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ALIENATION OF CHURCH PROPERTY UNDER THE NEW CODE OF CANON LAW

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I think first I must enter a disclaimer here that I am not a canon lawyer, either by training, profession, or reputation, and, therefore, what I have to say here today comes from one who is knowledgeable of canon law only through interest, and by necessity from time to time, as a diocesan lawyer becoming involved in such matters.

Therefore, what I am going to say is primarily directed toward the diocesan attorney and his interrelationship with the canon law as it interrelates with the civil law.

My role this afternoon is hopefully to set the stage for Father Heintschel's commentaries on the canonical requirements and limitations which exist in the new Code with respect to the alienation of church property, and hopefully also stimulate some questions, some disagreement with what I may have to say, and some contrary or concurring opinions as to what the current state of the law or the prospective state of the law is in this regard.

With the enactment of the new Code in 1983, I think the stage has been set whereby there has been added to the cast further characters in the ongoing scenario of the administration of church property and church affairs under canon law. These new characters are the civil law of the particular state in which the church is located, and the diocesan attorney, as the one who must interpret that civil law.

This inherent involvement becomes immediately apparent when one considers the vast implications of Canon 1290 of the new Code, which provides, and I quote:

Whatever general and specific regulations on contracts and payments are determined in civil law for a given territory are to be observed in Canon law

* Denechaud & Denechaud.

with the same effects in the matter which is subject to the governing power of the church, . . . unless the civil regulations are contrary to divine law or Canon law makes some other provision. . . .

The mandate, therefore, of Canon 1290 demands of the civil lawyer and the diocesan attorney what I suggest is a threefold analysis of applicable canon and civil law in any situation involving a contractual relationship, and more specifically in terms of today's discussion, the alienation of church property.

Firstly, what is the applicable civil law of the jurisdiction?

Secondly, is it in any way contrary to what the Code describes as divine law, or which we may otherwise express as the natural law?

Thirdly, the analysis involves the question, does the canon law make some provision in conflict with the civil law, or otherwise provide than the civil law so provides?

Should your analysis result in the conclusion that the canon law is in some way at variance with the civil law or makes different provisions than the civil law, what then are the implications of such a conclusion?

As a general proposition I suggest to you that the courts have long recognized the supremacy of ecclesiastical law in matters of property disputes arising in the hierarchical churches.

The Supreme Court very early on gave recognition to this principle in the case of *Gonzalez v. Bishop of Manila*,¹ and although this case was not a property dispute, and did not really turn on any First Amendment considerations, the court applied the law as first announced in the earlier landmark decision of *Watson v. Jones*² decided in 1871.

In *Gonzalez* the Supreme Court said, and I quote from the opinion:

In the absence of fraud, collusion or arbitrariness, the decisions of the proper Church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.³

This principle was further refined later on by the Court in *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian*.⁴ In that case Justice Brennan, speaking for the Court, observed the following, and I quote at length from the court in *Blue Hull*, because I think it's an excellent analysis of what the Court has now said are the parameters of that discrete area in which they will not intrude:

It is of course true that the State has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution.

¹ 280 U.S. 1 (1929).

² 80 U.S. (13 Wall.) 679 (1871).

³ *Gonzalez*, 280 U.S. at 16.

⁴ 393 U.S. 440 (1969).

Special problems arise, however, when these disputes implicate controversies over church doctrine and practice. The approach of this Court in such cases was originally developed in *Watson v. Jones*. . . . There, as here, civil courts were asked to resolve a property dispute between a national Presbyterian organization and local churches of that organization. There, as here, the disputes arose out of a controversy over church doctrine. There, as here, the Court was asked to decree the termination of an implied trust because of departures from doctrine by the national organization. The *Watson* Court refused, pointing out that it was wholly inconsistent with the American concept of the relationship between church and state to permit civil courts to determine ecclesiastical questions. . . . The logic of this language leaves the civil courts *no* role in determining ecclesiastical questions in the process of resolving property disputes.⁵

Justice Brennan then goes on to say in *Blue Hull*:

Thus, the First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes. It is obvious, however, that not every civil court decision as to property claimed by a religious organization jeopardizes values protected by the First Amendment. Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. . . . [T]here are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which the property is awarded.⁶

The Court then concludes that the First Amendment, therefore, commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.

Justice Brennan then makes a comment which, I think, is an admonition to us all. He says, "Hence, States, religious organizations and individuals must structure relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."⁷

Thus, the Court in *Blue Hull* gave recognition to the "neutral principles" analysis, which would permit a civil court to inquire into ecclesiastical property disputes if such inquiry can be limited to an examination of civil, corporate, or contractual documents or relationships.

The "neutral principles" doctrine, which is of particular importance to our discussion today, was further refined in the case of *Jones v. Wolf*⁸ decided by the Court in 1979, and cited in my outline.

In the *Jones* case, the Court approved the application of "neutral principles," and reasoned in the following manner. The Court said, and I quote:

⁵ *Id.* at 445-47 (citation omitted) (emphasis in original).

⁶ *Id.* at 449.

⁷ *Id.* at 449.

⁸ *Jones v. Wolf*, 443 U.S. 595 (1979).

In undertaking such an examination, a civil court must take special care to scrutinize the document in purely secular terms, and not to rely on religious precepts in determining whether the document indicates that the parties have intended to create a trust. In addition, there may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.⁹

A recent case which I have cited in my outline as a practical example of the "neutral principles" analysis is that of *Parent v. Roman Catholic Bishop of Portland*¹⁰ which was handled by my good friend, Bob Robinson.

Parent involved a dispute between parishioners in the parish of Lille, Maine against the Bishop of the Diocese of Portland on the basis of the fact that he had closed or suppressed a parish in that community, and had transferred the parish property and had, in effect, merged the Lille parish with a nearby parish. The parishioners filed suit, claiming that there was an implied trust which was created between the Bishop and his parishioners, and that there was an implied promise of the church to continue to provide religious services to the Catholics of that community. They argued that the court should issue injunctive relief on the basis of this so-called confidential relationship between the Bishop and the parishioners, and based upon his promises to provide religious services in that area, and that the Bishop had abused this promise, and had actually breached his duty to the parishioners.¹¹

The court rejected these demands, and granted the Bishop's motion for summary judgment, finding by an application of the "neutral principles" analysis that there was a deed of record transmitting title to this property in absolute fee simple, back in 1876; that there was no evidence of any restriction on the ability of the church or the Bishop, as the corporation sole, to alienate this property; and that there was no implied trust in any documents which plaintiffs were able to submit.¹²

The court held, and I quote from the decision, that:

absent evidence of some collateral legal obligation existing between the bishop and plaintiffs which could have been identified without entanglement in religious doctrine or polity, the Superior Court had no authority to review the bishop's actions with respect to church property in Lille. . . . If

⁹ *Id.* at 604.

¹⁰ 436 A.2d 888 (Me. 1981).

¹¹ *Id.* at 889.

¹² *Id.* at 890-91.

it is assumed, as plaintiffs alleged, that a confidential relationship existed between the bishop and plaintiffs, the First Amendment prohibited the Superior Court from deciding whether the bishop abused that relationship so as to justify the imposition of a constructive trust. Such a decision would have required the court to assess the scope of the bishop's authority under canon law and the propriety of his exercise of that authority in this case, matters over which the courts of this State have no jurisdiction.¹³

The court, therefore, held that, without the aid of a document plainly evidencing conditions or restrictions on the Bishop's use of the Lille property, and, thus, some basis for a legal or equitable right vested in the plaintiffs, the superior court could not have resolved the dispute before it without passing on the doctrines and practices of the Catholic Church.¹⁴

Therefore, I suggest that, it is clear that the courts have now recognized this so-called "neutral principles" doctrine, and will abstain from such inquiries.

Where then does all this leave us as diocesan attorneys with respect to handling matters of alienation of church property? The threshold issue, is whether the provisions of the Canons, as now codified and translated into English, well-promulgated and widely available from bookstores, may form the basis for the application of the "neutral principles" analysis, themselves, apart from their incorporation into any civil law documentation, or will the courts strictly apply the "neutral principles" test, as well as the other prior tests which have been set forth in the *Serbian Orthodox Church*¹⁵ case, and the others that I have referred to, and say that inquiries into ecclesiastical matters necessarily prohibit any analysis of what the canon law says or does not say.

If the latter be the case, then perhaps my first query becomes moot, but if the Canons are not held by the courts to be beyond the pale of judicial scrutiny or notice, or judicial interpretation or application, then I suggest we must address the problems arising therefrom.

For example, Canon 1292 requires the permission of the Holy See for the alienation of property in certain cases beyond certain maximum dollar limitations as to be established by the National Conference of Bishops.

Can the granting of such permission become the basis for a title examiner, for example, to make a requirement of evidence thereof, and if it may be legitimately so required, what evidence does one need to produce to establish that the Holy See has thusly approved such alienation?

If the alienation is conducted or consummated without such approval, what is the civil law effect thereof, and who may collaterally at-

¹³ *Id.* at 890 (citations omitted).

¹⁴ *See id.*

¹⁵ *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

tack or directly attack such alienation as being *ultra vires*? The answers to the query seem to be perhaps further complicated by the language of Canon 1296 which says, and I quote from the Canon:

Whenever ecclesiastical goods have been alienated without the required canonical formalities, but the alienation is civilly valid, it is the responsibility of the competent authority, after a thorough consideration of the situation, to decide whether and what type of action, that is, a personal or real action, is to be initiated to vindicate the rights of the Church as well as by whom and against whom such an action is to be initiated.¹⁶

I suggest to you that this Canon needs a little bit more interpretation and clarification before we, as civil lawyers, can give it any substantive meaning in the civil courts.

Another query which I propose for your consideration and debate, Canon 1292 requires that the Ordinary obtain the consent of both the Finance Council of the Diocese and the Diocesan College of Consultors to alienate the goods of the Diocese.

I suggest to you that we must now consider what formalities need to be incorporated into either corporate documents, by way of resolution of a Board of Trustees or Board of Directors if you have a corporate entity, as a diocese, or what other evidence of such approval needs to not be produced if you have a corporation sole to satisfy someone on the outside that such consultation and such approval has been obtained, or to the contrary, is it impermissible, under the "neutral principles" concept, for any third-party to collaterally attack a sale by an Ordinary on the claim that he has not obtained the permission of these various bodies which canon law has required him to establish to consult?

What documentation is necessary, as a matter of public record, to indicate such consent, if any, and what is the effect of alienation absent such consent in the light of Canon 1296?

I have suggested to you a multitude of questions. I have answered none of them, and I think the time now appropriate and the moment ripe for me to turn over this discussion to the gentleman who is capable of answering some, or perhaps even further stimulating discussion, Father Heintschel.

¹⁶ 1983 CODE c.1296.