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Article 9

Good Character as a Requirement for Citizenship; The Paroled Alien's Right to a Deportation Hearing; Deductibility of Gift to Religious

RECENT DECISIONS AND DEVELOPMENTS

Good Character as a Requirement for Citizenship

The provisions of the Immigration, Naturalization and Nationality Act of 1952, better known as the McCarran-Walter Immigration Act, require that an applicant for citizenship maintain good moral character for at least five years prior to naturalization.[1]

A recent case, *In re Kielblock*,[2] is illustrative of the difficulty confronting the courts in the application of this statutory requirement to the facts of the individual case. A woman petitioning the court for citizenship admitted that she had sexual relations with a married man within the five years immediately preceding the petition. The Court held that these acts did not affect the petitioner's status as a person of good moral character. The basis of the decision is almost impossible to pinpoint. The Court adverts to numerous factors: the non-adulterous nature of the acts; the privacy which should be accorded the satisfaction of sexual appetite; the absence of aggravating circumstances; petitioner's frank and honest admission of the acts; the practical impossibility of divining the dictates of the "common conscience." Other factors are mentioned, but these suffice to suggest that the Court appears to have bolstered its conclusion with a series of interesting facts which, since not directed toward a logical inference of character, are legally meaningless.

The Court characterizes the acts as not adulterous, emphasizing that there was no cohabitation, which is an element of the crime of adultery in California. The Court does not specifically mention the additional fact that according to the California statute, as well as the common law, only a married person can be an adulterer.[3] Petitioner was unmarried. Hence, petitioner's actions were not among those specifically designated by the statute as immoral.[4] Her character, therefore, must be adjudged according to the general tenor of the statute.[5]

The Court, in the *Kielblock* case, twice alluded to petitioner's reputation.[6] Herein lies the basic fallacy of the Court's *ratio decidendi*. Petitioner's reputation rather than her character seems to have controlled the decision, in spite of the fact that the distinction between the decisive element of character and the evidentiary factor of reputation has been steadfastly maintained by

[1] 66 STAT. 242, 8 U.S.C. §1427 (1952).

[2] 163 F. Supp. 687 (S.D. Cal. 1958).

[3] See CAL. PENAL CODE ANN. §§269a, 269b (West 1955). "Adultery. Voluntary sexual intercourse of a married person with a person other than the offender's husband or wife." BLACK, LAW DICTIONARY 71 (4th ed. 1951). "Fornication. Unlawful sexual intercourse between two unmarried persons. Further, if one of the persons be married and the other not, it is fornication on the part of the latter, though adultery for the former. . . ." *Id.* at 781. "Adultery. . . . In general, it is sufficient if either party is married; and the crime of the married party will be adultery, while that of the unmarried party will be fornication. . . ." 1 BOUVIER, LAW DICTIONARY 149 (8th ed. 1914).

[4] 66 STAT. 172, 8 U.S.C. §1101 (f) (1952).

[5] "The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character." 66 STAT. 173, 8 U.S.C. §1101 (f) (1952).

[6] *In re* Kielblock, 163 F. Supp. 687, 688-89 (S.D. Cal. 1958).

the courts.[7]

Character has been defined as the principle of intelligently controlled action.[8] Thus, it is an abstraction. It is manifested in two ways which may be the object of judicial consideration in naturalization hearings: human conduct and reputation.[9] The court's judgment of the conduct should be compared with the testimony as to reputation. Character is then to be inferred. The "character," referred to in the immigration statute, would thus be a combination of conduct and reputation.

Prior to considering decisions in similar cases, it should be understood that serious and heinous crimes obviously disqualify a petitioner while minor offenses, such as traffic violations, need not affect good moral character. It seems the issue becomes doubtful when there is no criminal offense but the petitioner's actions are at least open to question under generally accepted moral standards. With reference only to this doubtful area, it can safely be stated that previous decisions on the question of good moral character have been inconsistent. A person keeping a saloon open in violation of Sunday laws was denied naturalization,[10] whereas another was granted naturalization in the same situation.[11] Moreover, an individual who had slot machines in violation of law, plus two liquor violations at his saloon, was considered to be of good moral character.[12] An adulterous way of living was held acceptable in some cases;[13] in another it was deemed ground for disqualification,[14] even when followed by marriage.[15] A single act of adultery has been held to prevent naturalization;[16] it has also

[7] Ralich v. United States, 185 F.2d 784, 786 (8th Cir. 1950); *In re* Spenser, 22 Fed. Cas. 921 (No. 13234) (C.C.D. Ore. 1878); United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031, 1033 (1909) (per curiam). "The applicant must not simply have sustained a good reputation, but his conduct must have been such as comports with a good character. . . . The one is the substance, the other the shadow." *In re* Spenser, *supra.*

[8] BRENNAN, GENERAL PSYCHOLOGY 405 (1937). It has also been defined as ". . . the aggregate of a person's traits, including those relating to care and skill and their opposites." MODEL CODE OF EVIDENCE rule 304 (1942).

[9] See MODEL CODE OF EVIDENCE rule 305 (1942); 1 WIGMORE, EVIDENCE §52 (3d ed. 1940). In general, there are three types of character evidence: conduct, reputation and opinion. For the purpose of this discussion of naturalization proceedings, opinion evidence is classed within the scope of general reputation.

[10] United States v. Gerstein, 284 Ill. 174, 119 N.E. 922 (1918); United States v. Hrasky, 240 Ill. 560, 88 N.E. 1031 (1909) (per curiam). The tenor of both cases, in which the fact-patterns were essentially identical, was that even the slightest offense, be it malum prohibitum or malum in se, vitiated the petitioner's claim to good moral character.

[11] *In re* Hopp, 179 Fed. 561 (E.D. Wis. 1910). The court distinguished the *Hrasky* case, *supra* note 10, on the ground that in that case only the back door was open, while in the *Hopp* case the front door was left open, displaying an "honest" violation of law. *Id.* at 563.

[12] Petition of Gani, 86 F. Supp. 683 (W.D. La. 1949). The entire decision is based on his good reputation and the acceptability of his conduct to the community.

[13] Application of Murra, 178 F.2d 670 (7th Cir. 1949); Petition of Rudder, 159 F.2d 695 (2d Cir. 1947). In the latter case, because four couples, living in adultery, were unable to marry due to legal impediments, and because all had maintained "long-term" and "faithful" relationships, they were adjudged of good moral character.

[14] Petition of Pacora, 96 F. Supp. 594 (S.D.N.Y. 1951).

[15] Petition of F——— G———, 137 F. Supp. 782 (S.D.N.Y. 1956). The specification of adultery as immoral which appeared in the 1952 act was held declarative of public policy and controlled this case, which was decided under the 1940 act.

[16] Estrin v. United States, 80 F.2d 105 (2d Cir. 1935). The reason for the decision was that petitioner offered no explanation or mitigating circumstances. It is fairly probable that in the interval between this decision and the characterization of adultery as immoral in the 1952 act, few petitioners were caught without ready excuses for any prior indiscretion.

been held not to prevent naturalization.[17] Misstatement of name on entry into the country has, in one instance, been held to be a disqualifying action,[18] and, in another, a non-disqualifying action.[19] The reason behind these inconsistencies may well be that the test applied is not uniform,[20] except insofar as it delegates to the community and the "average citizen" a task solely judicial.[21] The test has become more of a shield to avoid judgment upon another's moral character than a sword to use in separating the acceptable from the unacceptable.[22] It is to be noted that the courts which are stricter concerning good moral character seem to concentrate on the conduct aspect of character, while others appear to weigh reputation in the community more heavily.[23]

The cases discussed above may well have been correctly decided in view of the circumstances and the personalities of the individual applicants. Yet, in any objective synthesis, they could hardly be reconciled. A remedy for the situation might be to adopt a test which would set up an objective norm but leave sufficient judicial latitude to encompass mitigating or aggravating circumstances. One possible test would be to answer the following question concerning petitioner's behavior: Are petitioner's conduct and reputation indicative of the character of a person probably incapable of assuming the duties of citizenship? In no event should the inscrutable and non-existent test of "community con-

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[17] United States v. Palombella, 168 F.2d 903 (3d Cir. 1948) (per curiam). Facts of this case are mentioned in Schmidt v. United States, 177 F.2d 450 (2d Cir. 1949).

[18] *In re* Zycholc, 43 F.2d 438 (E.D. Mich. 1930).

[19] *In re* Liebowitz, 49 F. Supp. 953 (N.D. Ill. 1943). The fact that the name had been used for some time prior to its being used on entry was felt to distinguish the case from one involving fraud.

[20] Chief Judge Learned Hand, speaking of the practicality of ascertaining the conscience of the community: "The situation is one in which to proceed by any available method would not be more likely to satisfy the impalpable standard, deliberately chosen, than that we adopted in the foregoing cases: that is, to resort to our own conjecture, fallible as we recognize it to be." Schmidt v. United States, 177 F.2d 450, 451 (2d Cir. 1949). "In determining the character of a petitioner for naturalization the facts and circumstances in each case must be weighed in the light of generally accepted standards of morality . . . . not [necessarily] . . . 'moral excellence' [but] . . . good moral character *up to the standard of the average citizen.*" Petition of Gani, 86 F. Supp. 683, 685-86 (W.D. La. 1949). "What standard does the statute contemplate? It is plain that it does not require the highest degree of moral excellence. A good moral character is one that measures . . . *up to the standard of the average citizen.* . . . So here, where the law says a good moral character, it means such a *reputation* as will pass muster with the *average man.* It need not rise above the level of the *common mass of people.*" *In re* Hopp, 179 Fed. 561, 562-63 (E.D. Wis. 1910). "The standard may vary from one generation to another, and probably the *average man* of the country is as high as it can be set." *In re* Spenser, 22 Fed. Cas. 921 (No. 13234) (C.C.D. Ore. 1878). (Emphasis added in all quotations.) See also Note, 16 U. CHI. L. REV. 138 (1948).

[21] See Cahn, *Authority and Responsibility,* 51 COLUM. L. REV. 838 (1951); Note, *Judicial Determination of Good Moral Character,* 5 J. PUB. L. 504 (1956).

[22] See Cahn, *supra* note 21, at 840-41. Compare the following statement from a recent case which emphasizes the progressive decline in moral standards: "A more liberal view of sexual behavior has been taken by the courts in the past decade when passing on the moral character of petitioners for naturalization. . . . This court also recognizes the rather liberal attitude taken by the public in the United States of adultery, seduction, rape, and other equally intriguing human aberrations. Yet we must not forget that our civilization is built around a family relation which should be kept as sacred as possible if we are not to become an amoral people." Petition of Anzalone, 107 F. Supp. 770, 771 (D.N.J. 1952) (dictum).

[23] See notes 10-19, *supra.*

science" be applied.[24]

The test suggested would still attain the desideratum of selectivity in admission to citizenship. Those applying it would have to keep in mind certain considerations. First, citizenship is a privilege, and not a right.[25] Second, any doubt must be resolved in favor of the government.[26] Third, the result to be attained is benefit to the nation rather than charity to the petitioner.[27] It is true that great contributions are not to be expected in every case, but constructive citizenship can and does mean more than mere fulfillment of the minimum legal obligations. The final and prime consideration under this test would be whether the conduct, though it fell short of crime,[28] had such a social tendency as would indicate the character of a person unable or unwilling to perform the duties of citizenship.

The result reached in the *Kielblock*[29] case may have been correct. The reasoning of the Court, however, appears open to criticism. The conduct aspect of the actions in question is almost ignored because not criminal. The fact that such conduct is inimical to our domestic institutions is not mentioned and the Court almost reaches the point of implicit condonation. The reputation of petitioner is, on the other hand, overemphasized and accorded controlling weight. The Court does not discuss whether the *social tendencies* of petitioner's behavior indicate a person of "good moral character" – a person who would make a good citizen.

The Paroled Alien's Right to a Deportation Hearing

While Russian heavy tanks were crushing their way into Budapest in October 1956, thousands of Hungarians fled across the border into Austria in a desperate attempt to escape annihilation. In order to aid these refugees, the President issued a proclamation dispensing quota requirements and allowing 32,000 Hungarian immigrants to be paroled into the United States without visas. Subsequently one of these, Gyula Paktorovics, was scheduled to be deported without a hearing because he did not possess an entry visa. In granting Paktorovics' request for a hearing, the Court of Appeals for the Second Circuit decided that the refugee Hungarians represented a unique class of parolees, and as such were entitled to the benefits of constitutional due

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[24] See Cahn, *supra* note 21, at 843-47. *Cf.* Schmidt v. United States, note 20 *supra.*

[25] See Brukiewicz v. Savoretti, 211 F.2d 541, 543 (5th Cir. 1954); Ralich v. United States, 185 F.2d 784, 786 (8th Cir. 1950); *In re* Nosen, 49 F.2d 817, 818 (D. Wash. 1931).

[26] See United States v. Manzi, 276 U.S. 463, 467 (1928); Petition of Gani, 86 F. Supp. 683, 685 (W.D. La. 1949); *In re* McNeil, 14 F. Supp. 394, 395 (N.D. Cal. 1936).

[27] "The citizenship of the country is sufficiently alloyed and debased by the presence of immoral natives without the addition of those born in foreign countries." *In re* Spenser, 22 Fed. Cas. 921 (No. 13234) (C.C.D. Ore. 1878). See Ohlson, *Moral Character and the Naturalization Act,* 13 B.U.L. REV. 636, 642 (1933), wherein a strong argument for greater selectivity in granting citizenship is presented.

[28] "The court is called upon to use a different set of scales in weighing conduct on a petition for naturalization from those used in weighing conduct in a criminal case. Conduct may not be sufficiently bad to justify criminal prosecution and still fall far short of being good enough to reward with citizenship. We are not . . . dealing with the question of enforcing the criminal law, but with the question of whether or not this petitioner has earned, by his conduct, the high reward of citizenship. . . ." Petition of Nybo, 34 F.2d 161, 163 (E.D. Mich. 1929), *aff'd,* 42 F.2d 727 (6th Cir. 1930).

[29] 163 F. Supp. 687 (S.D. Cal. 1958).

process.[1]

The impact of this decision can only be appreciated when viewed against the background of the established American legal policy toward immigration. The reported cases in this field have observed a basic dichotomy of alien classification: the alien present within the United States as a resident, and the alien who is still on foreign soil while seeking admission to the country.[2] The difference in the treatment of the two classes is elemental and yet far-reaching; the former class is entitled to the protection of constitutional due process,[3] the latter is not.[4] This distinction is significant in the instant case because, under the doctrine of parole, an alien physically present within the United States is treated as being still on foreign soil. Parole into the United States does not constitute presence within the country as far as constitutional protection is concerned.[5]

A recognition of this difference has resulted in two separate legal proceedings for the removal of undesired aliens. "Exclusion" prevents an alien from entering the United States when he is either actually outside its borders or, under the doctrine of parole, is treated as being so. "Expulsion" forces out of the United States an alien who is a resident of this country.[6] The exclusion and expulsion of aliens is a basic power of Congress,[7] but in the case of a *resident* alien the power is not arbitrary.[8] The fifth and fourteenth amendments are not confined to the protection of citizens, but apply to all persons within the territorial jurisdiction.[9] Therefore, it is beyond the power of any executive officer to cause a resident alien to be taken into custody and deported without giving him ample opportunity to be heard on the issues involving his right to remain in the United States.[10] The alien has become a part of the population by his residence, and no arbitrary deportation can be allowed against him.[11] Although it may later be established that the alien can be expelled and deported, during the expulsion proceedings he is entitled to notice of the nature of the charge and a hearing before an executive or administrative tribunal.[12]

In the case of an excluded alien the situ-

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[1] United States *ex rel.* Paktorovics v. Murff, 260 F.2d 610 (2d Cir. 1958). Part of the President's message on the Hungarian refugee problem is as follows: "The eyes of the free world have been fixed on Hungary over the past 2½ months. Thousands of men, women, and children have fled their homes to escape Communist oppression. They seek asylum in countries that are free. Their opposition to Communist tyranny is evidence of a growing resistance throughout the world. Our position of world leadership demands that, in partnership with the other nations of the free world, we be in a position to grant that asylum." 1957 U.S. CODE CONG. & AD. NEWS 756.

[2] See, *e.g.*, Leng May Ma v. Barber, 357 U.S. 185 (1958); Jay v. Boyd, 351 U.S. 345 (1956); Bridges v. Wixon, 326 U.S. 135 (1945).

[3] See The Japanese Immigrant Case, 189 U.S. 86 (1903); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[4] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).

[5] See Shaughnessy v. United States *ex. rel.* Mezei, 345 U.S. 206 (1953).

[6] Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n. 4 (1953).

[7] See United States *ex rel.* Turner v. Williams, 194 U.S. 279 (1904); The Chinese Exclusion Case, 130 U.S. 581 (1889).

[8] See The Japanese Immigrant Case, 189 U.S. 86 (1903).

[9] See Yick Wo v. Hopkins, 118 U.S. 356 (1886); Coyler v. Skeffington, 265 Fed. 17 (D. Mass. 1920), *rev'd on other grounds sub nom.* Skeffington v. Katzeff, 277 Fed. 129 (1st Cir. 1922).

[10] The Japanese Immigrant Case, *supra* note 8.

[11] *Ibid.*

[12] Kwong Hai Chew v. Colding, 344 U.S. 590, 597 (1953).

ation is quite different. An alien who is a stranger to our shores brings with him no constitutional rights; Congress may exclude him for whatever reason it thinks fit, and may do so without due process. The Bill of Rights is futile authority for an alien who is seeking admission.[13] The denial of due process to an entering alien is logically applied to a paroled alien since the latter is fictively considered to be outside the United States.[14] He is considered as being stopped at the border, and the parole is merely to save him the inconvenience of remaining aboard ship.[15] The adherence to this doctrine has been strict. Paroled Chinese citizens have been denied a hearing before being excluded, even though their deportation might result in physical persecution and death. "The authorities seem to be well settled that parole into the United States of an excludable alien . . . does not constitute an entry."[16]

The rigidity of the parole doctrine was early upheld by Mr. Justice Holmes in the *Kaplan* case.[17] A thirteen-year-old Russian girl had been found by immigration authorities to be feeble-minded and was, for that reason, ordered excluded. Before the order could be executed World War I began. The child was placed with an immigrant aid society which allowed her to live with her father. As late as 1923, after her father had become a naturalized citizen, a warrant for her deportation was ordered. Ordinarily, naturalization of parents affects minor children who are dwelling within the United States. The Kaplan girl was held to be merely a parolee because she could not have lawfully landed in the country due to her feeble-mindedness, and therefore could not have "dwelt within the United States."[18] That parole into the United States does not transform an excluded alien into a resident alien entitled to due process has been reaffirmed by the Supreme Court as recently as June 1958.[19]

In the light of prior case law and the statute now in force,[20] the decision in favor of a hearing for Paktorovics despite his parole status is truly remarkable and indicates a revolutionary departure from previous authority.[21] At first glance the decision seems reasonable, but there is weighty support for the government's position. The power to exclude is based on the sovereign's power and need to protect itself from inva-

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[13] Shaughnessy v. United States *ex. rel.* Mezei, 345 U.S. 206 (1953). See also Bridges v. Wixon, 326 U.S. 135, 161 (1945) (concurring opinion).

[14] United States *ex rel.* Lue Chow Yee v. Shaughnessy, 146 F. Supp. 3 (S.D.N.Y. 1956), *aff'd mem.*, 245 F.2d 874 (2d Cir. 1957).

[15] See Shaughnessy v. United States *ex. rel.* Mezei, 345 U.S. 206, 215 (1953).

[16] United States *ex rel.* Lue Chow Yee v. Shaughnessy, 146 F. Supp. 3, 4 (S.D.N.Y. 1956).

[17] Kaplan v. Tod, 267 U.S. 228 (1925).

[18] *Ibid. Cf.* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950). In this case the alien wife of an American soldier, seeking entry under the War Brides Act (ch. 591, 59 STAT. 659 (1945)), was excluded by the Attorney General without a hearing although the effect of this would be to deprive the husband of his own citizenship if he wished to live with his wife.

[19] Leng May Ma v. Barber, 357 U.S. 185 (1958).

[20] "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons . . . any alien applying for admission to the United States, *but such parole of such alien shall not be regarded as an admission of the alien* and when the purposes of such parole shall . . . have been served the alien shall forthwith return . . . to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 66 STAT. 188 (1952), 8 U.S.C. §1182 (d) (5) (1953). (Emphasis added.)

[21] The Court in the instant case stated: "If this means an extension of the doctrine that aliens as

sion. A curtailment of that power by requiring a hearing for persons paroled into the country, with the possible exposure of confidential sources of information, could be dangerous. The question of individual rights versus national security is a delicate one, and it is possible that this decision creates more problems than it solves. If the Hungarian parolees can be considered sui generis, surely other groups will seek a like distinction. It may be difficult to devise a criterion by which subsequent cases can be judged.

Deductibility of Gift to Religious

A novel question concerning the deductibility of charitable bequests was presented in *Estate of Dichtel*.[1] The testator made a cash bequest to his daughter, a member of a religious order and resident of a convent. The estate claimed a tax deduction, alleging that the decedent believed the money would be transferred to the order. The Court denied this claim on the ground of insufficient evidence of the nature of the legatee's obligation so to transfer the bequest and of the testator's awareness of that obligation. Though not answered in the case at bar, an interesting question is posed concerning the allowability of the deduction if facts were presented indicating that the religious was under a strict obligation to transfer the bequest to the order, and that the testator knew of this obligation.

Section 812 (d) of the Internal Revenue Code of 1939 provides that there shall be deducted from the value of the gross estate the "amount of all bequests, legacies, devises, or transfers, to or for the use of . . . ." charities.[2] The question is thus dependent on whether or not the legatee, though the absolute recipient of the bequest, was under a duty to transfer it to the order, and if so, whether the transfer was the type recognized by the Code.

Gifts for charitable or religious purposes have enjoyed a privileged position in the law of testamentary disposition.[3] If the intention to make such a gift pervades and dominates the whole bequest, though there be no formal gift in trust, a charitable trust will be implied.[4] In the instant case there are no precatory words in the will, nor can a charitable intent be inferred from the instrument as a whole. Nevertheless, in cases concerning similar absolute bequests the courts have, on occasion, imposed on the legatee an obligation in the nature of a constructive trust.[5]

In order to establish a constructive trust where the will states that the devisee or legatee is to take the property for his own benefit, the intent of the testator to create a trust must be communicated to the legatee.[6]

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well as citizens are entitled to the protection of procedural due process in deportation proceedings *so as to include within the protected class of persons parolees who have come to the United States as have the Hungarian refugees* of whom appellant is merely one of thousands, we do not hesitate to take that forward step, in view of all the circumstances of this case. . . ." 260 F.2d at 614. (Emphasis added.)

[1] Estate of Dichtel v. Commissioner, 30 T.C. No. 133 (September 26, 1958).

[2] INT. REV. CODE OF 1954, §2055 is not relevantly different.

[3] Matter of Durbrow, 245 N.Y. 469, 157 N.E. 747 (1927).

[4] See, *e.g.*, Girard Trust Co. v. Russel, 179 Fed. 446 (3d Cir. 1910).

[5] See, *e.g.*, Clark v. Tibbetts, 167 F.2d 397 (2d Cir. 1948); Shields v. McAuley, 37 Fed. 302 (C.C.W.D. Pa. 1888). See also Delaney v. Gardner, 204 F.2d 855 (1st Cir. 1953), wherein a trust imposed by a lower court was recognized.

[6] Flood v. Ryan, 220 Pa. 450, 69 Atl. 908 (1908); Schultz's Appeal, 80 Pa. 396 (1876).

Likewise, it is an essential element of the trust that the legatee agree to convey the property to the third party.[7] There need be no express agreement by the legatee. If the testator communicates his intention to him, absent his express refusal to do so, it will ordinarily be inferred that he agreed to carry it out.[8] The basis for making these agreements part of the testator's will, although they have not been executed and attested in the manner prescribed by the statute of wills,[9] is the theory that the legatee would otherwise be perpetrating a fraud upon the testator and his intended beneficiaries.[10]

On applying these rules to the case at hand it is clear that it does not fall squarely within the usual judicial concept of a constructive trust. There is neither the communicated intent of the testator nor acquiescence by the legatee. On the other hand, neither is the case so distinguishable as not to be at least analogous. For the awareness by the testator of the obligation to surrender the bequest, once established, may be considered as amounting to an intent, and the fact of the obligation as amounting to an agreement by the legatee to convey the property. Understanding of this may be aided by considering the problem from the nature of the obligation or vows of the religious.

The entrance of a son or daughter into the religious life is an event of deep significance in the Catholic home. It is undoubtedly preceded by much discussion and questioning as to the nature and rules of the community. The father is aware, for he probably must provide for it, that a woman contemplating vows must have a dowry before the taking of the habit.[11] His interest in the welfare of his child, primed in part by the fact that the dowry he is paying may be used by her should she leave the order,[12] will probably be manifested by his examination of the nature of her vows. He would learn that a corollary of this necessity of dower is the right of ownership. A professed of simple vows, as contrasted with solemn vows, keeps the ownership of her property and the right to acquire more unless the constitutions of the order state the contrary.[13] Since the father knows these facts, even if he intended to benefit the order, a constructive trust would not arise upon the bequest to his daughter, for he neither expressed his intent nor exacted a promise from the legatee. To impose a constructive trust on the absolute recipient of the bequest in such circumstances would be a flagrant violation of the statute of wills.[14] It is clear, then, that when a bequest is made to one under simple vows it is a direct gift to her and no tax deduction should be allowed the estate.

This would not be true where the religious is under solemn vows. One professed of solemn vows[15] is incapable of possessing or acquiring property. All property that this religious does acquire accrues

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[7] See Delaney v. Gardner, 204 F.2d 855 (1st Cir. 1953), *reversing* 103 F. Supp. 610 (D.C. Mass. 1952); *accord,* Colgrove v. Goodyear, 325 Mich. 127, 37 N.W.2d 779 (1949).

[8] Amherst College v. Ritch, 151 N.Y. 282, 45 N.E. 876 (1897).

[9] See N. Y. DECED. EST. LAW §21; 1 SCOTT, TRUSTS §55.1, at 395-97 (2d ed. 1956).

[10] See, *e.g.,* Matter of Will of O'Hara, 95 N.Y. 403 (1884); Barron v. Stuart, 136 Ark. 481, 207 S.W. 22 (1918); 1 SCOTT, TRUSTS §55.1, at 395 (2d ed. 1956).

[11] CODEX IURIS CANONICI, Can. 547, §§1, 2.

[12] Can. 551, §1.

[13] Can. 580, §1.

[14] See note 9 *supra.*

[15] Can. 582, §1.

to the order.[16] It is fair to assume, because of the seriousness of these vows and the infrequency of their application, that the father of a solemn professed is fully aware of their existence. If he does not know of them at the outset of his child's professed life, he could reasonably be expected to learn of them when contemplating the making of his will. In some orders, the vows are simple, so that the members retain capacity for ownership, but the constitutions command that all property acquired be surrendered to the order.[17] Thus, could it not be said that when a testator makes a bequest, knowing that his legatee has made solemn vows or is bound by such constitutions, he really intends the legacy for the use of the order? Could not the awareness of so firm an obligation amount to an intent?

And unless a desire to the contrary is communicated to the testator, could not the fact of the obligation amount to an agreement by the legatee to hold the property for the benefit of the order? It is submitted that although the elements of a constructive trust are not present in their usual form, because of the relationship of the parties and the nature of the vows or constitutions there is an enforceable obligation on the legatee in the nature of a constructive trust, an obligation that may be enforced even if the religious should leave the community.[18]

The question next to be determined concerns the allowance of a tax deduction to the estate. If section 812 (d)[19] merely provided for the deduction of "bequests, legacies, [and] devises" to charities, it would apply only to the normal situation of a strictly testamentary gift directly to charity. But the statute also includes "transfers . . . for the use of" charities, which covers the transfer of money from an estate to a charity by the device of a constructive trust.[20] Thus when a bequest is made to a religious under solemn vows, or one under simple vows but subject to the constitutions mentioned above,[21] a deduction would seem to be authorized by the Code.

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[16] Can. 582. *But see* Can. 488, n. 7, which provides for religious whose vows, according to the constitution of their institute, should be solemn, but which, by Apostolic provision, are simple in certain regions. "The places in which the direction of the Holy See referred to in Can. 488, n. 7 is in force are the following . . . (c) United States of North America by reason of the decision of the Congregation of Bishops and Regulars, 30 Sept. 1864; but the four monasteries of the Visitation Nuns at Georgetown, Baltimore, Mobile, and St. Louis were excepted." SCHAEFER, DE RELIGIOSES 76 (1947).

[17] Can. 581, §1.

[18] *Cf.* Townley v. Province of the Holy Name, 25 F. Supp. 654 (N.D. Cal. 1938), was a suit by a priest to have his order declared trustee, for his benefit, of property he had transferred to it. The court granted judgment for the religious order, declaring that the property had been conveyed to it under the provisions of the canon law and the constitution of the order.

[19] INT. REV. CODE OF 1939, §812 (d). INT. REV. CODE OF 1954, §2055 is not relevantly different.

[20] Marine Midland Trust Co. v. McGowan, 223 F.2d 408 (2d Cir. 1955), where the court held that a constructive trust falls squarely within the definition of transfers to the use of charities, and hence allowed a tax deduction. *Contra,* Delaney v. Gardner, 204 F.2d 855 (1st Cir. 1953), where the court denied a deduction on the ground that the charities were not disclosed in the will.

[21] Since this is a bequest for religious purposes it would come within the limitations imposed by section 17 of the Decedent Estate Law. This section provides that no more than half the net estate can be bequeathed for religious purposes if an objection is raised by a surviving parent, spouse, descendant or child.