. Atty Gen. 250 (1940).
monies, and otherwise fulfilled the "functions of a minister or priest." Although not ordained, he was "commissioned" by the Salvation Army "after a course of schooling, including considerable theological training." The question was whether his residence would be exempt as a parsonage. "Churches and other religious institutions," Attorney General Martin replied, "enjoy no inherent exemption and their property is taxable except so far as it is specifically exempted by constitutional or statutory enactment." Accordingly, since the Salvation Army commander lacks ordination, he is not a pastor or parson and his residence, therefore, cannot be exempted as a parsonage under the statute.

A similar question was posed to Attorney General Broadfoot in 1948. The Lutheran Wisconsin District of the Missouri Synod Lutheran Church owned a house in Wausau which it devoted to the Executive Secretary of Christian Education of the Synod for use as his home. His duties were "to promote the religious and educational work of the Synod." Since he was not ordained, and hence the property could not be exempt under the statute, as a parsonage, the question raised was whether it would be exempt as consisting of "real property necessary for the location and convenience of the buildings of such institution." The only purpose here for the religious organization in owning the property, Attorney General Broadfoot replied, is "to supply an employee with a personal dwelling," and not to use it for religious activities. In respect to the language exempting parsonages, he said:

"If premises furnished by a church organization to an officer or employee were included in and accorded exemption by this general language . . . then by the same reasoning premises furnished by a church to its minister or priest for a private home would also be included therein and exempt. There would seem to be more reason and basis for exemption in the case of a minister or priest than in that of the officer or employee."

**Dominant Purpose Doctrine**

Aside from the subject of property belonging to strictly religious institutions, such as church buildings and parsonages, there is the matter of property belonging to institutions that are only partly religious in character and are otherwise charitable or benevolent. Some of these possess funds in excess of cost, and in this sense certain activities are profitable. But to be exempt under the statute, their property may not be leased or otherwise used for pecuniary profit. Prior to 1949, it was declared that the statute required only the personal property of

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148 Id. at 251.
149 37 Ops. Wis. Att'y Gen. 537 (1948).
150 Id. at 539-40.
151 Id. at 540.
152 Formerly Wis. Rev. Stat. sec. 1038 (3) (1878), now Wis. Stat sec. 70.11 (4) (1951).
such an association to be used exclusively for its purposes, and that this was not required of its real property. But this distinction was erased in 1949 by the deletion of the prefix "personal" at the beginning of the exemption provision, so that now exempt is: "Property owned and used exclusively . . . by churches or religious, educational or benevolent associations."

Clearly, an association must come within at least one the specified classifications for its property to be exempt. Under the tax exemption statute, Wisconsin has the "dominant purpose" rule. This means that the dominant purpose of the institution, rather than incidental or collateral lesser purposes, characterizes it.

Thus, the Young Men's Christian Association of Appleton, which is otherwise charitable or benevolent, does not lose such character because some income results from the operations conducted by it. It is "a nonprofit corporation, and its prime purpose is to build character and better Christian citizenship from the developing material in its community. That is truly a benevolent purpose." Accordingly, Y.M.C.A. owned and operated camps for boys and young men are tax free to ten acres total Y.M.C.A. property in each taxing district.

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153 5 Ops. Wis Att'y Gen. 716, 721 (1916).
154 Wis. Laws ch. 63, 634 (1949).
155 Prairie du Chien Sanitarium Co. v. Prairie du Chien, 242 Wis. 262, 7 N.W. 2d 832 (1943); Order of the Sisters of St. Joseph v. Plover, 239 Wis. 278, 1 N.W. 2d 173 (1941); Rogers Memorial Sanitarium v. Summit, 228 Wis. 507, 279 N.W. 623 (1938); Will of Roberts, 193 Wis. 415, 214 N.W. 347 (1927); Northwestern Publishing House v. Milwaukee, 177 Wis. 401, 188 N.W. 636 (1922); St. John's Military Academy v. Edwards, 143 Wis. 551, 128 N.W. 113 (1910); St. Joseph's Hospital Association v. Ashland County, 96 Wis. 636, 72 N.W. 43 (1899).
156 5 Ops. Wis Att'y Gen. 716, 717 (1916).
157 21 Ops. Wis. Att'y Gen. 74, 76 (1932). "... it is a matter of common knowledge that the social and entertainment activities of Y.M.C.A.'s that are not directly religious, educational, or benevolent, are incidental to the dominant purpose. . . ." Ibid.
158 State ex rel. Association of Y.M.C.A. of Wisconsin v. Richardson, 197 Wis. 390, 222 N.W. 222 (1928). The 10 acres limitation does not mean that the association only is allowed 10 acres tax free in the whole state, but rather it means 10 acres tax free in each taxing district. "If an association were entitled to but a single exemption in the state, the statute provides no method by which the taxing district in which the exemption is to be claimed shall be determined." 197 Wis. at 393, 222 N.W. at 223. Land jointly owned by the Methodist churches of Janesville and Beloit and used by them for a summer playground is not exempt under sec. 70.11 (4), Stats., for the reason that the land is not necessary for the location and convenience of the buildings of the religious corporations involved. 20 Ops. Wis. Att'y Gen. 282 (1931). A lot on which no building stands is not exempt under the statute. 14 Ops. Wis. Att'y Gen. 132 (1925). But property of a corporation formed for the purpose of conducting a summer school and camp for boys where lectures, classes, and religious services are held, and various forms of instruction are given in connection with recreational activities, is an educational purpose within the exemption section. 12 Ops. Wis. Att'y Gen. 434 (1923). Likewise, property of the Onoway Camping Association, having the purpose to maintain a camp for physical, moral, and spiritual training of young people, and organized exclusively for educational, benevolent, charitable, and reformatory purposes, is exempt up to 10 acres, unless its property is used for pecuniary profit. 14 Ops.
PROPERTY OF RELIGIOUS INSTITUTIONS

A Catholic woman’s club, comprising a club-house in which rooms were rented for meetings, and an auditorium rented to lodges and private dancing parties, was declared exempt as a nonprofitable benevolent, charitable, and educational institution. The incidental activities amount to “occasional leasing” which is permitted by the statute, the Supreme Court ruled.159

To the same effect was the decision in *St. Joseph’s Hospital v. Ashland County*.160 A hospital operated by a Catholic order of nuns, the “Handmaids of Jesus Christ,” received many charity patients without distinction as to race, religion, or “position in life.” Whatever profits were derived were used for paying the building expenses, and some was loaned without interest to aid the building of other hospitals belonging to the same order in Superior and West Superior. For the Supreme Court, Judge Winslow was grandiloquent:

“How can it be doubted that this institution is doing a benevolent work in the truest sense of the word we are unable to see. It is really the work of the good Samaritan. . . . The care of the sick and wounded of all races and religions indiscriminately, with or without pay, according to the ability of the patient, must ever be one of the most genuine forms of benevolence. It breathes the truest love for unfortunate mankind.”161

A very similar case was *Order of the Sisters of St. Joseph v. Plover*.162 The Town of Plover of Portage County levied a tax on the River Pines Tuberculosis Sanatorium operated by Catholic nuns of the Order of the Sisters of St. Joseph. Some of the profit was used for the

Wis. ATT’Y GEN. 434 (1925). It is to be noted that the exemption statute now provides specifically for exemption of lands not exceeding 40 acres of the state Y.M.C.A. or Y.W.C.A. used “exclusively for summer training camps or assemblies for moral, religious and educational purposes.” Wis. STAT. sec. 70.11 (10) (1951). Also now exempted is “all real property not exceeding 30 acres and the personal property situated therein, of any Bible camp conducted by a religious nonprofit corporation organized under the laws of this state, so long as the property is used for religious purposes and not for pecuniary profit of any individual.” Wis. STAT. sec. 70.11 (11) (1951).

159 Catholic Woman’s Club v. Green Bay, 180 Wis. 102, 104, 192 N.W. 479, 480 (1923). “Each case depends upon its particular facts. . . . The corporation must not only be judged by its declared objects but also by what it actually does.” “To deny that the respondents come within the statute of exemptions . . . is to deny the purpose of the statute.” 180 Wis. at 104-5; 104, 192 N.W. at 480. In Madison Particular Council of St. Vincent de Paul Society v. Dane County, 246 Wis. 208, 16 N.W. 2d 811 (1944), the Court held that the Council had a “religious” make-up and “benevolent” ends and therefore was exempt. The Council was affiliated with the St. Vincent de Paul Society, a religious and charitable association devoted to the care of the poor. The Council operated a second-hand store which received gifts of clothing, furniture, etc., and was distributed to the poor. See also, Methodist Episcopal Church Baraca Club v. City of Madison, 167 Wis. 207, 167 N.W. 258 (1918).

160 96 Wis. 363, 72 N.W. 43 (1897).

161 96 Wis. at 640, 72 N.W. at 43-4. “The fact that there were surplus receipts at times, which were loaned other hospitals of the same character, does not show that the property was used for pecuniary profit.” 96 Wis. at 640, 72 N.W. at 44.

162 239 Wis. 278, 1 N.W. 2d 173 (1941).
support of other hospitals or schools. There were 97½% of the patients who were incapable of paying. All such charity patients were sent to the hospital by the state and municipalities which paid for their care as public charges. “That the public authorities pay for this care, does not avoid the fact that the patients are objects of charity,” said Judge Fowler for the Supreme Court.163 It is a “charitable institution,” therefore, and is exempt.

“The respondents claim is to the effect that the River Pines Sanatorium should be taxed on the ground that it aims to operate at a profit. If this be so there is no hospital or school except those municipally operated that is not subject to taxation and the statute becomes practically or entirely ineffectual. For all benevolent institutions endeavor so to operate. But as the profit made by these institutions, if any, is payable to nobody, but is only turned back into improving facilities or extending the benevolence in which the institutions are primarily engaged, the profit element becomes immaterial.”164

Still another case concerning the Order of the Sisters of St. Joseph, known as the “Poor Handmaids of Jesus Christ,” was United States National Bank v. The Poor Handmaids of Jesus Christ.165 The Catholic order was organized to maintain and teach parochial schools, maintain and support hospitals, and to help the poor and distressed. The question presented was whether St. Joseph’s Hospital of Superior was a “religious society, association or corporation” within the meaning of the city charter special assessment provision:

“No lot or parcel of land benefited in said city shall be exempt from the payment of its portion of any tax or assessment for sewers, the improvement of streets or the building or repairing of sidewalks, excepting . . . parsonages or property owned by

163 239 Wis. at 282, 1 N.W. 2d at 175.
164 239 Wis. at 283-4, 1 N.W. 2d at 175. An interesting point here is that public funds were paid “for the care of patients” to a branch of the Catholic Church. The Sanatorium gave part of these funds, in excess of costs, to other Catholic institutions. The question could have been raised, although it is doubtful that it was raised, whether this was tantamount to the drawing of public funds from the treasury in support of a particular religion in violation of Wis. Const. Art. I, sec. 18. The issue was not discussed. In 41 Ops. Wis. Att’y Gen. 83 (1952) St. Luke’s Hospital of Milwaukee was held not to be a “religious organization” despite its requirement that there “shall be nineteen directors of the corporation, all of whom shall be of the protestant faith and ten of whom shall be Lutheran.” According to Attorney General Thomson: “This may give the controlling voice in the management of the hospital to persons of the Lutheran faith but it does not subject the hospital to the control of any organized Lutheran church or organized Lutheran agency.” Id. at 84-5. In this connection, distinguish Madison Particular Council of St. Vincent de Paul Society v. Dane County, 246 Wis. 208, 16 N.W. 2d 811 (1944). For discussion of the status of church connected orphan homes and asylums, see: Evangelical Lutheran Church v. Shawano County, 256 Wis. 196, 40 N.W. 2d 590 (1949); 40 Ops. Wis. Att’y Gen. 419 (1951); 33 Ops. Wis. Att’y Gen. 254 (1944); 28 Ops. Wis. Att’y Gen. 154 (1939); and 20 Ops. Wis. Att’y Gen. 685 (1931).

165 148 Wis. 613, 135 N.W. 121 (1912).
some religious society, association or corporation and not used for pecuniary profit. . . ."

The Supreme Court ruled that "a corporation organized . . . for benevolent purposes, is not a religious corporation under the Superior charter." 166 Said Judge Marshall:

"The suggestion of exemption from taxation under [the state statute] hardly merits notice, since that has no reference to taxes on account of special benefits or under police regulations. . . . The distinction has been made on the familiar principle that statutes on the subject of taxation are to be construed, where construction is permissible, strictly against exemption." 167

_Inheritance and Income Taxes_

Wisconsin has also extended to religious institutions the privilege of exemption from inheritance and income taxes. Exempted from the inheritance tax is:

"All property transferred to . . . corporations of this state organized under its laws, solely for religious, humane, charitable or educational purposes, . . . which shall use the property so transferred exclusively for the purposes of their organization, within the state, and all property transferred to banks or trust companies of this state, or to individuals residing in this state, as trustees, in trust exclusively for public, religious, humane, charitable, educational or municipal purposes in this state. . . ." 168

According to Attorney General Reynolds, in a 1908 opinion, this statute does not exempt bequests such as those included in the last will and testament of Rev. Marius de Wilt:

"Fifth, I give and bequeath to the Rt. Rev. J. J. Fox, bishop of Green Bay, or his successor in office, the sum of five thousand dollars.

"Tenth, I give and bequeath to Mother Mary Emily, Prioress Gen. of the Sisters of St. Dominie at Racine, Wisconsin, or her successor in office, the sum of five thousand dollars.

"I give and bequeath to the very Rev. Bernard N. Pennings, Prior to St. Norberts Priory at De Pere, Wisconsin, or his successor in office, all the residue of the above said purchase money and all my estate in America of whatever kind or nature." 169

These are not bequests to a religious corporation organized under Wisconsin laws, reasoned the Attorney General. Rather they are bequests to named individuals or their successors in office, but "no mention is made as to how the property shall be used."

"While I believe that, a liberal construction should be given to the above quoted provisions of the inheritance tax law, in order

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166 148 Wis. at 617, 135 N.W. at 122.
167 148 Wis. at 617, 135 N.W. at 123.
168 Wis. Stat. sec. 72.04 (1) (1951), created by Wis. Laws ch. 44, sec. 1 (1903).
169 Rept. of Att'y Gen. 846, 847 (1908).
to exempt from its provisions all such bequests as are actually
to be used by corporations in this state for religious ... purposes,
I am unable to see how the law could be so broadly constructed
as to include the above bequests."\footnote{170}

In 1916, on the ground that the statute only exempts corporations of
this state organized for religious purposes, the Attorney General held
that gifts of a deceased resident to religious corporations located outside
the state of Wisconsin are liable to an inheritance tax.\footnote{171}

It remains to be noticed that exemption from Wisconsin's income
tax is provided, as follows:

"There shall be exempt from such taxation any part of the
gross income, without limitation, which pursuant to the terms of
the will, deed or other trust instrument creating the trust, is during the taxable year permanently set aside to be used exclusively
by or for the state of Wisconsin or any city, village, town, county
or school district therein or any agency of any of them or any
corporation, community chest fund, foundation or association
operating within this state, organized and operated exclusively
for religious, charitable, scientific or educational purposes ... ."\footnote{172}
Also exempt from the income tax is "income of ... all religious, scientific, educational, benevolent or other corporations or associations of
individuals not organized or conducted for pecuniary profit."\footnote{173}

**Conclusion**

It appears significant to contemplate here the broader implications
of what has been said. Inviolable separation of Church and State has
been written in very specific terms in the Wisconsin Constitution. But
this has not meant that the state of Wisconsin has been unfriendly to
religious institutions. On the contrary, the state legislature has extended
to them the rights or privileges to exercise corporate powers, to receive
bequests, and to be exempt from taxation. In this sense, the Wisconsin
legislature has emerged as the public benefactor of organized religion.

And the Wisconsin judiciary has emerged as the public protector of
these rights of property. It will inquire into differences of creed to
protect religious property. It will exercise its judicial power to the
fullest extent to enforce religious bequests. And it will give effect to
taxation exemption of religious property as provided.

Perhaps these rights are taken for granted by Wisconsin religious
institutions. They would doubtlessly interpret their repeal as producing
chaos, which well it might. Through the invocation of positive and per-
missive powers of the state, Wisconsin religious property holds a very
preferred position.

\footnote{170}{Id. at 847-8.}
\footnote{171}{5 Ops. Wis. Att'y Gen. 101 (1916).}
\footnote{172}{Wis. Stat. sec. 71.08 (9) (1951).}
\footnote{173}{Wis. Stat. sec. 71.01 (3) (a) (1951).}