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TRANSACTIONS WHICH MAY WORSEN THE PATRIMONIAL CONDITION OF A PUBLIC JURIDIC PERSON IN THE UNITED STATES: A STUDY OF CANON 1295

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INTRODUCTION

Canon 1295 of the 1983 Code of Canon Law makes the canonical requirements for alienation applicable to transactions which, although not alienation, may nonetheless worsen the patrimonial condition of a public juridic person. The canon is intentionally general and open-ended. It purports to cover a large class of transactions which are not alienations as such but which, sometimes inadvertently, can generate effects similar to alienation or which otherwise can expose a public juridic person to risk of economic harm. The most obvious examples of such transactions include mortgaging or pledging property, accepting conditional gifts, granting easements, and corporate restructuring.

The proper implementation of canon 1295 requires an adequate appreciation of its full scope. This dissertation proposes to investigate such scope. The meaning of canon 1295 in the light of its legislative history, beginning with the 1917 Code of Canon Law and canonical commentaries on that code, is first explored. Various transactions which have economic consequences in the United States are then examined in order to determine whether and to what extent they may expose a public juridic person's stable patrimony

to the risk of harm.

This dissertation is intended to offer assistance to public juridic persons (such as dioceses, parishes and religious institutes) in the United States in understanding and complying with canon 1295. It is intended to provide guidance for evaluating the manner in which various transactions may adversely affect the patrimonial condition of the public juridic person.

Transactions Which May Worsen the Patrimonial Condition of a Public Juridic Person in the United States: A Study of Canon 1295

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Canon 1295 of the 1983 Code of Canon Law provides that transactions which can worsen the patrimonial condition of a juridic person are subject to canons 1291 through 1294, and canon 1295 mentions that the statutes of a juridic person must be in conformity with canons 1291 through 1294. Canons 1291 through 1294 contain requirements with respect to alienations of property owned by public juridic persons, such as obtaining approval from various levels of ecclesiastical authority before an alienation may validly and licitly take place.

A thorough understanding of canon 1295 requires recourse to its legislative antecedent, canon 1533 of the 1917 code. As with canon 1295, canon 1533 directed itself to transactions which entailed transfers of rights in property short of transfers of ownership. The commentators on the 1917 code referred to the Church property to which canon 1533 applied as "stable patrimony," a term which continues to be used in reference to canon 1295. This dissertation investigates the nature of "stable patrimony" as it was understood in the context of canon 1533 of the

1917 code and continues to be understood with respect to canon 1295. A review of the general scope of transactions subject to canon 1533 is similarly illuminative of those categories of transactions coming within the ambit of canon 1295.

Whereas canon 1533 of the 1917 code dealt with "moral persons" of the Church, canon 1295 refers to "juridic persons." Juridic persons are either "public" or "private" in the 1983 code. This dissertation discusses why canon 1295 is restricted to public juridic persons. It also gives a summary of the requirements of canons 1291 through 1294 with respect to the alienation of stable patrimony in order to understand the consequences of the application of canon 1295.

Canon 1295 is an important element of the 1983 code because it is far-reaching, despite its non-application to private juridic persons. This dissertation demonstrates this by surveying transactions which, because of their enforceability under American law, may place a public juridic person's patrimonial condition at risk.

CHAPTER ONE

CANON 1533 OF THE 1917 CODE

I. INTRODUCTION

Canon 1295 of the 1983 Code of Canon Law provides:

> The requirements mentioned in cann. 1291-1294, with which the statutes of juridic persons are to be in conformity, must be observed not only in an alienation but also in any transaction through which the patrimonial condition of a juridic person can be worsened.[1]

The canon is based substantially upon canon 1533 of the 1917 Code of Canon Law which stated:

> The formalities mentioned in cann. 1530-1532 are required not only in an alienation strictly so-called, but also in any contract that may worsen the condition of the Church.[2]

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[1]"Requisita ad normam cann. 1291-1294, quibus etiam statuta personarum iuridicarum conformanda sunt, servari debent non solum in alienatione, sed etiam in quolibet negotio, quo conditio patrimonialis personae iuridicae peior fieri possit." *Codex Iuris Canonici Auctoritate Ioannis Pauli PP. II Promulgatus* (Vatican City: Libreria Editrice Vaticana, 1983); translation in *Code of Canon Law, Latin-English Edition* (Washington: Canon Law Society of America, 1983) [hereinafter "1983 CIC." All translations herein of canons of the 1983 code are from this source].

[2]"Sollemnitates ad normam can. 1530-1532 requiruntur non solum in alienatione proprie dicta, sed etiam in quolibet contractu quo conditio Ecclesiae peior fieri possit." *Codex Iuris Canonici Pii X Pontificis Maximi Iussu Digestus Benedicti Papae XV Auctoritate Promulgatus* (Rome: Typis Poliglottis Vaticanis, 1917) [hereinafter "1917 CIC." Unless otherwise indicated, all translations of the 1917 code are by the author].

Just as canon 1295 incorporates by reference the requirements with respect to alienation contained in canons 1291 through 1294, canon 1533 referred to canons 1530 through 1532. Canons 1530 through 1532 contained the requirements for the valid and licit alienation of durable ecclesiastical property (as well as important relics and precious images). In general, canons 1530 through 1532 provided that the disposition of the property could only be made for a just cause and after securing the permission of competent ecclesiastical authority, with the hierarchical level of such authority (as well as the necessity of obtaining consent from the cathedral chapter, the council of administration, and interested parties) to be determined by reference to the value of the property as appraised by experts. Further, the proceeds from the alienation of the property had to be invested profitably and safely.

Canon 6 §2 of the 1983 code states that the current code is to be assessed in accord with canonical tradition insofar as its canons refer to the old law. It follows that canon 1295 is to be interpreted in substantially the same way as canon 1533 of the 1917 code.

Canon 1295 of the 1983 code and canon 1533 of the 1917 code are both concerned with transactions which can endanger the patrimonial condition of the juridic persons included in their purview. Neither canon, however, identifies such transactions with particularity. The canons also contain

terms which they do not define. Nevertheless, commentators on the 1917 code developed certain concepts and terminology to express an understanding of canon 1533 which are now germane to a proper analysis of canon 1295 of the 1983 code. It is particularly important to understand the concept of alienation as it has developed since the promulgation of the 1917 code in the light of evolving financial realities and legal considerations. It is also important to understand the concept of "stable patrimony," because the alienation requirements apply only to those assets of a juridic person which are categorized as "stable patrimony." Accordingly, this dissertation begins with a consideration of the concepts of alienation and stable patrimony.

Following those threshold considerations, the scope of canon 1533 of the 1917 code will be addressed, first in regard to the general degree of exposure to loss required before the canon applied, and then in regard to the classes of transactions typically falling within its purview.

A. THE CONCEPT OF ALIENATION

Alienation was understood on two levels in the 1917 code. G. Vromant summarized the two notions as follows:

> 1. *In the strict sense*, any act by which the direct ownership of property is transferred to another, including sale, gift, exchange, a loan for consumption, etc.
>
> 2. *In the broad sense*, alienation includes not only acts by which direct ownership is transferred, but all acts by which a right to a thing is granted to another, so that direct dominion in some way is diminished; and in this sense it also encompasses pawns and pledges, special mortgages, loans for use, and *emphyteusis* (emphasis in original).[3]

To the definition of alienation in its broad sense, M. Conte a Coronata added options, settlements or the cessation of legal actions, compromises of disputes, assignments of use or enjoyment, servitudes, and easements.[4]

Alienation under the 1917 code, then, essentially entailed (i) in its strict sense, an outright transfer of ownership, and (ii) in its wide sense, some reduction in ownership, dominion or other legal or equitable[5] right in

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[3]G. Vromant, *De Bonis Ecclesiae Temporalibus*, 3rd ed., rev. (Brussels: L'Edition Universelle, 1953) 246-247, n. 293:

"1. *Stricte*, pro eo tantum actu per quem dominium directum rei traditae in alterum transfertur, cuiusmodi sunt venditio, donatio, permutatio, mutuum, etc.

"2. *Lato* sensu sumitur alienatio non tantum pro actu quo dominium directum, sed etiam pro omni actu quo ius in re alii conceditur, ita ut dominium directum tamen minuatur; atque hoc sensu complectitur etiam pignorationem, hypothecam specialem, commodatum, emphyteusim" (emphasis in original).

[4]M. Conte a Coronata, *Institutiones Iuris Canonici*, 5th ed., rev. (Turin and Rome: Marietti, 1962) 2 (*De Rebus*): 489, n. 1070.

[5]According to H. L. McClintock, equity in the juridical sense "means the power to meet the moral standards of justice in a particular case by a tribunal having discretion to mitigate the rigidity of the application of strict rules of law so as to adapt the relief to the circumstances of the

regard to property, or the danger of losing any proprietary rights.

To understand further the scope of alienation outlined above, the following clarification of terms is in order:[6]

(i) A loan for consumption (*mutuum*) is an agreement whereby the recipient will consume the property in its first use (such property being in the nature of fungible goods, which would include cash), and in return promises to pay to the party who transferred the property an item of the same kind or quality.[7] Canon 1543 governed the matter of charging interest on loans for consumption, stipulating that the lender had to take into account the maximum legal rate of interest and the risk inherent in the transaction, thereby prohibiting usury.

In contrast to a loan for consumption, a loan for use (*commodatum*) is an agreement whereby the transferee is

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particular case. In Anglo-American law, equity means the system of legal materials developed and applied by the court of chancery in England and the courts succeeding to its powers in the British Empire and the United States. . . . Aristotle developed for Greek law the theory and application of the principle (*Epikeia*) which a recognition of this demand called for." H. L. McClintock, *Handbook of the Principles of Equity*, 2d ed. (St. Paul: West Publishing Co., 1948) 1, §1. While legal and equitable rights in Anglo-American legal systems formerly had been adjudicated in separate tribunals, under current federal and state laws adjudication of legal and equitable issues in connection with the same case generally takes place in one tribunal and under the same rules of procedure. Ibid., 14-15, §6.

[6]These concepts will be discussed in greater detail in Section II.B.2 of this chapter.

[7]Vromant, 298, n. 358.

obligated to return the specific item received. According to Vromant, a loan for use differs from a lease (*locatio*) in that the former is gratuitous, whereas the latter involves the receipt of payment or other compensation.[8] It should be noted that, so far as loans involving sacred objects (as defined in canon 1497 §2) were concerned, canon 1537 required that sacred objects could not be loaned for a use contrary to their sacred character.

(ii) *Emphyteusis* was a form of long-term lease, typically conferring upon the lessee (called the "*emphyteuta*") the right of assignment. *Emphyteusis* does not exist in the United States but is somewhat approximated through the usage of the ninety-nine year lease. The periodic rental payable under an agreement of *emphyteusis* was called the "canon." Canon 1542 §1 provided the conditions and requirements under which an *emphyteusis* could be terminated prior to the expiration of the term of the lease. In the event that such termination took place, complete title to the property (generally called "fee simple absolute" in Anglo-American, or "common law" countries) would vest in the *emphyteuta* in exchange for a sum at least equivalent to the amount due on the unexpired lease. This payment from the *emphyteuta* to the owner was referred to as the "redemption of the canon." Inasmuch as this redemption would transfer the ownership of the property, Vromant added

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[8]Ibid., 287, n. 343.

that, while the original contract of *emphyteusis* was in the nature of alienation in the wide sense, not in the strict sense, "redemption of the canon" was to be considered alienation in the strict sense.[9]

B. THE CONCEPT OF STABLE PATRIMONY

Although alienation broadly understood included a wide variety of transactions, one limitation on the application of the requisites contained in the 1917 code for valid and licit alienation[10] was that the property in question had to be what commentators on the 1917 code called "stable patrimony." Were this not the case, the daily administration of church property would have come to a virtual standstill, as ordinary transactions and expenses could not have been consummated or incurred without fulfilling what, at times, could be arduous and protracted procedures for obtaining approval.[11] Although canon 1522 §3 of the 1917 code employed only the word *patrimonium* in reference to the administrator's duty to maintain an inventory of all property of the moral person, and the 1917 code did not utilize the term "stable patrimony,"

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[9]Ibid., 297, n. 357.

[10]Cc. 1530-1532.

[11]Without limitation of the requirements contained in canons 1530-1532 to matters involving stable patrimony, such requirements would have been applicable to decisions as routine as the transfer of administrative supplies and the expenditure of petty cash.

commentators used the latter term universally with respect to the rules on alienation. They coined the term as shorthand for the longer designation, found in canon 1530 of the 1917 code, of property subject to the norms governing alienation.

Canon 1530 was the first of a sequence of canons governing alienation. The prefatory clause of section 1 described those things which were subject to the requirements contained in canons 1530 through 1532:

> §1. Except as provided in c. 1281, §1, for the alienation of ecclesiastical things immovable or movable, which are not consumed in their use, it is required that . . .[12]

The breadth of the term "stable patrimony" can be inferred from an analysis of this clause. Such analysis involves three steps: (1) investigating the meaning of the expression "ecclesiastical things immovable or movable, which are not consumed in their use," divided into its component parts, namely, "ecclesiastical things" or "ecclesiastical property" (*res ecclesiasticas*), "immovable" (*immobiles*) and "movable, which are not consumed in their use" (*mobiles, quae servando servari possunt*), including a discussion of the relevance to canon 1530 of incorporeal and fungible property; (2) establishing the link between the

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[12]"Salvo praescripto can. 1281, §1, ad alienandas res ecclesiasticas immobiles aut mobiles, quae servando servari possunt, requiritur . . ."
Canon 1281 §1 pertained to the alienation of relics and precious images.

phrase "ecclesiastical things immovable or movable, which are not consumed in their use" and stable patrimony; and (3) determining the ways in which "ecclesiastical things immovable or movable, which are not consumed in their use" became held in stable tenure, thereby drawing them into the purview of canons 1530 through 1532 as stable patrimony.

1. *Res ecclesiasticas immobiles aut mobiles, quae servando servari possunt*

a. The concept of ecclesiastical property (*res ecclesiasticae*)

Although canon 1530 §1 employed the term *res ecclesiasticae*, it did not define it. Canon 1497 §1, however, provided a definition for "ecclesiastical goods" (*bona ecclesiastica*):

> Temporal goods, whether they be corporeal, immovable and movable alike, or incorporeal, which belong either to the universal Church or the Apostolic See or any other moral person in the Church, are *ecclesiastical goods* (emphasis in original).[13]

If it were clear that the terms *res ecclesiasticas* in canon 1530 §1 and *bona ecclesiastica* in canon 1497 §1 were equivalent, then on the basis of canon 1497 §1 it would be clear that the expression *res ecclesiasticae* in the 1917 code referred to all property owned by the universal Church,

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[13] "Bona temporalia, sive corporalia, tum immobilia tum mobilia, sive incorporalia, quae vel ad Ecclesiam universam et ad Apostolicam Sedem vel ad aliam in Ecclesia personam moralem pertineant, sunt *bona ecclesiastica*" (emphasis in original).

the Apostolic See, or any moral person of the Church. That the two terms were indeed synonymous can be inferred from canon 1534, which stated as follows:

> §1. The Church may bring a personal action against anyone who has alienated ecclesiastical goods [*bona ecclesiastica*] without the required sollemnities, as well as against his heirs; if the alienation is invalid, then it [the Church] may bring a real action against the possessor, although such a party as purchaser of the goods maintains its right against the one who performed the illegal alienation.
>
> §2. An action against an invalid alienation of ecclesiastical property [*rerum ecclesiasticarum*] may be brought by the one who alienated the property [*rem*], by his Superior, or by the successor of either, and, finally, by any clergyman assigned to the church which has suffered damage from the alienation.[14]

What is to be noted about this canon is that section 1 contained the term "ecclesiastical goods" (*bona ecclesiastica*), whereas section 2 utilized the term "ecclesiastical property" (*rerum ecclesiasticarum*), though the two sections dealt with the same invalid alienation. The first section focused on the issue of whether a personal or real action could be instituted; the second section concentrated on the party who could initiate the real action. Clearly, "goods" (*bona*) and "property" (*res*) were

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[14]"§1. Ecclesiae competit actio personalis contra eum qui sine debitis sollemnitatibus bona ecclesiastica alienaverit et contra eius heredes; realis vero, si alienatio nulla fuerit, contra quemlibet possessorem, salvo iure emptoris contra male alienantem.

"§2. Contra invalidam rerum ecclesiasticarum alienationem agere possunt qui rem alienavit, eius Superior, utriusque successor in officio, tandem quilibet clericus illi ecclesiae adscriptus, quae damnum passa sit."

used synonymously in that canon. It is logical to conclude that they were also equivalent terms elsewhere in Part VI of Book III, and, hence, that in canon 1530 §1 *res ecclesiasticas* was equivalent to *bona ecclesiastica*.

With respect to the terms *bona ecclesiastica*, defined in canon 1497 §1, and *res ecclesiasticae* used in canon 1530 §1, it can be noted that, while it is feasible for the Apostolic See to own ecclesiastical property, one would be hard pressed to cite an example of property owned by the "universal Church." Of more practical importance, however, was the inclusion of moral persons within the ambit of both terms. Canon 99 affirmed the existence in the Church of moral persons, entities with legal personality so constituted by public authority. Moral persons could be collegial or non-collegial. Canon 100 §1 stated that, whereas the Catholic Church and the Apostolic See are moral persons by divine law, other moral persons acquired such legal status "by a prescript of the law itself or by special concession by the competent ecclesiastical Superior given by formal decree for a religious or charitable end."[15]

Moral persons included, for example, hospitals, schools, religious houses, provinces, and institutes.[16]

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[15]". . . sive ex ipso iuris praescripto sive ex speciali competentis Superioris ecclesiastici concessione data per formale decretum ad finem religiosum vel caritativum."

[16]T. L. Bouscaren, A. C. Ellis and F. N. Korth, *Canon Law, A Text and Commentary*, 4th ed., rev. (Milwaukee: The Bruce Publishing Company, 1966) [hereinafter Bouscaren-

Moral persons did not, however, include associations which were merely approved by the Church, such as pious unions and charitable societies. T. L. Bouscaren, A. C. Ellis and F. N. Korth gave additional illustrations of organizations not included under the rubric of moral persons, whose temporal goods were, therefore, not governed by the alienation canons, which applied only to ecclesiastical property:

> Nor does it include pious and social works established by private persons which do not require ecclesiastical approval and which are not subject to the Ordinaries, such as the Society of St. Vincent de Paul, or the various fraternal organizations of the Catholic laity, e.g., the Knights of Columbus, the Catholic Foresters, Catholic Men's Benefit Association, Ladies' Catholic Benefit Association, and the like. These organizations may be incorporated by the civil law and may be entitled to hold and administer their own property, but such property is in no sense *church property* within the meaning of the canons of this chapter (emphasis in original).[17]

In summary, for all practical purposes the significance of the term *res ecclesiasticae* is that it corresponded to property owned by moral persons in the Church. The remaining questions concern the meaning of the terms "immovable" and "movable, which are not consumed in their use" and the extent to which the clause containing these terms limited the reach of canon 1530 with respect to *res*

Ellis-Korth] 89-90, 808.

[17]Ibid., 808. Regarding the Society of St. Vincent de Paul, see S.C. Conc., *Resolutio*, 13 Nov. 1920, *Acta Apostolica Sedis* [*AAS*] 13 (1921) 135 (English translation in *Canon Law Digest* [*CLD*] 1: 714). The society was denominated a "pious and social work," but not classified as a moral person under canon 100 §1 of the 1917 code.

ecclesiasticae.

b. Immovable property

Vromant treated immovable property as a category of corporeal goods. First, he described corporeal goods as those which can be physically perceived and taken hold of or occupied, such as houses, land, livestock, crops and money.[18]

He then defined immovable goods as those corporeal goods which (i) by their nature cannot be moved unimpaired, such as chapels and houses; and (ii) although movable by their nature, are nonetheless considered by law to be immovable because they are destined to be utilized permanently as part of naturally immovable goods.[19] Naturally movable property which is considered to be immovable would consist of such items as windows, doors, fixtures, lights and plumbing.[20]

Vromant added that immovable property also included monetary sums earmarked for the purchase of immovable property, or for the construction of a church or for the conservation thereof, in accordance with the limits approved by the superior and his council.[21] One might ask whether,

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[18]Vromant, 41, n. 36.

[19]Ibid., 42, n. 36. See also Conte a Coronata at 441, n. 1034 for substantially the same definition.

[20]Bouscaren-Ellis-Korth, 807.

[21]Vromant, 42, n. 36.

in referring to the role of the superior and his council, the Vromant view should be restricted to congregations and orders. The answer would be no, inasmuch as canons 1530 and 1532 used the term "legitimate Superior" (*legitimus Superior*) broadly, with canon 1532 §3 defining legitimate Superior in cases of property worth between one thousand and thirty thousand lire or francs to be the local Ordinary (who was required to obtain the consent of his administrative council, among others, before approving the alienation). It should also be noted that the pre-1917 code commentator F. Schmalzgrueber likewise observed that money which was clearly allocated for the construction, repair or maintenance of immovable property was subject to the same restrictions as the underlying immovable property; but he made no reference to a superior or council and, hence, could in no wise be construed as having limited his statement to the situation of a religious congregation or order.[22]

c. Movable property

Vromant and Conte a Coronata both defined movable property residually, that is, as corporeal property that was not immovable.[23]

Conte a Coronata, among others, additionally

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[22]F. Schmalzgrueber, *Jus Ecclesiasticum Universum* (Rome: Ex Typographia Rev. Cam. Apostolicae, 1844) 3: 455-456, n. 52.

[23]Vromant, 42, n. 36; Conte a Coronata, 441, n. 1034.

distinguished between fungible and nonfungible movable goods, the former being those which are consumed in their first use, such as bread and fruit, and the latter being those which are conserved rather than consumed in first usage.[24]

d. Inclusion of incorporeal property within the ambit of canon 1530 §1

Incorporeal property was understood by commentators on the 1917 code to consist of those things which are not palpable or have no intrinsic worth. Their value derives from rights in the corporeal property to which they relate. As expressed by Vromant, incorporeal property is that which is grasped only by reason, such as rights resulting from legal judgments, accounts receivable or sums due, and legally enforceable rights to property, as under the terms of pious wills or obligations to tithe.[25] Conte a Coronata contrasted corporeal and incorporeal property by listing the examples of estates and money as belonging to the first category, and legal rights or actions and servitudes as pertaining to the second.[26]

Property as a generic concept, then, included incorporeal things. Nevertheless, while in canon 1530 §1

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[24]Conte a Coronata, 441, n. 1034. See also Bouscaren-Ellis-North 807, listing grain, fruit and vegetables as examples of fungible property.

[25]Vromant, 41-42, n. 36.

[26]Conte a Coronata, 441, n. 1034.

there was explicit reference to immovable and movable things or property as forming part of *res ecclesiasticae*, no mention was made of incorporeal property. It is therefore necessary to determine the basis upon which commentators included incorporeal property within the scope of that canon.

As demonstrated above, the terms *bona ecclesiastica* as defined in canon 1497 §1 and *res ecclesiasticae* were equivalent. Since canon 1497 §1 explicitly included incorporeals in its definition of ecclesiastical goods, the equivalent expression, *res ecclesiasticae*, was understood as encompassing incorporeals as well.

This conclusion was confirmed by examining the pre-1917 law. W. F. Cahill[27] noted that the wording of canon 1530 §1, "ecclesiastical things immovable or movable, which are not consumed in their use," was derived from the constitution *Ambitiosae* of Pope Paul II.[28] That document prohibited the alienation of corporeal property (classified as "immovables and precious movables"[29]) and explicitly provided that fruits and goods which could not be preserved

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[27]W. F. Cahill, "The Dedication of Property to the Fixed Patrimony of a Church," *The Jurist* 17 (1957) 139-140.

[28]C. 1, *de rebus ecclesiae non alienandis*, III, 4, in *Extrav. Com.* [A. Friedberg, ed., *Corpus Iuris Canonici* (Graz: Akademische Druck-U. Verlagsantalt, 1959) 2: 1269].

[29]". . .immobilia et pretiosa mobilia." Ibid.

after use (fungible property) were freely alienable.[30] Under the principles of canon 6 of the 1917 code, the pertinent language in canon 1530 was to be interpreted in the same manner as *Ambitiosae*, since the content of that decree formed the basis of the canon. A literal reading of *Ambitiosae* would suggest that the restrictive rules contained in canon 1530 should have been interpreted as inapplicable to both incorporeal property and fungible corporeal property. However, Cahill pointed out that canonists prior to the 1917 code did not conclude that *Ambitiosae* exempted all incorporeal rights from the restrictions on alienation.[31] Incorporeal rights incident to immovable and precious movable property were viewed as being subject to whatever limitations applied to the alienation of the underlying corporeal property. Schmalzgrueber, for example, argued that legal judgments which conferred rights in immovable property or precious movable property were equivalent to, or at least comparable to, the property itself, and hence were subject to the same restrictions on alienation.[32]

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[30]". . . praeterquam in casibus . . . de fructibus et bonis, quae servando servari non possunt, pro instantis temporis exigentia." Ibid.

[31]Cahill, 139-140.

[32]Schmalzgrueber, 3: 446, n. 29.

e. Inclusion of some fungible property within the ambit of canon 1530 §1

The inclusion of some fungible property within canon 1530 §1 followed the same rationale as that of including incorporeal property. Cahill, like other commentators, noted that one type of fungible property is money, because it is an asset that is consumed upon first use.[33] As fungible property, money was generally thought of as spendable without restriction. There were, however, exceptions:

First, even prior to the 1917 code, restrictions on alienation extended to money budgeted for or donated for, the purpose of purchasing, preserving or improving immovable property.[34] Money earmarked for such ends in effect represented and assumed the nature of the underlying immovable property.

Second, many commentators, including Cahill himself and F. X. Wernz, argued that proceeds and annual installments of money received in connection with the disposition of immovable or precious movable property were equivalent to the property disposed of.[35] The stable nature of the

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[33]Cahill, 141. See also A. Larraona, "Commentarium Codicis," *Commentarium Pro Religiosis* 13 (1932) 191.

[34]Schmalzgrueber, 3: 454, n. 52.

[35]Cahill, 140-145; F. X. Wernz, *Ius Decretalium* (Rome: Universitas Gregoriana, 1908) 3 (*Ius Administrationis Eccles. Catholicae*), part 1 [hereinafter Wernz]: 181, n. 160.

property given up extended to the money or other fungible property received in payment therefor.

Schmalzgrueber distinguished money received from the sale of fruits or the renting of property from money received from a sale of immovable property or precious movable property. The first class of receipts was not to be considered subject to the solemnities of alienation, but the second was.[36]

In fact, this "carryover" treatment of the nature of property received in exchange for property could yield a contrary result. For example, a moral person could alienate immovable property without being subject to the requirements of canon 1530 §1 if the property had been purchased with money that was not itself subject to that canon and if it could be established that the moral person did not intend to carry the immovable property as a permanent or stable investment.[37] In such case, the immovable property would represent the money (freely alienable fungible property) that was expended. Therefore, despite the fact that canon 1530 referred to immovable property and movable property which was not consumed in usage, one could not construe the canon as restricting alienation of all immovables and

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[36]Schmalzgrueber, 3: 454, n. 51.

[37]Cahill 142; Vromant, 250, n. 296. The relevance of intention to dedicate property to stable patrimony, along with the presumption that operated in the event that no intention was expressed, is dealt with in Section I.B.3 of this chapter.

nonfungibles or as permitting alienation of all fungibles.

Cahill pointed out that the representative or carryover nature of property received in exchange for property was consistent with the import of canon 1531 §3.[38] One might indeed argue that such a view of replacement property provided the impetus for that canon.

Canon 1531 §3 stated that money received from an alienation of church property should be invested cautiously, safely and productively in favor of the moral person that had owned the alienated property. The moral person could not use the proceeds to defray ordinary expenses or to retire major debts unless permission had been given as part of the original permission for alienation (which would often have been the case since the petition would have contained such a reason for the proposed alienation).[39] Vromant contended that the preferred investment generally would be in immovable property, except where a particular risk made such an investment inadvisable (as in exposure to confiscation in missionary regions).[40] Thus, under canon

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[38]Cahill, 143-144.

[39]Vromant affirmed this in the context of approval by the Holy See: "Indultum alienationis a S. Sede concessum aliquando saltem implicite complectitur licentiam pecuniam erogandi: nempe si causa alienationis allegata necessario continebat etiam pecuniae erogationem." Vromant, 254, n. 300.

[40]Ibid. The Sacred Congregation of the Council (which, pursuant to canon 250 §2, had authority to regulate matters concerning ecclesiastical property) was apparently more restrictive in a 1951 declaration which maintained that

1531 §3 the proceeds were considered to retain the character of the original ecclesiastical property.

If incorporeal property and some fungible property were properly includable within the ambit of canon 1530 §1, why was there not explicit reference in the canon to such classes of property? Cahill offered the explanation that incorporeal rights and fungible goods generally were not held as a stable store of wealth and were usually converted soon after being acquired; the incorporeal right being converted into the corporeal property which it represented, and fungible proceeds of sales being simply spent or consumed.[41] However, to the extent that such property was stably held, it was properly included among *res ecclesiasticae*. The phrase "immovable or movable, which are not consumed in their use" should accordingly be understood as including any property which a moral person was expected

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money realized from alienations could be invested *only* in immovable property. S.C. Conc., declaration, 17 Dec. 1951, *AAS* 44 (1952) 44. However, that declaration concerned transactions discussed in a prior decree issued by the Sacred Consistorial Congregation [S. C. Consistorialis, 13 July 1951, *AAS* 43 (1951) 602] which had provided that, due to volatile currency exchange rates and for so long as such condition existed, recourse should be made to the Apostolic See for any alienation involving more than ten thousand gold francs or lire. It therefore appears that the restriction to investment in immovable property was a temporary requirement.

[41]Cahill, 146-149. By way of example, Cahill stated: "We expect a man who owns a right to reduce the right to a tangible property. We expect a man to spend his money or other consumptibles, . . . The conduct of a miser, who hoards fungibles as such, is aberrational." Cahill, 149.

to hold permanently, whether or not such property was actually so retained.

2. Patrimony

As previously noted, commentators on the 1917 code habitually employed the term "stable patrimony" in connection with the canonical requirements attending alienation, even though the expression "stable patrimony" appeared nowhere in the 1917 code and the word "patrimony" appeared in the code only in the context of maintaining a current inventory under canon 1522, 3°. For example, after distinguishing stable patrimony from free patrimony, D. M. Huot explicitly stated that canon 1530 referred to stable patrimony:

> Although there does not appear to be any *textual* exception, not all movable or immovable things come [within the canon]. Those *res mobiles* which come [within it] are those which are conserved or which are stable patrimony. *Res immobiles* are understood as those which, in law and fact, whether physically or juridically, are immobile, stable patrimony or which form part of the same.
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> In other words, falling within [the canon] are all things which are stable patrimony, not those which constitute free patrimony (emphasis in original).[42]

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[42]"Etsi nullas videatur admittere *textus* exceptiones, non omnes tamen veniunt hic res mobiles neque omnes res immobiles. Illae veniunt *res mobiles* quae, de facto, servantur seu res illae mobiles quae sunt patrimonii stabilis. *Res immobiles* intelliguntur quae, de jure et de facto, vel physicae vel juridice, revera sunt immobiles, patrimonium stabile vel partem ipsius efformant.

"Aliis verbis, veniunt res omnes quae patrimonium stabile, non vero quae patrimonium liberum constituunt" (emphasis in original). D. M. Huot, "Bonorum Temporalium apud Religiones Administratio Ordinaria et Extraordinaria,"

While Huot's focus was on the limited application of canon 1530 to ecclesiastical property which was held in a stable manner, his words also exemplify another common understanding among commentators on the 1917 code, namely, that the word "patrimony" was simply synonymous with the term property.

Further, patrimony was not limited to nonfungible corporeal property, immovable and movable. The term also encompassed fungible property, such as money and money equivalents (often called "capital"[43]) as well as other liquid investments or representative assets (such as bank accounts, stocks and other securities).

Incorporeal interests could be patrimony as well, depending upon whether or not they had been reduced to property rights or were merely expectations. A common instance of a mere expectation, for example, would result from an unwritten proposal to give a parcel of land to a parish for a specified purpose, such as maintaining a cemetery, which subsequently failed to mature to the status

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Commentarium Pro Religiosis 34 (1955) 268.

See also Cahill, 134, who preferred the expression "stable patrimony" to the lengthy equivalent phrase ("immovable or movable, which are not consumed in their use") contained in canon 1530 §1 because "stable patrimony" more "lucidly" described the property subject to the alienation rules of the 1917 code.

[43]The 1917 code did not employ the word "capital," but it appeared in questionnaires issued by the Holy See. See S. Congr. de Religiosis, *Instructio*, 25 Mar. 1922, 14 *AAS* (1922) 281; S. Congr. de Propaganda Fide, *Epistola*, die Paschae Resurrectionis 1922, 14 *AAS* (1922) 307.

of a legally enforceable claim on the part of the parish. The donor of the land could propose to make the gift during his lifetime by deed or upon his death pursuant to his last will and testament. He might do so without providing for any intervening interest, or he might, for instance, stipulate that his son was to receive possession of the land for use and enjoyment during the son's lifetime with the parish receiving ownership of the land upon the son's death (the son thereby acquiring what Anglo-American law would call a "life estate" and the parish acquiring a "remainder" interest). Whether such a gift was to be directly to the parish or with intervening possession by the son, the parish could renounce the gift without there ever having arisen a property right, in which case the land would not have become part of the patrimony of the parish. It never became more than an "expectation."

In contrast, if a parish accepted an outright deed, the land became part of its patrimony, and any subsequent effort to rid itself of the land constituted an attempt at alienation. Similarly, if a parish received by deed a remainder interest, such a legally enforceable interest became part of the patrimony of the parish. So, too, if prior to any acceptance by the parish of a deed giving a remainder interest to the parish, the donor's son, after accepting a deed giving him a life estate in the land, contracted with the parish to purchase its remainder

interest, such a contract had the effect of placing the remainder interest in the parish's patrimony because the assignment of the future interest would implicitly have constituted an acceptance of the gift by the parish.[44]

So, too, if the owner of the land entered into an enforceable written contract with the parish to execute such a deed in the future, the agreement itself was considered to be incorporeal property of the parish (known in Anglo-American jurisdictions as a chose in action).[45] As such, it was part of the parish's patrimony. Until the time, however, that the owner's promise was reduced to such an enforceable written contract,[46] there was no incorporeal property but only a mere expectancy on the part of the parish, which did not become part of its patrimony. That was so even if the parish could obtain a loan from a third party on the basis of the expectancy,

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[44]Cahill, 263-264.

[45]A "chose in action" is personal property and, more specifically, an intangible or incorporeal right. *Gregory v. Colvin*, 363 S.W.2d 539, 540 (Ark. 1963); 73 *C.J.S.* "Property" (1983) 198, §22a.

[46]Under modern-day statute of frauds legislation in the various States, a sales contract for land is enforceable only if it is written. R. A. Cunningham, W. B. Shoebuck, and D. A. Whitman, *The Law of Property* (St. Paul: West Publishing Co., 1984) 625-632. This is predicated on the transaction being a sale. If it is purely a gift, then, in spite of any prior written evidence of donative intent, the grantee cannot compel a conveyance; the grantee's right to the property as a donee can arise only upon delivery of an executed deed. However, nothing would appear to preclude a written contract from being enforceable merely because the sales price was substantially below the fair market value.

because the expectancy itself was not legally enforceable.[47]

Similarly, it was logical to argue, as Cahill did,[48] that the general credit of a moral person was not part of its patrimony unless reduced to a contracted line of credit with a lending institution. This was so because patrimony is property, and property presupposes a vested legal right. General credit as such is a mere expectancy of capital and resources, however likely or reliable it may be.[49]

3. The notion of "stability"

As pointed out in the previous section, Huot emphasized the applicability of the alienation requirements only to patrimony that was stable in character.[50] Immovable

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[47]Cahill, 266.

[48]Ibid.

[49]The status of general credit as mere expectation can be understood more clearly by contrasting it with the status of accounts receivable. Were a moral person to hold such accounts as a result of sales from an ancillary enterprise which it operated, it might be able to sell those accounts to a bank, a procedure known as "factoring" the accounts. Even if the accounts were not acceptable to a bank or were factorable only at a substantial discount, they would still be property and not just an expectation, because the moral person would have legal recourse against the debtors to discharge those accounts. Whether the debtors were financially able to pay them in full would affect the real value of the accounts (which might be less than their face value if the prospect of complete payment was doubtful), but not the status of the accounts as property, and hence patrimony, in the hands of the moral person.

[50]Other canonists agreed, as, for example, A. Vermeersch and J. Creusen, and F. X. Wernz and P. Vidal, both sets of authors focusing on money as being subject to the alienation requirements if and only if it was stable capital. A. Vermeersch and J. Creusen, *Epitome Iuris Canonici*, 6th ed.

property, the first of the two categories of property made subject to the alienation requirements by canon 1530, was easily characterized as "stable" since only on rare occasions would a moral person acquire immovable property with an intent to dispose of it shortly thereafter. The characterization of certain items of movable property as "stable" or "fixed" patrimony was inferred from the expression of canon 1530 §1 "which are not consumed in their use" (*quae servando servari possunt*).

Nevertheless, it was still necessary to identify with more particularity the criteria under which a moral person was said to hold patrimony in a "stable" manner. Inasmuch as the 1917 code did not express such criteria for *bona ecclesiastica* in general, it was necessary to recur to similar cases, as prescribed in canon 20.[51] As a similar case, Cahill drew upon the *bona* of benefices as described in Title XXV of Book III of the 1917 code.[52] So also in his treatment of investments of ecclesiastical funds, H. J. Byrne included a special discussion of the property of

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(Brussels: L'Editione Universelle, 1940) [hereinafter Vermeersch-Creusen] 2 (*Liber III Codicis iuris canonici*): 594, n. 851; F. X. Wernz and P. Vidal, *Ius Canonicum* (Rome: Apud Aedes Universitatis Gregorianae, 1935) 4 (*De Rebus*) [hereinafter Wernz-Vidal]: 222, n. 757.

[51]"Si certa de re desit expressum praescriptum legis sive generalis sive particularis, norma sumenda est, nisi agatur de poenis applicandis, *a legibus latis in similibus*; . . ." (emphasis added).

[52]Cahill, 153-156.

benefices as stable capital.[53]

As defined in canon 1409, a benefice essentially was a non-collegial moral person with two components: a sacred office and the right to receive income from it.[54] While the income was granted on account of the sacred office, there had to exist a source of such income, known as an endowment. One type of endowment listed under canon 1410 was property owned by the moral person itself.[55] An example of this kind of endowment would be the immovable or movable property owned by a parish.[56] Canon 1415 §2 provided that where money was offered to establish a benefice, it was to be invested in real estate or securities.[57] The canons of Title XXV contemplated as *bona* held by a benefice: (i) useful immovable property; (ii) useful movable property; and (iii) productive land and securities held for the purpose of yielding income. These properties were, moreover, to be

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[53]H. J. Byrne, *The Investment of Church Funds, Canon Law Studies*, 309 (Washington, D.C.: The Catholic University of America, 1951) 30, 65-71.

[54]"Beneficium ecclesiasticum est ens iuridicum a competente ecclesiastica auctoritate in perpetuum constitutum seu erectum, constans officio sacro et iure percipiendi reditus ex dote officio adnexos." See Vromant, 196-197, n. 225.

[55]Other types listed in canon 1410 were: (i) regular, pledged payments made by a family or by another moral person; (ii) regular, voluntary offerings of the faithful; (iii) stole fees; and (iv) choir allotments.

[56]Vromant, 196, n. 225.

[57]C. 1415 §2.

retained in a stable manner, a conclusion evident not only from the nature of the properties but from the responsibilities of the beneficiaries as well. In the case of a bishop as administrator of his own benefice, he was obliged to maintain an inventory of furnishings and other movable property, and to transfer such property unimpaired to his successor.[58] A beneficiary was considered to be the administrator of the property comprising the endowment,[59] and he was responsible for restoring property that was lost or damaged through his culpability, be it negligence or otherwise.[60] The beneficiary was also to bear any costs of ordinary maintenance of the property and of realizing the fruits or income from it,[61] but was not responsible for extraordinary repairs unless otherwise specifically provided in the foundational document of the benefice or by custom.[62]

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[58]C. 1483 §3.

[59]C. 1476 §1. See Cahill, 153; S. Alonso Morán, "De los beneficios y otros institutos eclesiásticos," in *Código de Derecho Canónico y Legislación Complementaria*, 10th ed., rev., ed. S. Alonso Morán et al. (Madrid: Biblioteca Autores Cristianos, 1976) 574-575, noting that the beneficiary had to be especially diligent in discharging the responsibility of ordinary repairs and maintenance under canon 1477 and in conserving the property through adequate insurance and through proficient financial and legal administration as described in canon 1523.

[60]C. 1476 §2.

[61]C. 1477 §1.

[62]C. 1477 §2. Consistent with this, canon 1186 provided that ordinarily the restoration of a cathedral parish or church was to be funded, first of all, from the resources of the cathedral or church itself ("bonis fabricae ecclesiae").

The import of these provisions was that underlying property was to be conserved, and only the *net* profits or fruits were to be allocated to the beneficiary; the underlying property could not be depleted.

Byrne noted that the alienation of property comprising the endowment of a benefice was subject to the limitations pertaining to the alienation of church property, and that the proceeds from the alienation would have to be reinvested in a cautious and productive manner pursuant to canon 1531 §3, in order to preserve the character of the endowment.[63] In other words, the endowment property of a benefice was stable patrimony which was not to be depleted.

The criteria governing the composition and management of *bona* held by benefices were applied by Cahill, on the basis of canon 20, to moral persons in general regarding their *bona ecclesiastica*. Accordingly, "stable" patrimony was, according to Cahill, "church property bound to be conserved as to its substance, to be held in fixed tenure by the church which owns it, while its use and yield are devoted to the proper functioning of that church."[64] The

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Canon 1483 §2 provided that the episcopal residence was ordinarily to be restored and repaired from the "episcopal table," meaning the episcopal benefice.

[63]Byrne, 68.

[64]Cahill, 156. The word "church" was used by Cahill as equivalent to any "moral person" in accord with canon 1498, which clarified that, for purposes of the canons which followed, the word "church" was to include the universal Church, the Apostolic See, and moral persons.

word "bound" connoted a legal obligation on the part of the administrator (as opposed to a merely customary practice) to maintain stable patrimony intact, which was reflected in the aforementioned provisions concerning benefices and in the restrictions on alienation found in canons 1530 through 1532. The obligation was serious because stable patrimony formed the basis upon which the moral person sustained itself.

In addition to identifying the characteristic of stability, there remained the question of when a moral person became bound to hold property "stably." This determination was pivotal to the application of the alienation requirements of the 1917 code, yet the criteria for such determination were not clear. The mere fact that by its nature a given asset could be permanently productive or useful was not sufficient for concluding that it was held in a stable manner. Byrne and Vromant contended that a productive investment of cash, for instance, did not in itself establish such asset as stable capital; the competent ecclesiastical authority had to intend to incorporate it as a permanent capital resource.[65] Applying the point more broadly to other forms of church property, Cahill stated that there had to be "a commitment on the part of the acquiring church to hold the property in permanent tenure, to conserve its substance while retaining freedom to dispose

[65]Byrne, 28; Vromant, 250, n. 295.

of its use and yield."[66] Such a commitment could be made prior to, concomitant with, or subsequent to acquisition of the property.

There were three general ways in which patrimony could be rendered stable: by a carryover of the status of stable patrimony incident to a disposition of stable patrimony; by an explicit aggregation to stable patrimony; and, by an implicit aggregation to stable patrimony.

a. Carryover of status as stable patrimony

As mentioned previously,[67] there was a carryover of stable-patrimony status to the proceeds received from the disposition of stable patrimony. Thus, money realized from the alienation of stable patrimony was itself deemed to be stable patrimony.[68] This applied as well to securities acquired, in conformity with canon 1539 §2, in exchange for other securities which before that had been stable patrimony.

b. Explicit designation as stable patrimony

While explicit designation as stable patrimony could pertain to any form of church property, the usual example

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[66]Cahill, 269.

[67]Pp. 18-21, *supra*.

[68]Vromant, 254, n. 300. Canon 1531 §3 implied as much by requiring that the sum realized from alienation be invested safely and profitably.

involved cash because immovable property or movable nonfungible property was often implicitly incorporated into stable patrimony. There could, however, be an explicit dedication to fixed patrimony of property other than cash in order to serve an entity's long-term needs, even though such an asset might not immediately generate income or be currently productive or useful.[69] For instance, by written declaration a competent administrator could explicitly reserve furniture purchased with free capital for use in a particular parish school. Explicit dedication also occurred when a donor attached a condition that property given, for example, to a diocese be used for a specific purpose and the diocesan bishop agreed.

Whatever the church property involved, it was the "competent authority" who was to make the designation.[70] While many commentators left it at that, Cahill, J. E. McManus, and S. Alonso Morán were more specific, explicitly stating that the competent authority was the local Ordinary.[71] Cahill based his opinion upon the argument that

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[69]Cahill, 276.

[70]Vromant, 249-250, n. 295; Cahill, 276; Byrne, 28; W. J. Doheny, *Practical Problems in Church Finance* (Milwaukee: The Bruce Publishing Company, 1941) 43; E. L. Heston, "The Element of Stable Capital in Temporal Administration," *The Jurist* 2 (1942) [hereinafter Heston, "Stable Capital"] 130-131.

[71]Cahill, 276-277; J. E. McManus, *The Administration of Temporal Goods in Religious Institutes*, Canon Law Studies 109 (Washington: The Catholic University of America, 1937) 87; S. Alonso Morán, "De los religiosos," in *Código de*

aggregation to stable capital was an act of extraordinary administration and therefore subject to the requirement of canon 1527 §1 that the local Ordinary approve such an action. McManus and Alonso Morán pointed out that, in the context of religious orders and congregations, the local Ordinary's permission was often required for an investment, pursuant to canon 533.[72] In the case of money, Vromant reasoned that, since investments of long-term duration presupposed that the capital to be invested represented a surplus to the moral person, it followed that canon 1523, 4° applied, and canon 1523, 4° required that the Ordinary approve such investment. In this regard, Vromant's observation led to the same conclusion that Cahill, McManus, and Alonso Morán had made explicitly: allocation to fixed capital was a decision ultimately to be made by the local Ordinary.[73]

Derecho Canónico y Legislación Complementaria [hereinafter, Alonso Morán, "De los religiosos"], 215-216.

[72]McManus, 87; Alonso Morán, "De los religiosos," 216.

[73]This is so despite the fact that Vromant did not specifically refer to "Ordinary" but rather to the "formal decision of the competent authority." Vromant, 250, n. 295.

Besides the issue of the Ordinary's role in approving allocations to stable patrimony, canonists considered whether or not additional parties would be required to give their advice or consent. In regard to an Ordinary's own administrative acts, Cahill pointed out that in transactions "of greater moment" the advice or consent of the Ordinary's council of administration would be required pursuant to canon 1520 §3. Cahill, 276, footnote 84. However, that canon did not define what a transaction of "greater moment" was, so it could not be concluded that all aggregations to stable capital would be included within the purview of canon

Explicit dedication of cash to stable patrimony was typical in instances of setting cash aside for future acquisition or improvement of immovable or nonfungible movable property. This dedication to stable patrimony took place without there yet having been a conversion from cash to another form of property; the cash was viewed as representing the property to which it would eventually be converted. Accordingly, cash funds declaratively set aside for the construction, purchase, improvement, or conservation (beyond ordinary repair and maintenance) of immovable property or sacred or precious property were considered

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1520 §3.

Without elaboration, Heston contended that consent of "interested parties" was required in aggregations to stable capital. Heston, "Stable Capital," 131. Vromant argued that it would be appropriate that particular constitutions, diocesan statutes, or rules of general chapters or of major superiors prescribe formalities by which allocation of cash to stable capital was to be made; but that, absent any such prescription by particular law or by custom, a proposal which A. Reiffenstuel made with respect to allocations of money for the improvement of immovable property should be adopted generally. Vromant, 249, n. 250. While acknowledging that cash could normally be expended without formalities, Reiffenstuel stated that when cash was set aside or deposited for the improvement of immovable property, under the "authority of the Superior and with the consent of the clerics," the money could no longer be freely expended. A. Reiffenstuel, *Ius Canonicum Universum*, 9th ed. (Paris: Apud Ludovicum Vives, 1867) 4: 197, tit. 13, n. 15. Reiffenstuel did not describe the types of clerics involved in such scenario or the moral persons to which his argument would apply. Nevertheless, his view appears consistent with Heston's contention that interested parties had to consent to such aggregations.

In the opinion of several canonists, then, the advice or consent of parties other than the local Ordinary was required for the aggregation to stable capital, at least in some instances.

stable patrimony.[74] Similarly, cash received with the intention that it fund the payment of an annuity was stable patrimony.

Surplus cash which was not allocated for the purchase of immovable property or nonfungible movable property might also be converted to stable capital but, according to Vromant, this did not take place simply by the fact of the yearly net surplus having been fruitfully deposited or reserved for future needs; the aggregation to stable capital, in Vromant's opinion, had to be accomplished through an external manifestation of intent by the competent authority, and in accordance with the norms of the constitutions or diocesan statutes where they addressed the matter.[75]

A cash investment in securities or in some forms of bank deposit would constitute an aggregation of property to stable patrimony if the competent authority explicitly designated the investment as such in the permission to

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[74]Vromant, 249, n. 295.

[75]Ibid., 249-250, n. 295: "Itaque ut huiusmodi pecuniae, vel ingressus annui qui supersint, sortem stabilem iuridice ingrediantur, . . . *requiritur formalis voluntas competentis auctoritatis*, actu quodam externo manifestata, saltem per modum quo bona collocantur vel administrantur. - Congruit ut iure particulari constitutionem vel dioecesis statutorum, . . . formalitates quaedam seu licentiae speciales obtinendae praescribantur" (emphasis in original). An external manifestation of intent to allocate cash to stable capital encompassed not only explicit aggregation but also implicit aggregation, discussed in the subsection which follows.

invest. More commonly, however, the permission would simply permit the investment without explicit designation of the investment as "stable capital." An explicit permission to invest cash was not the same as an explicit designation of the cash to stable capital. In some instances a temporary investment might also require a competent authority's approval (for example, one which amounted to an act of extraordinary administration), even though there would be no intention of converting property to stable capital.[76]

Short of an explicit reference to "stable capital" in the approval to invest, an express aggregation to stable capital could take place by way of implication.

c. Implicit aggregation to stable patrimony

By implicit aggregation to stable patrimony, property was deemed to be held in stable tenure even though the intention to do so had not been explicitly expressed. Most cases of implicit aggregation were a matter of presumption arising from the nature of the property; it was presumed

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[76]Cahill noted that an administrator's principal duties were described in canon 1523, 3°, which required him to conserve the revenue and contributions received by the moral person, and then to expend money to meet expenses. Only after those primary duties were discharged and there remained a surplus of cash could long-term investments be made, pursuant to canon 1523, 4°. In conserving the money pursuant to canon 1523, 3°, certain temporary investments might require the approval of the Ordinary because they constituted extraordinary administration under canon 1527. Since permission to invest might at times apply to temporary investments, it could not be concluded that such permission was always tantamount to aggregation to stable capital.

that the competent authority intended certain types of property to be retained as stable patrimony. Such property was of long-term utility, whether or not it generated income. Examples included property blessed or consecrated for religious use, immovable property, major furnishings, equipment and other nonfungible property (along with improvements and major repairs thereto) for a school or parish.[77] A presumption that property was stable patrimony meant that any contrary conclusion would require proof of the competent authority's intent that the property be held as free patrimony, as, for example, in the purchase of real estate (using free capital) with a view to imminent resale, exchange or other disposition.

Cash, on the other hand, was not an asset presumptively retained in stable tenure because its utility was generally in its expenditure and consequent exhaustion; it was not preserved in its usage. Whether the act of earmarking cash for investment in securities, notes of indebtedness and bank accounts constituted an implicit aggregation of the cash (as well as the ensuing investments themselves) to stable capital was a complex issue, requiring a close evaluation of the facts and circumstances.

Cahill argued that investing surplus receipts in income-yielding assets pursuant to canon 1523, 4°, which required approval from the Ordinary, was indeed a dedication

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[77]Cahill, 275.

of free capital to stable capital because the investment was not of a transitory nature.[78] The length of term of investment, however, was not as important to Cahill's analysis as the issue of whether or not the money was surplus, that is, truly in excess of what would be needed to defray operational expenses in the foreseeable future.

The primary duty of the administrator regarding capital was to conserve the receipts in order to meet the operating expenses of the moral person, pursuant to canon 1523, 3°. The secondary duty of the administrator was to invest surplus income, a contingent responsibility in that there might not exist a surplus. The long-term investment of these surplus receipts came under canon 1523, 4°. The ambiguity concerned distinguishing those short-term "investments" which required the local Ordinary's approval because they were deemed to be part of extraordinary administration under canon 1527 §1, and long-term investments which required the local Ordinary's approval pursuant to canon 1523, 4°.[79]

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[78]Ibid., 273-274.

[79]Canon 1523, 3° did not itself require that the administrator obtain the permission of the Ordinary regarding the acts which it described. Moreover, in commenting on canon 533 with respect to the duties of an administrator in a religious order or congregation, Alonso Morán noted that no permission would be needed for such routine matters as opening a savings account to deposit and conserve cash. Alonso Morán, "De los religiosos," 216. However, particular law might specify that some temporary investments were extraordinary administration, thereby requiring permission from competent authority.

The matter of what comprised surplus cash or income was not susceptible to mathematical certitude since it involved projections of future receipts and outlays over a period not defined in the 1917 code. Cahill summarized this consideration as follows:

> The Code does not limit the charge of expenses against receipts to a year or to any other fixed period. Therefore, it is only when the receipts on hand and under conservation exceed all reasonably foreseeable expenses of a church's normal function, that a surplus exists which may be invested under the direction of canon 1523, n. 4°.[80]

Although the 1917 code was silent on the point, the local Ordinary apparently was to decide whether and to what extent there was a surplus. It would only be logical that he satisfy himself that such a surplus existed before he gave his approval to a proposed investment, relying upon an analysis made by his council of administration concerning the expected net cash flow submitted by the administrator.

While Cahill emphasized the distinction between operating or working capital on the one hand and surplus receipts on the other, in the determination of whether an approved investment constituted an aggregation to stable capital, other canonists focused more on the maturity of the investment. Byrne, for example, cautioned that not every investment of money established stable capital, in view of the fact that investments could have a wide range of

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[80]Cahill, 272.

maturities.[81] There was considerable difference of opinion as to what constituted an investment for purposes of an aggregation to stable capital. Heston, for example, claimed that bank time deposits (passbook accounts) could qualify,[82] whereas Bouscaren-Ellis-Korth argued that a commitment to income-producing assets had to be of a longer term in order to be an "investment" in the juridical sense, and an investment which marked a conversion to stable capital.[83]

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[81]Byrne, 26-30.

[82]E. L. Heston, *The Alienation of Church Property in the United States*, Canon Law Studies 132 (Washington: The Catholic University of America, 1941) [hereinafter Heston, *Alienation*] 73. The expression used by Heston was "cash deposited at interest in a bank." Time deposits such as these may be withdrawn upon little or no prior notice. They are short-term.

[83]Although Bouscaren-Ellis-Korth contended that an investment of money which complied with canon 1523, 4° necessarily entailed a conversion to stable capital (in agreement with Cahill), they stated that the mere deposit of money "at call" in a bank was not an investment which would bring that canon into play. Bouscaren-Ellis-Korth, 256. The foremost example of money deposited in a bank at call is a demand deposit (or checking account). In the opinion of these authors, an investment of money entailed a conversion to "nonconsumable and productive goods, such as real estate, stocks, bonds, etc." Ibid. The fact that an asset was "nonconsumable" implied a lack of liquidity (which meant that, by nature, it was not to be held for a short term) and its "productive" characteristic meant that it generated more than nominal income.

McManus acknowledged the difference of opinion as to whether or not a deposit of money could be considered an investment requiring previous consent of the Ordinary. His own conclusion was: "If the deposit is made as administrative routine for temporarily securing a sum of money, or for greater facility in paying bills and making purchases, etc., it is undoubtedly not an investment and no permission of the local ordinary is required. But if for greater security an investor chooses to place his money in a quasi-permanent way at interest in a bank, there is every

In any event, the maintenance of cash, short-term time deposits, negotiable securities and other types of fungible or short-term, liquid investments carried the *presumption* of being free capital. The rationale given by Schmalzgrueber and Reiffenstuel was that cash was principally employed as a medium of exchange, available for daily operations rather than producing additional income or acquiring additional permanent assets.[84] This was so nothwithstanding the fact that cash and near-cash assets incidentally yielded interest or other income. Yet, canonists were not in agreement as to the strength of this presumption or its application in practice. Doheny, for example, contended that the investment of a parish's annual surplus in liquid assets did not necessarily consign it to stable capital, and in case of doubt the presumption would be that of free capital;[85] but Heston viewed what he referred to as "reserve" money as an example of implicit aggregation to stable patrimony:

> Such [implicit aggregation] would be the case, for instance, with reserve money belonging to a parish which is burdened with no debt and which has no immediate needs to be provided for. The simple fact that such money has been duly deposited in a

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reason for considering this a juridical investment. . . . If the deposit is made merely for convenience or security, no permission is required; if with the intention of making one's resources productive, it is an investment and permission is required in the cases expressed by law." McManus, 94-95.

[84]Schmalzgrueber, 3: 453-454, n. 50; Reiffenstuel, 4: 103, n. 15; see also, Doheny, 43.

[85]Doheny, 43.

> bank or otherwise profitably invested, with no intention of using it for specific needs, would seem to be sufficient assignment to stable capital, even though this assignment has not been explicitly mentioned.[86]

Heston evidently viewed this example as one which did not present appreciable doubt, because he further argued that decisions in ambiguous cases should favor the status of capital as free, in order to afford the administrator greater latitude in managing and disposing property.[87] Perhaps an underlying assumption implicit in Heston's argumentation was the magnitude of the "reserve" money; if the parish or other moral person had substantial cash on hand relative to operational needs (thus Heston's phrase "no immediate needs to be provided for") and relative to the value of all its assets and debts, that would point to an intention to invest the money as stable capital. In other words, a relatively large "reserve" of cash was one that would exceed any short-term contingent liabilities and was therefore truly synonymous with a "surplus." Accordingly, any investment thereof, even by way of a bank deposit, implicitly constituted an aggregation to stable capital.

The presumption that short-term, liquid investments

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[86]Heston, "Stable Capital," 131.

[87]Ibid., 131-132. Heston relied upon canon 19, which declared that laws which restricted the free exercise of rights were subject to strict interpretation. One may question, however, whether an administrator's activities involved the exercise of "rights" contemplated by canon 19; see discussion of this point pp. 56-58, *infra*.

were not part of stable capital could be overcome, and the sheer size of an investment relative to the total property of a given moral person was considered relevant. For example, the value of the assets or holdings appears to be a factor in an analysis made in 1922 of whether relatively liquid assets should be considered as free or stable capital.[88] The assets under consideration were stocks and bonds, and it was acknowledged that no precise rule existed. Such assets, it was argued, were like money because of their liquidity, but their productivity (dividends, interest, and long-term appreciation) was the characteristic trait of a long-term, stable investment. Having stated the hybrid characteristics of these types of assets, the author concluded that discrete holdings of stocks and bonds could be likened to money, but, where they were part of a larger fund or group of stocks and bonds, the accumulation was in the nature of an investment portfolio of long-term duration and therefore was to be reckoned as stable capital.[89]

To summarize, an aggregation to stable capital by implication was a matter of presumption with respect to certain types of property; the mere fact that land, for example, was typically acquired for long-term use carried with it a rebuttable presumption that it was held in stable

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[88]"Quaesita Varia," n. 18, *Periodica* 11 (1922) (author unknown) (157)-(158).

[89]Ibid., (158).

tenure. Cash and near-cash assets carried the opposite presumption, namely, that they were free capital. Aggregation to stable capital by implication occurred with respect to these liquid assets when such a presumption was overcome on the basis of the facts at hand, as when it was demonstrated that a true surplus of cash existed over and above foreseeable expenses, or that an investment taken as a whole (e.g., a portfolio of securities) was large relative to the other assets and liabilities of the moral person. The less liquid the investment, the more likely it was to be considered stable capital.

As a final comment with respect to implicit aggregation to stable patrimony, Cahill carefully pointed out that presumptions with respect to the nature of some types of property as stable patrimony and other types of property as free capital were presumptions of fact rather than of law, and therefore were always subject to rebuttal.[90] Canon 1825 of the 1917 code categorized a presumption as being either "*iuris*" (a presumption expressed in the law) or "*hominis*" (a presumption formulated by a judge), the latter equivalent, according to Cahill, to a presumption of fact.[91] Further,

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[90]Cahill, 278.

[91]Ibid. It should be pointed out that canon 1825 §2 referred to two forms of legal presumption, *iuris simpliciter* and *iuris et de iure*. According to canon 1826, a presumption *iuris simpliciter*, or simple presumption (e.g., a person of seven years was presumed to have the use of reason, c. 88 §3), could be rebutted by direct or indirect proof. A presumption *iuris et de iure* (e.g., a

canon 1828 of the 1917 code cautioned judges not to formulate factual presumptions unless they were based upon established facts which dealt directly with the matter in controversy. Drawing upon this, Cahill concluded that presumptions of fact "are no more than inferences, which are only as strong as the evidentiary facts which support them and the logical coherence seen to exist between those facts and the conclusion which is said to be 'presumed.' "[92]

Therefore, in stating that assets normally held long-term for usage or as investments carried the presumption of being stable patrimony in the hands of a juridic person, one could not formulate a sweeping conclusion regarding the strength of such presumption. Each case had to be decided according to its own facts and circumstances. It certainly appears that the presumption that such property was stable patrimony would be overcome by evidence that competent authority explicitly designated it to be held only temporarily or *not* as stable patrimony, but other cases would require a closer assessment of the available evidence.

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judicial decision that was *res iudicata* was presumed to be true and just, c. 1904 §1) could be rebutted only by indirect proof. F. Della Rocca and J. D. Fitzgerald, *Canonical Procedure, Philosophical-Juridic Study of Book IV of The Code of Canon Law* (Milwaukee: The Bruce Publishing Company, 1961) 239.

[92]Cahill, 278.

II. CANON 1533, ANTECEDENT OF CANON 1295

The 1917 code referred to alienation in what commentators called its wide sense in canon 1533, which stated that the solemnities set forth in canons 1530 through 1532 were required not only in alienation in the technical or strict sense (*proprie dicta*), but also in any contract whereby the condition of the Church might be worsened.[93] This was the immediate predecessor of canon 1295 of the 1983 code.

A. CANON 1533 INCLUSIVE OF TRANSFERS OF RIGHTS *IN REM* AND RIGHTS *IN PERSONAM*

A rather traditional description of an individual's ownership interest in specific property is to say that one possesses a right *in rem*, as opposed to a right *in personam*. A right is *in rem* when it (i) relates to particular property, and (ii) is generally protected against an indefinitely large number of persons.[94] An owner of land,

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[93]"Sollemnitates ad normam can. 1530-1532 requiruntur non solum in alienatione proprie dicta, sed etiam in quolibet contractu quo conditio Ecclesiae peior fieri possit."

[94]American Law Institute, *Restatement of the Law of Property* (St. Paul: American Law Institute Publishers, 1936) 1: 10.

The description of rights *in rem* contained in the *Restatement of the Law of Property* is relevant to the current discussion because canon 1529 of the 1917 code canonized civil law with respect to contracts except where a civil law provision was contrary to divine law or where the code provided otherwise. Moreover, the terms *in rem* and *in personam* continue to be employed in both American law and canon law, and they are derived from Roman law. J. B.

for example, has a right to that property which is enforceable against people at large. This contrasts with a right *in personam*, which, for example, may be a natural right of freedom from personal injury caused by a negligent or intentional act of others (an interest enforceable against an indefinitely large number of persons under the law of torts but not pertaining to property), or it could be a contractual, inchoate right of one person with respect to property but enforceable only against one or a limited number of other persons (as where an individual buyer has a contractual right to have a seller transfer ownership of property to him upon his tendering payment; the buyer's right is generally valid only with respect to the seller).

Stenger, *The Mortgaging of Church Property*, Canon Law Studies 169 (Washington: The Catholic University of America, 1942) 75, footnote 2. Stenger summarized the correct understanding of these and related terms as follows:

(1) *Dominium*, or ownership. This is a property right *in rem*, inasmuch as it is a right with respect to a thing which is enforceable against an indefinitely large number of persons.

(2) *Ius in re* (or, in the plural, *iura in re aliena*). This corresponds to a property right *in rem* which is less comprehensive than *dominium*. Examples would be an easement or a mortgage which run with the land: the holder of the easement has a right, for instance, to cross the land irrespective of who is in current possession; and the mortgagee retains the right of foreclosure in the event of nonpayment of the debt, irrespective of who is in current possession.

(3) *Ius ad rem*. This is equivalent to a right *in personam*. Based upon contract or other legal relationship, this is the right that one individual has to performance from another, such as a service, a forbearance from action, or the payment of a debt. The holder of the right retains no security in a specific thing upon which he could foreclose in the event that the other party failed to perform. Stenger, 75-77, footnote 2.

The scope of canon 1533 was subject to dispute among canonists, with some contending that the canon extended only to transactions which amounted to a transfer of property rights *in rem* short of an outright transfer of ownership,[95] whereas others held that the canon also encompassed the transfer of rights *in personam*. J. B. Stenger summarized the reasoning of those who limited canon 1533 to transactions involving rights *in rem* on the basis of three arguments, which he himself rejected:[96]

1. The argument that greater risk attaches to transfers of rights *in rem* than to transfers of rights *in personam*

It was contended that the transfer of rights *in personam* does not entail as much vulnerability on the part of the transferor as that of transferring rights *in rem*; hence, canon 1533 should not be understood as contemplating such remote risk. For example, when one who contracts a debt has not furnished the creditor with security in a specific asset, the creditor is relying on the general creditworthiness of the debtor. In the context of American civil law, the creditor would seek a personal judgment against the debtor in the event of the latter's default. Assuming the creditor prevailed, and the debtor still failed

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[95]An outright transfer of ownership would be alienation in the strict sense of the word, which would fall squarely within the requirements of canons 1530-1532 without the need for any intervening application of canon 1533.

[96]Stenger, 77-89.

to pay, the creditor would then have to institute a separate action to levy against whatever assets the debtor had.[97] When the debtor transfers to the creditor a right *in rem*, however, as, for example, by a mortgage in the case of real property or a security interest in the case of tangible personal property, the creditor may proceed directly against the asset upon the debtor's default and obtain a judgment good against any other parties who could not prove that they had a prior, superior interest in that same asset.

In response to this argument, Stenger noted that canon 1533 did not on its face distinguish among gradations of risk.[98] In addition to Stenger's comment, it should be noted that risk in the context of secured versus unsecured loans is of far more concern to the creditor than to the debtor. The creditor incurs less risk when he holds a mortgage or security interest in an asset of the debtor than if he is dependent on a simple contractual right (an *in personam* right, or, *ius ad rem*), because he then has a claim over specific property (a right *in rem*, or, *ius in re*) that takes precedence over the competing claims of other creditors. In the event of debtor insolvency, the secured creditors' claims will be satisfied first to the extent of

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[97]T. D. Crandall, R. B. Hagedorn, F. W. Smith, Jr., *Debtor-Creditor Law Manual* (Boston: Warren, Gorham & Lamont, Inc., 1985) [hereinafter Crandall-Hagedorn-Smith] 6-67, ¶6.05[1].

[98]Stenger, 78.

the property subject to a mortgage or security agreement. There may then be little remaining with which to discharge indebtedness to unsecured creditors.

As far as the risk to the debtor is concerned, even the unsecured creditor may enforce his contractual claim if in fact unsecured assets are available. Once the secured creditors are satisfied, the unsecured, or general, creditor may then obtain a lien on the remaining assets, effectively becoming a secured creditor with rights *in rem*. So, upon default the debtor is exposed to the loss of his property, whether or not his creditors are secured.

Heston, on the other hand, argued that canon 1533 should be interpreted as implicitly taking into account degrees of risk, even though no such qualification existed in the literal wording of the canon.[99] The basis of his opinion was that, in accord with canon 6, 2° of the 1917 code, one should interpret canon 1533 in light of previous legislation and the commentaries of notable authors with respect thereto, inasmuch as canon 1533 was a re-enactment of the prior law.[100] On the view that previous legislation restricted only the transfer of rights *in rem* and not rights *in personam*, Heston thought the same interpretation should be given to canon 1533.

In response to Heston, it should be noted that applying

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[99]Heston, *Alienation*, 128-131.

[100]Ibid., 130.

the restrictions on transfer only to rights *in rem* under prior law was subject to some divergence of opinion. The constitution *Ambitiosae* embodied the prior law on transactions falling under the concept of alienation. One such transaction was the *hypotheca*, or mortgage, which could be further subdivided into the general or special mortgage, although *Ambitiosae* did not note the distinction. Stenger explained the distinction between the two as follows:

> At times, all of a debtor's property was obligated to the payment of the debt, viz., by a General mortgage, while at other times only a specific portion or piece of property was agreed on as security, i.e., by a Special mortgage. The latter gave the creditor a "real" right (*jus in re aliena*), in contradistinction to a "personal" right or an obligation, which was transferred in the former.[101]

The general mortgage is in fact not considered a mortgage at all in Anglo-American law; it is rather in the nature of an unsecured debt, since the creditor in such a transaction holds only a right *in personam* with respect to the debtor. The special mortgage, on the other hand, is a true mortgage in the Anglo-American legal sense; the creditor has an interest in a specific asset of the debtor, a right *in rem*. In employing the term *hypotheca* without further precision, *Ambitiosae* left open the question of whether a general mortgage was to be considered an alienation. The commentators were not unanimous in their interpretations of the scope of the constitution with respect to the *hypotheca*.

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[101]Stenger, 26.

M. Merlin, for example, argued that a general mortgage was not subject to the prohibition on alienation, because it granted only a right *ad rem* (or, *in personam*).[102] Reiffenstuel, on the other hand, held that, as with a special mortgage, a general mortgage could not be incurred without the solemnities of alienation since alienation was taking place by means of the general mortgage.[103]

Even if one were to conclude that a so-called general mortgage was not subject to the prohibitions imposed by *Ambitiosae*, one must bear in mind a distinction made by Stenger[104] between *Ambitiosae* and the 1917 code: *Ambitiosae* did not restrict the alienation of all nonfungible movable property but only the alienation of immovable property and *precious* movable property, whereas canon 1530 extended the alienation restrictions to all nonfungible movable property. The free alienability of non-precious movable goods under *Ambitiosae* was the basis for not considering general mortgages to be alienations, according to H. Pirhing: if property had to be liquidated to pay a debt associated with a general mortgage, movable goods would be alienated first, and only in the event that they were insufficient to discharge the liability would the immovable property then be

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[102]M. Merlinus, *De Pignoribus et Hypothecis* (Venice: Apud Iuntas, & Barba., 1649) 187-188 (lib. 2, tit. 2, q. 85, nn. 7 and 8).

[103]Reiffenstuel, 4: 309, tit. 21, n. 34.

[104]Stenger, 78-79.

transferred.[105] In effect, the freely alienable movable property served as a buffer to protect immovable property from creditors. Once all nonfungible movable property was incorporated into stable patrimony in canon 1530, it was no more alienable than immovable property. Therefore, Heston's assertion that the alienation canons of the 1917 code did no more than reenact the prior law of *Ambitiosae*, and hence should be similarly interpreted, was unwarranted.

2. The argument that canon 1533 only applied to transactions which immediately affected specific patrimony

In speaking of the law prior to the 1917 code, Wernz asserted that alienation in the wide sense encompassed transactions which *in fact* worsened the condition of the Church's patrimony. His words were, ". . . generatim peioris conditionis *fiunt*" (emphasis added).[106] The fact that Wernz employed the word *fiunt* (the present indicative form of *fieri*, as opposed to utilizing the future indicative or the present subjunctive) implies that the transaction, in his view, had to have a direct and immediate effect on the

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[105]H. Pirhing, *Jus Canonicum Nova Methodo Explicatum*, 9th ed. (Dilingae: Per Joannem Michaelem Sporlin, 1722) 3: 272, lib. 3, tit. 21, n. 16.

[106]Wernz, 187, n. 154: ". . . etiam comprehendit [alienatio] illos actus legitimos, quibus bona ecclesiastica retento dominio directo quoad dominium *utile* vel usumfructum transferuntur aut aliis iuribus in illa concessis *periculo* amissionis exponuntur aut ad *longius tempus directae* possessioni Ecclesiae subtrahuntur aut generatim *peioris conditionis* fiunt" (emphasis in original).

value of the property in order to have the character of alienation in the wide sense. A general mortgage or unsecured debt does not directly and immediately affect specific property, and therefore was not alienation in the wide sense in Wernz' understanding of the term.

Stenger pointed out, however, that canon 1533 did not assert that such a strict effect had to obtain in order to make applicable the alienation requirements of canons 1530 through 1532, since canon 1533 referred to any transaction which *could* place the patrimony in a worse condition.[107] Moreover, as discussed above,[108] a civil court could transform a creditor's *in personam* right to a right *in rem* if the debtor failed to pay a legally enforceable debt and there were assets available against which such debt could be satisfied. It was therefore logical for Vermeersch-Creusen to include within the purview of canon 1533 a settlement between parties to a lawsuit,[109] and for Vromant to place a general mortgage within the scope of that same canon.[110]

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[107]Stenger, 84-85. It will be recalled that the relevant clause of canon 1533 was: ". . . sed etiam in quolibet contractu quo conditio Ecclesiae peior fieri *possit*" (emphasis added).

[108]P. 50, *supra*.

[109]Vermeersch-Creusen, 2: 598, n. 855. A settlement could entail one or both parties transferring or relinquishing their respective rights to patrimony.

[110]Vromant, 289, n. 345.

3. The argument that canon 19 of the 1917 code required a strict interpretation of laws which restricted the free exercise of rights[111]

Under this line of reasoning, canon 1533 was to be interpreted strictly or narrowly so as to afford the administrator the widest latitude in exercising his right of administration over stable patrimony. A strict or narrow interpretation would limit canon 1533 to transfers of all rights *in rem*. In response to this argument, Stenger argued that the focus of canon 19 was on personal rights of individuals and the rights of moral persons within the Church, rather than on the rights of agents of such persons in the discharge of their duties as such. Any rights contemplated under canon 19 in relation to stable patrimony inhered in the moral person owning the property involved, not in the administrator who acted as its agent.[112]

Stenger was correct in this observation, but Stenger's argument for excluding canon 19 from consideration would be insufficient on this basis alone because the moral person, in turn, did have a right to have its property alienated when beneficial to the moral person's overall patrimonial position and reason for existence. Canon 19 could be used to insure against the moral person losing the right of alienation.

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[111]C. 19: "Leges quae poenam statuunt, aut liberum iurium exercitium coarctant, aut exceptionem a lege continent, strictae subsunt interpretationi."

[112]Stenger, 80-81.

However, Stenger then strengthened his position by reminding the reader that ecclesiastical moral (juridic) persons were treated as minors, according to canon 100 §3 of the 1917 code. Canon 1527 §2 protected them from the negligence or malfeasance of their administrators, by enabling moral persons to disclaim liability for unauthorized contracts entered into by their administrators except to the extent that the moral person benefitted from the transactions.[113] For this additional and related reason, Stenger concluded that canon 19 could not legitimately be used to narrow the scope of restricted alienations of the property of moral persons by their administrators.

Stenger's reference to canons 100 §3 and 1527 §2 was indeed relevant to the issue of limiting the scope of canon 1533 by virtue of canon 19, but Stenger's argument appears to have been incomplete. Were there no more to be said, it is doubtful that a moral person's right to disclaim liability for an unauthorized and improvident decision of its administrator would eliminate the role of canon 19 as a safeguard (by providing a presumption regarding the scope of canon 1533) to the moral person's right to make contracts involving the possible disposition or encumbrance of its stable patrimony .

However, by way of canon 1538, the 1917 code itself

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[113]Ibid, 81.

resolved the matter of applying canon 19 based upon a distinction between rights *in rem* and rights *in personam*; while canon 19 might restrict the scope of canon 1533 on other bases, it did not restrict it on the basis of the *in rem-in personam* distinction. Canon 1538, discussed in greater detail in the section which follows, provided:

> §1. If, for legitimate cause, it is necessary to pledge or mortgage ecclesiastical goods, or if it is a matter of contracting debts, the legitimate Superior who is to grant the permission in accordance with canon 1532, will require beforehand that all interested parties be heard, and will endeavor to see that the debt is discharged as soon as possible.
>
> §2. To this end, the Ordinary will specify the amount that should be allocated annually to amortize the debt.[114]

In referring to the superior's compliance with canon 1532 with respect to debts (both secured and unsecured), canon 1538 left no doubt that the legislator intended an unsecured debt to be subject to the formalities of alienation, just as with other transactions which could endanger the patrimonial condition of a moral person. When a moral person contracted an unsecured debt, it transferred a right *in personam*. Canon 1538 was a specific application of canon 1533; therefore, canon 1533 pertained to transfers of rights *in*

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[114]"§1. Si ecclesiae bona, legitima interveniente causa, oppignoranda vel hypothecae nomine obliganda sint, vel agatur de aere alieno contrahendo, legitimus Superior, qui ad normam can. 1532 licentiam dare debet, exigat ut antea omnes, quorum interest, audiantur, et curet ut, cum primum fieri poterit, aes alienum solvatur.

"§2. Hac de causa annuae ratae ab eodem Ordinario praefiniantur quae exstinguendo debito sint destinatae."

personam as well as to transfers of rights *in rem*.

B. GENERAL CLASSES OF TRANSACTIONS WITHIN THE SCOPE OF CANON 1533

That canon 1533 was far-reaching in its applicability is clear from the conclusion that it encompassed the transfer both of rights *in rem* and rights *in personam*. What follows is a synopsis of the kinds of transactions subject to canon 1533. In Chapter Three attention will be directed to contemporary examples of transactions which may endanger patrimonial condition, and hence which fall under canon 1295 of the 1983 code.

1. Debt

Canon 1533, in effect, treated the subject of indebtedness incurred by a moral person because the canon addressed transactions in general which could jeopardize a moral person's stable patrimony. However, as stated above, canon 1538 of the 1917 code dealt explicitly with the issue of indebtedness assumed by a moral person and, therefore, was a specific application of canon 1533 to debts. To the extent that a debt could adversely affect a moral person's financial condition, canons 1533 and 1538 both would require adherence to the solemnities of alienation.

The element of potential risk to the financial condition of a moral person placed a limit on the applicability of these canons, but it should be noted that canon 1538 contained no such reference to risk; it referred

to contracting debts without any qualification. What, then, is the basis for limiting the applicability of canon 1538 to debts which are potentially damaging to the financial condition of a moral person?

First, while canon 1538 did not textually place limitations upon its application to debts, it did in the same provision refer to mortgages and pledges of existing ecclesiastical goods, legal transactions which necessarily placed those ecclesiastical goods at risk. Reading mortgages, pledges, and debts together in the same section, it would be incongruous to extend the reach of the canon to debts which did not endanger the financial condition of a moral person.

Second, it would also be incongruous to do so in light of canons 1530 through 1533, which were directed to transactions which constituted alienations of ecclesiastical goods or placed them at risk.

Third, and related to the second reason, canon 1538 §1 explicitly required the legitimate Superior to comply with canon 1532 in granting permission to contract debts. Canon 1532, however, dealt explicitly with alienations "in the strict sense," to use terminology employed by commentators on the 1917 code. Canon 1532 could only govern a debt transaction, which was alienation "in the wide sense," by way of canon 1533, but canon 1533 considered only contracts which could worsen the economic condition of a moral person

as within its ambit. Thus, one comes full circle to the conclusion that canon 1538 was concerned with contracting a debt only when doing so could present a risk to the financial situation of a moral person.

Stenger also maintained that the scope of canon 1538 excluded debt which did not result in financial risk:

> What then does canon 1538 mean to include in its transactions forbidden without the proper solemnities of alienation? Since it is one of the canons describing specifically the contracts mentioned generally in canon 1533, these of canon 1538 must be legally enforceable contracts which can harm the stable capital of the corporation entering them. There must be a transfer of *jus in re* or a *jus in rem* in reference to the stable capital.[115]

So, too, Vermeersch-Creusen observed that, while contracts of indebtedness were not subject to solemnities prior to the 1917 code, they fell under canon 1538 §1 *because* they were dangerous and detrimental.[116] Vromant stated that "contracts of alienation (special mortgages and pledges) and contracts which could worsen the condition of the Church (namely, general mortgages or contracts of indebtedness)" were subject to canon 1538 §1.[117]

In referring both to pledging or mortgaging

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[115]Stenger, 93.

[116]Vermeersch-Creusen, 2: 602, n. 860.

[117]Vromant, 289, n. 345: ". . . de contractu alienationis (hypotheca speciali vel oppignoratione) vel de contractu quo condicio Ecclesiae peior fieri possit (hypotheca nempe generali vel aere alieno contrahendo), . . ."

ecclesiastical property and to contracting debts in general, canon 1538 directed itself to secured and unsecured debts. For the sake of clarity, the remainder of this discussion of indebtedness is similarly divided.

a. Secured debt (mortgages and pledges)

When a loan was secured by immovable property, the legal relationship falling within canons 1533 and 1538 was that of a mortgage as it is understood in Anglo-American civil law ("special mortgage" or *hypotheca specialis* in traditional canonical terminology). When the loan was secured by movable corporeal or by incorporeal property, the legal relationship falling within canons 1533 and 1538 was either that of a security interest or of a pledge.

It should be borne in mind that canons 1533 and 1538, since they incorporated by reference the alienation canons, addressed situations actually or potentially involving stable patrimony. Therefore, if the moral person as debtor gave security in the form of property which was not part of its stable patrimony, the fact of having placed such property in jeopardy would not in itself cause the canons to apply.[118] This would occur, for example, when the moral person and creditor executed a security agreement giving the

[118]However, if the creditor could, in the event of a default, proceed against other assets of the debtor that were not included in the security agreement or mortgage (as where a liquidation of the secured property proved insufficient to discharge the balance of the debt), canons 1533 and 1538 might nonetheless apply.

creditor an interest in any future accounts receivable that the moral person might generate, although one would expect such cases to be rare. It would also occur with so-called nonrecourse debt, in which the moral person incurred the indebtedness to acquire an asset and, by agreement, the creditor limited the creditor's own remedy in the event of default to levying on that same asset (even if its fair market value in the meantime had depreciated below the outstanding debt).

b. Unsecured debt

Canon 1538 included the contracting of unsecured debts within its ambit. This is consistent with the argument previously advanced in this dissertation that canon 1533 covered the transfer of rights *in personam* and not just rights *in rem*, because incurring a debt without granting to the creditor any collateral for payment is nothing more than granting the creditor a right *in personam*. As with canon 1533, canon 1538 in effect held that, where such a transaction could pose a risk to the stable patrimony of a moral person despite the absence of any mortgage, security agreement or pledge, it was to be subject to the requirements for alienation.

Again, however, it must be emphasized that canons 1533 and 1538 applied only when stable patrimony could be placed at risk as a result of the debt. Therefore, canonists argued that "*operational*" debts could be contracted without

subjecting the moral person to the alienation solemnities.[119] "Operational" debts consisted of indebtedness incurred to defray ordinary, budgeted expenses, repayable within a short time period. The moral person would repay this indebtedness from its operating receipts, without any appreciable risk of having to delve into its stable capital.[120] Without this type of distinction in

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[119]Stenger,99; Heston, *Alienation*, 165; J. Creusen, *Religious Men and Women in the Code*, 5th Eng. ed. revised and edited to conform with 6th French ed. by A. C. Ellis (Milwaukee: The Bruce Publishing Company, 1953) 118, n. 164: "The debts and loans which may be paid each year from the certain revenues do not require a special authorization. These are not regarded as obligations which burden the budget of the community, but rather they are classed among extraordinary or ordinary current expenses."

The fact that in a given instance a debt had no potential adverse effect on stable patrimony would not, however, necessarily relieve the administrator of the obligation of obtaining permission from the local Ordinary, even though canons 1533 and 1538 did not apply. Such would be the case where the transaction exceeded the limits of ordinary administration, thereby falling within the ambit of canon 1527 §1. P. C. Augustine argued that "borrowing a considerable sum" was an act going beyond ordinary administration, evidently based upon the letter which the Sacred Congregation for the Propagation of the Faith directed to the dioceses in Holland in 1856 [S.C.P.F., July 21, 1856, n. 20 (*Collectanea*, vol. I, n. 1127; *Fontes* 7: 347-348, n. 4841)]. P. C. Augustine, *A Commentary on the New Code of Canon Law*, 3d ed. (St. Louis: B. Herder Book Co., 1931) 6: 589.

[120]An example of such operational debt would be a "bridge loan" of money which was small relative to the yearly revenues and value of the net assets of the moral person. These kinds of debts were low risk *both* because they could be defrayed from operating revenues *and* because they were rapidly turned over. Stenger referred to such indebtedness as "current" debts (Stenger, 99), and Heston wrote of them as having been incurred "to meet the expenses of the current year, for example, when experience has shown that the gross receipts of the year will make it possible to repay this debt within a very short time" (Heston,

categories of debts, daily, normal financial activities would have come to a standstill, because of the time required to obtain permission from legitimate authority and the virtual impossibility of coalescing ongoing transactions for the purpose of determining whether approval should be sought from the Apostolic See under canon 1532 §1, 2°.[121]

Alienation, 165). The short-term nature of the indebtedness referred to here was markedly different from the indebtedness subject to canons 1533 and 1538.

[121]Canon 1532 §1, 2° required the Apostolic See's approval for alienations of more than 30,000 lire or francs. For purposes of determining whether this threshold was met, the Pontifical Commission for the Authentic Interpretation of the Canons of the Code stated that the disposition of distinct properties owned by the same moral person, if made at the same time, would be treated as one. Pontificia Commissio ad Codicis Canones Authentice Interpretandos, *Responsa ad proposita dubia*, 20 July 1929, 21 *AAS* (1929) 573, *CLD* 1: 731.

Some commentators referred to this interpretation in the context of canon 1532 §4. See, e.g., Vermeersch-Creusen, 2: 598, n. 854; U. Beste, *Introductio in Codicem*, 3rd ed. (Collegeville, MN: St. John's Abbey Press, 1946) 765. Properly speaking, however, canon 1532 §4 did not deal with the "coalescing" of alienations of distinct properties, but, rather, with partitioning a single but divisible unit of property and alienating the divisions in separate transactions. In fact, the matter of coalescence did not expressly appear in the 1917 code, but was treated in light of the authentic interpretation of 1929 as a logical application of canon 1532 §1, 2°. Bouscaren-Ellis-Korth summarized the concept of coalescence as follows:

"Pieces of property must be taken together (*per modum unius*) when they coalesce for the purpose of alienation. This may occur in three ways:

"1. *By intention.* Once it is determined to alienate several pieces of property, their total joint value must be considered in reference to the permission needed, regardless of any time intervals between sales of individual pieces.

"2. *By time.* When several independent pieces of property are alienated within a short space of time, these acts become morally one.

"3. *By purpose*, that is, various items of property are alienated for the same purpose, e.g., it is decided to put

Another type of agreement which often effectively gives rise to an unsecured debt is that of an annuity. In its most basic form, one contractant agrees to make fixed, periodic payments to the other over a term of years or during the lifetime of the latter, in exchange for a lump sum of money or for property.[122] The Sacred Congregation for Religious held in 1936 that an annuity fell squarely within the provisions of canons 534 §1 and 1533 regarding

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up an addition to a building and there is no cash at hand. The estimated cost of the building is 65,000 Swiss francs and some church property is sold to meet the cost. Before the addition is finished, however, the actual cost runs to 75,000 Swiss francs. The permission of the Holy See would have to be obtained to alienate property to obtain the extra 10,000 Swiss francs since the combined value of the property alienated to pay for the addition is over 66,000 Swiss francs.

"Alienations of church property made independently, which do not coalesce by reason of intention or time or purpose are to be judged individually in relation to the permission required" (emphasis in original). Bouscaren-Ellis-Korth, 844-845.

The authentic interpretation cited at the beginning of this footnote was an illustration of coalescence on the basis of time. The Sacred Congregation for the Propagation of the Faith provided an illustration of coalescence on the basis of intention:

"If a piece of real estate is sold by parts, the various partial sales, for the purposes of canon 1532, coalesce if the partial sales (whether simultaneous or separated by some interval of time) are made with the intention of selling the entire piece; on the contrary they do not coalesce if one part is sold without the intention of selling the remainder." Sacra Congregatio de Propaganda Fide, *Sylloge*, n. 80, July 10, 1920 (Private), *CLD* 2: 447-448.

[122]It should be noted that annuities may or may not be secured.

debts.[123]

2. Loan to another party

Loans by moral persons to others could be of three kinds: (i) a loan for consumption, wherein the temporal good lent was fungible, with the intent that a like good be returned to the juridic person; (ii) a loan for use, wherein the good was nonfungible and the borrower was to restore it to the lender without any compensation for usage; and (iii) a lease, wherein the good was nonfungible and the borrower was to restore it to the lender with compensation for usage.

a. Loan for consumption

A "loan for consumption," or *mutuum*, was defined earlier in this chapter as an agreement whereby the recipient would consume the property in its first use (such property being in the nature of fungible goods), and in return promised to pay to the transferor property of the same kind or quality.[124] Canon 1543, which regulated the charging of interest on loans for consumption, was the principal legislation governing such loans because fungible goods typically did not constitute stable patrimony and hence were not usually within the scope of canon 1533 or the

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[123]*CLD* 2: 162-163. Canon 534 §1 specified the persons or bodies whose consent would be necessary for a valid alienation or the contracting of debts or other obligations by a religious order or congregation.

[124]p. 5, *supra*.

fundamental alienation canons. However, if a fungible item was part of the stable patrimony of the moral person lending it, as, for example, money that had been dedicated to stable patrimony, the solemnities of alienation under canons 1530 through 1532 would apply.[125]

b. Loan for use

When nonfungible goods were to be returned to the lender without any compensation for usage, the loan was known as a "loan for use," or *commodatum*. The borrower was to return the object that he received rather than a replacement; the lender renounced no title to the item. Therefore, no alienation in the strict sense occurred. However, a risk of loss or damage to the item loaned could, of course, exist, in which case canon 1533 technically would have applied if the loaned property fell within the category of stable patrimony. This at least was the position of Vromant, inasmuch as he explicitly included *commodatum* in his list of transactions illustrative of alienation in the wide sense.[126]

On the other hand, other commentators did not refer, at least not explicitly, to *commodatum* as a form of alienation in the wide sense, and they did not discuss the subjection

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[125]Vromant, in fact, contended that a loan for consumption was an alienation in the strict sense. Vromant, 246-247, n. 293. The rationale would be that the borrower consumed the good upon first usage.

[126]Ibid., 247, n. 293

of such loans to the rigors of canons 1530 through 1532.[127] It seems clear why this was so: loans for use would often be over such a short period as to present a negligible risk to the lending juridic persons, and in so many cases they would result from needs that arose quickly and had to be acted upon almost immediately, as in lending an automobile.[128] These situations made compliance with canon 1533 virtually impossible in practice.[129] The most that can be concluded is that where a loan of stable patrimony raised an appreciable risk of loss or damage, owing to such factors as the manner in which the property would be used or the

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[127]Wernz-Vidal, 222-223, n. 757; Augustine, 6: 593. It is unclear whether Vermeersch-Creusen contemplated *commodatum* as falling within a more general term which they did include as an example of alienation in the wide sense, *concessio ususfructus* (Vermeersch-Creusen, 2: 594, n. 851), and whether Conte a Coronata's usage of the broad terms *constitutionem usus* and *usumfructum* were meant by that commentator to encompass *commodatum* (Conte a Coronata, 489, n. 1070). Bouscaren-Ellis-Korth included within alienation "any act by which the use of property is transferred to another, as a rental, a lease, and the like." Bouscaren-Ellis-Korth, 838. It is unclear whether Bouscaren-Ellis-Korth, by employing the phrase "the like," contemplated loans for use as fitting within the concept of alienation.

[128]Although Vromant included *commodatum* in his definition of alienation in the wide sense, he did not subsequently discuss its relationship to canon 1533. However, in discussing canon 1537, which prohibited loans of sacred objects for uses repugnant to their nature, Vromant did comment that *commodatum* was not a particularly risky type of transaction ("Cum hic contractus minus sit periculosus, . . ."). Vromant, 287, n. 343.

[129]In this regard, it should be added that a law which was impossible to comply with did not bind. A. Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici* (Mechlininae-Romae: H. Dessain, 1930) 2 (*De Legibus Ecclesiasticis*): 89, n. 79.

duration over which the borrower would have possession, canon 1533 would apply and, hence, the moral person would have to be more deliberate in making its decision.

c. Lease and *emphyteusis*

Payments made by a borrower for use of nonfungible property are in the nature of rental payments, and the contractual relationship between lender and borrower is that of a lease, defined more particularly by Vromant as follows:

> A lease is a bilateral consensual contract by which some property is granted to another to be used, or *ad usum*, for a certain price or rent and for a determined period. [130]

Prior to the 1917 code, canon law regarded a lease in excess of three years as long-term and as an alienation in the broad sense, thereby subjecting it to the requirements of alienation.[131] Canon 1541 of the 1917 code changed the treatment of leases in two respects: first, canon 1541 established the distinction between long and short-term leases at nine years, not three years; second, canon 1541 prescribed detailed norms for leases, including requisite permissions depending on the duration and value of the lease.

While some commentators on the 1917 code continued to

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[130]Vromant, 292, n. 350: "Locatio est contractus consensualis bilateralis quo res aliqua alteri *utenda*, seu ad usum, pro certo pretio vel mercede ad tempus determinatum conceditur."

[131]Wernz, 187, n. 154. See Vermeersch-Creusen, 2: 604, n. 862.

consider leases as a form of alienation in the wide sense of the term,[132] others did not, reasoning that the detailed nature of canon 1541 had removed leases from the preceding canons governing alienation and, hence, from the categories of alienation in both the strict and wide senses.[133] For this latter group of canonists, the provisions of the alienation canons applied to leases (both those in excess of nine years and those of lesser duration) only insofar as canon 1541 referred to them.

It appears to this author that the view of those canonists who maintained that leases were no longer a form of alienation in the wide sense was correct. Canon 1541 applied canon 1531 §2 (dealing with requirements of public auction or announcement and of accepting the highest monetary offer) to leases and applied canon 1532 §§2 and 3 (dealing with levels of approval from competent ecclesiastical authorities) under specified circumstances. In other respects canon 1541 preempted the alienation rules; in making the alienation rules inapplicable, canon 1541 thereby rendered canon 1533 irrelevant to leases as well. Moreover, the requirement of canon 1541 §1 that a lease contain adequate safeguards for conserving the property and

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[132]Conte a Coronata, 489, n. 1070; Wernz-Vidal, 223, n. 757; Augustine, 6: 593; Bouscaren-Ellis-Korth, 844.

[133]Vermeersch-Creusen, 2: 594, n. 851; Vromant, 247, n. 293; F. M. Cappello, *Summa Iuris Canonici in Usum Scholarum*, 4th ed. (Rome: Apud Aedes Universitatis Gregorianae, 1945) 2: 578, n. 613.

obtaining prompt payment was intended precisely to prevent a moral person from entering into an arrangement which could worsen its economic condition.

An *emphyteusis* was dealt with under canon 1542. As mentioned earlier in this chapter,[134] *emphyteusis* was a form of long-term lease giving the lessee a right of assignment. The periodic payments of rental in an agreement of *emphyteusis* were collectively known as the "canon." An *emphyteusis* could be terminated early by a "redemption of the canon." In effect, the owner would be selling the property to the lessee (or *emphyteuta*). Canon 1542 §1 listed certain conditions under which a redemption of the canon could take place. It may summarily be stated that a redemption of the canon that comported with canon 1542 §1 entailed a direct application of canons 1530 through 1532 because it was an alienation in the strict sense; canon 1533 was not relevant to a redemption of the canon.

The more relevant issue was whether an *emphyteusis* itself was subject to canon 1533 at the time the agreement was executed. It has already been pointed out[135] that, in his general description of alienation, Vromant included *emphyteusis* as an example of alienation in the wide sense. Conte a Coronata agreed, reasoning that such an agreement could be detrimental to the economic condition of the Church

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[134]P. 6, *supra*.

[135]Pp. 4, 6, *supra*.

and making reference to canon 1533 by way of footnote.[136]

The complicating factor, however, was that canon 1542 §2 contained a special set of requirements for an *emphyteusis*, just as canon 1541 contained a special set of requirements for leasing in general. Vermeersch-Creusen did not include *emphyteusis* among their list of contracts governed by canon 1533, consistent with their contention that canon 1533 applied only to transactions not covered by special requirements in the canons following canon 1533, in accordance with the adage, "*Ne bis in idem.*"[137] On the other hand, the list of transactions given by Vermeersch-Creusen could not be considered as taxative, inasmuch as Vermeersch-Creusen made no reference to the special mortgage, which was among the most obvious examples of transactions to which canon 1533 applied.

In analyzing the question of whether or not *emphyteusis* was subject to the requirements of canons 1530 through 1532 as an alienation in the wide sense, it must be borne in mind that canon 1542 was positioned immediately after the general canon on long-term leases.[138] Inasmuch as an *emphyteusis*

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[136]Conte a Coronata, 503, n. 1077, footnote 10.

[137]Vermeersch-Creusen, 2: 598, n. 855.

[138]Canon 1541 governed all leases, but its principal focus was long-term leases. Canon 1541 §2, 3° effectively exempted shorter term leases with lower rent, giving the administrator the prerogative of signing a lease contract upon his notifying the Ordinary of such intent, where the term did not exceed nine years and the annual rent was no more than 1,000 lire or francs.

was a particular form of long-term lease, the positioning of the canons would suggest that an *emphyteusis* was governed by the provisions of canon 1541 with respect to long-term leases in general, as well as the provisions of canon 1542 specific to an *emphyteusis*. In the opinion of this writer, therefore, an *emphyteusis* was no more subject to the alienation requirements of canons 1530 through 1532 than other long-term leases. It should be added that, although Vromant conceptually included *emphyteusis* in his general definition of alienation in the wide sense, he proceeded to exclude it as an alienation for purposes of the 1917 code by categorizing it as a form of long-term lease.[139]

3. Guaranty or surety

A moral person exposed to the risk of harm to its stable patrimony where a loan was concerned need not have been the debtor. Instead, it could have been a third party acting as a guarantor or surety for the debt. In a guaranty, the third party-guarantor becomes liable for the debt should the debtor default in payment or performance of a contract. Under a surety contract, the third party commits itself to making payment to the creditor even before

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[139] "Emphyteusis ipsa, iure saltem Codicis, etsi dominium utile transfert, ac propterea condicio ecclesiae inde peior evadit, nihilominus *hodie* non aequiperatur alienationi proprie dictae, sed locationi diuturnae; ita ut quoad licentias necessarias attendatur non valor ipsius rei, sed valor locationis" (emphasis in original). Vromant, 296, n. 357.

a default of the debtor. Thus, whereas a guarantor's liability is collateral and secondary, a surety's obligation is primary.[140]

A moral person acting as a guarantor or surety was subject to canons 1533 and 1538 as if it were the principal debtor. In fact, it could be said that a moral person carried greater exposure in these cases because a guarantor or surety must rely on the debtor to perform under the principal contract while the guarantor or surety receives no benefit from the loan proceeds (absent a side-agreement between the debtor and the guarantor or surety to compensate for the assumption of risk).

4. Transaction or arbitration in financial matters

A transaction (*transactio*), also known as a "settlement" in Anglo-American law and dealt with in canons 1925 through 1928 of the 1917 code, is in the wide sense an agreement between parties to a dispute. More narrowly, it is a bilateral contract, with some concession being made by each party to the other (hence the term "onerosus" used by Vermeersch-Creusen), which has the effect of ending or preventing litigation.[141] Where ecclesiastical goods were involved in the settlement, canon 1927 §2 required the

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[140]Crandall-Hagedorn-Smith, 5-26 and 5-27, ¶5.06[1].

[141]Vermeersch-Creusen, 3: 128, n. 255: "Lato sensu pro omni compositione amicabili. Stricte intellecta est contractus onerosus bilateralis, qui ordinatur ad litem finiendam vel praeveniendam."

solemnities of alienation to be observed.[142]

In arbitration,[143] the parties to a dispute agree to submit their controversy to one or more persons for resolution, and under the 1917 code this was done in either of two ways: (i) by means of at least one "arbiter" who decided the matter in accordance with the substantive and procedural rules of canon law or (ii) by means of at least one "arbitrator" who examined and judged the dispute in accordance with principles of equity and prudence (*de bono et aequo*).[144] Canon 1930 provided that canon 1927 applied to arbitration, thereby subjecting a decision in arbitration to the laws concerning alienation where stable patrimony was involved.

While canons 1925 through 1932 governed ecclesiastical settlements and arbitration, the need to comply with the solemnities of alienation, referred to in canons 1927 and 1930, also applied by analogy to settlements and arbitration which took place in the civil forum as well, for the

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[142]C. 1927 §2: "Sed si quaestio fiat de bonis temporalibus ecclesiasticis et de iis rebus quae, etsi spiritualibus sunt adnexae, seorsum tamen a spiritualibus considerari queunt, transactio fieri potest, servatis tamen, si materia id postulet, sollemnitatibus a iure statutis pro alienatione rerum ecclesiasticarum."

[143]Cc. 1929-1932.

[144]C. 1929. See Della Rocca and Fitzgerald, 368-370; M. Cabreros de Anta, "De los modos de evitar el juicio contencioso," in *Comentarios al Código de Derecho Canónico*, ed. S. Alonso Morán et al. (Madrid: Biblioteca de Autores Cristianos, 1964) 3: 665.

obligation to observe the canonical requirements for alienation applied whenever there was risk of harm to stable patrimony, whether the risk arose from a canonical or civil undertaking.

It should be noted that a strong argument could be made for placing settlements under the category of strict alienation. A settlement involved an agreement which could definitively effect a transfer of ownership of stable patrimony, not merely place stable patrimony at risk. Nevertheless, commentators evidently categorized settlements, along with arbitration, as a form of alienation in the wide sense.[145]

5. Substituted agreement and novation

Parties to an already valid and binding contract may amicably agree to change its terms, and this in Anglo-American law is generally known as either a "substituted agreement" or a "novation."

In a substituted agreement, the subject matter of the original contract is changed.[146] For example, a buyer agrees to purchase condominium X from a developer for $100,000. However, condominium X is not available on time, and for the same consideration the buyer agrees to accept

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[145]Conte a Coronata, 489, n. 1070; Vermeersch-Creusen, 2: 598, n. 855.

[146]H. O. Hunter, *Modern Law of Contracts*, rev. ed. (Boston: Warren Gorham Lamont, 1993) 19-37, ¶19.05[1][a].

condominium Y, all other terms remaining the same.

The term "novation" is often used interchangeably with "substituted agreement," but the former is technically different from the latter. In a novation, the identity of one of the contracting parties is changed.[147] White and Black reach an agreement, but subsequently White agrees to accept performance from Gray in lieu of Black.

The effect of a substituted agreement or novation is similar to that of a settlement or arbitration award; namely, at least one party foregoes a right that it, at least arguably, possessed. Accordingly, if a moral person could jeopardize its stable patrimony by entering into a substituted agreement or novation, canon 1533 applied.

6. Servitude or easement

In canon law and in civil law countries, the term "servitude" is used to denote an enforceable, nonpossessory right that one party has with repect to land which is owned by someone else, and in common law countries this right is referred to by the word "easement."[148] However, in order to clarify terms, it should also be noted that common law countries use the term "servitude" as well, but usually in reference to the obligation of the landowner; in other words, "easement" focuses on the right of the non-owner,

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[147]Ibid., 19-37, ¶19.05[1][b].

[148]Heston, *Alienation*, 139.

whereas "servitude" focuses on the correlative burden of the landowner.[149]

Although an easement is a nonpossessory right to use land and, as such, is classified in American law as an incorporeal interest (or, "incorporeal hereditament") rather than an estate in land,[150] it is considered to be a property right (*in rem*),[151] rather than a mere contractual right (*in personam*).[152]

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[149]*Black's Law Dictionary* defines a "servitude" in the following manner: "Servitude: . . . A charge or burden resting upon one estate for the benefit or advantage of another; a species of incorporeal right derived from civil law and closely corresponding to the 'easement' of common-law, except that 'servitude' rather has relation to the burden, while 'easement' refers to the benefit or advantage or the estate to which it accrues." H. C. Black, *Black's Law Dictionary*, 6th ed. by J. R. Nolan and J. M. Nolan-Haley (St. Paul: West Publishing Co., 1990) 1370.

In American usage, however, the term "servitude" may sometimes be understood as carrying a broader meaning. J. L. Bross, for example, describes a servitude not as the burden attendant to an easement, but rather as a general category of interests in real property other than those of an estate or a tenancy. It would include, for example: easements, profits, licenses and real covenants running with the land. J. L. Bross, "Chapter 62, Servitudes," in *Thompson on Real Property, Thomas Edition*, ed. D. A. Thomas et al. (Charlottesville, VA: The Mitchie Company, 1984) 7: 499-501, §62.01. This usage of the term "servitude" emphasizes the benefit of a nonpossessory interest rather than a burden upon a landowner, which is similar to the way the term is employed in civil and common law countries.

[150]*Burris* v. *Cross*, 583 A.2d 1367, 1377 (Del. Super. Ct. 1990).

[151]*Magna, Inc.* v. *Catranis*, 512 So.2d. 912, 913 (Ala. 1987).

[152]J. H. Pearson, "Chapter 60, The Law of Easements: Rights in the Property of Another," in *Thompson on Real Property, Thomas Edition*, 7: 392-394, §§60.02(b)-(d).

One way to categorize easements or servitudes is in terms of a right to act or duty to refrain from acting: an *active* (or, positive) easement is the right of one to enter onto another's land for a specified purpose, such as to pass through it; and a *passive* (or, negative) easement is one which prohibits the owner of the land from doing something that would otherwise be lawful, such as cutting off electricity from a house on the owner's land.

Another manner of categorization is in terms of whether the beneficiary enjoys his right because he is the owner of neighboring property or whether it is simply a personal right. The canonical term "real servitude" corresponds to the former, in which the beneficiary who owns some land enjoys certain rights with respect to neighboring property, such as that of ingress and egress, rights which will inure to future owners of the current beneficiary's land. The canonical term "personal servitude" corresponds to situations in which the beneficiary enjoys a right with respect to someone else's real estate regardless of whether or not the beneficiary himself owns land, a right which terminates upon the beneficiary's death or other event specified by contract.

Vromant specifically referred to real servitudes as being included within the purview of canon 1533:

> Outstanding among the contracts included [within the application of canon 1533] are the following:
> . . .

> b) *a real servitude*, which corresponds to "any right inhering in land, regarding its utility, and diminishing the right or liberty of another to land": The Church's effective release of an *active* servitude is the equivalent of alienation; so also is the concession of a *passive* servitude, which burdens Church property (emphasis in original).[153]

In this brief reference to servitudes, Vromant restricted himself to "real" servitudes as falling within canon 1533. There seems, however, to be no reason why "personal" servitudes would not qualify as well, inasmuch as they too might indeed reduce the value of the property burdened with the servitude.

SUMMARY

In its strict sense, alienation was a transfer of ownership. In the wide sense, it involved a transfer of a legal or equitable right short of the loss of ownership but one which entailed exposure to the risk of loss or harm.

The restrictions on alienation, in either the strict or wide sense, were applicable only to ecclesiastical property (*res ecclesiasticae* or the equivalent *bona ecclesiastica*),

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[153]Vromant, 263, n. 311: "Contractus autem praesertim sunt sequentes: . . .

"b) Quoad *servitutem realem*, quae est 'quoddam ius praedio inhaerens, ipsius utilitatem respiciens, et alterius praedii ius sive libertatem diminuens': Alienationi aequiperatur remissio servitutis *activae* quae Ecclesiae competebat; vel servitutis *passivae* admissio, qua Ecclesiae proprietas gravatur" (emphasis in original. Vromant's quotation is from Reiffenstuel, 3: 241, n. 93).

which was defined in the 1917 code as the property of moral persons in the Church. The restrictions on alienation were also applicable only where what the commentators called "stable patrimony" was involved.

The term "stable patrimony" was not defined in the 1917 code; the term was derived from reflection upon canon 1530 §1 which applied the requirements for a valid alienation to immovable ecclesiastical property and to movable ecclesiastical property which was not consumed in its use. The fact that canon 1530 §1 referred to preservable ecclesiastical property did not exclude incorporeal property from its purview. Fungible items, such as money, could also be stable patrimony when it could be established that there was an intent to hold them as such, for assets were held as stable patrimony when they were so designated by the authority competent to do so. This status would automatically apply to proceeds received from the disposition of prior stable patrimony. Designation as stable patrimony could be explicit or implicit, and, in the case of immovable property and long-term investments, such designation was presumed.

Canon 1533 was the basis for commentators on the 1917 code speaking of alienation in the wide sense. Canon 1533 stated that the formalities of alienation applied to any contract which could worsen the condition of the Church (the term "Church" being understood as referring to moral persons

in the Church). The canon applied to contracts which transferred rights *in rem*, short of ownership, in regard to specific stable patrimony. It also applied more broadly to transfers of rights to others which did not involve specific stable patrimony owned by a moral person, but which obligated the moral person to perform certain actions or, at times, to forbear from performing actions. This latter group of rights were rights *in personam*. Rights *in personam* were included within the ambit of canon 1533 because, in the event that a moral person failed to discharge its obligation, the other party could take legal action to convert its right *in personam* to a right *in rem*.

The most obvious class of transfers of rights to which canon 1533 applied were those which resulted from a moral person incurring debt. In this connection, canon 1538 was a specific application of canon 1533. Canon 1538 called upon the Superior competent to approve the indebtedness in accord with canon 1532 to hear all interested parties beforehand, to provide for a discharge of the indebtedness as soon as possible, and to calculate the yearly amortization payments that would be required to do so. Canon 1538 referred explicitly to mortgaging and pledging ecclesiastical property while referring, generally, to contracting debts.

The special reference in canon 1538 to mortgages and pledges of ecclesiastical property underscored their direct effect on the financial condition of a moral person. A

mortgage was typically the most important instance of a contract which could place the financial condition of a moral person at risk because normally the moral person's most valuable stable patrimony was immovable property. Pledges referred to the transfer to creditors of rights in movable corporeal or incorporeal property to secure indebtedness. Mortgages and pledges of stable patrimony therefore constituted transfers of rights *in rem* to creditors of moral persons.

However, the general reference in canon 1538 to indebtedness without the qualification of being secured made clear that a transfer of rights *in personam* was also regarded as a risky transaction, and one to which the competent Superior would have to take sufficient precautionary measures as well. An example of indebtedness which the Sacred Congregation for Religious held to be subject to canon 1533 was an annuity, by which a moral person undertook to pay periodically a sum to the annuitant over a term of years or over the annuitant's lifetime, in exchange for a lump sum received at the time the agreement was executed.

In general, a loan of stable patrimony by a moral person to another party would also give rise to the application of canon 1533 if there was a risk that the stable patrimony could be lost or damaged. Such a loan could be one for consumption (*mutuum*) whereby the property

would be consumed by the borrower, and the borrower was obligated to return to the moral person other property of the same kind or quality. The most practical example would be cash which had been aggregated to stable patrimony. Or a loan could be for use (*commodatum*), whereby nonfungible property was transferred to the borrower to be returned to the lender without compensation.

Nonfungible property (both immovable and movable corporeal) could also be loaned by a moral person under a contract for rent, denominated as a lease. A particular type of long-term lease was *emphyteusis*, which conferred upon the lessee a right of assignment. While some commentators maintained that leases continued to be alienation in the wide sense under the 1917 code as they had been under pre-code law, this author is of the opinion that other commentators were correct in contending that leases and contracts of *emphyteusis* were not alienation in any sense under the 1917 code. Canons 1541 and 1542, with their detailed provisions for leasing, preempted the alienation provisions, with canon 1541 governing leases in general and canon 1542 constituting a special set of norms for *emphyteusis*.

A moral person could also risk exposing its stable patrimony to loss when it acted as a guarantor or surety for debt contracted by another party. Hence, these types of arrangements fell within the purview of canon 1533.

If a settlement in a canonical forum involved ecclesiastical goods, canon 1927 required that the moral person comply with the norms governing alienation. According to canon 1930, canonical arbitration which could adversely affect the stable patrimony of a moral person was likewise subject to the norms governing alienation. Settlements and arbitration were considered to be alienation in the wide sense. The same was true of settlements and arbitration in the civil forum which could place stable patrimony at risk.

If a moral person was a party to a contract which was later to be amended in such a way as to abridge the rights of the moral person in stable patrimony, amending the contract would be subject to canon 1533. This could take place through a "substituted agreement," which pertained to a change in the subject matter of the original contract, or through a "novation," under which a new party to the contract replaced an original party.

Finally, granting a servitude or easement in regard to immovable property could also occasion the application of canon 1533. This was because the enjoyment of the property by the moral person as owner could thereby be impeded, and because the consequent burden could result in a devaluation of the property.

Canon 1533 of the 1917 code, then, which was viewed by commentators as governing alienation "in the wide sense,"

embraced a number of different economic transactions. The canon was the immediate progenitor of canon 1295 of the 1983 code, the latter provision being the focus of Chapter Two.

CHAPTER TWO

CANON 1295 OF THE 1983 CODE

Canon 1295 of the 1983 code provides that transactions which may place a juridic person's patrimonial condition at risk are subject to the same requirements for liceity and validity as an alienation of valuable stable patrimony:

> The requirements mentioned in cann. 1291-1294, with which the statutes of juridic persons are to be in conformity, must be observed not only in an alienation but also in any transaction through which the patrimonial condition of a juridic person can be worsened.[1]

The alienation requirements of canons 1291 through 1294 generally require that there be (i) just cause for the transaction, (ii) prior permission granted by competent ecclesiastical authority, (iii) such safeguards as the ecclesiastical authority may specify in order to prevent harm to the Church, (iv) a receipt of proceeds which generally will not be less than the appraised value of the patrimony involved, and (v) a prudent investment or expenditure of the proceeds in accord with the purposes of

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[1]"Requisita ad normam cann. 1291-1294, quibus etiam statuta personarum iuridicarum conformanda sunt, servari debent non solum in alienatione, sed etiam in quolibet negotio, quo conditio patrimonialis personae iuridicae peior fieri possit."

the transaction.

In turning attention in this chapter to the current law governing transactions which may jeopardize stable patrimony, the objectives are as follows:

(i) To clarify the nature of the juridic persons to which canon 1295 applies;

(ii) To review the language of canon 1295 with respect to the types of financial activity which bring the canon into play. The focus is not so much on the ways in which patrimony may be placed at risk (a subject which was addressed in Chapter One and which will be returned to in Chapter Three in the context of American civil law) as on what constitutes a "transaction" for purposes of the canon; and,

(iii) To examine in detail the canons on alienation which are referred to in canon 1295.

I. APPLICABILITY OF CANON 1295 TO PUBLIC JURIDIC PERSONS

A. JURIDIC PERSONS

1. Juridic persons, pious foundations, and associations

The 1917 code provided for the existence of artificial persons within the Church which had rights and obligations, and these artificial entities were often referred to as "juridic persons" in the commentaries on that code. The 1917 code itself, however, called them "moral persons," as

in canon 1498 of the 1917 code, which clarified that the term "Church" for purposes of the canons on temporal goods encompassed the universal Church, the Apostolic See, and "moral persons" of the Church.

Canon law now utilizes the term "moral person" only in a limited sense and refers to artificial entities with legal personality as "juridic persons," as canon 113 of the 1983 code explains:

> §1. The Catholic Church and the Apostolic See have the nature of a moral person by divine law itself.
>
> §2. Besides physical persons, there are also in the Church juridic persons, that is, subjects in canon law of obligations and rights which correspond to their nature.[2]

A. Gauthier points out that canon 113 underscores the reality that "the Church preexists as a 'moral' entity, before the intervention of human positive law."[3]

A juridic person in the 1983 code is an artificial construct of the Catholic Church, a single, legal entity with rights and duties under canon law, distinct from the individuals which pertain to it, benefit from it or manage it. As such, it is analogous to a corporation created under

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[2]"§1. Catholica Ecclesia et Apostolica Sedes, moralis personae rationem habent ex ipsa ordinatione divina.
"§2. Sunt etiam in Ecclesia, praeter personas physicas, personae iuridicae, subiecta scilicet in iure canonico obligationum et iurium quae ipsarum indoli congruunt."

[3]A. Gauthier, "Juridical Persons in the *Code of Canon Law*," *Studia Canonica* 25 (1991) 81.

civil law. As with a corporation, a juridic person is generally perpetual.[4]

In the words of canon 114:

> §1. Juridic persons are constituted either by prescription of law or by special concession of the competent authority given through a decree; they are aggregates of persons or of things ordered towards a purpose congruent with the mission of the Church and which transcends the purpose of the individuals that make them up.
>
> §2. The purposes spoken of in §1 are understood as those which pertain to works of piety, of the apostolate or of charity, whether spiritual or temporal.
>
> §3. The competent ecclesiastical authority is not to confer juridic personality except upon those aggregates of persons or things which pursue a truly useful purpose and, all things considered, have resources which are foreseen to be sufficient to achieve their designated end.[5]

A juridic person is usually of perpetual duration, is

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[4]Perpetuity is the general principle. However, a juridic person may cease through legitimate suppression by competent authority, or because it has been inactive for one hundred years. In the case of a private juridic person, the entity may be extinguished according to the provisions of its statutes or, if it is a foundation, when competent authority decides that it no longer exists according to the norm of its statutes. C. 120 §1.

[5]"§1. Personae iuridicae constituuntur aut ex ipso iuris praescripto aut ex speciali competentis auctoritatis concessione per decretum data, universitates sive personarum sive rerum in finem missioni Ecclesiae congruentem, qui singulorum finem transcendit, ordinatae.
"§2. Fines, de quibus in §1, intelleguntur qui ad opera pietatis, apostolatus vel caritatis sive spiritualis sive temporalis attinent.
"§3. Auctoritas Ecclesiae competens personalitatem iuridicam ne conferat nisi iis personarum aut rerum universitatibus, quae finem persequuntur reapse utilem atque, omnibus perpensis, mediis gaudent quae sufficere posse praevidentur ad finem praestitutum assequendum."

established by the law itself or by decree from competent authority, and has a purpose in keeping with the mission of the Church. It should be noted that canon 115 §1 repeats the description of juridic persons as *universitates* either of persons or things. Use of the term "aggregates" to translate *universitates* carries the inaccurate connotation that a juridic person is a composite of persons or things; such is not the case. The juridic person is independent, with rights and duties apart from the rights and duties of those who may be members or attendant upon the things that form the substratum of the juridic person. The imprecision is understandable, in that *universitates* is not readily translatable into English.

Of course, aggregates of persons or things may or may not have juridic personality, depending upon whether or not, as canon 114 §1 points out, they are constituted as such. Insofar as aggregates of things, or *universitates rerum*, are concerned, when they are erected as juridic persons by competent ecclesiastical authorities in accordance with canon 1303 §1, 1°, they are known as "autonomous pious foundations" (*piae fundationes autonomae*). Foundations which have no juridic personality are called "non-autonomous pious foundations" (*piae fundationes non autonomae*).[6] Non-autonomous foundations are a form of pious trust which requires long-term administration, with a public juridic

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[6]C. 1303 §1, 2°.

person acting as the trustee.[7]

With respect to *universitates personarum*, canon 215 enunciates the basic right of the Christian faithful to found and govern "associations for charitable and religious purposes or for the promotion of the Christian vocation in the world."[8] R. Pagé has grouped associations into three general categories: *de facto* associations, private associations which are recognized as such and which may or may not have been erected as juridic persons, and public associations (which always have juridic personality).[9] *De facto* associations are not discussed in the 1983 code, but emanate immediately from the exercise of the right of association.

The concept of a recognized association, however, finds expression in Title V of Part I of Book II, entitled "Associations of the Christian Faithful" (*De Christifidelium Consociationibus*), canons 298 through 329. Canon 298 §1 lists in somewhat more detail than canon 215 the purposes

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[7]That is, under canon 1303 §1, 2°, the non-autonomous foundation is not a separate juridic person; rather, property is donated to an existing public juridic person which acts as trustee, to employ the annual income generated by the trust principal for the celebration of Masses or other specified ecclesiastical functions or purposes generally described in canon 114 §2. The trust is long-term and only the income is to be used for such purposes; the principal remains intact.

[8]". . . consociationes ad fines caritatis vel pietatis, aut ad vocationem christianam in mundo fovendam, . . ."

[9]R. Pagé, "Associations of the Faithful in the Church," *The Jurist* 47 (1987) 167.

for which an association may exist:

> . . . to promote a more perfect life or to foster public worship or Christian doctrine or to exercise other apostolic works, namely to engage in efforts of evangelization, to exercise works of piety or charity and to animate the temporal order with the Christian spirit.[10]

According to canon 299 §1, the faithful may privately agree among themselves to establish an association to carry out the objectives of canon 298 §1, except for teaching Catholic doctrine in the name of the Church or for promoting public worship (functions reserved to associations erected by competent ecclesiastical authority pursuant to canon 301 §1). Such an association, at first *de facto*, becomes a recognized "private association" when its statutes "are reviewed" (*recognoscantur*) by competent ecclesiastical authority, according to canon 299 §3. The conditions for the recognition of a private association may thus be summarized as (i) the association having an end which conforms to those established in canon 298 §1 and (ii) its statutes having been reviewed by competent ecclesiastical authority.

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[10]". . . ad perfectiorem vitam fovendam, aut ad cultum publicum vel doctrinam christianam promovendam, aut ad alia apostolatus opera, scilicet ad evangelizationis incepta, ad pietatis vel caritatis opera exercenda et ad ordinem temporalem christiano spiritu animandum."

L. Martínez Sistrach observes that the content of canon 298 §1 coincides with (and may be viewed as a codification of) article 17 of the decree *Christus Dominus* and article 19 of the decree *Apostolicam actuositatem*. L. Martínez Sistrach, "Asociaciones Públicas y Privadas de Laicos," *Ius Canonicum* 26 (1986) 152-153.

According to canon 94 §1, the term "statutes" consists of "ordinances which are established in aggregates of persons or of things according to the norm of law and by which their purpose, constitution, government and operation are defined."[11] Canon 304 §1 refines the concept of statutes in the context of an association by requiring that they "define the end of the association or its social objective, its headquarters, its government, the conditions of membership and by whom its policies are to be determined, according to the need or utility of time and place."[12]

The fact that a private association is recognized in the Church does not confer upon it rights and obligations distinct from those of its members, who may jointly contract duties and acquire rights, including those of co-ownership and possession of goods.[13] The ascription of rights and

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[11]C. 94, §1: "Statuta, sensu proprio, sunt ordinationes quae in universitatibus sive personarum sive rerum ad normam iuris conduntur, et quibus definiuntur earundem finis, constitutio, regimen atque agendi rationes."

[12]C. 304, §1: "Omnes christifidelium consociationes, sive publicae sive privatae, quocumque titulo seu nomine vocantur, sua habeant statuta, quibus definiantur consociationes finis seu obiectum sociale, sedes, regimen et condiciones ad partem in iisdem habendam requisitae, quibusque determinentur agendi rationes, attentis quidem temporis et loci necessitate vel utilitate."

[13]C. 310. A reply from the Pontifical Commission for the Authentic Interpretation of the Code states that rights and obligations jointly contracted by the faithful need not depend upon their association being recognized, which implies that canon 310 applies to all private associations, whether recognized or not, and therefore to *de facto* associations. Pontificia Commissio Codicis Iuris Canonici Authentice Interpretando, *Responsiones ad proposita dubia*,

obligations to a private association as an entity distinct from its members occurs only upon the conferral of juridic personality. On the other hand, even a private association having no canonical juridic personality (whether or not it is a recognized association under canon law) may attain legal personality under civil law through civil incorporation.

In order to attain a decree conferring the status of a private juridic person, (i) competent authority must have determined that the entity has useful ends;[14] (ii) such authority must also have determined that the entity has sufficient means to achieve those ends;[15] and, (iii) the statutes of the entity must be "approved" (*probata*) by competent ecclesiastical authority[16].

2. Public contrasted with private juridic persons

Juridic persons may be public or private. Canon 116 defines public juridic persons in positive terms, and private juridic persons residually:

AAS 80 (1988) 1818, translated by L. G. Wrenn, *Authentic Interpretations of the 1983 Code* (Washington: Canon Law Society of America, 1993) 46-47. According to the reply, a group of the faithful, lacking juridic personality and even recognition under canon 299 §3, could initiate hierarchical recourse against a decree of its own diocesan bishop.

[14]C. 114 §3.

[15]Ibid.

[16]Cc. 117 and 322 §2.

> §1. Public juridic persons are aggregates of persons or things which are so constituted by the competent ecclesiastical authority that, within the limits set for them in the name of the Church, they fulfill a proper function entrusted to them in view of the common good, in accord with the prescripts of law; other juridic persons are private.
>
> §2. Public juridic persons are given this personality either through the law itself or by a special decree of the competent authority expressly granting it; private juridic persons are given this personality only through a special decree of the competent authority expressly granting this personality.[17]

In analyzing the differences between a public and private juridic person, one might take as a point of departure the ends which the two categories of juridic person respectively pursue. Gauthier describes this as the traditional approach to contrast public institutions in the Church with private ones, the former (which he refers to as "Church institutions") being founded "to further the activity of the Church, to act in the name of the Church."[18] Canon 301 §1 sets forth those functions which are reserved to public juridic persons: to teach Christian doctrine in

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[17]"§1. Personae iuridicae publicae sunt universitates personarum aut rerum, quae ab ecclesiastica auctoritate competenti constituuntur ut intra fines sibi praestitutos nomine Ecclesiae, ad normam praescriptorum iuris, munus proprium intuitu boni publici ipsis commissum expleant; ceterae personae iuridicae sunt privatae.

"§2. Personae iuridicae publicae hac personalitate donantur sive ipso iure sive speciali competentis auctoritatis decreto eandem expresse concedenti; personae iuridicae privatae hac personalitate donantur tantum per speciale competentis auctoritatis decretum eandem personalitatem expresse concedens."

[18]Gauthier, 90.

the name of the Church, to promote public worship, and to pursue any other ends which by their nature are reserved to ecclesiastical authority.

However, it is submitted that, with the exceptions contained in canon 301 §1, differentiating the two classes of juridic person on the basis of distinct ends is erroneous, for the ends of public and private juridic persons are really the same; canon 114 §2 explicitly presents the ends of all juridic persons as "works of piety, of the apostolate or of charity, whether spiritual or temporal." These ends are "congruent with the mission of the Church."[19] Indeed, in the context of *universitates personarum*, the description of ends in canon 114 §2 is no more specific than that of canon 298 §1 and could therefore apply to private associations without juridic personality as well.

At the same time, it appears that Gauthier confuses the ends of public juridic persons and the means used to achieve the ends. In his statement that these types of entities are founded "to further the activity of the Church, to act in the name of the Church," Gauthier evidently intends his second clause to be equivalent to his first. In fact, however, they are not equivalent; the former clause refers to the mission of the Church, in which the faithful participate whether or not through a public juridic person,

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[19]C. 114 §1.

while the latter clause refers to a means which is confined to public juridic persons.

It is in contrasting these means, as M. G. Moreno Antón argues, that one distinction between public and private juridic persons is to be found.[20] Canons 116 §1 and 313 provide that the public juridic person acts *in nomine Ecclesiae*, the Church thereby committing itself to, and vouching for, those actions of the public juridic person which are within the competence conferred upon it. F. Coccopalmerio expresses the representative nature of the public juridic person by stating that the Church itself is acting through the public juridic person.[21]

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[20]M. G. Moreno Antón, "Algunas Consideraciones en Torno al Concepto de Bienes Eclesiasticos en el C.I.C. de 1983," *Revista Española de Derecho Canónico* 44 (1987) 86.

[21]"Quid sibi vult 'Ecclesiae nomine agere'? Actio-prout videtur-personae iuridicae publicae refertur ipsi Ecclesiae, est actio ipsius Ecclesiae, in persona iuridica publica ipsa Ecclesia agit." F. Coccopalmerio, "De Persona Iuridica iuxta Schema Codicis Novi," *Periodica* 70 (1981) 374.

The 1983 code does not define the term *in nomine Ecclesiae*, but the issue of its meaning did arise in the drafting process. Gauthier summarizes the position of the *coetus* "De personis physicis et moralibus" as having maintained that, in the case of a public juridic person, to act *in nomine Ecclesiae* meant to act in the name of the hierarchy (Gauthier at 90). In its discussion of the term *in nomine Ecclesiae*, the *coetus* held that the "mission of the entire Church" should not be confused with the "hierarchical functions of the individual Holy Pastors" ("*Confundenda enim non sunt--uti iam dicebatur--missio totius Ecclesiae atque munera hierarchica Sacrorum Pastorum propria.*") *Communicationes* 21 (1989) 145. A consultor then added that *in nomine Ecclesiae* meant "*nomine Auctoritatis publicae Ecclesiae,*" or, "in the name of the public Authority of the Church" (Ibid.). A new formula for what would be canon 116 §1 was then proposed: "§1. Personae iuridicae seu canonicae pubblicae [*sic*] sunt personarum

The scope of a public juridic person's competence will be limited in concrete cases to certain ends for which individual public juridic persons are erected, but those ends are not exclusive to them since they correspond to canon 114 §1 and, hence, may be pursued by private juridic persons. Canon 313 states that the public juridic person "receives a mission to pursue the ends which it proposes for itself in the name of the Church, to the extent that such a mission is required."[22]

In pursuing its ends, a public juridic person may undertake initiatives consistent with its statutes but is subject to direction by the competent ecclesiastical authority which has established it.[23] A specific application of the foregoing principle concerns temporal

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communitates ac rerum complexus, qui ab auctoritate ecclesiastica competenti eriguntur ac deputantur ut intra fines sibi praestitutos nomine Ecclesiae agant; . . ." (Ibid.). It may be stated that ecclesiastical authority (or the hierarchy) participates in the mission of the Church, and public juridic persons participate in the mission of the Church under the governance of ecclesiastical authority.

[22]". . . missionem recipit, quatenus requiritur, ad fines quos ipsa sibi nomine Ecclesiae persequendos proponit."

It should be noted that canons 216 and 313 both employ the word "mission" (*missionem*), but not equivalently. In the context of canon 216, *missionem Ecclesiae* is synonymous with the general ends of the Church, that canon clarifying that all the faithful participate in those general ends, or, mission, of the Church. Canon 313 uses the term more narrowly in reference to the individually approved means by which a public juridic person pursues those ends, namely, by acting in a hierarchically approved capacity which represents and binds the Church.

[23]C. 315.

goods; canon 319 §1 provides that a public juridic person must administer its goods in accord with its statutes but is under the overall direction of competent ecclesiastical authority and must provide a yearly accounting. By canon 319 §2, a public juridic person must also account to the same authority for expenditures made by it of contributions and alms received. Thus, a public juridic person is subject to significant ecclesiastical governance.

On the other hand, a private juridic person acts in its own name and under its own responsibility, although, where it is an association of the faithful (*universitas personarum*, as opposed to *universitas rerum*), it is subject to the vigilance of competent ecclesiastical authority regarding the application of goods to the purposes of the association, pursuant to canon 325 §1.

In this light, even the provision of canon 301 §1 which permits only public juridic persons to "teach Christian doctrine in the name of the Church" goes to the means employed (that of discharging the function in an official capacity as representative of the ecclesiastical authority that erected such person) rather than to the function itself, inasmuch as all associations of the faithful may "promote . . . Christian doctrine" pursuant to canon 298 §1.[24]

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[24]Another instance of the code's recognition of the right to teach doctrine is found in canon 229 §1, which calls upon the laity to acquire doctrine in order, among

Another distinction between public and private juridic persons is based upon the moment in which competent ecclesiastical authority intervenes. Moreno Antón writes of two relevant "moments" with respect to the private juridic person: the underlying "constitutive moment," in which a private association is created,[25] and the subsequent point at which it receives juridic personality.[26] The former results from private initiative of the faithful exercising its right of association. The latter results from a special decree of competent ecclesiastical authority.[27]

In contrast, there is no separate "constitutive moment" in which a public association exists without juridic personality. Ecclesiastical authority takes the initiative in erecting such an association by decree, and by such action the association receives juridic personality pursuant to canon 313.

Summarizing, (i) a public juridic person serves the mission of the Church by acting *in nomine Ecclesiae*; (ii) a public association of the faithful (which can be erected only by competent ecclesiastical authority) has juridic

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other things, to announce it and defend it. In a wide sense, this amounts to teaching Christian doctrine in an unofficial capacity.

[25]As discussed above, this is a different matter from that of recognizing a private association, which always involves ecclesiastical authority.

[26]Moreno Antón, 84-85.

[27]C. 116 §2.

personality from its inception; (iii) a private juridic person serves the mission of the Church on its own responsibility, consistent with the right of the faithful to associate freely in the Church; and, (iv) the faithful by its own initiative must first form a private association before competent authority can confer juridic personality on it by decree. Notwithstanding the general role of vigilance that ecclesiastical authorities have with respect to all juridic persons, it is logical that the goods of private juridic persons should be regarded as private rather than ecclesiastical.[28]

Although the foregoing analysis of public versus private juridic persons focuses on entities under the division of *universitates personarum*, the same reasoning applies to *universitates rerum*. The faithful are certainly free to set up an entity comprised of things rather than persons, with the objective of serving a pious cause. They may at some point seek from ecclesiastical authority conferral of juridic personality, public or private, upon that entity. Alternatively, ecclesiastical authority may itself erect an entity having things rather than persons as its substratum which, from its inception, fulfills the

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[28]Canon 1257 reflects this logic by providing that the temporal goods of the universal Church, the Apostolic See and other public juridic persons are ecclesiastical goods subject to regulation under the 1983 code as well as by their own statutes, whereas the temporal goods of private juridic persons are regulated only by their own statutes unless the code expressly provides otherwise.

criteria of canon 114 and has the status of a public juridic person.

B. CANON 1295 APPLIES ONLY TO PUBLIC JURIDIC PERSONS

The distinction between public and private juridic persons in the 1983 code has generally been said to emanate from the right of association[29] which was articulated in the conciliar decrees *Apostolicam actuositatem*[30] and *Presbyterorum Ordinis*.[31] While both types of juridic persons work for the common good of the Church, the public juridic person does so pursuant to a specific function entrusted to it by ecclesiastical authority under whom it acts in the name of the Church.

Public juridic persons may be aggregates of persons or things, as stated above. If they are aggregates of persons, they may be collegial or non-collegial.[32] An example of a public juridic person which is a collegial aggregate of persons is a religious institute.[33] A diocese and a parish,

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[29]Pontificio Commissio Codici Iuris Canonici Recognoscendo, *Relatio* (Vatican City: Typis Polyglottis, 1981) 39.

[30]Decree on the apostolate of the laity, *Apostolicam actuositatem*, November 18, 1965, nn. 19-24, AAS 58 (1966) 853-857.

[31]Decree on the ministry and life of priests, *Presbyterorum Ordinis*, December 7, 1965, n. 8, *AAS* 58 (1966) 1003-1005.

[32]C. 115 §2.

[33]A religious institute holds elections, as described, for example, in canons 625-626.

on the other hand, are two examples of public juridic persons which are non-collegial aggregates of persons.[34]

An autonomous pious foundation is one example of an aggregate of things constituting a public juridic person under canon 1303 §1, 1°. Another example is a church cared for by a rector, which "is neither parochial nor capitular nor connected with a house of a religious community or of a society of apostolic life."[35] The rector administers the goods of such a church.[36]

While a public juridic person acts in the name of the Church and is closely governed by ecclesiastical authority, a private juridic person acts in its own name, reflecting the autonomy and freedom of the faithful to take initiatives and form associations and foundations which pursue the ends of religion and piety.[37] One would expect this autonomy to

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[34]Canon 369 provides that a diocese, a "portion of the people of God" (*populi Dei portio*), is entrusted to a bishop for pastoral care. Canon 515 §1 provides that a parish is "a definite community of the Christian faithful" (*certa communitas christifidelium*) entrusted to a pastor for pastoral care by the diocesan bishop.

[35]C. 556: ". . . , quae nec sit paroecialis nec capitularis, nec adnexa domui communitatis religiosae aut societatis vitae apostolicae, . . ."

[36]C. 562.

[37]W. Onclin, Relator, Coetus "De personis physicis et iuridicis," *Communicationes* 6 (1974) 99: "*Distinctio in personas iuridicas publicas et privatas etiam admittitur.* Haec distinctio facienda est, cum in iure recognito de christifidelium associationibus expressius quam in iure Codicis stabilitur integrum esse christifidelibus omnibus ut libere condant atque moderentur consociationes ad eos fines religionis vel pietatis prosequendos, quorum persecutio non

be especially apparent with regard to the management and disposition of temporal goods by private juridic persons, but in fact it has been the subject of some disagreement, to be considered below.

Notwithstanding such disagreement, the issue of whether or not canon 1295 applies to private as well as to public juridic persons, or only to public juridic persons, seems readily resolvable. The issue arises because of the wording of canon 1295 which speaks only of "juridic persons," without specifying which of the two categories of juridic persons is intended.

1. Arguments for applying canon 1295 only to public juridic persons

    a. Book V applies to public juridic persons, not to private juridic persons unless otherwise expressly provided

In addressing the issue of the scope of canon 1295, an appropriate starting point would seem to be to recall the content of canon 1257, one of the preliminary canons of Book V:

> §1. All temporal goods which belong to the universal Church, the Apostolic See, or other public juridic persons within the Church are ecclesiastical goods and are regulated by the following canons as well as by their own statutes.

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uni Ecclesiae auctoritati reservatur" (emphasis in original). One would include works of charity as an additional end.

> §2. The temporal goods of a private juridic person are regulated by their own statutes, but not by the following canons unless express provision is made to the contrary.[38]

In establishing the requirement that a canon of Book V must make express reference to private juridic persons in order to apply to such entities, canon 1257 creates a presumption that, in the event of ambiguity or doubt as to the applicability of a provision of Book V to private juridic persons, the provision should be interpreted to exclude such applicability. Any assertion that canon 1295 includes private juridic persons within its purview must overcome this presumption.

b. It is consistent to apply canon 1295 to the same entities as those to which canons 1291 through 1294 apply

Canon 1295 directs that the transactions to which it applies are subject to the requirements of canons 1291 through 1294. Canons 1291 through 1294 contain various requirements for the valid and licit alienation of stable patrimony belonging to public juridic persons. These alienation provisions are concerned with insuring against the improper disposition of the valuable patrimony of public juridic persons, and they do so by imposing certain

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[38]"Can. §1. Bona temporalia omnia quae ad Ecclesiam universam, Apostolicam Sedem aliasve in Ecclesia personas iuridicas publicas pertinent, sunt bona ecclesiastica et reguntur canonibus qui sequuntur, necnon propriis statutis.
"§2. Bona temporalia personae iuridicae privatae reguntur propriis statutis, non autem hisce canonibus, nisi expresse aliud caveatur."

safeguards; the canons are not concerned with the temporal goods of private juridic persons. Canon 1291 explicitly refers only to public juridic persons,[39] and no argument has been advanced for applying it also to private juridic persons.

Canon 1295 is directed to transactions which are less radical than outright alienations. Transactions which are subject to canon 1295, to the extent that they are related to alienation, expose the relevant entities only to the *possibility* of forced alienations in the future. The effect on the patrimonial condition when immovable property is mortgaged, for example, is clearly less than the effect of making an outright disposition of such property.

If the drafters of Book V chose not to apply canons 1291 through 1294 to alienations made by private juridic persons, it would be anomalous to consider these canons applicable to transactions of private juridic persons which carry consequences that are less drastic than direct alienations of patrimony.

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[39]Canon 1291 requires permission from competent authority for the valid alienation of temporal goods exceeding a certain value and "which through lawful designation constitute the stable patrimony of a *public* juridic person" (quae personae iuridicae *publicae* ex legitima assignatione patrimonium stabile constituunt) (emphasis added).

c. Canon 1295 is to be interpreted in conjunction with canons 1291 through 1294 as a single sequence of canons

That canon 1295 pertains only to the stable patrimony of public juridic persons is also evident from the scope of the three canons which precede it, canons 1292 through 1294. None of these three canons contains the phrase "public juridic person," and yet there is no doubt that their application is limited to that type of entity, given that the first of the alienation canons, canon 1291, explicitly refers to the public juridic person as the subject of its requirement of securing permission to alienate from competent ecclesiastical authority.

An earlier draft of canon 1292, which defines the various levels of authority competent to grant the permission required by canon 1291, had, in fact, contained explicit reference in its first section to "public juridic persons" (*personas iuridicas publicas*), but the phrase was changed to "juridic persons" (*personas iuridicas*) without the qualifier, and without any reason stated in the published legislative history for the deletion.[40]

Since canons 1292 through 1294 must be interpreted in light of canon 1291, it is entirely consistent that canon 1295 be interpreted in the same light. Canon 1295 directs itself to any transaction "through which the patrimonial condition of a juridic person can be worsened," but it also

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[40]*Communicationes* 12 (1980) 423.

contains the ancillary requirement that the "statutes of juridic persons are to be in conformity" with canons 1291 through 1294. If private juridic persons were subject to canon 1295, they would be in the bizarre situation of having to include in their statutes the requirements associated with alienation, when it is clear that canons 1291 through 1294 do not apply to private juridic persons.

2. Arguments for applying canon 1295 also to private juridic persons, and responses thereto

There is an opinion which would have canon 1295 apply to private as well as public juridic persons. The chief exponent of this view has been F. R. Aznar Gil, who advances several reasons for his position:[41]

a. Canon 1295 implicitly includes private juridic persons within its scope

Aznar Gil maintains that, although canon 1295 does not explicitly refer to private juridic persons, it is nonetheless expressly applicable to such entities.[42] "Expressly" applicable, for Aznar Gil, does not mean "explicitly" applicable.[43]

Aznar Gil is correct in asserting that the words

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[41]F. R. Aznar Gil, *La Administración de los Bienes Temporales de la Iglesia*, 2d ed. (Salamanca, Spain: Publicaciones Universidad Pontificia Salamanca, 1993) 427-431.

[42]Ibid., 40-41, 428.

[43]Ibid., 56-57. Aznar Gil acknowledges that an express indication may be explicit or implicit.

"express" and "explicit" are not synonymous. M. Conte a Coronata, in his discussion of canon 11 of the 1917 code (the forerunner of canon 10 of the 1983 code), maintained that laws were expressly invalidating or incapacitating when they explicitly so stated or when they consisted of words which had the same import or effect.[44] In treating that same canon 11, G. Michiels wrote that the invalidity of an act (or the incapacity of a person to act), when not explicitly stated in a law, would still be implicitly stated, and hence "expressed" if it were a necessary effect of what the law did explicitly state.[45] He gave canon 534 of the 1917 code as an example: among other things, section 2 of canon 534 stipulated that, where a moral person pertaining to a religious congregation sought permission from the relevant superior to contract debts or obligations, the written petition would have to include information concerning other outstanding debts or obligations; failure to supply such data would render the *permission* null. Section 1 of the canon stated, among other things, that for

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[44]M. Conte a Coronata, *Institutiones Iuris Canonici*, 4th ed., rev. (Turin and Rome: Marietti, 1950), 1 (*Liber I-Normae Generales*): 35, n. 21: ". . . dicemus eas esse leges *expresse irritantes* aut *inhabilitantes* quae irritationem aut inhabilitatem vel conceptis verbis vel verbis idem importantibus statuunt" (emphasis in original).

[45]G. Michiels, *Normae Generales Juris Canonici, Commentatius Libri I Codicis Juris Canonici*, 2d ed. (Paris, Turin, Rome: Typis Societatis S. Joannis Evangelistae , Desclée et Socii, 1949), 1 (*Praenotanda generalia, canones praeliminares, de legibus ecclesiasticis*): 337.

a moral person pertaining to a religious congregation to contract debts or obligations, it had to secure the written *permission* from the relevant superior, or else the *contract* would be invalid. Michiels therefore concluded that canon 534 §2 implicitly provided that a petition which omitted the required information regarding outstanding debts and obligations would render the *contract* invalid.[46]

Acknowledging the distinction between explicit and express references, however, is not enough to conclude that the drafters contemplated the application of canon 1295 to private juridic persons. Aznar Gil reaches such a conclusion by contending, among other things, that since the phrase "public juridic person" was inserted into canon 1291 but not into canon 1295, the drafters must have meant that canon 1295 not be restricted to public juridic persons;[47] hence, according to Aznar Gil, canon 1295 should be interpreted as implicitly (and therefore expressly)

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[46]Ibid.: "*In utroque casu* nullitas aut inhabilitas personae, non solummodo *explicite* statui potest, sed et *implicite*, hoc scilicet sensu quod in plico verborum manet abscondita, revera tamen ab ipso legislatore sub iisdem fuit materialiter comprehensa tamquam conclusio in principio explicite enuntiato, effectus in causa explicite enuntiata, etc. Ita v.g. habetur *irritatio implicita positive expressa* in can. 534 §2 coll. §1; ibi explicite statuitur, quod si in precibus pro obtinendo consensu ad contrahenda debita non exprimantur anteriora debita, *venia* a legitimo Superiore obtenta invalida est; ergo implicite statuitur invaliditas *contractus* de quo in §1, ad cujus validitatem requiritur legitima competentis Superioris venia" (emphasis in original).

[47]Aznar Gil, 428-429.

applicable to private juridic persons.

Aznar Gil further states that the provisions of canon 1295 are to be interpreted separately from the provisions of canons 1291 through 1294 because the 1983 code does not systematically dedicate one title or part of Book V to public juridic persons and another to private juridic persons, and hence one cannot be confident that canon 1295 is part of a single series of canons beginning with canon 1291.[48] The weakness in this line of reasoning is that it would be difficult *not* to interpret canon 1295 in light of canons 1291 through 1294, given that canon 1295 makes explicit reference to those canons, and because, as stated above, there is no reason to believe that the drafters would be more concerned with the transactions of a private juridic person which fall short of alienations than with alienations themselves. The rationality of singling out transactions which *may* endanger the patrimonial condition of a private juridic person for regulation under the alienation canons, while not including alienation itself, is simply not evident.

An express reference to private juridic persons could indeed be something less than an explicit reference. But

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[48]Ibid.: ". . . ya hemos indicado que el término *expresse* se interpreta canónicamente como explícito o implícito. Que el contexto inmediato, los cc. 1291-1294, se refiera a las personas jurídicas públicas no es aval seguro de esta interpretación ya que el CIC no dedica una parte sistemática a regular los bienes de una u otra persona jurídica."

there must be solid reason for reading into a canon by implication what is not explicitly stated. In view of the close relationship between canons 1291 through 1294 and canon 1295, mere absence of the word "public" in canon 1295 cannot be regarded as solid reason for reading the canon as implicitly including private juridic persons.

Aznar Gil appears to place the burden of establishing legislative intent on those who would maintain that private juridic persons are outside the reach of canon 1295.[49] As has been pointed out, however, canon 1257 §2 makes clear that the canons of Book V do not regulate the temporal goods of private juridic persons except where expressly provided. Also relevant is canon 10:

> Only those laws which expressly state that an act is null or that a person is incapable of acting are to be considered to be invalidating or incapacitating.[50]

Canon 1295 is effectively an invalidating law for, where it applies, canons 1291 and 1292, which are invalidating laws, also apply. Therefore, canon 10 applies to the issue of canon 1295 and private juridic persons; as an invalidating law, canon 1295 must expressly state the object of its provisions. But nothing in canon 1295 expressly refers to

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[49]Ibid., 428: ". . . pero ni acude a todo el proceso de codificación, ni describe todos los datos allí aparecidos, ni del texto por él aludido se deduce que el canon se refiere sólo a las personas jurídicas públicas."

[50]"Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus actum esse nullum aut inhabilem esse personam expresse statuitur."

private juridic persons.

The proposition that canon 1295 should be restricted in scope is also consistent with the general norm of canon 18 concerning the interpretation of laws which would confine the free exercise of rights:

> Laws which establish a penalty or restrict the free exercise of rights or which contain an exception to the law are subject to strict interpretation.[51]

A private juridic person is the subject of rights and duties.[52] Pursuant to canon 1255, it is "capable of acquiring, retaining, administering and alienating temporal goods, in accord with the norm of law."[53] Dealing in temporal goods, then, is a right of a private juridic person. Accordingly, canon 18 is pertinent to the interpretation of any law thought to be applicable to a private juridic person in its management of temporal goods.

As noted above, it appears logical that canon 1295 should apply only to the same entities as do canons 1291 through 1294. As already observed, an alienation more seriously affects the patrimonial condition of a Church entity than does a canon 1295 transaction. It would be inconsistent, therefore, to apply canon 1295 to private

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[51] "Leges quae poenam statuunt aut liberum iurium exercitium coarctant aut exceptionem a lege continent, strictae subsunt interpretationi."

[52] C. 113 §2.

[53] ". . . capacia bona temporalia acquirendi, retinendi, administrandi et alienandi ad normam iuris."

juridic persons if the drafters did not also intend the canons on alienation to apply to them.

b. Changes to the proposed drafts of canons 1291 through 1295 disclose that the drafters intended to bring private juridic persons within the scope of canon 1295

This argument is perhaps an extension of Aznar Gil's contention that canon 1295 expressly refers to private juridic persons. Here he notes that the *coetus* decided in 1979 to change the 1977 draft of what was to become canon 1291 by inserting an explicit reference to the public juridic person, whereas it inserted simply the phrase "juridic person" into the draft of what was to become canon 1295. His opinion is that the latter insertion was made precisely in order to include private juridic persons within the ambit of canon 1295.[54]

A more accurate interpretation, however, would seem to follow from a consideration of the prior terminology employed in the 1977 drafts of what were to become canons 1291 and 1295, and from a comparison with the changes made at the same time in what would become canon 1292. The 1977 draft of canon 1291 (then referred to as canon 36) had contained the phrase *personae iuridicae ecclesiasticae*. The *coetus* decided to replace the word *ecclesiasticae* with *publicae*.[55] This was logical, in light of the fact that the

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[54]Aznar Gil, 429.

[55]*Communicationes* 12 (1980) 422.

term "ecclesiastical juridic person" was not to be employed in the new code. Rather, a juridic person would either be "public" or "private." Similarly, the *coetus* decided that the draft of canon 1295 (then referred to as canon 40) should not contain the phrase *patrimonialis Ecclesiae* (patrimony of the Church);[56] in its place the *coetus* substituted simply *personae iuridicae*, without the modifier *publicae*.

At the same time, however, the *coetus* also revised its draft of what was to become canon 1292 §1 (then referred to as canon 37 §1) by changing the phrase *personas iuridicas publicas iuris dioecesani* to *personas iuridicas sibi subiectas*.[57] This was apparently an attempt to specify more precisely which juridic persons would be subject to approval of the local Ordinary with respect to alienation of their patrimony. Clearly, however, although the *coetus* omitted the word *publicas*, only public juridic persons were intended to be included since the canon is simply identifying which authorities are competent to grant the permission required by canon 1291, which explicitly refers only to public juridic persons. The *coetus* also inserted into what was to become canon 1292 §1 language to the effect that, in the case of supradiocesan juridic persons, their own statutes would define the authority competent to grant the necessary

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[56]Ibid., 426.

[57]Ibid., 423.

permission for alienation, but again the *coetus* did not explicitly use the word *publicas* to denote the juridic persons involved,[58] though clearly only public juridic persons were intended because of the relationship of canon 1292 to canon 1291.

Similarly, in what was to become canon 1292 §4 (then referred to as canon 37 §5), which dealt with the requirement of providing all parties responsible for approving an alienation with adequate information, the *coetus* retained the term *personae iuridicae*, evidently seeing no reason to add *publicae* thereto.[59]

The one explicit reference that had been made to *public* juridic persons in the prior draft of canon 1292, then, was deleted in 1979, and the other references to juridic persons in that canon were not refined to refer explicitly to public entities. Yet it is not disputed that the canon indeed refers only to public juridic persons, consistent with canon 1291. Similarly, there is no reason to conclude that the term *personarum iuridicarum* in canon 1295 was intended to refer to any juridic persons other than public ones. Indeed, interpreting canon 1295 to include private juridic persons within its scope would, in effect, contradict the intention to exclude such entities from the alienation

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[58]Ibid., 424: "Quoad personas iuridicas supradioecesanas et Ordinario loci non subiectas auctoritas competens est quae propriis statutis definitur."

[59]Ibid., 423.

requirements, an intention manifested by the explicit reference in canon 1291 to public juridic persons.

Further, in the same meeting of November 14, 1979, the *coetus* decided to add a subordinate clause to the draft of what was to become canon 1295 which required the statutes of the relevant juridic person to conform to what would be contained in canons 1291, 1293 and 1294.[60] Canons 1291 through 1294 deal with alienations rather than transactions which may merely jeopardize patrimony, and they are uniformly understood to apply only to public juridic persons. Yet, interpreting canon 1295 as referring to all juridic persons would put private juridic persons in the position of having to adapt their statutes to comply with the norms of canons 1291 through 1294, to which private juridic persons are not subject. It would therefore be illogical to insert the aforementioned clause into the draft of canon 1295 were the canon not confined in scope to public juridic persons.

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[60]Ibid., 426. The 1977 and 1979 drafts of canon 40 (to become c. 1295) respectively read as follows:

1977: "Sollemnitates ad normam cann. 36, 38 et 39 requiruntur non solum in alienatione, sed etiam in quolibet negotio quo conditio patrimonialis Ecclesiae peior fieri possit."

1979: "Sollemnitates ad normam cann. 36, 38 et 39, quibus etiam statuta personarum iuridicarum conformari debent, requiruntur non solum in alienatione, sed etiam in quolibet negotio quo conditio patrimonialis personae iuridicae peior fieri possit" (emphasis added).

The final version of canon 1295 made explicit reference to canon 1292 as well as to canons 1291, 1293, and 1294 (cc. 36, 38, and 39 in the 1977 and 1979 drafts).

It is also significant that in the meeting of November 14, 1979 the phrase *patrimonialis personae iuridicae* replaced the phrase *patrimonialis Ecclesiae* in the draft of canon 40 (which was to become canon 1295), in view of the change that had been made to the draft of what would become canon 1258 on June 20, 1979. The word *Ecclesiae* had been defined in canon 1498 of the 1917 code as encompassing the universal Church, the Apostolic See and all moral persons. The draft of what would become canon 1258, successor to canon 1498 of the 1917 code, was accordingly modified on June 20, 1979 to include *persona iuridica publica*, thereby replacing the term *persona moralis* found in canon 1498.[61] When *patrimonialis Ecclesiae* was amended to *patrimonialis personae iuridicae* in canon 40 on November 14, 1979, the word *Ecclesiae* already contained within its ambit public juridic persons, but this change to canon 40 evidently aimed at greater precision by eliminating "universal Church" and "Apostolic See" and concentrating solely on juridic persons, which were understood as public juridic persons.

Finally, the grammatical construction of canon 1295 itself implies a restriction of its application to public juridic persons. The phrase which links the application of canons 1291 through 1294 to transactions contemplated under canon 1295, ". . . *not only* in an alienation *but also* in . . ." (emphasis added), carries the grammatical thrust

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[61]Ibid., 399.

of applying canons 1291 through 1294 to the *same* juridic person both in acts of alienation *and* in transactions which can worsen the patrimonial condition of such entity.

c. Canon 1295 is an instance of extraordinary administration, a concept applicable to public and private juridic persons alike

There are really two positions taken in this argument: (i) that private juridic persons are subject to the requirements concerning extraordinary administration, and (ii) that canon 1295 is but a facet of extraordinary administration, hence drawing private juridic persons within its ambit.[62]

(i) Regarding the first aspect, Aznar Gil gives particular attention to canon 1281. The first two sections of canon 1281 provide as follows:

> §1. With due regard for the prescriptions of their statutes, administrators invalidly posit acts which go beyond the limits and procedures of ordinary administration unless they first obtain written authority from the ordinary.
>
> §2. The acts which go beyond the limits and procedures of ordinary administration are to be defined in the statutes; if, however, the statutes do not mention such acts, it is within the competence of the diocesan bishop to determine such acts for persons subject to him after he has heard the finance council.[63]

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[62]Aznar Gil, 396-397, 428-429.

[63]"1. Firmis statutorum praescriptis, administratores invalide ponunt actus qui fines modumque ordinariae administrationis excedunt, nisi prius ab Ordinario facultatem scripto datam obtinuerint.
"2. In statutis definiantur actus qui finem et modum ordinariae administrationis excedunt; si vero de hac re

Aznar Gil contends that canon 1281 §2 expressly pertains to the administration of goods owned by private juridic persons as well as by public juridic persons, noting that the 1977 draft expunged the explicit reference to public juridic persons that had appeared in a prior draft of the canon.[64]

This, however, is inadequate to show that canon 1281 in its final form expressly applies to private juridic persons, as required by canon 1257 §2. The contrary seems evident from the context in which canon 1281 appears; it is one of several canons (specifically canons 1279 through 1289) dealing with the duties of administrators other than Ordinaries relative to ecclesiastical goods. Canon 1279, the first in this series of canons, is explicit in referring to the administration of the goods of public juridic persons. Similarly, canon 1282 reminds all those involved in the administration of *ecclesiastical goods* that they are to discharge their duties in the name of the Church. Ecclesiastical goods are those belonging to public juridic

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sileant statuta, competit Episcopo diocesano, audito consilio a rebus oeconomicis, huiusmodi actus pro personis sibi subiectis determinare."

[64]Aznar Gil, 397.

persons, not private juridic persons;[65] and canons 116 §1

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[65]C. 1257 §1. This, again, is a position with which Aznar Gil takes issue, contending that the term *bona ecclesiastica* indeed encompasses the temporal goods of private juridic persons, essentially basing his argument on the legislative history of canon 1257. Aznar Gil, 46-49. It is in fact the case that the *coetus* on Book V was not originally in agreement on the question, the relator reporting a spectrum of opinions, ranging from the view that the vigilance of the Church extended to all that pertained to the acquisition, administration and alienation of temporal goods by private juridic persons, to the position that vigilance was to be employed only in reference to the ends determined in specific statutes inasmuch as the goods were private and not ecclesiastical [F. Voto, relator of the Coetus studiorum "De Bonis Ecclesiae Temporalibus," session of June, 17-23, 1979, *Communicationes* 12 (1980) 392].

In a meeting of the *coetus* on June 29, 1979, one consultor suggested the following draft:

"§1. All temporal goods which belong to the Church, the Apostolic See, or any public juridic persons within the Church are ecclesiastical goods.

"§2. The goods of a private juridic person, even though they are not ecclesiastical goods, are nevertheless subject to the general vigilance of the Bishop in order that they fulfill the ends of such person as defined in its statutes."

["§1. Bona temporalia omnia quae ad Ecclesiam, Apostolicam Sedem vel quascumque in Ecclesia personas iuridicas publicas pertinent sunt bona ecclesiastica.

"§2. Bona personae iuridicae privatae, quamvis non sint bona ecclesiastica, subsunt tamen generali vigilantiae Episcopi ut eorum destinatio ad fines proprios in statutis definitos servetur."]. *Communicationes* 12 (1980) 398.

In the same session, the *coetus* agreed on what was to become the final wording of the canon. Aznar Gil notes that the *coetus* excised from section 2 the phrase "even though they are not ecclesiastical goods," inferring from this that the *coetus* did not wish to exclude the property of private juridic persons from the notion of ecclesiastical goods. Aznar Gil, 49, footnote 30.

This, however, ignores the fact that the *coetus* also deleted from the same section the phrase "are nevertheless subject to the general vigilance of the Bishop in order that they fulfill the ends of such person as defined in its statutes" (. . . subsunt tamen generali vigilantiae Episcopi ut eorum destinatio ad fines proprios in statutis definitos servetur). It is this writer's opinion that the consultor who proposed the additional language wanted to clarify that, even though the property of a private juridic person should

and 313 provide that it is the public juridic person which acts *in nomine Ecclesiae*. Surrounded by canons that are explicit in making clear that the concern is for goods of *public* juridic persons, canon 1281 should similarly be interpreted.

For additional support of his proposition Aznar Gil refers to the right of ecclesiastical authority to ensure that private associations administer their goods in accordance with their purposes, pursuant to canon 325 §1.[66] This reliance upon canon 325 §1, however, seems misplaced; whatever general right of vigilance such canon invests in competent ecclesiastical authority falls short of what canon 1281 §2 and other canons concerning extraordinary administration prescribe because canon 325 §1 applies to private associations with or without juridic personality.[67]

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be under the vigilance of the bishop, that does not imply that such property is in the nature of ecclesiastical goods. Once the *coetus* decided not to approve the wording on the bishop's vigilance, there was no need to retain the preceding clause, either; section 1 of the canon had already stated that ecclesiastical goods are those belonging to public juridic persons, not private ones.

[66]Aznar Gil, 397-398, 428.

[67]That in drafting canon 1257 the *coetus* omitted reference to the bishop's vigilance over the goods of a private juridic person is not a basis for concluding that the 1983 code does not provide for any supervision at all of the property of private juridic persons. As Aznar Gil mentions (Aznar Gil, 55), the private juridic person is subject to ecclesiastical authority by the terms of canon 305, which provides for hierarchical supervision of associations in order to maintain their integrity of faith and morals and insure against pervading abuses in ecclesiastical discipline. The canon also subjects

(ii) Even if one were to admit that private juridic persons are subject to the canons governing extraordinary administration, which they are not, they still would not be drawn within the ambit of canon 1295 because, while canon 1295 does treat of transactions which are acts of extraordinary administration, it deals only with a special category of such acts, namely, those which pose a danger of serious harm to the overall patrimonial condition of the juridic person. To those acts which may cause such serious harm canon 1295 makes applicable, instead of the less demanding norms governing acts of extraordinary administration in general, the more stringent norms governing alienation which, by their very terms, are applicable only to *public* juridic persons.

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associations to ecclesiastical "governance," the parameters of which appear, in the case of private associations, in canons 321-326.

In particular, canon 325 §1 states that, while a private association is free to administer its goods in accordance with its statutes, competent ecclesiastical authority has the right to ensure that the goods are applied to the purposes of the association.

However, to conclude from canons 305 and 325 §1 that the goods of private juridic persons are ecclesiastical goods for purposes of Book V and that, as Aznar Gil argues (Aznar Gil, 397-398, 428), they are subject to the control of ecclesiastical authority in matters such as extraordinary administration, is to conclude too much. Canons 305 and 325 §1 prescribe a lower degree of hierarchical involvement than what Book V provides for extraordinary administration and alienation because they are directed not only to private associations with juridic personality but to those without it as well.

II. APPLICABILITY OF CANON 1295 TO TRANSACTIONS WHICH RISK HARM TO PATRIMONIAL CONDITION

A. CHANGE OF TERMINOLOGY FROM "CONTRACT" TO "TRANSACTION"

In beginning his discussion of the division of the 1917 code pertaining to contracts involving temporal goods (cc. 1529-1543),[68] G. Vromant stated that the concept of "contract" was to be understood as encompassing a vast array of financial activities, including not only traditional bilateral agreements but unilateral transfers of rights and duties as well.[69] Thus, it would include consensual contracts (*contractus consensuales*) such as sales, leases, *emphyteusis*, and partnership agreements, as well as gratuitous loans, loans for consumption, and pawns and pledges of property.[70] The notion of contract also extended to donations.[71] U. Beste added that a contract could be implicit; for example, an individual who accepted an office tacitly committed himself to discharge the responsibilities

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[68]Book III, Part VI, Title XXIX (*De Contractibus*).

[69]G. Vromant, *De Bonis Ecclesiae Temporalibus*, 3rd ed., rev. (Brussels: L'Edition Universelle, 1953) 239, n. 284. Vromant referred to a contract in the narrow sense as "contractus proprie ac stricte sumptus" and in the wide sense as a "pactum." He interpreted the 1917 code as applying to contracts in the wide sense. A *pactum* could entail a unilateral transfer of rights with correlative assumption of duties. It could arise simply upon one party accepting a promise to perform from the other.

[70]Ibid., 240, n. 285.

[71]Ibid., 239, n. 284.

that went with the position.[72] The word "contract" appeared in both canon 1529 (dealing with the canonization of civil law with respect to contracts) and in canon 1533, the precursor of canon 1295 in the 1983 code.

The drafters of the new code, while retaining the word "contract" in canon 1290 (the "canonization of civil law" canon), used the term "transaction" (*negotio*) instead of "contract" in canon 1295, the successor to canon 1533. The *coetus* "*De Iure Patrimoniali Ecclesiae*" did not provide an explanation for this change of terminology in the draft of what was to become canon 1295. The *coetus* simply affirmed the thrust of canon 1533 regarding those "*negotia*" which

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[72]U. Beste, *Introductio in Codicem*, 3rd ed. (Collegeville, MN: St. John's Abbey Press, 1946) 761. Beste stated that an implicit contract was also known as a quasi-contract (*quasi-contractus*). J. A. Abbo and J. D. Hannan defined quasi-contracts as "those in which the law imputes to a person a responsibility, resulting from his status or his conduct or benefits he has received, to do what an honest man would do," and, without stating whether implicit contracts were distinguishable from quasi-contracts, they gave as examples of "implied agreements" (implicit contracts) "the implied agreement of an employer to pay an employee what he is reasonably worth (technically named '*quantum meruit*'); the implied agreement of a purchaser to pay the seller what the property bought is reasonably worth (technically named '*quantum valebat*'); the implied agreement of one who receives another's money without title to it to pay it to the owner; the implied agreement of one person to reimburse another for money spent by request of the former; the implied agreement to pay lawful interest on overdue debts." J. A. Abbo and J. D. Hannan, *The Sacred Canons, A Concise Presentation of the Current Disciplinary Norms of the Church* (St. Louis: B. Herder Book Co., 1952) 2: 733, footnote 2. Abbo and Hannan gave these examples in the context of the application of American law pursuant to canon 1529.

could worsen the patrimonial condition of the Church;[73] no rationale was given for the substitution of words. It may not have been a deliberate change.

There is no reason to suppose that the insertion of *negotio* was intended to broaden or otherwise alter the range of activities to be included within the successor canon, beyond what canon 1533 of the old code had already contemplated. Broad though the term "transaction" is, however, not all financial activities which entail risk of loss are subject to the provisions of canon 1295. This is clear in the case of financial activities which do not affect stable patrimony, regardless of the monetary terms. An act of administration, be it ordinary or extraordinary, might have a potentially adverse effect on a substantial quantity of free capital, but this would not bring canon 1295 into play, since canon 1295 simply applies canons 1291 through 1294, which are applicable only to stable patrimony. It is also apparent that canon 1295 will not even apply to a transaction involving stable patrimony, unless the value thereof exceeds the legislated minimum threshold.

What is less obvious is that, in the conduct of administering stable patrimony, some decisions may be made (or, out of neglect, not be made) which carry a high risk of loss with respect to such patrimony, and in amounts

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[73]*Communicationes* 5 (1973) 100: "37. Can. 1533 confirmatur quoad negotia quibus conditio *patrimonialis* Eclesiae [*sic*] peior fieri possit" (emphasis in original).

exceeding the legitimate minimum, but which nevertheless do not come within the purview of canon 1295 for failure to qualify as "transactions." Whether what is involved amounts to a "transaction" is a threshold question in the interpretation and application of canon 1295; if it is not a transaction, canon 1295 simply does not apply.

Although the 1983 code does not define "transaction" (*negotium*),[74] it would seem in the light of the predecessor canon 1533 of the 1917 code, which used the term "contract," that the term logically refers to a business decision which *affirmatively* renders patrimony vulnerable to diminution or loss.

Certain financial activities are foreseen in Title II of Book V as constituting ordinary administration of temporal goods. Canon 1284 §2 explicitly enjoins administrators to engage in a number of such activities:

> §1. All administrators are bound to fulfill their office with the diligence of a good householder.
>
> §2. For this reason they must:
>
> 1° take care that none of the goods entrusted to their care is in any way lost or damaged and take out insurance policies for this purpose, insofar as such is necessary;
>
> 2° take care that the ownership of ecclesiastical goods is safeguarded through

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[74]C. T. Lewis and C. Short define *negotium* in relevant part as follows: "Negotium (negocium): ...a business, employment, occupation, affair." C. T. Lewis and C. Short, *A Latin Dictionary*, 2d ed. (Oxford, Eng.: Clarendon Press, 1958) 1199.

civilly valid methods;

> 3° observe the prescriptions of both canon and civil law or those imposed by the founder, donor or legitimate authority; they must especially be on guard lest the Church be harmed through the non-observance of civil laws;
>
> 4° accurately collect the revenues and income of goods when they are legally due, safeguard them once collected and apply them according to the intention of the founder or according to legitimate norms;
>
> 5° pay the interest on a loan or mortgage when it is due and take care that the capital debt itself is repaid in due time; . . .[75]

Such acts of financial stewardship normally fall within the ambit of ordinary administration, although it is possible that an administrator might have to obtain approval from higher authority if one or more of these acts were to constitute extraordinary administration under canons 1277, 638 §1 or 1281, or might have to consult others if one or more of these acts were to constitute an act of ordinary

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[75]"Can. 1284, §1. Omnes administratores diligentia boni patrisfamilias suum munus implere tenentur.
"§2. Exinde debent:
1° vigilare ne bona suae curae concredita quoquo modo pereant aut detrimentum capiant, initis in hunc finem, quatenus opus sit, contractibus assecurationis;
2° curare ut proprietas bonorum ecclesiasticorum modis civiliter validis in tuto ponatur;
3° praescripta servare iuris tam canonici quam civilis, aut quae a fundatore vel donatore vel legitima auctoritate imposita sint, ac praesertim cavere ne ex legum civilium inobservantia damnum Ecclesiae obveniat;
4° reditus bonorum ac proventus accurate et iusto tempore exigere exactosque tuto servare et secundum fundatoris mentem aut legitimas normas impendere;
5° foenus vel mutui vel hypothecae causa solvendum, statuto tempore solvere, ipsamque debiti summam capitalem opportune reddendam curare; . . ."

administration of greater importance under canon 1277. The statutes of a public juridic person could also require certain approvals or consultations for financial actions which otherwise would fall under ordinary administration.[76]

In any event, the provisions of canon 1284 §2, 1°-5° are designed to protect the property of a public juridic person in ways that would certainly not be subject to canon 1295. A failure to comply with canon 1284 §2, 1°-5°, reprehensible though such a failure might be, would not bring canon 1295 into play because failure to act appropriately is not a "transaction." Neglecting to take out adequate insurance or to make timely mortgage payments may subject patrimony of great value to a risk of loss, but it would be difficult to argue that such inaction constitutes a "transaction." Despite the imprecision of the term, a "transaction" at least connotes some *affirmative* act with respect to property. Beyond this consideration, there exists the practical impossibility of employing canon 1295 to ensure that administrators avoid negligence and exercise prudence in order to conserve property.

Where, as a matter of general law, the 1983 code explicitly treats a specific type of action as requiring

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[76]While the requirements of canon 1284 §2, 1°-5° would normally be sufficiently routine as to obviate the necessity of the administrator securing special approvals, the 1983 code evidently attaches more importance to investment decisions, mandating in canon 1284 §2, 6° that the administrator invest the surplus receipts of the public juridic person, but only with the consent of the Ordinary.

approval by the competent Ordinary, one would also expect that canon 1295 would not apply, even where the potential effect of the act on patrimony may be substantial, so long as no serious risk of harm to the overall economic condition of the public juridic person is involved. A case in point is that of initiating or contesting a lawsuit in a civil court. Canon 1288 prohibits the administrator from doing so on behalf of a public juridic person unless he first obtains written permission from the Ordinary. Implicit here is the legislator's determination to protect public juridic persons from imprudent involvement in civil lawsuits, and to protect the Church from scandal.

This is clear when one contrasts the initiation or contestation of a lawsuit with the code's treatment of a canonical settlement under canon 1715:

> §1. A settlement or compromise cannot be made validly concerning matters which pertain to the public good and other matters about which the parties cannot freely dispose.
>
> §2. If it is a question of temporal ecclesiastical goods, whenever the matter requires this, the formalities specified by law for the alienation of ecclesiastical goods are to be observed.[77]

A settlement or compromise is contractual in nature and often entails a commitment to transfer money or property.

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[77]"Can. 1715, §1. Nequit transactio aut compromissum valide fieri circa ea quae ad bonum publicum pertinent, aliaque de quibus libere disponere partes non possunt.
"§2. Si agitur de bonis ecclesiasticis temporalibus, serventur, quoties materia id postulat, sollemnitates iure statutae pro rerum ecclesiasticarum alienatione."

Even though canon 1715 §2 does not explicitly refer to canon 1295, it would appear axiomatic that the words "whenever the matter requires this" in reference to the formalities required by law for alienation include canon 1295 transactions.

Nor is there reason to distinguish settlements in a canonical court from those under civil law for purposes of applying canons 1291 through 1294. Canon 1715 §2 explicitly treats settlements and compromises in canonical disputes because it is part of Title III of Part III of Book VII, which is dedicated to outlining the ways to avert a trial in the canonical forum. The principle, however, is the same in civil litigation; where the parties come to a settlement they have effected a transaction and, therefore, canons 1291 through 1294 may apply if the settlement concerns Church property and is of an amount greater than the legislated minimum.

B. CANON 1295 AND ACTS OF EXTRAORDINARY ADMINISTRATION, ACQUISITIONS, AND INVESTMENTS

V. DePaolis has raised the question of whether the words "but also in any transaction" found in canon 1295 are an expression which is residual in relation to acts of alienation or in relation to all acts of extraordinary administration.[78] Stated differently, may the canon be

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[78]"Il termine di relazione immediato è preceduta da quest'altra: 'requisita ad norman cann. 1291-1294 . . . , servari debent non solum in alienatione, sed etiam . . .'

interpreted broadly enough so that its requirements reach all acts of extraordinary administration?

DePaolis raises and answers his question in the context of what he views as distinct classes of extraordinary administration:

> Two categories of extraordinary administration may be distinguished: those for which permission from the Holy See is not required and those for which it is.
>
> In the first category would be included active and passive litigation in the civil forum, the acceptance of offers not burdened with obligations or conditions, and leases, which are reserved to the exclusive competence of the diocesan ordinary by the law itself (cc. 1288, 1267, §2) or by the episcopal conference (c. 1297); such are purely acts of extraordinary administration, different from alienation of stable patrimony and from transactions which can worsen the patrimonial condition of entities, determined by the episcopal conference (c. 1277) for the diocese and juridic persons administered by the Bishop, or by the diocesan bishop (c. 1281, §2) for juridic persons subject to him in case the statutes are silent on the matter. These latter can be, if so determined, for example: change in the designated use of immobile property, decision to revise expenditures in an approved budget, the hiring of personnel of indefinite duration, etc.
>
> In the second category would be included all acquisitions, be they for consideration (purchases and sales, barters, investments of capital) or gratuitous with or without obligations (inheritances, donations, legacies), insofar as they fall within the generic provision of c. 1295: where one is dealing in fact with acts which could endanger the patrimonial situation of a juridic person and therefore necessitate the authorization

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Ma è una espressione residuale in relazione agli atti di alienazione, o in relazione a tutti gli atti di amministrazione straordinaria?" V. DePaolis, "Negozio Giuridico 'Quo Condicio Patrimonialis Personae Iurdicae Peior Fieri Possit' (Cf. c. 1295)," *Periodica* 83 (1994) 493.

> of superior authority, when the value of the goods involved in the acquisition exceeds the maximum fixed by the episcopal conference.[79]

The first category of actions described by DePaolis would not bring canon 1295 into play. They are purely a matter of extraordinary administration, as DePaolis asserts, or perhaps are acts of ordinary administration of greater importance.[80] Changes in the way real property is utilized

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[79]Ibid., 494-495, footnote 1: "Si sono distinti in due categorie gli atti di amministrazione straordinaria: quelli per i quali non si richiede la licenza della Santa Sede e quelli invece per i quali si richiede.

"Nella prima categoria rientrerebbero le liti attive e passive in foro civile, l'accettazione di offerte non gravate da modalità di adempimento o da condizione, e le locazioni, che o dal diritto stesso (cc. 1288, 1267, §2) o dalla Conferenza Episcopale (c. 1297) sono riservate all'esclusiva competenza dell'Ordinario diocesano; così pure gli atti di straordinaria amministrazione, diversi dalle alienzioni del patrimonio stabile e dai negozi che possono peggiorare lo stato patrimoniale degli enti, determinati o dalla Conferenza Episcopale (c. 1277) per le diocesi e le persone giuridiche amministrate dal Vescovo, o dal Vescovo diocesano (c. 1281, §2) per le persone giuridiche a lui soggette, nel caso che tacciono in merito gli statuti. Questi ultimi possono essere, se così determinati, ad es.: la mutazione di destinazione di uso d'immobili, la decisione di nuove voci di spese rispetto a quelle indicate nel preventivo approvato, l'assunzione di personale dipendente a tempo indeterminato, etc.

"Nella seconda categoria rientrerebbero tutti gli acquisti, siano essi a titolo oneroso (compravendita, permuta, investimenti di capitali) o a titolo gratuito con o senza oneri (eredità, donazioni, legati), in quanto rientrano nella generica previsione del c. 1295: si tratterebbe infatti di atti da cui può essere pregiudicata la situazione patrimoniale della persona giuridica e pertanto necessitano dell'autorizzazione della superiore autorità, quando il valore dei beni in oggetto degli acquisti è superiore a quello massimo fissato dalla Conferenza Episcopale."

[80]DePaolis includes all of the actions described in his second paragraph (the first category) under extraordinary administration. In the case of extraordinary

(even if greater wear and tear to the property would result), alterations to budgets, and the employment of additional personnel do not in themselves endanger the overall patrimonial condition.

In his first category of extraordinary administration, DePaolis also includes certain activities which are treated with particularity in the code. One such activity is that of instituting or contesting a lawsuit in civil court. As has been pointed out above, decisions to litigate or defend against civil lawsuits require the Ordinary's approval under canon 1288. The fact that the code explicitly provides a mechanism of control with respect to these activities evidently, for DePaolis, preempts the application of canon 1295, a conclusion that may be agreed with on the ground

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administration, a failure to secure the requisite approval from the Ordinary renders the action invalid. Among the acts to which DePaolis refers in his second paragraph (the first category) is the acceptance of gifts containing no obligation or condition, as addressed in the first clause of canon 1267 §2. A clarification, however, is in order. It is not the acceptance of such unconditional gifts which the first clause of canon 1267 §2 addresses but rather a refusal of such gifts on behalf of a juridic person. The first clause of canon 1267 §2 states that an unconditional gift cannot be refused unless there is a just reason for doing so and, "in matters of greater importance" (*in rebus maioris momenti*) concerning a *public* juridic person, without the permission of the Ordinary. If the refusal of a gift by an administrator on behalf of a public juridic person is a matter of greater importance and the administrator has not first obtained the Ordinary's permission as required, the refusal is illicit but not invalid. The first clause of canon 1267 §2 does not, therefore, concern itself with an instance of extraordinary administration but, rather, with an act of ordinary administration "of greater importance," as explicitly stated in the canon, and only where the gift is refused, not accepted.

that initiating or responding to a lawsuit is not likely to endanger patrimonial condition. If, in a given instance, it were to do so, then it is the opinion of this author that canon 1295 would apply, and the requirement of canon 1288 would simply be subsumed into the requirements of canons 1291 through 1294.

In delineating his first category of extraordinary administration, DePaolis mentions another activity treated with particularity in the 1983 code, that of leases. The matter of leases is addressed in canon 1297, which effectively charges the episcopal conference with the responsibility of establishing the norms applicable to leasing ecclesiastical goods, including permissions to be obtained from competent ecclesiastical authority.[81] In so doing, canon 1297 removes leasing from the body of financial activities governed by other canons, including canon 1295. By including leasing in his first category of extraordinary administration, DePaolis agrees that leasing is not subject to canon 1295; he appears, however, to regard leasing as subject to the canons governing extraordinary administration, which would seem contrary to the intent of canon 1297 to leave the matter of leasing entirely to norms enacted by the episcopal conference.

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[81]Conferentiae Episcoporum est, attentis locorum adiunctis, normas statuere de bonis Ecclesiae locandis, praesertim de licentia a competenti auctoritate ecclesiastica obtinenda.

DePaolis' second category of extraordinary administration is comprised of financial activities that are subject to canon 1295. DePaolis includes in this category a species of transaction that generally is not subject to the canons governing administration, and is generally not thought to be subject *per se* to canon 1295, namely, acquisitions. As is true of alienations and other contracts, acquisitions are treated separately from administration, in Title I of Book V, entitled, "The Acquisition of Goods."

This does not mean, however, that there is never an overlap between acquisitions and ordinary administration of greater importance or extraordinary administration, or canon 1295. Possible overlap between acquisitions and acts of ordinary administration of greater importance or extraordinary administration may occur where the statutes of a public juridic person provide that certain types of acquisition, or acquisitions above a certain value, are acts of ordinary administration of greater importance or acts of extraordinary administration, or the relevant diocesan bishop may so determine where the statutes are silent. In the case of religious institutes, the proper law of the institute may define acquisitions as such,[82] or the episcopal conference may define certain acquisitions by a diocesan bishop for the diocese as extraordinary

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[82]C. 638.

administration.[83]

It is to be expected that important acquisitions be classified as ordinary administration of greater importance or as extraordinary administration by one of the sources described above. However, the only type of acquisition which the 1983 code itself effectively categorizes as ordinary administration of greater importance is the investment of surplus cash under canon 1284 §2, 6°, inasmuch as that canon requires the consent of the Ordinary for liceity.

Overlap may also occur between acquisitions and canon 1295. A given acquisition might entail the application of canon 1295, not because of the acquisition itself, even though it is a "transaction," but because of conditions or obligations attached to the acquisition, or because of the method by which the acquisition was financed. Specifically, an acquisition could be financed by incurring debt to a degree that would place stable patrimony at risk. Where, however, the acquisition is made with cash, there would be no reason to invoke canon 1295, unless conditions or other obligations encumbered the acquisition. The 1983 code is explicit about these latter situations in the second clause of canon 1267 §2, which provides that, in addition to obtaining the permission of the Ordinary before accepting any gift to which a condition or modal obligation is

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[83]C. 1277.

attached, a public juridic person must also conform to the prescriptions of canon 1295. Where there is no obligation attached to a gift, canon 1295 would not be an issue.

Canon 1284 §2, 6° has been mentioned above in the context of investments as an illustration of ordinary administration of greater importance, but the matter of investments suggests some additional comments. The opinion was expressed in Chapter One that, even if the Ordinary did not explicitly state, when granting permission for an investment, that the investment is thereby dedicated to stable patrimony, a dedication should be inferred if the magnitude of the surplus funds is substantial relative to the net assets of the entity and its operational needs.[84] There is necessarily an element of subjectivity in the assessment of what comprises a large enough pool of money to be deemed stable capital once invested, but the principle is that funds that are truly surplus should be considered as having been placed in the long-term patrimony of the entity when converted to investment property which may generate income or appreciate.

After an investment has been duly approved by the Ordinary and made, and assuming that the acquired property thereby enters into the stable patrimony of the public juridic person (which would be true of most long-term investments), what is the nature of any subsequent change in

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[84]Pp. 38-44, *supra*.

the investment? The applicability of canons 1291 through 1294 to changes in investments is not by virtue of canon 1295, but rather on the basis of a direct alienation. Selling large investments which form part of the stable patrimony of a public juridic person in order to reinvest in other assets will often bring the alienation requirements into play,[85] but this is not due to canon 1295.

The only exception here would be the case of an investment which obligated the investor to make additional payments contingent upon certain events coming to pass. The most common example would be a partnership, where the partnership agreement provides that the non-managerial partners (who are in the nature of investors) might be required to make additional contributions of capital should the enterprise so require. Such an agreement could pose a threat to the patrimonial condition, and hence be subject to canon 1295.

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[85]Of relevance here is an interpretation from the Pontifical Commission for the Authentic Interpretation of the Canons of the 1917 Code that various dispositions of distinct properties owned by the same moral person, under certain circumstances, should be treated as morally one. See Chapter One, pp. 65-66, footnote 121, *supra*. In the case of an investment portfolio of stocks and bonds, however, where the administrator makes discrete, independent sales and purchases of other securities (as opposed to selling the portfolio in its entirety or portions of it without purchases of other securities) in order to increase the value of the portfolio or to reduce risk, the portfolio as a whole remains intact. In such case it would appear illogical to apply the interpretation that the transactions coalesce for the purpose of fulfilling the alienation requirements.

Summarizing, then, an acquisition in itself does not cause canon 1295 to apply, whether the acquisition in question is considered extraordinary administration or an act of ordinary administration of greater importance, unless the acquisition is accompanied by conditions or obligations or is financed in such a way as to jeopardize the stable patrimony of the public juridic person. In this connection, investments are but a particular form of acquisition. A change of investment may entail consideration of canons 1291 through 1294 because the exchange of one asset for another involves a direct alienation; canon 1295, however, is generally irrelevant to a change of investment.

As a concluding note to this section, distinguishing between acts subject solely to the norms governing extraordinary administration, on the one hand, and transactions falling under canon 1295 or alienations subject to canons 1291 through 1294, on the other, is of practical importance. Failure to keep the distinction in mind can cause the requirements of canons 1291 through 1295 to be applied indiscriminantly to all acts of extraordinary administration. In particular, obfuscating the distinction between acts subject only to the laws governing extraordinary administration and those subject to the laws governing alienation or to canon 1295 carries the risk that the point of demarcation between ordinary and extraordinary

administration (determined by the episcopal conference for acts of a diocesan bishop, according to canon 1277, or, in the statutes of a juridic person or by the diocesan bishop to which it is subject, according to canon 1281 §2), may be based erroneously on the minimum amount set pursuant to canon 1292 §1 for alienation.[86] This may be an inappropriate basis upon which to distinguish ordinary and extraordinary administration.

It is this writer's opinion that any deliberation regarding acts subject solely to the laws governing extraordinary administration and those subject to the laws governing alienations or related transactions will be more effective if the decision maker maintains a clear differentiation between the categories of acts.

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[86]In an attempt to comply with the directive of canon 1292 §1, the National Conference of Catholic Bishops ("NCCB") proposed a series of monetary benchmarks for the different levels of approval required in alienations and, hence, in transactions which are subject to canon 1295. National Conference of Catholic Bishops, *Implementation of the 1983 Code of Canon Law, Complementary Norms* (Washington, D.C.: National Conference of Catholic Bishops, 1991) [hereinafter "*NCCB Complementary Norms*"], 22-24. This matter is discussed at pp. 148-150, *infra*. However, under the title of "Canon 1277: Extraordinary Administration," the NCCB also lists alienations to which canon 1292 applies, transactions to which canon 1295 applies, and leasing to which canon 1297 applies, as forms of extraordinary administration. This error of categorization could give rise to a mistaken impression that any act of extraordinary administration, or, for that matter, acts of ordinary administration of greater importance, with large monetary potential, would be subject to the same criteria as transactions under canon 1295.

III. CANONS INCORPORATED BY REFERENCE IN CANON 1295

Canon 1295 incorporates by reference the requirements connected with alienations properly speaking, applying them to the transactions which may jeopardize the patrimonial condition of a public juridic person.

A. CONFORMING THE STATUTES TO CANONS 1291 THROUGH 1294

A subordinate clause of canon 1295 requires the statutes of a public juridic person to make reference to the provisions of canons 1291 through 1294. The subordinate clause reads, "The requirements mentioned in cann. 1291-1294, *with which the statutes of juridic persons are to be in conformity*" (emphasis added).[87] Even though the clause does not contain the adjective "public," canon 1295 must be interpreted as applying only to public juridic persons; otherwise, the canon would be requiring a private juridic person to incorporate into its statutes the prescriptions of canons 1291 through 1294, which are applicable only to public juridic persons. Canon 1291 explicitly limits itself to public juridic persons, and the other three canons merely particularize the general requirements of canon 1291 by specifying competent authorities and delineating various levels of monetary value.

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[87]"Requisita ad normam cann. 1291-1294, *quibus etiam statuta personarum iuridicarum conformanda sunt*, . . ." (emphasis added).

The *coetus* added the subordinate clause to what was to become canon 1295 in its meeting of November 14, 1979, expressing the desire that, when a transaction subject to the invalidating requirements within canons 1291 through 1294 failed to meet those requirements, the transaction should be invalid not only canonically but under civil law as well.[88] In the United States, achieving such a result requires wording of similar import in the relevant civil documents, such as corporate bylaws and articles of incorporation.

B. CANON 1291

This canon is the successor to canon 1530 §1, 3° of the 1917 code, and states as follows:

> The permission of the competent authority according to the norm of law is required in order validly to alienate the goods which through lawful designation constitute the stable patrimony of a public juridic person and whose value exceeds the sum determined in law.[89]

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[88]*Communicationes* 12 (1980) 426: "Ex suggestione cuiusdam Organi consultationis, Consultoribus placet addere normam qua praecipiatur ut in statutis recenseantur solemnitates requisitae, ita ut negotia canonice invalida ob inobservantiam sollemnitatum, sint etiam civiliter invalida. Ideo in canone adduntur haec verba: 'Sollemnitates ad normam cann. 36, 38 et 39, *quibus etiam statuta personarum iuridicarum conformari debent*, requiruntur non solum . . .'" (emphasis in original). The final text of canon 1295 contains substantially the same clause, except for the substitution of "requirements" (*requisita*) for "solemnities" (*sollemnitates*).

[89]"Ad valide alienanda bona, quae personae iuridicae publicae ex legitima assignatione patrimonium stabile constituunt et quorum valor summam iure definitam excedit, requiritur licentia auctoritatis ad normam iuris

The concept of stable patrimony, discussed in Chapter One in reference to the 1917 code,[90] finds explicit expression in the 1983 code. Stable patrimony represents the material basis upon which an entity subsists in order to carry on the purposes for which it has been instituted. Accordingly, this canon is the first of a series designed to assure that any decision to alienate stable patrimony not be made lightly.

The phrase "through lawful designation" in regard to the constitution of stable patrimony finds no counterpart in the 1917 code. The phrase first appeared in the 1977 *schema* but without comment.[91] After noting that stable patrimony comprises the "minimum secure financial basis" of a public juridic person in the current code, M. López Alarcón states:

> . . . there are no absolute rules, however, for establishing the stability of a patrimony, since this depends not only on the nature and the quantity of the goods, but also on the financial requirements for the fulfillment of the objectives, as well as on the stationary or expansive situation of the institution when discharging its commitments.[92]

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competentis."

[90]Pp. 7-46, *supra*.

[91]Pontificio Commissio Codici Iuris Canonici Recognoscendo, *Schema canonum Libri V: de iure patrimoniali Ecclesiae* (Vatican City: Typis Polyglottis, 1977) 17.

[92]M. López Alarcón, "Book V-The Temporal Goods of the Church," in *Code of Canon Law Annotated*, ed. J. I. Arrieta et al., Eng. ed. to conform with 5th Latin-Spanish ed. by E. Caparros, M. Thériault and J. Thorn (Montreal: Wilson & Lafleur Limitée, 1993) 797.

López Alarcón evidently is referring here to implicit aggregation to stable patrimony, as opposed to a carryover allocation or explicit designation to stable patrimony, since he is discussing in a general way the factors to consider in those cases which are not clear on their face.

This is in contrast to F. G. Morrisey's position with respect to money. Morrisey maintains that there are only two ways in which cash can become part of stable patrimony: when a donor of cash stipulates that it is to be used for a specified end, or by formal designation by competent authority.[93] Similarly, J. J. Myers contends that cash, inasmuch as it is principally a medium of exchange, is free capital unless it is formally declared as stable patrimony.[94]

Despite the position of Morrisey and Myers, it is the opinion of this author that the discussion in Chapter One[95] of implicit allocation to stable patrimony would seem to continue to be relevant to the 1983 code and to canon 1291 in particular. One would expect implicit designation to be the normal channel of allocating to stable patrimony

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[93]F. G. Morrisey, "Book V-The Temporal Goods of the Church," in *The Canon Law, Letter & Spirit*, ed. G. Sheehy et al. (Collegeville, MN: The Liturgical Press, 1995) 732-733.

[94]J. J. Myers, "Book V: The Temporal Goods of the Church (cc. 1254-1310)," in *The Code of Canon Law: A Text and Commentary*, ed. J. A. Coriden et al. (New York/Mahwah: Paulist Press, 1985) 879.

[95]Pp. 37-46, *supra*.

immovable property of substantial value which is usually acquired for a lengthy or indefinite period of time, but cash under certain conditions could also become part of stable patrimony without a formal designation. Even though the phrase "by lawful designation" contained in canon 1291 was not found in the 1917 code, it really provides no more practical guidance for determining how property is allocated to stable patrimony than the norms of the 1917 code did. Hence, whatever indicia were relevant to such determination under the 1917 code should continue to apply.

Likewise, Chapter One's discussion of the carryover status of the proceeds of stable patrimony[96] when sold would seem also to apply to the "lawful designation" clause of canon 1291.

With respect to explicit allocation to stable patrimony, one must first ask whether such action falls under extraordinary administration or more important acts of ordinary administration, because if it is not, then an administrator may make such an allocation in his sole discretion. As previously pointed out, (i) the episcopal conference determines those acts which constitute extraordinary administration in cases where the diocesan bishop acts as administrator pursuant to canon 1277, and (ii) canon 1281 §2 states that in other cases (i.e., where the diocesan bishop is not the administrator) the acts of

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[96]Pp. 18-21, 32, *supra*.

extraordinary administration are to be defined in the statutes of a juridic person, or, if the statutes fail to do so, by the diocesan bishop after hearing his finance council.[97]

If explicit allocation to stable patrimony is extraordinary administration, a diocesan bishop acting as administrator must obtain the consent of his finance council and the college of consultors[98] before making the allocation, in accordance with canon 1277. Other administrators must obtain written consent from their Ordinaries before making the allocation, in accordance with canon 1281 §1.

A diocesan bishop acting as administrator would also have to comply with canon 1277 if an explicit allocation to stable patrimony was considered to be an act of ordinary administration of greater importance. Such acts, when placed by a diocesan bishop as administrator, are governed by canon 1277 which requires the diocesan bishop to consult

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[97]Canon 492 states that every diocese must have a finance council, the members of which (a minimum of three) are appointed by the bishop and are to have expertise in finance and civil law and be of outstanding integrity. The bishop (or his delegate) presides over the council. The members have five-year, renewable terms.

[98]The college of consultors, described in canon 502, consists of between six and twelve priests selected by the diocesan bishop from his presbyteral council for five-year terms, automatically extended until the bishop makes new appointments. The presbyteral council is defined in canon 495 §1 as a body of priests representing the presbyterate and analogous to a senate with respect to the diocesan bishop.

his finance council and the college of consultors before placing acts of this type. The code is silent as to what constitutes a more important act of ordinary administration, leaving such a determination to be made in the statutes of the diocese. Statutes of public juridic persons other than the diocese may also designate certain acts as acts of ordinary administration of greater importance, and require certain consultations before such acts are placed.

C. CANON 1292

This canon in general stipulates the level of authority necessary for approving an alienation, according to the value or type of property involved:

> §1. With due regard for the prescription of can. 638, §3, when the value of the goods whose alienation is proposed is within the range of the minimum and maximum amounts which are to be determined by the conference of bishops for its region, the competent authority is determined in the group's own statutes when it is a question of juridic persons who are not subject to the diocesan bishop; otherwise, the competent authority is the diocesan bishop with the consent of the finance council, the college of consultors and the parties concerned. The diocesan bishop also needs their consent to alienate the goods of the diocese.
>
> §2. The permission of the Holy See is also required for valid alienation when it is a case of goods whose value exceeds the maximum amount, goods donated to the Church through a vow or goods which are especially valuable due to their artistic or historical value.
>
> §3. If the object to be alienated is divisible, the parts which have previously been alienated must be mentioned in seeking the permission for alienation; otherwise the permission is invalid.

> §4. The persons who must take part in alienating goods through their advice or consent are not to give their advice or consent unless they have first been thoroughly informed concerning the economic situation of the juridic person whose goods are proposed for alienation and concerning previous alienations.[99]

The canon is patterned after canon 1532 of the 1917 code. The most important change is that of the role that episcopal conferences play in determining the different levels at which approval must be sought from different authorities. By omitting references to specific monetary sums, as was the case with canon 1532 of the 1917 code, canon 1292 has more flexibility to meet the needs of public juridic persons as they vary with time and place. Such a revision reflects the principle of subsidiarity approved in the First General Assembly of the Synod of Bishops in 1967 as one of ten

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[99]"§1. Salvo praescripto can. 638, §3, cum valor bonorum, quorum alienatio proponitur, continetur intra summam minimam et summam maximam ab Episcoporum conferentia pro sua cuiusque regione definiendas, auctoritas competens, si agatur de personis iuridicis Episcopo dioecesano non subiectis, propriis determinatur statutis; secus, auctoritas competens est Episcopus dioecesanus cum consensu consilii a rebus oeconomicis et collegii consultorum necnon eorum quorum interest. Eorundem quoque consensu eget ipse Episcopus dioecesanus ad bona dioecesis alienanda.

§2. Si tamen agatur de rebus quarum valor summam maximam excedit, vel de rebus ex voto Ecclesiae donatis, vel de rebus pretiosis artis vel historiae causa, ad validitatem alienationis requiritur insuper licentia Sanctae Sedis.

§3. Si res alienanda sit divisibilis, in petenda licentia pro alienatione exprimi debent partes antea alienatae; secus licentia irrita est.

§4. Ii, qui in alienandis bonis consilio vel consensu partem habere debent, ne praebeant consilium vel consensum nisi prius exacte fuerint edocti tam de statu oeconomico personae iuridicae cuius bona alienanda proponuntur, quam de alienationibus iam peractis."

principles [100] to inspire and give direction to the drafters of the new code.[101] The fifth of those principles deals with subsidiarity. After confirming that the principle of subsidiarity finds application in canon law by serving

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[100]Pontificia Commissio Codici Iuris Canonici Recognoscendo, "Principia quae Codicis Iuris Canonici recognitionem dirigant," *Communicationes* (Vatican City: Typis Polyglottis, 1969-) 1, no. 2 (1969) 80-82.

[101]The role of the conference of bishops in alienations (and in transactions that could endanger patrimonial condition) had in fact begun before the convocation of the synod of 1967. In 1963, Pope Paul VI granted to Ordinaries the faculty of giving permission to moral persons to alienate, pledge, mortgage, rent or perpetually lease ecclesiastical property and to contract debts up to a sum of money determined by the relevant conference of bishops and approved by the Apostolic See. Paul VI, motu proprio *Pastorale Munus* 32, November 30, 1963: *AAS* 56 (1964) 10, translation in *CLD* 6: 375. A correlative pronouncement was made for religious congregations by way of the pontifical rescript *Cum Admotae* 9, November 6, 1964: *AAS* 59 (1967) 375-376, translation in *CLD* 6: 149.

The function of the episcopal conference in regard to alienations was expanded in the 1977 draft of the new code. In its prefatory remark to the draft, the *coetus* stated that the Ordinary would be required to receive permission from a body set up by the episcopal conference before giving his approval to any alienation of property the value of which exceeded a sum established by the conference. If the value exceeded twice what that threshold figure was, the Ordinary would have to recur to the Holy See for permission. Coetus studiorum "De Bonis Ecclesiae Temporalibus," *Communicationes* 9 (1977) 272.

The *coetus* took a more conservative approach in its 1979 draft. The consultors concluded that episcopal conferences would encounter difficulties in establishing an organ suitable for examining proposed alienations and rendering decisions binding on individual bishops. The consultors of the *coetus* anticipated that diocesan bishops would regard the action of such a body as unwarranted intervention. Accordingly, the *coetus* deleted the provision referring to such a body. Instead, it inserted a provision which called upon episcopal conferences to establish a value range, the overall thrust of which would come to be canon 1292 §1 of the 1983 code. *Communicationes* 12 (1980) 424.

legislative unity and providing for the needs of individual institutions, the fifth principle refers to article 8(a) of the conciliar decree *Christus Dominus*, with its affirmation of the bishop's proper and immediate ordinary power (subject to the reservation of cases to the pope or some other authority), and then the fifth principle focuses on the legislative acts of national councils in the area of temporal goods:

> With the exception of the discipline proper to the Eastern Churches, it is alien to the mind and spirit of Vatican II that there be in particular Western Church law anything which would indicate a specific form of national church law. This is not to say that the dignity and custom of particular legislation is not desired, especially in the laws made by national councils in which the particular needs of an individual region are apparent.
>
> The new Code is to accurately describe the weight of this particular type of legislation especially in regard to the administration of temporal goods which, for the most part, should be ordered in accord with the laws proper to an individual nation.[102]

Canon 1292 may be analyzed according to each section.

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[102] "Alienum autem videtur a mente et spiritu Concilii Vaticani II, salvis disciplinis Ecclesiarum Orientalium propriis, ut in Ecclesia occidentali Statura peculiaria adsint, quae veluti formam praebeant specificam legibus ecclesiarum nationalium. Attamen id significare non debet in legislationibus particularibus maiorem amplitudinem et autonomiam non desiderari, praesertim in iure a Conciliis nationalibus, regionalibus condendo, adeo ut aspectus peculiares ecclesiarum singularium non apparere non possint. Momentum harum peculiarium legislationum in novo Codice Iuris Canonici accuratius esset describendum praesertim in re administrativa temporali, cum regimen bonorum temporalium iuxta leges propriae nationis magna ex parte ordinari debeat." *Communicationes* 1, no. 2 (1969) 81; translation by R. G. Cunningham, "The Principles Guiding the Revision the Code of Canon Law," *The Jurist* 27 (1967) 450-451.

(i) Section 1: Canon 1292 begins by acknowledging canon 638 §3, which provides that administrators in religious institutes must secure written permission from the competent superior with the consent of the council before they attempt an act of alienation or any other transaction which could adversely affect the patrimonial condition of the juridic person involved.[105] That being acknowledged in the first clause of canon 1292 §1, the canon proceeds to define various other requirements in specification of the broad norm of law enunciated in canon 1291:

1. If the value of a proposed alienation does not exceed the minimum established by the relevant episcopal conference, the norms governing alienation do not apply (although such a transaction may be an act of extraordinary administration[106]).

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[105]Canon 638 §3 also requires the consent of the Holy See for property of value exceeding a given regional figure (established by the Holy See) and for precious or *ex voto* items.

[106]Canon 1281 §2 provides that the statutes of a public juridic person may declare that various acts are acts of extraordinary administration, which could include specified types of alienation which are not large enough in value to be subject to the norms governing alienation in the 1983 code. Canon 1281 §2 also states that if the statutes are silent, the diocesan bishop to whom such juridic person is subject could also determine that such smaller alienations are extraordinary administration. According to canon 1277, where a diocesan bishop functions as administrator, the relevant episcopal conference defines what is meant by extraordinary administration. The episcopal conference could therefore include in extraordinary administration certain types of alienation which are not large enough in value to be subject to the norms governing alienation.

2. If the value falls within the minimum and maximum amounts established by the relevant episcopal conference, the procedure depends upon the canonical status of the entity involved:

(a) When the entity is a public juridic person not subject to the diocesan bishop, for example a supradiocesan entity, its statutes are to determine what authority is competent to approve the transaction. The code makes no provision for a situation in which statutes are silent on the matter. Such a situation should rarely, if ever, arise, however, because canons 117 and 314 require that statutes must be approved by the authority competent to erect a public juridic person.

(b) When the entity is a public juridic person which is subject to the diocesan bishop or is the diocese itelf, the diocesan bishop is competent. The diocesan bishop may or may not be the administrator, but in either event, he in turn will need the consent of the finance council, the college of consultors[107] and any parties concerned. López

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[107]Canon 502 describes the college of consultors. L. de Echeverría points out that the relevant episcopal conference may determine that the functions of the college of consultors may be committed to the cathedral chapter, pursuant to canon 502 §3, which in such case would mean that consent from the cathedral chapter would be required in lieu of the college of consultors for purposes of canon 1292 §1 when the bishop acted as competent authority with respect to a proposed alienation or when goods of the diocese were to be alienated. L. de Echeverría, "Libro V-De los bienes temporales de la Iglesia," in *Código de Derecho Canónico, Edición bilingüe comentada*, ed. J. L. Acebal et al. (Madrid: Biblioteca de Autores Cristianos, 1992) 615.

Alarcón gives as examples of interested parties the parish priest, the founder of the entity, and others with real or personal rights in the property.[108]

(ii) Section 2: If the value of the property exceeds the maximum sum established by the relevant episcopal conference, or if the alienation concerns *ex voto* offerings or property that is precious by reason of artistic or historical significance, the additional permission of the Holy See is required. There are effectively two layers of approval necessary: the approval required under section 1 and that of the Holy See. The permission of the Holy See is given by the Congregation for the Clergy.[109]

It is important to note that any determination by the episcopal conference of the minimum and maximum amounts referred to in canon 1292 §1 is not binding until it receives a *recognitio* from the Congregation for the Clergy and is subsequently promulgated by the episcopal conference. This is because such a determination by deliberative vote of the bishops constitutes a general decree for the territory, thus bringing into play canon 455 §§1-3.

On two occasions the National Conference of Catholic Bishops attempted to establish definitive figures, for which the Congregation for the Clergy refused to grant its

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[108]López Alarcón, "Book V-The Temporal Goods of the Church," 802.

[109]John Paul II, Apostolic constitution *Pastor Bonus* 98, June 28, 1988: *AAS* 80 (1988) 885.

recognitio.[110] The conference first approved in its plenary meeting of November 1985 a proposal establishing the minimum limit at $500,000 and the maximum at the greater of $1,000,000 or $5.00 per capita of Catholic population in a diocese up to a ceiling of $3,000,000. By letter from the Apostolic Pro-Nuncio,[111] the Congregation for the Clergy refused to give its *recognitio* to the sliding per capita scale or to the proposed maximum of $3,000,000 but instead approved a $1,000,000 maximum. The Congregation also stated that the minimum was to be established according to canon 1292 §1.

In its general meeting of November, 1990 the NCCB approved a proposal containing two alternative formulas for computing the maximum:

(1) that it be calculated at $5.00 per capita of Catholic population but no less than $1,000,000 and no more than $5,000,000; or,

(2) that the following flat amounts apply, based upon population: (a) $5,000,000 for a diocese with a Catholic population of greater than 1,000,000; (b) $4,000,000 for one with a Catholic population of between 600,000 and 1,000,000; (c) $3,000,000 for one with a population of less than

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[110]National Conference of Catholic Bishops, *NCCB Complementary Norms*, 22-24.

[111]*NCCB Complementary Norms*, 22, with reference to letter from the Apostolic Pro-Nuncio (Prot. No. 1782/86/8) April 19,1986.

600,000.[112]

The Congregation for the Clergy rejected both sliding scale formulas. Instead, the congregation set a flat temporary maximum of $3,000,000, pending agreement by the bishops in a plenary meeting.[113]

The episcopal conference adopted the $3,000,000 maximum in a plenary session in November, 1991; the *recognitio* was granted on April 26, 1993;[114] and the decree of promulgation was dated May 24, 1993.[115] Regarding the 1986 statement by the Congregation that the minimum should be established according to canon 1292 §1, it is unclear whether such effectively granted a *recognitio* to the episcopal conference's previous proposal of $500,000, but, in any event, the episcopal conference has not promulgated it. At this writing, then, the maximum of $3,000,000 has been promulgated, but the minimum of $500,000 does not have the force of a general decree.

(iii) Section 3: This provision closely mirrors canon 1532 §4 of the 1917 code; the provision may conveniently be

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[112]*NCCB Complementary Norms*, 23.

[113]*NCCB Complementary Norms*, 23-24, with reference to letter from the Congregation for the Clergy to NCCB President (Prot. No. 190357/I) April 16, 1991.

[114]Letter of J. Cardinal Sanchez, Prefect of the Congregation for the Clergy, to W. H. Keeler, President of NCCB, April 26, 1993 (Archives NCCB).

[115]Decree of Promulgation by W. H. Keeler, President of NCCB, and R. N. Lynch, General Secretary of NCCB/USCC, May 24, 1993 (Archives NCCB).

described as the rule pertaining to "divisible property." The reason for a provision of this kind is obvious; if property could be divided into smaller units and alienated separately at individual prices below the threshold amount for obtaining approval from higher authority, an administrator could circumvent the requirements of the law that would otherwise apply were the property sold in block. Canon 1292 §3 is designed to frustrate this type of evasion by requiring that the petition for alienation include information concerning prior alienations which, together with the property which is the subject of a present request, comprise a cohesive unit. An obvious example would be the subdivision of land with separate sales thereof to distinct buyers. J. F. Cleary pointed out, in the context of canon 1532 §4 of the 1917 code, that the "analogy of landed property is to be extended to all kinds of church property having physical as well as moral unity."[116] There is no reason why this comment should not apply to canon 1292 §3 as well. It should be noted that failure to disclose this

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[116]J. F. Cleary, *Canonical Limitations on the Alienation of Church Property*, Canon Law Studies 100 (Washington: The Catholic University of America, 1936) 86. In reviewing canon 1532 §4 of the 1917 code, A. Vermeersch and J. Creusen also wrote of the division of property that comprised a physical or moral unity, giving the subdivision of land as an example of the former and as examples of the latter, sales of a portion of a herd of livestock or editions from a library or even a portion of a stamp collection. A. Vermeersch and J. Creusen, *Epitome Iuris Canonici*, 6th ed. (Brussels: L'Editione Universelle, 1940) 2 (*Liber III Codicis iuris canonici*): 598, n. 854.

information invalidates the alienation irrespective of any possible intent to defraud on the part of the petitioning administrator.[117]

It is important to note that the rule on divisible property found in canon 1292 §3 is distinct from mandatory coalescing of the dispositions of unrelated properties, as articulated in 1929 by the Pontifical Commission for the Authentic Interpretation of the Code, and which was noted in Chapter One.[118] The Commission affirmed that, by virtue of canon 1532 §1, 2° of the 1917 code, permission from the Holy See was required, under certain circumstances, to alienate each of several articles of ecclesiastical property belonging to the same person when their combined value exceeded 30,000 francs. In the Commission's view, such an interpretation was necessary in order to apply canon 1532 §1, 2° in an effective manner.

As was also true of the 1917 code, the rule of coalescence is not explicit in the 1983 code. The Commission's interpretation, however, which became a settled part of canonical jurisprudence, may be expected to be equally applicable under the 1983 code as a means of preventing evasion of the requirements of canon 1292 §§1 and

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[117]Canon 1377 calls for a criminal sanction to be imposed upon anyone who attempts to alienate property without the required permission, the penalty to be determined on the basis of the gravity of the offense and the culpability of the offender.

[118]Chapter One, pp. 65-66, footnote 121, *supra*.

2. Whereas canon 1532 §1, 2° provided a specific monetary threshold for seeking hierarchical approval, canon 1292 §§1 and 2 does not; but the principle of requiring hierarchical approval based upon the value of a total proposed alienation still holds.

This means that alienations are to be grouped for purposes of approval not only by reason of the inherent relationship of the properties to be transferred, as addressed in the divisible-property rule explicitly articulated in canon 1292 §3 of the 1983 code, but also in accord with canonical jurisprudence not explicitly contained in either the old or new codes, namely, that of coalescing dispositions by reason of: (i) the intention of the public juridic person to alienate several units of property, that is, as a result of a single decision to divest the public juridic person of several properties; (ii) the close proximity of the transfers in terms of time, irrespective of any over-arching initial decision to divest several properties; or, (iii) a unity of purpose in their transfer.[119]

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[119]This description of coalescence was made by Bouscaren-Ellis-Korth, 844-845 (see Chapter One, pp. 65-66, footnote 121, *supra*.). Note that (i) "intention" and (iii) "purpose," are distinct criteria. The administrator, for example, may in a single deliberation conclude that several assets should be sold, thus satisfying the criterion of unity of intention. Or, the administrator may decide to sell a unit of property to finance a particular undertaking, without any thought initially to selling other properties. Some time after having sold the unit and embarked upon the project, the administrator determines that the sale of

(iv) Section 4: This is a provision not found in the 1917 code. The advisability that those charged with the responsibility of giving or withholding consent to a proposed alienation be informed of all facts pertinent to the economic condition of the juridic person seems clear. It is, perhaps, less clear whether the requirement of full disclosure concerning alienations which have already taken place refers only to related alienations (i.e., the alienations of divisible property referred to in canon 1292 §3) or to all major alienations of the public juridic person in question. It would seem that the requirement that the decision-making persons are to receive precise data concerning the economic situation of the juridic person carries the implication that all substantial alienations should be disclosed because of their effect on the financial position, even if they were independent and unrelated to the

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additional property will be necessary to bring the project to fruition. The second sale does not coalesce with the first on the basis of intention, because, in fact, the administrator originally intended to sell only the first unit in order to finance the project. But the second sale will coalesce with the first on the basis of purpose, because both sales take place in order to finance the same undertaking.

One might conclude that, in most instances, unity of intention would not exist apart from unity of purpose. However, it is possible for the former to be present without the latter. For example, the administrator may, upon review of the public juridic person's holdings, decide that several assets carry no particular benefit to the entity, without any underlying plan of utilizing the proceeds of the dispositions in a single project of expansion or investment. For that matter, one asset might be alienated by way of gift, and another by sale with the purpose of applying the proceeds to a specific project.

proposed transaction at hand.

In his commentary on canon 1292 §4, L. de Echeverría reminds the reader that the interested parties who receive the information must, for their part, manifest their sincere opinion with respect to the advisability of the proposed alienation and observe secrecy if the nature of the proposal so requires.[120]

D. CANON 1293

Miscellaneous requirements are listed in this canon for all alienations of stable patrimony in excess of the minimum value referred to in canon 1292 §1:

> §1. To alienate goods whose value exceeds the minimum amount which has been determined, also required are:
>
> 1° a just cause such as urgent necessity, evident usefulness, piety, charity or some other serious pastoral reason;
>
> 2° a written estimate from experts concerning the value of the object to be alienated.
>
> §2. Other safeguards prescribed by legitimate authority are also to be observed to prevent harm to the Church.[121]

This canon is basically a restatement of canon 1530 of

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[120]De Echeverría, 615.

[121]"§1. Ad alienanda bona, quorum valor summam minimam definitam excedit, requiritur insuper:
1° iusta causa, veluti urgens necessitas, evidens utilitas, pietas, caritas vel gravis alia ratio pastoralis;
2° aestimatio rei alienandae a peritis scripto facta.
"§2. Aliae quoque cautelae a legitima auctoritate praescriptae serventur, ut Ecclesiae damnum vitetur."

the 1917 code, except that the content of canon 1530 §1, 3°, which provided that permission of the lawful superior was required for validity, is now found in canon 1291 of the 1983 code rather than in canon 1293.

As López Alarcón and Myers note,[122] the provisions of canon 1293 go to the liceity of a transaction, not to its validity. This is not stated in the canon itself, but is based upon canon 10, which makes clear that only those laws which expressly state that an act is null are invalidating. Nothing in canon 1293 either explicitly or implicitly "expresses" the invalidating nature of its requirments.

The just-cause requirement of canon 1293 §1, 1° mirrors canon 1530 §1, 2° of the 1917 code, which mentioned necessity, utility, and piety. In his commentary on the 1917 code, Conte a Coronata provided examples: (i) with respect to "urgent necessity," alienation in order to satisfy the demands of creditors for payment when such demands were in accord with law or a judge's ruling; (ii) with respect to "manifest utility," when money to be received from the alienation was more beneficial than retaining the property; (iii) with respect to "piety," aiding the destitute experiencing the effects of a public calamity, liberating captives, or constructing a needed

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[122]López Alarcón, "Book V-The Temporal Goods of the Church," 803; Myers, 881.

church.[123] Canon 1293 adds "charity or some other serious pastoral reason."[124]

In commenting upon the just-cause requirement, Myers writes,

> The phrase "some other serious pastoral reason" permits the legitimate authority to enjoy various options as long as the alienation is of significant importance. Reasons external to the Church may also dictate certain decisions. A situation of economic crisis or collapse in a country or an especially advantageous offer to purchase an asset may indicate a course of action of "evident usefulness" for the Church.[125]

Quite similar to the content of canon 1293 §1, 2°, canon 1530 §1, 1° of the 1917 code required "a written estimate of the value of the thing made by reputable experts" (*aestimatio rei a probis peritis scripto facta*). Vromant reminded the reader in his commentary on canon 1530 §1, 1° that, given the reference to experts in the plural, at least two were required.[126] Conte a Coronata agreed, stating that the experts could work jointly or

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[123]Conte a Coronata, 2: 492, n. 1071.

[124]"*Caritas*" appeared in the draft of what was to become canon 1293 §1, 1° in the 1977 schema, without explanation. Pontificio Commissio Codici Iuris Canonici Recognoscendo, *Schema canonum Libri V: de iure patrimoniali Ecclesiae*, 18. In a meeting of the *coetus* held November 14, 1979, some consultors suggested that the phrase "*bonum pastorale*" be deleted as superflous, and others suggested that it be replaced with "*vel alia ratio pastoralis*," whereupon a decision was made to use the expression "*vel gravis alia ratio pastoralis*," which appears in canon 1293 §1, 1°. *Communicationes* 12 (1980) 425.

[125]Myers, 881.

[126]Vromant, 252, n. 298.

independently. He also offered the view that the experts could establish a range of values as their finding, in which case it would be sufficient for the juridic person to demand the minimum figure as the compensation to be received.[127]

Without giving an opinion as to present-day applicability, Myers makes reference to the fact that commentators on the 1917 code required at least two experts,[128] while Morrisey and López Alarcón contend that the requirement of at least two experts is still in force.[129] Myers additionally notes that it is "often advisable for the estimates to be stated as a range of values, indicating a minimum acceptable and the most hopeful value for an object."[130]

Based upon canon 1530 §2 of the 1917 code, which, like canon 1293 §2 of the 1983 code, obliged administrators to observe other requirements imposed by competent authority, Vromant noted that a superior could require that the experts take an oath to discharge faithfully their function. Vromant also noted, pursuant to the canonization of civil law found in canon 1529 of the 1917 code, that all civil law requirements were to be observed with respect to the

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[127]Conte a Coronata, 2: 491, n. 1071.

[128]Myers, 881.

[129]Morrisey, 735; López Alarcón, "Book V-The Temporal Goods of the Church," 803.

[130]Myers, 881.

election, number and qualification of experts, and the method of documenting their evaluation.[131]

A comment of López Alarcón is noteworthy in connection with additional precautions that legitimate authority may impose pursuant to canon 1293 §2:

> These could take the form of public auctions or advertising, requiring certain qualities in the purchaser, a stabilization clause, the posting of bond when payment is deferred, etc.[132]

The matter of auctions and advertising would seem to pertain more to canon 1294 §1, to be addressed below. Reference by López Alarcón to the qualities in the purchaser reflects an implicit concern of canon 1293 §1, 1° that there be good reason for the alienation; the possibility of placing property in the hands of a purchaser who would misuse it in the light of Catholic teaching would militate against an alienation that might otherwise be warranted. Regarding the reference of López Alarcón to a stabilization clause and to the posting of bond, this is simply consonant with the sound business practice of obtaining adequate security for an installment sale, and one would expect such measures to be taken as a matter of course.

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[131]Vromant, 252, n. 298. See also C. Berutti, *Institutiones Iuris Canonici* (Turin: Casa Editrice Marietti, 1940) 4: 513, footnote 3, n. 184.

[132]López Alarcón, "Book V-The Temporal Goods of the Church," 803.

E. CANON 1294

The 1983 code also addresses the question of the price to be set for an alienation and the use to be made of the proceeds therefrom:

> §1. Ordinarily an object must not be alienated for a price which is less than that indicated in the estimate.
>
> §2. The money realized from the alienation is either to be invested carefully for the advantage of the Church or wisely expended in accord with the purposes of the alienation.[133]

The fact that when stable patrimony is sold the proceeds, if not expended in accord with the purpose of the alienation, are to be reinvested so as to retain the character of stable patrimony means that the sale should be for a price not less than fair market value; otherwise, the overall value of the stable patrimony held by the public juridic person would be reduced. Yet, the word "ordinarily" tempers canon 1294 §1 in comparison to the wording of canon 1531 §1 of the 1917 code, which on its face did not admit of exceptions. However, even the 1917 counterpart was in practice interpreted as allowing the moral person effectively to choose a lower price. As has been pointed out, an administrator did not have to use the highest of several appraisals as the minimum offering price, and could take into account the qualities of proposed purchasers. The

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[133] "§1. Res alienari minore pretio ordinarie non debet, quam quod in aestimatione indicatur.
"§2. Pecunia ex alienatione percepta vel in commodum Ecclesiae caute collocetur vel, iuxta alienationis fines, prudenter erogetur."

administrator or competent authority could also call for an additional appraisal, if a prior one appeared inaccurate.[134]

Canon 1531 §2 of the 1917 code stated that alienation should take place by means of public auction or at least after publication, and that the transfer should be made to the party making the highest offer. Bouscaren-Ellis-Korth pointed out that in the United States a juridic person generally does not avail itself of public auction when alienating church property, which may be all the more reason for observing the alternative of publicizing the impending sale, so as to solicit bids.[135] There may be circumstances, however, which would augur in favor of disclosing the offer to sell only to a limited number of parties, thereby settling for a price lower than could be obtained had there been widespread notice; such circumstances would include preventing the property from being utilized for undesirable purposes,[136] avoiding adverse publicity as in the case of a bankruptcy sale,[137] and preferring greater security of

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[134]Vermeersch-Creusen, 2: 596, n. 853; Vromant, 253, n. 299.

[135]Bouscaren-Ellis-Korth, 841.

[136]Ibid.

[137]P. C. Augustine, *A Commentary on the New Code of Canon Law*, 3d ed. (St. Louis: B. Herder Book Co., 1931) 6: 595-596.

payment.[138] These reasons are, of course, as compelling under canon 1294 §1 as they were when canon 1531 was in force. Morrisey adds two more examples of reasonable motives for alienating property at a price under the market value: because it has become an expensive liability to the public juridic person and should be disposed of in order to avoid further expense, or in order to offer the property to another apostolic or charitable endeavor.[139] In any event, the consent and disclosure requirements of canon 1292 should operate to prevent the alienation of property at a low price without due consideration of the arguments for and against the sale.

Moreover, as with canon 1293 and for the same reason, the requirements of canon 1294 §1 affect only the liceity and not the validity of an alienation.

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[138]Vermeersch-Creusen, 2: 596, n. 853; Vromant, 253, n. 299. An example would be where the seller opts for the security of receiving full cash payment at closing rather than the alternative of a higher sales price but with payments to be received in installments.

[139]Morrisey, 736. One might think that the first reason given by Morrisey, that of alienating property because it represents a continuing drain on the resources of the juridic person, would be somewhat specious, since the market value should already implicitly reflect the high cost of maintaining the property. However, market value reflects the "highest and best use" in financial terms, which aims at maximizing the difference between the revenue that the property can generate and the associated costs. A public juridic person is not in a business engaged in utilizing its assets in such a way as to maximize financial return. Knowing this and the fact that the juridic person may not be in a position to demand a price in line with market value, prospective purchasers will have an incentive to lower their offers.

Apart from special situations, such as *ex voto* offerings and artistically or historically precious goods, canons 1292 and 1294 do not even come into play unless the value of the patrimony to be alienated exceeds the minimum amount determined in accord with canon 1292 §1. Therefore, if the value of property is not accurately reflected in the financial records of a public juridic person, the alienation requirements may be evaded, willfully or not. Canon 1283, 2° calls upon administrators to prepare and renew an accurate and detailed inventory and appraisal of all stable patrimony (including precious objects).

Updating the value of patrimony at regular intervals is of the utmost importance. Movable and immovable property typically are recorded on a balance sheet at the historical cost of acquisition or, in the case of donations, the market value at the time of receipt, which becomes the so-called "book value" of the property. Thereafter, financial statements may reflect depreciation of movable property based on estimated wear and tear; in effect, the net book value (i.e., book value less accumulated depreciation) of movable property diminishes over time. Consequently, it may occur that property with a net book value below the minimum as determined in accord with canon 1292 has actually appreciated to a fair market value above that minimum. An administrator might then sell stable patrimony ignorant of the fact that the offer received is below the current market

value. An expert appraisal, as required by canon 1293 §1, 2°, should alert the administrator to the true value of the property. But the application of canon 1293 is predicated upon a prior determination that the property exceeds the minimum value, which is precisely the determination that has not been made. That stated, one way to ensure that canon 1294 §1 becomes fully operative (and, for that matter, the other provisions of canons 1291-1294) is for the statutes or the competent authority of a public juridic person to require a periodic appraisal of all stable patrimony with substantial value.

At this juncture it is appropriate to ask how the substance of canon 1294 §1 can be adapted to a transaction under canon 1295, that is, one in which patrimony is not being alienated but placed at possible risk. The answer can only be that the terms of the transaction must be commensurate with the value of the patrimony, based upon a prudential judgment made by the administrator and the ecclesiastical authority responsible for approving the transaction. However, while the word "commensurate" in a proposed alienation typically means a sale or exchange involving equal value, that is, where the value of the patrimony to be alienated by the juridic person should normally be no less than what the juridic person receives in money or money's worth, the measurement of value received by the public juridic person may be less precise in a

transaction under canon 1295.

For example, a public juridic person with a solid financial background is to execute a mortgage pursuant to a loan contract, and an appraisal has been made of the stable patrimony (immovable property) which is being mortgaged to secure the loan. Is the juridic person receiving loan proceeds and terms which are competitive, given (i) the value of the patrimony which the juridic person is placing at risk and (ii) the juridic person's credit history and overall financial condition? Or is the juridic person agreeing to terms which are too onerous, taking into account the value of the patrimony to be mortgaged and the juridic person's strong credit history? In the context of a public juridic person which contemplates incurring loan indebtedness, a meaningful application of canon 1294 §1 should entail not only an appraisal of whatever stable patrimony may be placed directly at risk, but also an evaluation of the reasonableness of the interest rate and other provisions of the loan contract in light of the financial history of the juridic person and the other alternatives available in the financial markets.

The requirement of canon 1294 §2 that the proceeds of an alienation be carefully invested or employed for the purposes for which the alienation was approved is an improvement over canon 1531 §3 of the 1917 code,[140] which

[140]See pp. 20-21, *supra*.

required investment of the proceeds and made no mention of using the proceeds for the purpose for which the alienation had been approved.[141] The requirement to reinvest reflects the carryover status of stable patrimony which attaches to the proceeds.[142] De Echeverría observes that normally the alienation will be made with an explicit objective regarding the application of the proceeds, in which case they must be used for such end, but that at times the alienation takes place simply to take advantage of an attractive offer or because of expropriation (perhaps in the United States the exercise of governmental eminent domain comes more readily to mind), which entails the admonition of canon 1294 §2 that

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[141]It will be recalled from p. 20, *supra.*, that Vromant contended that the preferred investment of proceeds would usually be in immovable property, where the request for alienation had not originally contained a specific plan of expenditure of the proceeds (ref. to Vromant, 254, n. 300). Further, W. F. Cahill stated, with respect to canon 1531 §3 of the 1917 code, that "license to sell or in other wise to realize money upon patrimonial property is not *de se* a license to alienate the proceeds of the transaction. This is a second alienation and will require a new license unless it was competently, and at least implicitly, provided for in the licenses to sell, etc." W. F. Cahill, "The Dedication of Property to the Fixed Patrimony of a Church," *The Jurist* 17 (1957) 144. The statements of Vromant and Cahill evidently acknowledge that, notwithstanding the absence in canon 1531 §3 of language to the effect that the proceeds should be used in a manner consistent with the purpose of the alienation, the proceeds could be used in accord with such purpose, where a reference was made to it by the moral person in the request for alienation, so that the permission at least implicitly included approval of the proposed expenditure of proceeds as well.

[142]See pp. 18-21, *supra.*

the proceeds be invested "carefully."[143]

A question arises as to whether the requirement of canon 1294 §2 is a matter of liceity or validity. Since the canon neither explicitly nor implicitly asserts that it affects validity, it would seem clear that it affects liceity only.[144] Invalidity could result, however, from failure to observe the requirements of canon 1294 §2 not because of the nature of the canon (it is not an invalidating law) but because of the status of the proceeds with which it is concerned. The proceeds of an alienation of stable patrimony, to the extent that they are not expended in accord with the purposes for which the alienation was approved, are themselves impressed with the carryover character of stable patrimony. That is why canon 1294 §2 requires that they be carefully invested. If, instead of being invested, the proceeds were used, for example, to meet the operating expenses or for some purpose other than that for which the alienation had been approved, such use would be invalid, not because it violates canon 1294 §2 which affects only liceity, but because it violates canon 1291, which invalidates unauthorized alienation of stable patrimony. In effect what transpires are two alienations: one of the original patrimony and a second of the proceeds which have taken on the character of stable

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[143]De Echeverría, 616.

[144]C. 10.

patrimony. The first transaction is valid, but the second is invalid if it does not constitute an investment. Canon 1294 §2 is a form of authorization; absent compliance with that authorization, an administrator invalidly alienates the proceeds of an approved alienation.

SUMMARY

Although canon 1295 explicitly refers simply to "juridic persons," it is clear on a number of grounds that the canon applies only to *public* juridic persons. Public juridic persons are distinguished from private juridic persons in a number of ways, chief among which is that public juridic persons act in the name of the Church, that is, closely governed by ecclesiastical authority.

Among the grounds on which is based the conclusion that canon 1295 applies only to *public* juridic persons are the following:

(i) Canon 1257 §2 states that the canons of Book V of the 1983 code do not apply to private juridic persons unless otherwise expressly provided, thus establishing the initial presumption that canon 1295 applies only to public juridic persons;

(ii) It is illogical to include private juridic persons within the ambit of canon 1295 in view of the fact that private juridic persons are not subject to canons 1291 through 1294, the canons which canon 1295 makes applicable

to the transactions with which it is concerned. Both canon 1295 and canons 1291 through 1294 are concerned with preserving stable patrimony. Since the alienation canons, 1291 through 1294, apply only to public juridic persons even though the effect of an alienation on stable patrimony is the same in the case of a private juridic person, it would not make sense to require private juridic persons to comply with canon 1295 for transactions which may endanger stable patrimony but are not an outright alienation of it;

(iii) Although the drafters deleted the modifier "public" in the final draft of canon 1295 in reference to juridic persons, this does not indicate that they thereby intended to include private juridic persons within the ambit of the canon, because they made the same deletion in a prior draft of canon 1292 §1 and used simply "juridic person" without the modifier in canon 1292 §4. Yet it cannot reasonably be contended that canon 1292 includes private juridic persons; it is clearly part of a series of canons which begins with canon 1291, and canon 1291 explicitly clarifies that the series of canons applies only to public juridic persons. Canon 1295 must be read as part of the same series rather than as an independent canon. Consequently, canon 1295 cannot reasonably be read as including in its application a category of juridic persons which the preceding canons do not.

(iv) If canon 1295 applied to private juridic persons,

then, in compliance with one of its provisions, the statutes of private juridic persons would have to conform to the requirements of canons 1291 through 1294 regarding alienations. This would contradict the restriction to public juridic persons which is explicitly provided in those same canons.

Canon 1295 deals with *transactions* which may jeopardize the patrimonial condition of a public juridic person. A "transaction" encompasses the broad array of activities that were associated with the word "contract" in canon 1533 of the 1917 code. Neglect, however, on the part of an administrator to carry out an act of administration when he has the duty to do so is not a transaction, even though such inaction may place stable patrimony at risk.

Acquisitions are rightly understood as a form of transaction, and may be subject to canon 1295 if they are accompanied by obligations or if they are financed in such a way as to subject the stable patrimony of the public juridic person to risk of loss. The same applies to investments, which are a form of acquisition.

This chapter next contained a discussion of the alienation provisions referred to in canon 1295, namely, canons 1291 through 1294. Of particular note is the current ambiguity in the United States with respect to the minimum amount referred to in canon 1292 §1; though the National Conference of Catholic Bishops appears to regard $500,000 as

the minimum, it is questionable that such amount ever received the required *recognitio* from the Holy See, and unquestionable that such an amount has never been promulgated by the NCCB as required in canon 455.

Having discussed in this chapter the canonical meaning of the terms contained in canon 1295 and the referenced canons pertaining to alienation, attention will be focused in Chapter Three upon the practical application of canon 1295 to transactions which may affect stable patrimony in the United States, with due consideration to be given to principles of American civil law.

CHAPTER THREE

THE APPLICATION OF CANON 1295 IN THE UNITED STATES

Canon 1295 applies the formalities of alienation to "any transaction through which the patrimonial condition of a juridic person can be worsened."[1] The patrimonial condition of a public juridic person may be worsened when its stable patrimony is placed at risk. Risk may be incurred in a number of ways. There is, for example, a risk associated with carelessness in the physical maintenance of property or in neglecting to make it physically secure. Risk also results when the administrator fails to take adequate measures to protect stable patrimony from confiscation arising from the nonobservance of civil laws or when the administrator fails to maintain adequate insurance to repair or replace property in the event it is damaged, lost, or destroyed. Indeed, the 1983 code addresses such concerns in canon 1284 §2.

Canon 1295, however, is more narrowly focused: its scope is limited to *transactions* which give rise to a risk of worsened patrimonial condition. One may approach the topic of the risk that attends transactions in property from

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[1]". . . in quolibet negotio, quo condicio patrimonialis personae iuridicae peior fieri possit."

the standpoint of principles of finance, such as an analysis of the concepts of risk versus return in investment decisionmaking and portfolio planning. But if a transaction produces risk in a legal sense, it is because its consequences to the parties involved are enforceable at law. For this reason, in order to obtain an insight into how canon 1295 can apply to public juridic persons operating in the United States, it is necessary to review certain principles of American civil law and establish their relevance to transactions in which a public juridic person is likely to engage in this country.

The most common general category of transaction to which canon 1295 may apply is that of debt incurred by the public juridic person. Accordingly, this is the first area of discussion in this chapter. Debt may be unsecured, secured by immovable property, or secured by incorporeal or movable corporeal property. The mechanics of how a public juridic person's stable patrimony can be jeopardized by these types of indebtedness will be reviewed. Also included in this discussion is the relationship of canon 1295 to refinancing indebtedness. Other forms of indebtedness to be covered are the issuance of bonds and annuities.

Canon 1295 may also apply to the reverse position of a public juridic person, that in which it functions as creditor. One would expect the incidence of these transactions to be lower than those in which a public

juridic person incurs debt; but when there is a loan of stable patrimony, canon 1295 must be considered.

Related to transactions which place a public juridic person in the position of a debtor are those in which it agrees to act as a guarantor or surety for the indebtedness of another party. These roles of a public juridic person are also described in this chapter, because they too may require adherence to the formalities of alienation due to canon 1295.

This chapter then will investigate the possible application of canon 1295 to rights or privileges of access that the public juridic person may grant to others with respect to its immovable property, specifically in the form of easements, "profits *a prendre*," and licenses.

At times a public juridic person may alienate immovable property or engage in another transaction which deals directly with immovable property but which also affects the utility or value of other immovable property not directly involved in the transaction. While the alienation may require compliance with canons 1291 through 1294, it is also necessary to consider the relevance of canon 1295 to the other property indirectly affected, and this chapter endeavors to do so.

A public juridic person may consider the advisability of issuing to another party an option to purchase immovable property. This chapter discusses the advantages to both

sides of such a transaction and its implications for canon 1295.

This chapter also includes a discussion of how canon 1295 may relate to the restructuring of an incorporated apostolate such as an educational, health, or other charitable institution sponsored by a public juridic person.

Finally, this chapter contains an explanation of the ways in which settlements, arbitration, and related techniques of avoiding or terminating litigation may necessitate compliance with canon 1295.

I. CANON 1295 AND DEBT

A. OVERVIEW

1. Terminology concerning classes of property under Anglo-American law

When a public juridic person contracts substantial indebtedness, it often runs a risk that its stable patrimony will be vulnerable to creditors. It was concluded in Chapter One that stable patrimony for purposes of the 1917 code encompassed immovable and movable corporeal property as well as incorporeal property. The 1983 code has certainly not contracted the range of property which may qualify as stable patrimony. In fact, given the expansion of ways in which wealth may be held, the forms of property eligible for designation as stable patrimony have proliferated under current law.

In applying canon 1295 to stable patrimony in the environment of American civil law, particularly with respect to indebtedness assumed by a public juridic person, a clarification of terms is in order. Anglo-American law employs the terms "tangible" and "intangible" property with meanings that correspond to the divisions of corporeal and incorporeal property used in canon law.[2]

Immovable and movable property as categories of corporeal property at canon law have no precise counterpart in Anglo-American law, but real and personal property may be employed as approximations. "Real property" is generally comparable in scope to immovable property inasmuch as it includes land and the structures thereon, and, for most purposes, is regarded as encompassing fixtures and other

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[2]*Black's Law Dictionary* defines tangible and intangible property as follows:

"Tangible Property. Property that has physical form and substance and is not intangible. That which may be felt or touched, and is necessarily corporeal, although it may be either real or personal." H. C. Black, *Black's Law Dictionary*, 6th ed. by J. R. Nolan and J. M. Nolan-Haley (St. Paul: West Publishing Co., 1990) 1456.

"Intangible Property. As used chiefly in the law of taxation, this term means such property as has no intrinsic and marketable value, but is merely representative or evidence of such value, such as certificates of stock, bonds, promissory notes, copyrights and franchises." Ibid., 809.

Intangible property may be further divided into (i) so-called "choses in action," which essentially are claims represented by bank accounts, promissory notes, corporate insurance policies, annuities, and other contractual rights; (ii) miscellaneous forms of intangible property such as patents, trademarks, and the goodwill of a business. R. A. Cunningham, W. B. Shoebuck, and D. A. Whitman, *The Law of Property* (St. Paul: West Publishing Co., 1984) 12.

movable property permanently placed on or affixed to land or structures to enhance the latters' utility and value.[3] The correspondence of the term "personal property" of Anglo-American law to "movable corporeal property" of canon law is more tenuous because personal property need not be tangible.[4]

2. The concepts of liens and priorities

The extent to which stable patrimony is vulnerable depends partly on the nature of the creditor. There are

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[3]Cunningham, Shoebuck, Whitman, 13-14.
Black's Law Dictionary defines real property, or, real estate, as follows:
"*Real estate*. Land and anything permanently affixed to the land, such as buildings, fences, and those things attached to the buildings, such as light fixtures, or other such items that would be personal property if not attached." Black's, 1217.
Of particular interest is the 1972 draft of §9-313(1)(a) of the Uniform Commercial Code, adopted in many jurisdictions of the United States, which defines fixtures as follows: "Goods are 'fixtures' when they become so related to real estate that an interest in them arises under real estate law." *Uniform Laws Annotated* (St. Paul: West Publishing Co., 1992, with pocket part updating) 3A: 418.

[4]Cunningham, Shoebuck, Whitman, 12. Also, *Black's Law Dictionary*, 1217:
"Personal property. In a broad and generic sense, everything that is the subject of ownership, not coming under the denomination of real estate. A right or interest in things personal, or right or interest less than a freehold in realty, or any right or interest which one has in things movable.
"Personal property includes money, goods, chattels, things in action, and evidences of debt.
"Personal property is divisible into (1) corporeal personal property, which includes movable and tangible things, such as animals, furniture, merchandise, etc.; and (2) incorporeal personal property, which consists of such rights as personal annuities, stocks, shares, patents, and copyrights."

three general categories of creditor possible: the creditor with a "lien"; the creditor with a "priority"; and finally the creditor with neither a lien nor a priority.[5] American law affords distinctive rights and remedies to each.

D. G. Epstein summarizes the essence of a lien as follows:

> A "lien" is a charge on the debtor's property that must be satisfied before the property or its proceeds is available for satisfaction of the claims of general creditors. A lien thus affects not only the lienor and the debtor but other creditors as well, because it withdraws some of the debtor's resources that would otherwise be available for distribution to other creditors.
>
> The lienor may resort to the encumbered property for the purpose of collecting its claim by means of its appropriation or sale in preference to other creditors and subsequent purchasers, yielding only to certain creditors with competing liens. . . . A lien may be created by agreement, common law, statute, or judicial proceeding.[6]

Consensual interests in personal property (movable property) are governed by Article 9 of the Uniform Commercial Code; they are known as "security interests" (a more archaic term being "chattel mortgages").[7] Consensual

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[5]D. G. Epstein, *Debtor-Creditor Law* (St. Paul: West Publishing Co., 1980) 2.

[6]Ibid., 2-3. See *Uniform Laws Annotated*, 3A: 10, containing §9-301(3) of the Uniform Commercial Code, which defines a "lien creditor" as a creditor who has obtained a lien through a judicial proceeding.

[7]Epstein, 3-4; L. P. King and M. L. Cook, *Creditors' Rights, Debtors' Protection and Bankrupcty*, 2d ed. (New York: Matthew Bender & Co., 1989) 120. It should be explained that the Uniform Commercial Code (UCC) is a uniform set of laws governing commercial transactions which have been adopted, at least in part, by all fifty States.

liens on realty (immovable property) are generally called "mortgages."[8] Common-law liens refer to the possessory liens that some creditors have on the property of their debtors, for example, the lien that an artisan has over the chattel that the debtor has transferred to him for repair, or the lien that the common carrier has over the goods subject to delivery pending payment of freight charges.[9] Statutory liens are a legislated expansion of liens that have developed at common law.[10] They are typically for the

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The UCC has been drafted and sponsored jointly by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The UCC offers alternative model provisions, or, "Official Texts," which have been issued in various years from 1962 through 1995, together with "Official Comments" by the drafters which serve as an interpretation of those provisions. For purposes of simplicity, this thesis confines itself to treatment of the UCC under the latest version of a given provision, unless otherwise provided. See T. D. Crandall, R. B. Hagedorn, F. W. Smith, Jr., *Debtor-Creditor Law Manual* (Boston: Warren, Gorham & Lamont, Inc. 1985) [hereinafter Crandall-Hagedorn-Smith] 7-7, ¶7.01[2].

[8]Epstein, 4; King and Cook, 120.

[9]Epstein, 93. Common-law liens may be further categorized as specific or general. The specific common-law lien attaches to specific property as security for some demand which the creditor has with respect to that particular item. In a general lien, the item may be used to satisfy any debt between the creditor and the debtor, not just a debt which may have been associated with the property held by the creditor. Ibid., 93-94.

[10]Ibid., 96. Widespread statutory liens include: employees' liens on the employer's personal property to secure the payment of back wages; a landlord's lien on the tenant's property; the materialmen's and mechanics' liens on land and affixed improvements to secure the compensation of persons who contractually provided labor or materials for such property; and tax liens. Epstein, 96-97; King and Cook, 121.

benefit of particular economic groups and are not dependent upon any agreement between the parties or any judicial proceeding.[11]

According to L. P. King and M. L. Cook,

> Judicial liens arise out of judicial proceedings. Examples are the judgment lien, attachment lien, and garnishment lien. Again, procedural statutes of a regulatory nature exist, but a judicial proceeding-pending or imminent-is the essential element.[12]

Thus, judicial liens result from prejudgment collection efforts such as attachment or garnishment, from the judgment itself or a recordation thereof, and from post-judgment efforts to enforce the judgment such as execution and garnishment.[13]

The baseline distinction between "liens" and "priorities" is that of timing: a priority does not arise until distribution of a debtor's assets on insolvency, whereas liens normally arise before and are enforceable

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[11]King and Cook, 121.

[12]Ibid., 120.

[13]As a clarification of terminology, the term "judicial lien" describes any lien obtained through use of a court-related action. A "judgment lien" is one form of "judicial lien," which arises after a definitive judgment has been entered against the debtor in court. Crandall-Hagedorn-Smith, 6-67, ¶6.05[2][a]. Examples of other forms of judicial lien are attachment liens and garnishment liens, which arise prior to the judgment in order to render property of the debtor secure pending final decision on the merits of the case and to give the creditors who petition for such liens priority in advance of such final decision. Epstein, 46.

without regard to insolvency of the debtor.[14] Creditors with a priority are still considered a type of "general creditor" (i.e., a creditor without any security interest in specific property by voluntary action of the debtor or by involuntary lien) and, accordingly, are paid with and from the assets that remain after the creditors with liens have been satisfied from assets subject to such liens.[15]

In addition to State laws which govern debtor-creditor relationships according to the class of creditor involved, there exists federal bankruptcy law, found in Title 11 of the United States Code. In article 1, section 8, clause 4 of the United States Constitution, the Congress is empowered to establish "uniform laws on the subject of Bankruptcies throughout the United States." Congress has acted pursuant to this power, and States are preempted from enacting

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[14]Epstein, 4-5. To state that a lien "normally" arises before a debtor becomes insolvent implies, however, that it can also arise after insolvency, as when a general creditor files a claim in court upon a default of its debtor. This is covered in the following Section I.B.

[15]Ibid., 5. As Epstein points out, the "priorities" of general creditors with respect to one another are created by statute (whereas, it will be recalled, liens may be consensual, judicial, statutory, or created by common law). Ibid. The term "priority," then, is specifically applicable to statutorily-created relationships among general creditors. It should be borne in mind, however, that "priority" also has a wider application; for instance, various parties may have competing consensual liens on the same debtor's property, in which case they, too, are subject to statutory rules of priority with respect to one another. In other words, "priority" is always germane to general creditors; it becomes relevant, as well, when there is more than than one secured creditor.

bankruptcy laws.

The following is a general scheme of laws which govern debtor-creditor relationships. It is relevant to the public juridic person as debtor for purposes of canon 1295, because it demonstrates how the public juridic person exposes stable patrimony to loss when it incurs a substantial debt which it may be unable to service or which entails an immediate encumbrance. It should be borne in mind, however, that this discussion is also germane to the reverse situation, wherein the public juridic person acts as the creditor; all creditors are not on equal footing, and the public juridic person as lender of stable capital assumes a risk that it may be unable to recoup that capital in the event of default.

B. CREDITORS WITHOUT LIENS PRIOR TO DEBTOR'S DEFAULT ("GENERAL CREDITORS")

A creditor with no special rights arising from security interests in, or liens on, specific property of his debtor may be said to hold a right *in personam* with respect to such debtor and is known as a "general creditor." This section of the dissertation summarizes how a general creditor may enforce rights under American law, thereby demonstrating how a public juridic person may expose itself to the danger of losing patrimony when it grants an *in personam* interest by incurring unsecured debt.

1. Prejudgment remedies

A creditor trying to collect a claim through a judicial process will not always be able to obtain a judgment immediately. While the collection suit is pending, the debtor may dispose of assets, or other creditors may recur to those assets to satisfy their claims. While the collection action proceeds, a creditor may decide to pursue one of several "prejudgment remedies" to prevent a diminution in the debtor's available assets.

a. Attachment

In an attachment proceeding, a creditor submits a motion to the court with an affidavit establishing the creditor's right to have a debtor's property confiscated. Assuming that the motion and affidavit are in order, a writ of attachment is then issued by the presiding judge, which instructs the sheriff of the county where property of the debtor is located to "attach" and securely keep all of the debtor's non-exempt property, or so much of it as is necessary to satisfy the creditor's claim, along with with costs and expenses.[16] The term "levy" refers to the sheriff taking custody of the property.[17] With respect to any real property of the debtor, a levy requires giving notice that

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[16]Epstein, 23; Crandall-Hagedorn-Smith, 6-25, ¶6.04[1][a] and 6-27 and 6-28, ¶6.04[1][b].

[17]Epstein, 23; Crandall-Hagedorn-Smith, 6-25, ¶6.04[1][a].

it is encumbered, typically by filing with the recorder of deeds. A levy of tangible personal property generally requires a physical seizure of the property.[18]

With a levy on the debtor's assets, the debtor is prevented from disposing of the attached assets while the underlying collection action is pending.[19] Moreover, a provisional lien is created which will enable the creditor to have such property liquidated upon attaining a judgment in such creditor's favor and which may give the creditor precedence over other claimants.[20] More particularly, if the debtor has insufficient assets to pay all its creditors in full, the creditor that has a lien resulting from a levy has a precedence over general creditors.[21] This is because State law does not provide for pro rata distributions in the case of liens. Instead, distributions are made generally along the lines of "first-in-time" rules. The earlier the general creditor obtains its lien, the more advantageous its position. A creditor with an attachment lien, for example, takes precedence over another creditor who subsequently obtains a judgment lien.

State laws generally allow attachment only on a showing

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[18]Epstein, 24, Crandall-Hagedorn-Smith, 6-28, ¶6.04[1][b].

[19]Epstein, 24-25.

[20]Crandall-Hagedorn-Smith, 6-25 and 6-26, ¶6.04[1][a].

[21]Epstein, 25; Crandall-Hagedorn-Smith, 6-38, ¶6.04[1][f].

by the creditor that (i) the creditor-plaintiff is unable to obtain personal service[22] on the debtor because the latter is absent from the State, in concealment, or is a non-resident; (ii) the creditor's claim is entitled to special treatment, as where fraud is involved; or (iii) the debtor has assigned, disposed of, or concealed assets, or is about to do one of such acts with the intent to defraud creditors.[23] The creditor must also obtain a bond and generally provide the debtor with some form of notice, thereby giving the debtor an opportunity to be heard prior to the issuance of the attachment order.[24]

b. Garnishment

This is a collection remedy which the creditor directs not to its immediate debtor, but rather to a third party, the "garnishee," who, in turn, owes the immediate debtor a sum or has property which the immediate debtor owns or in

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[22]Notification to a debtor that a legal action is being initiated.

[23]Epstein, 21-22, Crandall-Hagedorn-Smith, 6-31, ¶6.04[1][d].

[24]*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 605-608 (1975). *North Georgia Finishing* actually concerned a garnishment proceeding (garnishments to be discussed in the following subsection), but the same analysis of constitutionally required notice to debtors applies to attachment, garnishment, and other creditor prejudgment remedies. Crandall-Hagedorn-Smith, 6-59 through 6-63, ¶6.04[5][a][i].

which such debtor has an interest.[25] A prejudgment garnishment is a notice to the garnishee that it must hold the property or sum until the creditor's suit has been tried and any judgment satisfied. Garnishment is often considered a form of attachment and, in many States, is a proceeding ancillary to attachment.[26] In general, the same grounds apply to it as to attachment, as well as the bond requirement and the issuance of notice to the debtor with an opportunity to be heard prior to the issuance of the order for garnishment.[27]

c. Receivership

As with garnishment, receivership may be a prejudgment or post-judgment remedy. The court appoints a prejudgment receiver, or, receiver *pendente lite*, as a disinterested party whose function is to collect and administer the property under the order of the court.[28] This interim solution is "equitable" in nature under the American legal system, meaning that it is executed in accordance with a discretionary decision of the judge. Courts will employ it

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[25]Epstein, 30; Crandall-Hagedorn-Smith, 6-39, ¶6.04[2][a]; King and Cook, 167.

[26]Epstein, 30-31; Crandall-Hagedorn-Smith, 6-40, ¶6.04[2][a].

[27]Epstein, 30-31; Crandall-Hagedorn-Smith, 6-41, ¶6.04[4][b].

[28]Epstein, 34, Crandall-Hagedorn-Smith, 6-56 and 6-57, ¶6.04[4][a].

only when another remedy, such as attachment, is not feasible. It may be resorted to when there are allegations of danger of loss, deterioration, or other impairment of the value of property that is the subject matter of the action or that will be necessary to satisfy any judgment in the action.[29] Many State laws have provisions for the appointment of receivers of corporations both before and after dissolution.[30]

The powers of the receiver *pendente lite* are circumscribed by the court order. They may be limited to holding the property, or they may contemplate some active duties such as continuing the business, collecting income, or the sale of some assets.[31]

Receivership is a remedy intended primarily to preserve property. It differs from attachment and garnishment in that it confers no advantage upon the creditor who initiated the hearing to secure the property relative to other creditors. A petitioning creditor does not receive a lien over the property that has been transferred to a receiver. Since the title to the property is unaffected by the appointment of a receiver *pendente lite*, any already

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[29]Epstein, 34; Crandall-Hagedorn-Smith, 6-57 and 6-58, ¶6.04[4][b].

[30]Epstein, 35, Crandall-Hagedorn-Smith, 6-56, ¶6.04[4][a].

[31]Epstein, 35; Crandall-Hagedorn-Smith, 6-55 and 6-56, ¶6.04[4][a].

existing liens remain valid, and new liens may be obtained even while the property is in the receiver's custody.[32] However, neither the creditor who has petitioned the court for receivership nor any other creditor may levy over the property which has been placed in the hands of the receiver.[33]

d. Replevin

This is a proceeding to recover possession of personal property. It is often discussed in the context of prejudgment remedies available to unsecured creditors, largely because replevin requires a notice to the debtor and a posting of bond by the owner or creditor which are similar to the requirements associated with attachment and prejudgment garnishment proceedings.[34] However, it is really an action available only to a party that has a right to the particular property to be seized, such as the owner of the property or one who attempts to enforce a valid security interest in it. This rules out unsecured creditors. Nevertheless, replevin is worthy of discussion, because it is available to a party who makes a loan of personal property without having formally given public

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[32]Epstein, 36; Crandall-Hagedorn-Smith, 6-56, ¶6.04[4][a].

[33]Crandall-Hagedorn-Smith, 6-56, ¶6.04[4][a].

[34]Ibid., 6-51, ¶6.04[3][a] and 6-54 and 6-55, ¶6.04[3][c].

notice of its ownership by filing a security interest under the Uniform Commercial Code.

The first step in a replevin action is for the sheriff to seize the property and place it in the hands of the creditor-plaintiff, pending outcome of the litigation over possession. The plaintiff must file an affidavit with the court, stating with particularity the grounds upon which the plaintiff is entitled to immediate possession of the specific property.[35] Although the plaintiff will have posted a bond to obtain possession, the debtor-defendant who wishes to regain possession of the goods replevied may do so by posting a counter-bond.[36] Replevin is only available to one who has title to the property or otherwise a right to possession.[37] Moreover, it applies only to personal property, unlike attachment.[38]

2. Obtaining a judgment

The provisional remedies discussed above may or may not exert enough pressure on the debtor to pay or provide security for payment. If the debtor is unable or unwilling to do so, the creditor must continue by pursuing a judgment. This can mean that a trial on the merits of the case will

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[35]Ibid., 6-54, ¶6.04[3][c].

[36]Ibid., 6-55, ¶6.04[3][c].

[37]Epstein, 32; Crandall-Hagedorn-Smith, 6-51, ¶6.04[3][b].

[38]Crandall-Hagedorn-Smith, 6-52, ¶6.04[3][b].

ensue, unless a default judgment or a *cognovit* judgment is entered.

From the standpoint of the creditor, an expeditious and less expensive way of bringing a collection action to a favorable close is to obtain a default judgment. A default judgment is rendered when the debtor has failed to respond within the stipulated period after having been served with the summons and complaint.

Even less expensive and faster than a default judgment, however, is a *cognovit* judgment, or judgment by confession.[39] In a *cognovit* judgment, the parties agree at the time the debtor-creditor relationship is entered into that, in the event of the debtor's default, the creditor can obtain a judgment against the debtor without any notice to the debtor and without a hearing.[40] The debtor may therefore not even know when the *cognovit* judgment has been entered, and after learning of its existence has only two avenues of relief: petition to strike the judgment on the basis of some fatal defect which is on the face of the record, or simply petition to open judgment.[41] Although most States eliminated confession of judgment or have

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[39]Ibid., 6-18, ¶6.02[5][a].

[40]Epstein, 43; Crandall-Hagedorn-Smith, 6-17, ¶6.02[5][a].

[41]Epstein, 43-44; Crandall-Hagedorn-Smith, 6-22, ¶6.02[5][e].

severely restricted its use,[42] the administrator of a public juridic person as debtor should be wary of agreeing to the inclusion of a *cognovit* judgment provision in any contract of indebtedness.

3. Post-judgment collection

a. Judgment lien[43]

It is typical that when a judgment has been entered against a debtor, whether as a valid default judgment or *cognovit* judgment or judgment obtained after protracted litigation, the property of the debtor is subject to a lien.[44] The mechanics of obtaining the lien and of enforcing it vary from State to State.

In order to have the effect of a lien, the judgment must be final, and be for a sum certain or payable in

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[42]Also, the United States Supreme Court has noted the difficulty of *cognovit* judgments with respect to due process. In *D.H. Overmyer Co., Inc.* v. *Frick Co.*, 405 U.S. 174 (1972), the court held that the particular judgment in question, involving two substantial business entities, did not violate the due process clause of the Fourteenth Amendment to the United States Constitution. Nevertheless, by way of dictum the court did state that a confession of judgment might violate due process "where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the cognovit provision." 405 U.S. at 188.

[43]A judgment lien is a particular form of judicial lien. See footnote 13, *supra*.

[44]Only Kentucky, Michigan, and the New England States (excluding Connecticut) do not provide for judgment liens. Crandall-Hagedorn-Smith, 6-67, ¶6.05[2][a].

installments.[45] Statutes that provide that the judgment itself creates the lien are in a small minority, because they provide little notice to the public of the creation of the judgment lien.[46] The majority of States therefore provide that a lien arises only after the judgment is docketed by the clerk in the county where the property is located or after the judgment is recorded in the county where the property is located. Under laws applying in the latter group of States, a judgment in one county cannot create a lien on property in another county until the judgment is docketed or recorded in such other county.[47]

Epstein summarizes the scope of a judgment lien by stating, "A judgment lien operates as a general lien on all the debtor's property subject thereto, not as a specific lien upon particular property."[48] In most States, the judgment lien applies to the debtor's real property (and, in those States that require docketing of judgments, to all real property in counties in which the judgment has been docketed); in Alabama, Georgia and Mississippi, the judgment

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[45]E.g., *Uhrick* v. *Uhrick*, 362 N.E.2d 1163, 1164 (Ind. App. 1977); *Newstead Builder's, Inc.* v. *First Merchants' National Bank*, 369 A.2d 951, 952 (N.J. Super. 1977); California Code of Civil Procedure §697.310.

[46]Crandall-Hagedorn-Smith, 6-73, ¶6.05[2][c].

[47]Ibid.

[48]Epstein, 47.

lien reaches both real and personal property.[49]

As in the case with judicial liens generally, the precedence of a judgment lien, relative to others who claim interest in the same property of the judgment debtor, is determined on a "first-in-time, first-in-right" basis. The ranking of competing judgment liens depends upon the time at which the judgment lien is created (be it by rendering the judgment, docketing it, or recording it, as the applicable State law provides), with the first judgment lien being granted precedence.[50]

In any event, a judgment, or even a judgment lien, is not the final step in the collection process. A judgment lien creates only a right to levy on the debtor's property; in itself it is not a specific lien on any property and does not create an ownership interest.[51] This is consistent with

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[49]Epstein, 47; Crandall-Hagedorn-Smith, 6-74 and 75, ¶6.05[2][d]. Ala. Code §§6-9-40, 6-9-210, 6-9-211; Ga. Code Ann. §9-12-80; Miss. Code Ann. §11-7-191.

[50]E.g., *Massaker* v. *Petraitis*, 414 A.2d 590 (N.J. Super., 1980) [Lien priorities in New Jersey are determined by order in which execution is issued rather than by priority of docketing judgment]; *Krauth* v. *First Continental Dev-Con, Inc.*, 351 So.2d 1106, 1108 (Fla. App. 1977). On the other hand, in Florida if a creditor extends credit or a loan to the judgment debtor to purchase particular property and obtains a mortgage therefor, such a "purchase money" mortgage on that specific property has priority over the judgment lien of any other creditor, whether the judgment lien arose after *or before* the acquisition of the specific property, as held in *Sarmiento* v. *Stockton, Whatley, Davin & Co.*, 399 So.2d 1057, 1058 (Fla. App. 1981).

[51]*In re Estate of Wilhelm*, 760 P.2d 718, 723 (Mont. 1988).

the seminal ruling of *Conard* v. *Atlantic Insurance*, which held (i) that when a levy is actually made on property, the title of the creditor relates back to the time the judgment was rendered, thereby expunging any intermediate encumbrances; but, (ii) if the debtor should sell the property before the levy takes place, the creditor with the judgment lien cannot take the proceeds received by the debtor; the creditor can only enforce the lien against the property itself, which has been transferred to some third party.[52] Just how the property is levied on is a matter taken up in the law on "execution."

b. Execution and post-judgment garnishment

Execution, or post-judgment attachment, is a judicial process regulated by statute, resulting in a court-ordered writ of execution. Under this type of writ, a sheriff is ordered to levy upon property of a judgment debtor and sell it for the purpose of satisfying a judgment already obtained by a creditor. The levy creates a lien on certain property of the debtor that enables the judgment creditor to liquidate the property and obtain precedence over other claimants who do not already have liens. As previously stated, judgment liens in all but three States apply to real property rather than personal property. Since the real property of a debtor is already under a judgment lien

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[52]26 U.S. 386, 442 (1828).

wherever the judgment has been docketed or recorded, the writ of execution generally creates an "execution lien" only with respect to the personal property of the debtor, except for real estate with respect to which there was no prior judgment lien (due to a failure to docket or record in the proper county). As to that real estate that already was subject to a judgment lien, the writ of execution acts as a vehicle for forcing the sale of such real estate.[53]

Regarding the general process of obtaining execution, once a creditor has a judgment, the creditor requests of the clerk of the court that rendered the judgment that the sheriff be directed to take control of all land and personal property of the debtor necessary to satisfy the debt, and then to sell it. The proceeds, to the extent of the judgment amount, will be paid to the creditor. The writ directs the sheriff to the county or counties where the assets are located. Personal property is taken into his custody (or marked if custody is not feasible), and a certificate of levy is filed with the recorder of deeds with respect to the real estate of the debtor. Execution is completed when the property is sold and the proceeds distributed in order of precedence.[54]

Execution is the post-judgment procedural equivalent of prejudgment attachment, and post-judgment garnishment is the

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[53]Crandall-Hagedorn-Smith, 6-92, ¶6.05[3][d].

[54]Ibid., 6-87 and 6-88, ¶6.05[3][b].

procedural equivalent of prejudgment garnishment. As with its prejudgment counterpart, post-judgment garnishment is a method of reaching assets of the debtor held by third parties or debts owed the debtor by third parties. Procedurally, it is easier to obtain than a prejudgment garnishment, because all the creditor need show is the existence of an unsatisfied judgment and the reasonable belief that a third party possesses assets of the judgment debtor or has a debt outstanding to the judgment debtor.[55]

Finally, the "creditor's bill" is a procedure of last resort, designed to reach assets of the judgment debtor when the sheriff has been unsuccessful in locating them pursuant to a writ of execution. If the judgment creditor can establish the existence of such a state of affairs, State statutes generally provide, to employ the summary of Crandall-Hagedorn-Smith, for the following acts:

(1) Discovery of assets through the right of examination of the debtor and others;

(2) Issuance of injunctions to prevent disposition of property;

(3) Discretionary power to appoint receivers [on the part of the judge];

(4) Creation of liens on the debtor's property; and,

(5) Orders for the sale of the subject property.[56]

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[55]Ibid., 6-100, ¶6.05[4].

[56]Ibid., 6-104, ¶6.05[5][a]. See N.Y. Civil Practice Law and Rules §§5222-5228.

A creditor with no liens, mortgages, or security interests prior to a default by a debtor is one with a right *in personam*. Nevertheless, as can be concluded from the foregoing discussion, this type of creditor may quickly convert that *in personam* right to a right *in rem*. Whatever basis there was in the constitution *Ambitiosae* and other pre-1917 canon law for concluding that rights *in personam* (and particularly the so-called "general mortgage") were not subject to alienation requirements simply no longer exists under present day legal principles. Canon 1295 may apply to substantial non-secured debt incurred by a public juridic person as clearly as it does to secured debt, because the public juridic person's stable patrimony is rendered vulnerable in both sets of circumstances. To a creditor who would have to compete with other creditors for limited assets in the event of a default by a public juridic person, it would indeed make a great difference whether or not such creditor had secured a lien on the patrimony, but the assets would be subject to creditors' claims either way.

C. LOANS SECURED BY REAL ESTATE: MORTGAGES AND DEEDS OF TRUST

The classic example of a transaction which may endanger the patrimonial condition of a public juridic person is that of the so-called "special mortgage" applying to immovable property. This section focuses on the manner in which the law of mortgages and related security interests in real

estate may occasion the application of canon 1295 in the United States; the section also addresses those methods of real estate financing which may obviate the need for compliance with canon 1295.

1. Historical background of mortgages; current theories in the United States on the nature of mortgages

R. Kratovil provides a rather succinct definition of a mortgage:

> A mortgage may be defined as a conveyance of land given as security for the payment of a debt. On analysis, this definition discloses the existence of two elements: (1) Like a deed, a mortgage is a conveyance of land. (2) However, the object of the document is not, as in the case of a deed, to effect a sale of land, but to provide security for the payment of a debt.[57]

The fact that a mortgage is widely regarded as a security instrument is a reflection in American law of the development of the English common-law mortgage through the intervention of the equity courts in that country. The common-law mortgage of the fourteenth and fifteenth centuries generally involved a conveyance of the borrower-mortgagor's land to the lender-mortgagee, with the right of the mortgagor to re-enter the land and take possession only upon payment of the debt (eventually this took place by means of the mortgagee's deed of reconveyance).[58] In the

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[57]R. Kratovil, *Modern Mortgage Law and Practice*, 4th ed. (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1974) 23.

[58]G. S. Nelson and D. A. Whitman, *Real Estate Finance Law*, 3d ed. (St. Paul: West Publishing Co., 1993) 1: 6-7, §1.3; G. E. Osborne, *Handbook on the Law of Mortgages*, 2d

meantime, the mortgagee enjoyed all the incidents of ownership, including whatever profits and rents were payable.[59] The common-law mortgage was particularly harsh on the mortgagor because, if payment was not made precisely on the date on which the parties agreed, called the "law day,"[60] the mortgagor forfeited all interest in the land.

As a result, the English Chancery came to intervene in these cases by allowing a financially capable mortgagor to tender payment and recover the land after the law day, so long as he could establish that timely payment had not been made because of such grounds as fraud, misrepresentation, accident or duress. By the early seventeenth century, however, the right of "equity of redemption" had developed, under which the mortgagor could redeem the land after the law day as a matter of course, subject, according to G. E. Osborne, to two conditions: "one, the mortgagor must tender the principal and interest within a reasonable time after forfeiture; two, the mortgagee could go to court and obtain a decree ordering the debtor to pay by a fixed day or be forever barred."[61]

The laws prevailing in the jurisdictions of the United States reflect these historical antecedents in England, with

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ed. (St. Paul: West Publishing Co., 1970) 5, §2; 8, §5.

[59]Nelson and Whitman, 1: 6-7, §1.2; Osborne, 9-10, §5.

[60]Nelson and Whitman, 1: 7, §1.3.

[61]Osborne, 13, §6.

a few States giving more resonance to the original concept of title to the property having been transferred to the mortgagee subject to a "condition subsequent" (*viz.*, a timely tender of payment or performance in full by the mortgagor thereupon divesting the mortgagee of title) while most States have viewed a mortgage as solely a security device.[62]

All jurisdictions in the United States have affirmed the concept of equity of redemption. In fact, the concept has developed to the point where the parties may not insert a provision in the mortgage instrument purporting to waive this equitable redemption right.[63] However, to protect mortgagees from those mortgagors who might choose to redeem at any time following default, the practice has been carried over in the the United States of allowing a mortgagee to petition the court to place a time limit on the period during which the mortgagor may redeem; if the mortgagor fails to act during the stipulated period, he is preempted from doing so thereafter, and the property definitively vests in the mortgagee. This method of foreclosure, described as "strict foreclosure," is the rule of law in

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[62]The spectrum of views held by the States are dealt with in the following discussion of the title, lien and intermediate theories of mortgagor-mortgagee relationships.

[63]Kratovil, 25; Nelson and Whitman, 1: 32-33, §3.1; *Hamud* v. *Hawthorne*, 338 P.2d 387, 390-391 (Cal., 1959).

only a few States today.[64]

Instead, foreclosure is generally accomplished through a public sale. The most common type of public sale entails a full judicial proceeding, and all interested persons must be made parties to the suit. It is the only method of foreclosure in many States; it is expensive and may take substantial time.[65] In some jurisdictions a foreclosure sale may take place without a judicial proceeding, although the sale must be public and requires notice to any parties with an interest, such as the mortgagor or other creditors of record. These types of sales are often conducted by some public official such as a sheriff, but at times may be conducted by the mortgagee or by some other third party.[66] This latter type of sale is generally available only where the mortgage instrument so authorizes it, as in a deed of trust (discussed below).

Although the laws of many States defy any neat classification, the range of contemporary mortgage laws is commonly described according to three theories: the title theory, the lien theory, and the intermediate theory.

a. The title theory

States adhering to the title theory of mortgage,

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[64]Kratovil, 25.

[65]Nelson and Whitman, 1: 9, §1.4.

[66]Ibid.

characterized as a latter-day common-law mortgage, describe the mortgage as a transfer of legal defeasible interest in real estate; that is, the legal title to the real estate is actually conveyed to the mortgagee, but with a "defeasance clause," under which the conveyance will become null and void upon discharge of the mortgagor's obligation to the mortgagee.[67] Because the title is actually in the name of the mortgagee, the mortgagee has classically been described as the party vested with the incidents of ownership, including the right to possession.[68]

This purist approach to the transfer of the incidents of ownership to the mortgagee no longer holds in practice. The parties to a mortgage in a title-theory State typically agree that the mortgagor may retain possession until default; this is but an affirmation of what contemporary courts hold, in any event.[69] Where the title theory may be

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[67]See, for example, *Lund* v. *Lund*, 1 N.H. 39, 41 (1817), wherein the mortgage is described as a "deed conveying lands conditioned to be void upon the payment of a sum of money, or the doing of some other act." See also *Negron* v. *Gordon*, 366 N.E.2d 241, 244 (Mass. 1977) , wherein it was stated, "Prior to breach of the statutory condition, the mortgagee holds bare legal title to the property subject to a defeasance on the mortgagor's performance of the obligation secured by the mortgage."

[68]See *Darling Shops of Birmingham* v. *Nelson Realty Co.*, 79 So.2d 794, 797 (Ala. 1954).

[69]See *Maglione* v. *BancBoston Mortg. Corp.*, 557 N.E.2d 756 (Mass. App. 1990), wherein the court stated (at 757-758), "Literally, in Massachusetts, the granting of a mortgage vests title in the mortgagee to the land placed as security for the underlying debt. The mortgage splits the title in two parts: the legal title, which becomes the

of more practical significance is after a default has occurred, because in a State subscribing to the title theory it may be easier for a mortgagee to secure control of the property before foreclosure has taken place (and sometimes even to do so without seeking a foreclosure) than it would be in another, non-title theory State.[70] Even though mortgagees usually are in the business of lending rather than real estate management, possession of the premises prior to foreclosure can be valuable not only because it carries with it the right to protect the premises from waste, but more importantly, the right to collect rents and profits (although the mortgagee must then apply any such rents or profits toward the payment of the mortgage debt).[71]

b. The lien theory

In most States, the concept of a mortgage as a transfer

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mortgagee's, and the equitable title, which the mortgagor retains. . . . The purpose of vesting the legal title in the mortgagee is to secure the debt owed by the mortgagor. . . . In practical terms, the difference between the 'lien theory' and a 'title theory' as to the nature of a mortgage is that under the latter the mortgagee may enter into possession of the mortgaged premises upon default and before foreclosure, whereas under the 'lien theory' there is no right of possession; the mortgagee must await sale of the mortgaged property and obtains satisfaction of the mortgagor's debt from the proceeds of sale. . . . The right of possession gives the mortgagee under a 'title theory' regime slightly better control of foreclosure proceedings."

[70]J. J. Curtis, Jr., "Chapter 101, Mortgages, Deeds of Trust and Related Liens," in *Thompson on Real Property, Thomas Edition*, ed. D. A. Thomas et al. (Charlottesville, VA: The Mitchie Company, 1984) 12: 331, §101.01(b)(1).

[71]Nelson and Whitman, 1: 10-11, §1.5.

of legal title has been supplanted by the position of the equity courts that the mortgagor continues to hold title and the mortgagee holds only a lien as security.[72] This means, of course, that the mortgagor continues to enjoy the incidents of ownership, most importantly the right of possession, until the interest of the mortgagor is extinguished through foreclosure.[73] In fact, some statutes in lien-theory States provide that mortgagees are not entitled to possession before foreclosure;[74] others provide that, unless the parties agree otherwise, mortgagees are not entitled to possession until foreclosure;[75] and still others deny possession to mortgagees before foreclosure

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[72]Curtis in *Thompson on Real Property, Thomas Edition*, 12: 331, §101.01(b)(2). See also *Matter of Clark*, 738 F.2d 869, 871 (7th Cir. 1984) ("Under Wisconson law, a mortgagee has only a lien on the mortgaged property even after a judgment of foreclosure is entered. Neither equitable nor legal title passes until the foreclosure sale is held." 738 F.2d at 871); *Martinez* v. *Continental Enterprises*, 730 P.2d 308, 314 (Colo. 1986) ("Colorado, however, has by statute adopted a lien theory of mortgages, which theory generally prohibits a mortgagee from acquiring possession of mortgaged property until a foreclosure and sale have occurred." 730 P.2d at 314); *Kelley/Lehr & Associates* v. *O'Brien*, 551 N.E.2d 419 (Ill. App. 1990). Nelson and Whitman report that fewer than twelve States presently adhere to the title theory, whereas at least thirty-two States subscribe to the lien theory. Nelson and Whitman, 1: 152, §4.1 and 154, §4.2, footnote 1.

[73]*Matter of Clark*, 738 F.2d 869, 871 (7th Cir. 1984).

[74]Minn. Stat. Ann. §559.17 (1988); Or. Rev. Stat. §86.010 (1988); Wash. Rev. Code Ann. §7.28.230 (1992).

[75]California Civil Code §2927.

notwithstanding contrary agreements.[76]

c. The intermediate theory

Under this theory, the right to possession is strictly vested in the mortgagor, but once a default occurs the mortgagee generally has that right.[77]

2. Types of mortgages

There are several different types of mortgage instruments in use, which may be summarized as follows.

a. Regular mortgage

The ordinary printed form of mortgage encountered in most States is the regular mortgage, which consists of a deed or conveyance of land by the borrower to the lender preceded or followed by a description of the debt and a defeasance clause. There are two parties involved, the mortgagor and the mortgagee, who are borrower and lender, respectively.

It should be noted that this type of form is generally used not only in title theory States, but also in lien and intermediate theory States. Despite the features of purported "conveyance" followed by a clause calling for reconveyance upon satisfaction of the underlying debt, the

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[76]Colo. Rev. Stat. Ann. §38-35-117; *Martinez v. Continental Enterprises*, 730 P.2d 308, 309, 316 (Colo. 1986).

[77]Nelson and Whitman, 1: 10, §1.5.

mortgagor retains the incidents of ownership so long as no default occurs. As stated above, even in title theory States modern-day courts regard the mortgagee as having at best "bare" legal title, meaning that the mortgagee has primarily a lien interest in the property, with some advantage over mortgagees of lien theory States with respect to default remedies.

Of particular importance is a regular mortgage which has the status of a "purchase money" mortgage. In this case, the mortgage is issued by a purchaser of land to the seller. Sometimes, however, a lending institution may receive the mortgage as mortgagee; if the proceeds from the loan are to be paid entirely to the seller as part of the price of the property, this type of mortgage is also regarded as a "purchase money" mortgage.[78] In other words, whether the seller or an outside institution lends the money, the proceeds must be used only to finance the purchase of the specific property. The purchaser is the debtor, who receives a deed to the property, but in turn issues his mortgage to the seller (or a lending institution) as security. This type of mortgage may be advantageous to the mortgagor if the mortgagee agrees to limit the mortgagee's remedy in the event of default to the property subject to such a mortgage. This type of mortgage is also especially useful to the mortgagee (be it the seller or a

[78]Kratovil, 159.

lending institution), because a purchase money mortgage generally takes priority over any other prior or subsequent claim or lien attaching to the property through the mortgagor.[79]

b. Deed of trust

In this type of instrument, also known as a trust deed, the borrower conveys the land to a third party rather than to the lender. The third party holds the land in trust for the benefit of the holder of the promissory note or notes representing the mortgage debt.[80] The deed of trust has an advantage in those States which allow the effect of a power-of-sale clause, a provision which is commonly contained in such instrument. The power of sale clause allows the trustee to sell the property upon default by the mortgagor, without resorting to a court proceeding. In the event of a default, the note holder informs the trustee, who begins foreclosure proceedings with publication of notice; the sale usually occurs through public auction. The trustee is a disinterested third party representing both the lender and the borrower. The trustee manages the sale so that the note holder has no conflict of interest and, therefore, may bid on the sale.[81] As with regular mortgages, there exist

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[79]Ibid.

[80]Ibid., 28.

[81]Ibid., 61.

"purchase money" deeds of trust.

Kratovil lists several additional advantages to the deed of trust as a mortgaging vehicle, which may be relevant to the public juridic person, whether it is acting as lender or borrower:

1. A deed of trust may facilitate borrowing large sums of money. If the public juridic person, for example, plans to engage in the construction of a facility requiring a substantial outlay of capital, it may borrow the funds from a bank and execute a deed of trust on the land in favor of the bank as trustee. The deed of trust secures a large number of promissory notes or bonds. The bonds or notes may be sold to investors, with the bank recouping its loaned funds. The bank remains, however, in the position of trustee, as opposed to cancelling the trust deed and executing separate mortgages to the individual investors. In the event that foreclosure becomes necessary because of the public juridic person's default, the bank as trustee conducts the sale for the benefit of all bond or note holders.

2. In many States, a holder of a promissory note secured by a deed of trust may sell and transfer the note more easily and inexpensively than if it were secured by a regular mortgage, because in the situation of a regular mortgage the transfer of the note would entail an assignment of the mortgage as well, which would require executing

another instrument and recording it in the applicable county or other municipality.

3. The promissory note or bond holder secured by a deed of trust may maintain his ownership in secret.[82]

c. Equitable mortgage

According to Kratovil, an equitable mortgage is any written instrument in which the parties express their intention that real estate serve as security for a debt.[83] In some cases, an instrument that is intended to serve as a regular mortgage or deed of trust but is, for some reason, defective may still qualify as an equitable mortgage. For example, a mortgage on real estate owned by a husband and wife that was defective for failure to contain the husband's signature was nevertheless sustained in court as an equitable mortgage.[84]

d. Deed absolute given as security

This consists in the borrower simply executing a deed which is absolute on its face, that is, containing no

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[82]Ibid., 61-62. There are, however, disadvantages to this arrangement. For example, upon payment in full the borrower will want a release deed (to cancel the trust deed and re-vest title in the borrower), but the trustee will not issue one unless it receives all the promissory notes or bonds, duly cancelled. If a bond or note holder loses his debt instrument, a surety company will have to be engaged to induce the trustee to sign a release deed. Ibid., 62.

[83]Ibid., 28.

[84]*Gulf Shore Dredging Company* v. *Ingram*, 193 So.2d 232, 235 (Fla. App. 1966).

defeasance clause or other condition, but which nevertheless is intended by the parties to serve only as security for a loan. In nearly all States, parol (i.e., oral) evidence is admissible to show that the deed was intended solely as a mortgage; but there must be "clear and convincing" evidence, rather than a mere preponderance thereof, to sustain such a conclusion.[85]

e. Installment sales contract

Under this arrangement, a seller in effect provides the financing for the unpaid portion of the purchase price. In this sense, the installment sales contract is similar to the so-called purchase money mortgage, wherein the seller deeds the land to the purchaser, but the purchaser executes a promissory note in favor of the seller together with a traditional mortgage.

Under an installment sales contract, the purchaser takes possession and makes installment payments of principal and interest until the principal balance is paid off. The vendor retains legal title until full payment, at which time a deed to the land is executed. The installment sales contract has been employed in order to offer the seller an advantage that the purchase money mortgage does not: as under any conventional mortgage, default under a purchase money mortgage is subject to a formal judicial foreclosure

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[85]Osborne, 109, §72; 112-113, §74; *Walker* v. *Streeter*, 87 S.W.2d 43 (Ark. 1935).

proceeding; under an installment sales contract, on the other hand, the seller retains title until payment is made in full. In the past, therefore, in many jurisdictions a default by the purchaser would trigger a reversion of possession to the seller (which essentially was strict foreclosure by the seller) without a protracted judicial proceeding or any right of equity of redemption inhering in the purchaser. This advantage, however, has largely been eroded under the laws of most States.[86] Several States currently have statutes which require a seller to provide a purchaser with a notice of default, whereupon the purchaser has a grace period to make payment, ranging from thirty days to one year, depending on the State.[87] In those States which have not enacted statutes, courts have recently declined to enforce forfeiture clauses which they judge to be unreasonable. In some cases, they confer on the defaulting purchaser an equity of redemption which allows the purchaser to make payment in arrears; in others, when the purchaser is unable to pay, a judicial foreclosure is ordered; finally, if a court finds that the forfeiture clause is unfair, it may confer upon the purchaser a right of restitution, in which the purchaser recoups that sum of money which exceeds what the seller actually incurred as

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[86]Nelson and Whitman, 1: 93-98, §§3.27-3.28.

[87]Ibid., 1: 94, §3.28.

damages as a result of the default.[88]

3. Requisites of mortgages

While there is no set form which must be used in mortgages, there are some minimum requirements. As noted above, an agreement which falls short of such minimum requirements for legal mortgages may be upheld as an equitable mortgage, but this obviously places a burden of proof upon the party that petitions the court to rule in favor of such a mortgage, a burden which could have been avoided had the instrument been drafted and executed properly in the first place.

One may subscribe to the view that a mortgage is a transfer of legal interest or a form of lien. In either case it is an interest in real estate and therefore subject to the statute of frauds. Consequently, it must be evidenced by a writing,[89] and the written instrument must be delivered to the mortgagee to take effect.[90] The statute of frauds will usually be satisfied if the writing: (1) identifies the mortgagor and the mortgagee, as well as the trustee when the instrument is a deed of trust;[91] (2)

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[88]Ibid., 1: 98, §3.29.

[89]*In re Atkinson*, 126 B.R. 713, 716 (Bankr. N.D. Tex. 1991).

[90]*Godley* v. *Piedmont Land Sales, Inc.*, 505 F. Supp. 397, 398, 402 (E.D. Ky. 1978).

[91]*Bank of Christianberg* v. *Evans*, 178 S.E. 1, 2 (Va. 1935).

describes the realty interest encumbered; and (3) manifests the intent to make the realty interest security for debt.[92]

The mortgage must also function as security for a debt,[93] although many jurisdictions have held that the mortgagor may have gratuitously created the debt.[94] A mortgage may also be given to secure a debt previously incurred by the mortgagor (an "antecedent debt") or a debt incurred by someone else.[95]

The notion of debt implies an obligation payable in money or money's worth. Only obligations capable of being reduced to a liquidated sum can be secured by mortgages.[96] Obligations secured by mortgages are generally promises to pay money, usually repayable with interest. Often the amount of the loan is uncertain, as with open accounts, home equity loans, and construction loans. In these cases mortgages secure future extensions of credit (the instruments containing "future advance" clauses). Even so, the amount due in such transactions at any point in time can

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[92]California Code Civil Procedure §1971.

[93]*Bramblett* v. *Bramblett*, 310 S.E.2d 897, 898 (Ga. 1984); *County of Keith* v. *Fuller*, 452 N.W.2d 25 (Neb. 1990).

[94]*Safety Fed. Sav. & Loan Ass'n* v. *Thurston*, 648 P.2d 267, 268, 270 (Kan. 1982).

[95]*Pioneer Annuity Life Ins. Co.* v. *National Equity Life Ins. Co.*, 765 P.2d 550, 552, 557 (Ariz. App. 1988); *Crum* v. *United States Fid. & Guar. Co.*, 468 So.2d 1004, 1005, 1007 (Fla. App. 1985).

[96]*County of Keith* v. *Fuller*, 452 N.W.2d 26 (Neb. 1990); *Borsheim* v. *Owan*, 467 N.W.2d 96, 97 (N.D. 1991).

be calculated in monetary terms. A few States require that some terms of the obligation be specifically included in the mortgage document itself.[97]

4. Canon 1295 and purchase money mortgages

On the basis of the principle that an acquisition does not give rise to the application of canon 1295 unless such acquisition is financed in such a manner as may worsen the patrimonial condition of the public juridic person involved, it may generally be stated that canon 1295 does not apply to a purchase money mortgage issued by a public juridic person. In this type of mortgage, the only security offered for the loan is the land which is to be purchased. What is therefore immediately placed at risk is the new stable patrimony (the land). Were a default to take place shortly thereafter, the worst case would be to lose the new patrimony with little equity therein, which would only bring the public juridic person basically back to its pre-purchase position. The result is that, at the outset of the transaction, the patrimonial condition of the juridic person can be no worse than prior to the purchase.

Expressed alternatively, Vromant stated, in the context of the 1917 code, that the purchase money mortgage and the

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[97]Illinois, for example, requires the mortgage to state the amount of the obligation if known, as well as the maturity date. *Northridge Bank* v. *Lakeshore Commercial Fin. Corp.*, 365 N.E.2d 383, 386 (Ill. App. 1977). In Kentucky the amount of debt should also be stated. *Peoples Bank* v. *Morgan County Nat'l Bank*, 98 S.W.2d 936 (Ky. 1936).

construction mortgage were methods of financing that eliminated the need for the apostolic indult which would be required of other types of loans because what took place in either of these types of mortgages was really just an incomplete purchase, which one might liken to an installment purchase:

> Many times, however, there is a means to avoid the necessity of apostolic indult: by constituting a *special* mortgage on the very buildings which are being constructed, the case which obtains does not as such give rise to a debt, but to an *incomplete acquisition of buildings* (emphasis in original).[98]

However, one circumstance in which a purchase money mortgage could lead to the application of canon 1295 is when the public juridic person makes a downpayment from the stable patrimony in an amount which exceeds one of the thresholds applicable under canon 1295 and finances the balance with the loan. Even if the loan were relatively small, a default could force a foreclosure sale and a possible loss of the value of that patrimony (the downpayment) in order to satisfy the mortgagee's claim, unless the foreclosure sale yielded a sum at least equal to the contract price of the purchase.

An additional question arises as to whether or not, in

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[98]G. Vromant, *De Bonis Ecclesiae Temporalibus*, 3rd ed., rev. (Brussels: L'Edition Universelle, 1953) 251, n. 297: ". . . saepissime tamen non deficiet medium devitandi necessitatem indulti apostolici: constituendo nempe hypothecam *specialem* ipsorum aedificiorum quae extruantur: quo casu obtinetur non debitum proprie dictum, sed aedificiorum *acquisitio minus perfecta*" (emphasis in original).

order to render canon 1295 inapplicable to a purchase money mortgage, a further condition must be satisfied, namely, that the public juridic person reasonably foresees that the financed portion of the purchase price will be paid only from free capital (typically from the operating receipts of the public juridic person).

Whether or not the application of canon 1295 depends on the likelihood that the public juridic person can service the debt from its current receipts constituting free capital, an administrator would be remiss in not considering the matter, which becomes more important as the mortgage payments accumulate. As debt is gradually paid, the public juridic person is building up equity in the new property. In effect, those monies which have been paid represent a conversion of free capital to stable patrimony. The longer the mortgage remains outstanding, the more committed the public juridic person will be to conserve that stable patrimony (in the form of equity), which has been steadily increasing, by avoiding a default. If the public juridic person reaches the point of having insufficient liquidity in the form of free capital, it faces a dilemma: either it defaults and perhaps loses the substantial stable patrimony it has in the form of equity in the purchased property, or it begins to delve incrementally into other stable patrimony, liquidating investments or even other tangible properties, in order to pay installments. In a sense this

dilemma represents an issue divisible into two questions: whether there will be a danger of losing the stable patrimony that has been created by the conversion of free capital to pay the mortgage, and, if so, whether the public juridic person will then be in a position where it must liquidate other stable patrimony to prevent such a loss.

Neither canon 1295 of the 1983 code nor canons 1533 or 1538 of the 1917 code contain language to the effect that their requirements would only apply if it could be determined that there was a "likelihood" that a juridic person would be unable to repay the indebtedness incurred in a transaction. In other words, these canons did not by their terms predicate their applicability upon a transaction having attained some threshold level of risk of nonpayment (with consequent exposure of stable patrimony to loss); their was no distinction between remote and proximate risk in the canonical language. Moreover, not many commentators have investigated whether or not the possibility of inadequate free capital in the future would subject a purchase money mortgage to the alienation requirements. The excerpt of Vromant quoted above[99] simply states that what is tantamount to an installment purchase does not endanger stable patrimony.

Three commentators who have, however, expressed an awareness of the question in the context of the 1917 code

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[99]P. 223, *supra*.

were Heston, McManus, and Stenger. Heston contended that, as long as the juridic person was not forced to make payments from stable capital, there was no application of canon 1533 to a purchase money mortgage or a construction mortgage.[100] While this writer believes that Heston's conclusion was ultimately correct, it would seem that he did not take into account the fact that canon 1533, like canon 1295 of the 1983 code, included within its ambit transactions that *might* jeopardize the patrimonial condition immediately or in the future, and not just those that necessarily and immediately did so.

McManus acknowledged that a default would lead to foreclosure proceedings, which in turn could result in the loss of patrimony, and accordingly cautioned that purchase money mortgages should be considered on a case-by-case basis before being undertaken or concluding that they were not subject to the alienation requirements.[101] Such advice was logical, considering that any mortgage represents a long-term commitment of resources, in contrast with "operational"

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[100]E. L. Heston, *The Alienation Church Property in the United States*, Canon Law Studies 132 (Washington: The Catholic University of America, 1941) [hereinafter Heston, *Alienation*] 163, footnote 9; E. L. Heston, "The Element of Stable Capital in Temporal Administration," *The Jurist* 2 (1942) [hereinafter Heston, "Stable Capital"] 129.

[101]J. E. McManus, *The Administration of Temporal Goods in Religious Institutes*, Canon Law Studies 109 (Washington: The Catholic University of America, 1937) 125, footnote 22.

debts, discussed in Chapter One,[102] which are short-term.[103]

While the reserved posture adopted by McManus was reasonable, Stenger's analysis[104] was more thorough than that of either McManus or Heston:

(1) According to Stenger, the original purchase contract and mortgage *at the time they were entered into* did not adversely affect any then-existing stable patrimony, because they only related to property in the process of being acquired.

(2) Once converted into equity, or, as Stenger expressed it, *dominium*, the free capital became stable patrimony and therefore inalienable.

(3) A foreclosure sale following default would be a "new act, an act of alienation, a new contract."[105] As a result:

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[102]Pp. 63-65, *supra*.

[103]The cash inflow necessary to pay off a short-term debt is generally more predictable than that which corresponds to long-term debt, so that operational debts were regarded as not subjecting the juridic person to the solemnities of alienation under the 1917 code. There is no reason for reaching a contrary conclusion under the present code.

[104]J. B. Stenger, *The Mortgaging of Church Property*, Canon Law Studies 169 (Washington: The Catholic University of America, 1942) 110-112.

[105]Ibid., 111. Note that the word "contract" was employed by Stenger in keeping with the wording of canon 1533, even though in American civil law a foreclosure sale would hardly be considered a "contract" to which the public juridic person was a party.

> . . . the sale at foreclosure would make the condition of the Church worse on the sale date, since it would lose a certain portion of the stable capital which it did not have at the time of the mortgage. Hence permission to alienate this property through the foreclosure sale seems necessary, but need not be obtained until the sale is imminent.
>
> Nor does the fact that the foreclosure sale takes place by order of the State seem to relieve the necessity of securing the required ecclesiastical permission.[106]

Thus, Stenger analyzed the execution of the contract and purchase money mortgage as one transaction which did not in itself endanger stable patrimony. The subsequent foreclosure sale was a separate transaction which applied to the new stable patrimony, represented by the accretion of equity. The foreclosure sale was an alienation, to be evaluated with respect to canons 1530 through 1532 on its own merits, the counterparts of canons 1291 through 1294 under the current code.

Stenger's position appears to have been correct with respect to canon 1533 of the 1917 code, and equally persuasive in a discussion of canon 1295 of the 1983 code. When a public juridic person acquires land for stable use with a downpayment and the execution of a purchase money mortgage, it is acquiring stable patrimony. The measure of value of the stable patrimony at the time of purchase should not, however, be the value of the property itself but, rather, the downpayment. Otherwise stated, the value of the

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[106]Ibid., 111-112.

patrimony for purposes of canon 1295 is the equity that the public juridic person has in the property. As the mortgage is gradually paid, the value of the patrimony increases with the build-up in equity. That is logical because the principal component of each mortgage payment (as opposed to that portion which comprises a payment of interest) is not "expensed" for accounting purposes; rather, it represents an increase in the value of the interest that the mortgagor has in the property.

A possible argument against Stenger's position is that canon 1295 broadly refers to any transaction which can endanger the patrimonial condition of the subject juridic person. The word "can" (*possit*) means that the transaction need not necessarily or immediately endanger the patrimonial condition at the time the transaction takes place in order for the canon to apply, and the phrase "patrimonial condition" connotes that the patrimony that might be endangered need not be the patrimony that is the immediate object of the transaction. The public juridic person does indeed run a foreseeable risk that a future default will result in the loss of stable patrimony measured by the equity which will have accrued by the time the default has occurred.

In answer to this objection, it is to be noted that at the time of the purchase the stable patrimony that might be lost as a result of a future foreclosure is stable patrimony

which does not yet exist, except to the extent of the downpayment. The issue is thus reduced to whether canon 1295 should include future stable patrimony within its purview. When a public juridic person acquires temporal goods, it is exercising a right pursuant to canons 1254 and 1255. Canon 18 provides that laws which curtail the free exercise of rights are to be interpreted strictly. For this reason, it is submitted that the possibility of forfeiting future equity in property to be purchased is not sufficient to bring canon 1295 into application at the time of purchase.

It should be noted also that, were the public juridic person unable to service the debt at some point with free capital, it could avoid a default and consequent foreclosure by continuing the mortgage payments using other stable capital or patrimony as the source of funds. The liquidation of other stable capital, however, in itself would constitute an alienation or series of alienations. Payment from that stable capital or patrimony (whether the patrimony be in the nature of incorporeal investments or immovable or movable corporeal property) would have to receive approval from the competent ecclesiastical authority, depending on the value of those alienations as coalesced. For the purpose of determining the coalesced value of the alienations of stable patrimony necessary to service the remaining debt, the starting point would be the

outstanding principal indebtedness as of the date the public juridic person anticipated having to resort to liquidating stable patrimony.[107]

In summary, predicting the ability to service debt from free capital is certainly an important factor in considerating the execution of a purchase money mortgage. However, given the imprecise nature of the endeavor and that, in this writer's opinion, canon 1295 should be limited in application to currently existing stable patrimony, the reasonable foreseeability of adequate free capital should not be a condition to the inapplicability of the canon to purchase money mortgages.

5. The role of nonrecourse debt in protecting the patrimony of a public juridic person

An important consideration in the financing of debt is the extent to which a mortgagor or third party must be personally liable on the underlying debt in order that a mortgage securing such debt be valid. In most cases the mortgagor or some third party will be personally liable, as where the purchaser of land gives the seller a personal

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[107]It would appear that, in such a situation, the sum of projected interest payments on the principal indebtedness should not be included as part of the request, inasmuch as the public juridic person may alienate assets included in its stable patrimony gradually over the remaining life of the mortgage, allowing it to earn income on that patrimony in the meantime. Stated alternatively, the outstanding principal indebtedness as of the date on which the public juridic person can no longer service it from free capital represents the present value of the future stream of payments of both principal and interest.

promissory note in partial payment of the purchase price together with a purchase money mortgage. In fact, there have been court opinions containing dicta to the effect that personal liability is required on the underlying obligation.[108] Nevertheless, the general view is clearly that personal responsibility is not essential,[109] and it is not uncommon for contemporary real estate transactions to be structured with so-called "nonrecourse" debt.[110] With nonrecourse debt, the mortgagee may look only to the real estate that secures the loan. If, after a default by the debtor, a foreclosure sale takes place and the proceeds are insufficient to pay the outstanding indebtedness, the mortgagee may not pursue the debtor to make up for the shortfall from other sources.

To understand this more clearly, it is helpful to recall the general legal framework of foreclosure. As pointed out above,[111] the common-law right of equitable redemption following a default by the mortgagor has been

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[108]*County of Keith* v. *Fuller*, 452 N.W.2d 26, 30 (Neb. 1990); *Johnson* v. *Johnson*, 33 S.E.2d 784, 789 (Va. 1945).

[109]Nelson and Whitman, 1: 9, §2.1; Curtis in *Thompson on Real Property, Thomas Edition* 12: 336, §101.01(c)(1).

[110]*Lebowitz* v. *Commissioner of Internal Revenue*, 917 F.2d 1314, 1318 (2d Cir. 1990); *Lamm* v. *Commissioner of Internal Revenue*, 873 F.2d 194, 196 (8th Cir. 1989).

[111]P. 208, *supra*.

retained in all States,[112] upon the expiration of which the mortgaged property may be alienated according to three methods: strict foreclosure, a foreclosure sale pursuant to the decree of a judicial proceeding, or a foreclosure sale pursuant to the terms of the mortgage instrument. The sale involving a prior judicial proceeding is the most common method, with such a sale normally conducted by an officer of the court, usually the sheriff, or a master or referee appointed for the purpose by the court.[113]

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[112]It should also be stated that, in addition to the common-law right of equitable redemption present throughout the United States, about half the States have created a statutory right of redemption (Curtis in *Thompson on Real Property, Thomas Edition*, 12: 468, §101.07(c)(1)). This is a statutory right to redeem *after* foreclosure. In effect, the mortgagor in such States has two chances to redeem: the common law equitable right before foreclosure and the statutory right after foreclosure. The prices of redemption differ: whereas the price to redeem before foreclosure is the outstanding balance of the debt secured by the mortgage, the price to redeem after foreclosure is the price paid by the new purchaser at the foreclosure sale (California Code of Civil Procedure §729.060; Colo. Rev. Stats. §38-38-302; Or. Rev. Stats. §§23.560 and 88.080).

One of the putative advantages of statutory redemption is that it should encourage full value bidding at foreclosure sales on the theory that bidders will realize that, unless they offer an adequate price, mortgagors will redeem after the sale (i.e., the new buyer will not enjoy security, because the mortgagor will be able to buy the property back and, perhaps, leisurely resell it at a higher price, more in line with its market value). Others argue the opposite, however: that parties will be reluctant to bid full price when they know that the mortgagor will be entitled for some time to redeem even after the foreclosure sale has taken place (Curtis in *Thompson on Real Property, Thomas Edition*, 12: 469, §101.07(c)(1)). In any event, statutory redemption may at least discourage the party holding the first mortgage from bidding low.

[113]Curtis in *Thompson on Real Property, Thomas Edition*, 12: 390, §101.04(b).

In cases which do not involve nonrecourse financing, the mortgagee-lender may join in the foreclosure action a claim on the underlying debt.[114] When this is done, the mortgagee may obtain a personal judgment against the mortgagor for any deficiency between the balance on the debt and the proceeds of the foreclosure sale.[115] With a deficiency judgment, the mortgagee then proceeds to attach whatever other properties the mortgagor holds to make up for the shortfall. This entitlement to a deficiency obtains even if the mortgagee is the purchaser at the foreclosure sale.[116] It should be noted that if the proceeds represent a surplus over the outstanding mortgage rather than a deficit, those who have junior interests[117] in the property

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[114]*Faber* v. *Althoff*, 812 P.2d 1031, 1032, 1039 (Ariz. 1990).

[115]*Capital Bank* v. *Needle*, 596 So.2d 1134 (Fla. App. 1992); *In re Brown*, 126 B.R. 481, 482, 485 (Bankr. D. Md. 1991).

[116]*Capital Bank* v. *Needle*, 596 So.2d 1134 (Fla. App. 1992); *In re Brown*, 126 B.R. 481 (Bankr. D. Md. 1991). Recall, however, that if the mortgagee is able to purchase the property with a relatively low bid, in States where a statutory right of redemption exists following foreclosure, the mortgagor may be encouraged to buy the property back at that same low price.

[117]Upon a proper foreclosure, the new purchaser of the property takes title free of encumbrances arising subsequent to the first mortgage. *Fleet Real Estate Funding Corp.* v. *Koch*, 805 P.2d 1206, 1207, 1208 (Colo. App. 1991). A proper foreclosure entails complying with the requirements of procedural due process, meaning that the junior interests have been notified and are parties to the proceeding. Even when a foreclosure sale is confirmed by the court, if a junior interest has not been given adequate notice, the new purchaser takes the property subject to the omitted

are entitled to share in the surplus in accord with their relative degree of precedence,[118] which means that the mortgagor could receive the surplus if there are no secondary mortgagees or if there is surplus after they have been satisfied.

The implication of this is that when indebtedness is secured by immovable property under a nonrecourse financing arrangement in which the value of the immovable property is lower than the minimum threshold referred to in canon 1292, there is no application of canon 1295.[119] This would obtain whether or not the mortgage is on land already owned by the public juridic person or is a purchase money mortgage. Nonrecourse financing, wherever possible, is obviously desirable in either case from the standpoint of the juridic person as debtor.

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interest. *Snyder* v. *New Hampshire Sav. Bank*, 592 A.2d 506, 509 (N.H. 1991). The notice applies to junior interests who appear of record, and it also applies to the mortgagor. *Citicorp Mtg.* v. *Pessin*, 570 A.2d 481, 484, 485 (N.J. Super. 1990). Therefore, the foreclosure purchaser takes the property subject to the redemption interest of the mortgagor (or successor in interest) if the latter has not been notified and made a party to the action.

[118]*Bailey Mtg. Co.* v. *Gobble-Fite Lumber Co.*, 565 So.2d 138, 144 (Ala. 1990); *Arkansas Teacher Retirement Sys.* v. *Coronado Props., Ltd.*, 801 S.W.2d 50, 51, 55 (Ark. App. 1990).

[119]The non-application of canon 1295 would occur in this situation even if the underlying indebtedness exceeded the threshold, however unlikely it might be that a mortgagee would agree to take security worth less than the debt.

6. Gifts of immovable property subject to a mortgage

Canon 1267 §2, referred to in Chapter Two,[120] effectively provides that an administrator of a juridic person may not reject a gift or offering without just cause and, in matters of greater importance involving a public juridic person, the permission of the appropriate Ordinary, but that such offerings and gifts may also be subject to canon 1295 if they are conditioned or carry an encumbrance. A clear example of a situation in which an offering or gift may place a burden on a public juridic person as donee is when it receives immovable property and assumes an existing mortgage thereon.

Determining whether or not canon 1295 applies to such a situation follows much the same pattern as the purchase money mortgage discussion above. First, it is assumed that the fair market value of the property received exceeds the outstanding balance of the mortgage; otherwise, receipt of the property would not be a "gift." It would be irrational to accept the property if the mortgage balance exceeded the fair market value, unless the land served a special need of the juridic person not reflected in the market value. Second, inasmuch as the mortgage secures the payment of a prior debt incurred by the previous owner in purchasing the same property, it is tantamount to a purchase money mortgage carried over to the donee as successor mortgagor.

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[120]Pp. 135-136, footnote 80, and pp. 139-140, *supra*.

Therefore, canon 1295 finds no application.

Of course, if the indebtedness is nonrecourse, the public juridic person will have an advantage that can be especially important when the gifted property has a volatile market value, because a market value which exceeds the outstanding mortgage might drop below it after the transfer.

7. Construction loans and mortgages

As the name implies, a construction loan is a means of financing the erection of a building, secured by a mortgage. Nelson and Whitman explain the concept as follows:

> The purpose of a construction loan is to provide funds with which the owner of a parcel of land can construct improvements upon it. The construction loan is superficially similar to a long-term mortgage loan; the borrower's obligation to repay will be represented by a promissory note or similar instrument, and will be secured by a mortgage, deed of trust, or comparable document. In addition, the lender and borrower will usually enter into a construction loan agreement, spelling out the obligations of each with regard to the construction process. The borrower (who is usually the owner of the land on which the project will be built) may perform the construction personally, or may employ a separate contractor with whom the borrower enters into a construction contract.[121]

The mortgage generally secures two successive loans, one by a so-called "interim lender" and the other by a "permanent lender." Interim lenders engage in immediate construction lending, that is, advancing the funds necessary during the period of work. The interim lender exercises

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[121]Nelson and Whitman, 2: 147-148, §12.1.

considerable oversight in the construction work, employing its own on-site inspectors, because it must assure itself that the construction is complete, according to the construction plans and specifications which it has approved, and that no mechanics' liens have arisen during construction.[122]

An interim lender does not want its funds committed over the long period of a permanent mortgage, because it has an incentive to turn its capital over constantly. Its income is not principally earned as interest on a mortgage loan but, rather, as commissions paid by the borrower who has sought the mortgage loan through the interim lender, together with service charges connected with finding the permanent lender. In effect, the interim lender functions somewhat as a broker, taking the risk, however, of putting up its own funds during the construction period.[123]

In effect, the interim lender sells the mortgage loan, after completion of construction, to an investor who functions as the permanent lender. Before the interim lender agrees to finance the project, it insists on the issuance of a "take-out commitment" by the permanent lender, which is an agreement to buy the construction mortgage after the building has been completed free from mechanics' liens

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[122]Kratovil, 130-131.

[123]Ibid., 131.

and after all risks of construction are over.[124]

Nelson and Whitman provide a summary of items with which a lender is concerned before underwriting a construction loan,[125] not all of which are relevant to the situation of a public juridic person as borrower.[126]

(1) If the borrower is a closely held corporation or a limited partnership, its partners or shareholders will usually be asked to take personal liability for the debt. Obviously, this is of limited relevance to a public juridic person since a public juridic person will not ordinarily be structured civilly as a for-profit corporation with shareholders, or as a partnership (whether general or limited). The requirement is of some interest, however, in that it indicates a typical lender's interest that a loan be guaranteed by a third party. Moreover, if the project involves additional borrowers, as in the case of a joint venture comprised of a public juridic person and other individuals or for-profit entities (as in a health-care joint venture), it would stand to reason that the lender

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[124]Ibid.

[125]Nelson and Whitman, 2: 152-153, §12.1.

[126]In addition to those mentioned in the text, points of review by the lender would ordinarily include the compliance of the proposed project with zoning, environmental, and building codes and other governmental regulations; the loan commitment by the permanent lender; the construction contract or contracts between the borrower and the construction company or companies; the form of any bonds required; and what will constitute a default.

would require those other parties to assume personal liability.

(2) The marketability of the project also may be critical, according to Nelson and Whitman. This criterion may be relevant to a public juridic person contemplating the construction and operation of a health-care facility, as an example. "Marketability" has little to do, however, with a project of parish construction, except in the sense of the parish's ability to amortize the debt with adequate contributions and school tuition receipts.

(3) The borrower's reputation, experience, credit rating, and capitalization are all important factors to a lender, and they would appear to be far more relevant in the case of a public juridic person as borrower than would issues of shareholder guarantees or marketability of the project. In reference to capitalization, Nelson and Whitman note that most lenders require the borrower to put up substantial cash, often in the measure of ten percent of the project's construction cost. This, of course, presents its own question of whether the juridic person has sufficient free capital for dedication to this purpose (thereby becoming fixed capital) or stable capital duly authorized by competent authority to be alienated for the project.

There are typically three documents executed by the construction (interim) lender and the borrower: a promissory note, a construction loan mortgage or deed of

trust, and a construction loan agreement. The latter document is the comprehensive blueprint of the relationship between the parties. Among the more important matters, it incorporates by reference the plans and specifications of the project, the completion date, the budget to which the borrower agrees to adhere, the costs covered by the loan, and the extent to which land acquisition and development costs (such as grading, parking construction, and installation of utilities lines and conduits) are covered by the loan.[127] The loan agreement can also be expected to make reference to the construction contract executed by the borrower and the construction company, with the loan agreement stipulating that the construction contract require the construction company to obtain performance and payment bonds, with not only the borrower as the obligee but the lender as well.

As covered in the loan agreement, the disbursements made by the lender are typically according to one of two methods: (i) the so-called "progress payment" method, whereby a fraction of the funds is paid out as a percentage as the project is completed or agreed upon costs incurred, or, more commonly, (ii) a voucher system, which calls for disbursements only upon the lender receiving bills or vouchers for work actually completed.[128] The lender may

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[127]Nelson and Whitman, 2: 153-154, §12.1.

[128]Ibid., 2: 155, §12.1.

insist on contracting with a title company to insure each disbursement against mechanics' liens; the title company, in turn, will want to verify that the disbursements are free of such liens.[129]

Of course, the borrower also executes a contract with the businesses involved in the construction work. The borrower may personally negotiate and execute separate agreements with each of the contractors to have various types of work done, but the more common practice is to execute one contract with a general contractor who will, in turn, commission subcontractors to do specific work. The general contractor may, in the latter arrangement, agree (i) pursuant to a "lump sum" contract to complete the entire project for an agreed dollar figure; (ii) pursuant to a "guaranteed maximum" contract to a maximum dollar figure but with a share of savings to be divided between the general

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[129]Kratovil, 137. Mechanics' and materialmen's liens provide unpaid contractors, workers, and material suppliers with a security interest in the real estate which they have improved, and they may foreclose such liens in order to be made whole on the debt owed to them (Nelson and Whitman, 2: 183, §12.4). Almost half the States confer upon such liens priority from the time the building project began, regardless of when the lienholder did the work or supplied the materials (Nelson and Whitman, 2: 188, §12.4). While laws concerning these liens are statutory and vary widely from State to State, it may generally be observed that a common practice of owners and construction lenders is to insist that the general contractor supply a sworn list of subcontractors and suppliers used by it, and to require "lien waivers" from each of those parties prior to each disbursement of construction funds. What Kratovil points out is that a lender may also require that a title company verify that no mechanics' liens have in fact been filed, and insure against such eventuality.

contractor and the borrower if the contractor's costs are lower than estimated; or (iii) pursuant to a "cost-plus" contract to receive an amount equal to the costs incurred plus a percentage or dollar amount (although in this approach there typically is a maximum price ceiling attached).[130]

The issue of whether canon 1295 should apply to a construction loan to be taken out by a public juridic person, along with its accompanying mortgage, follows the same analysis as that of purchase money mortgages which apply to the purchase of properties with existing structures already on them. If the security consists only of the proposed improvements that are the subject of the loan, such security being in the form of a construction mortgage or deed of trust, then canon 1295 would not ordinarily apply.

However, if the juridic person already owns the land upon which the construction is to take place, canon 1295 would seem applicable to part of the construction loan. This is because, in the event of a default, any foreclosure proceeding would necessarily apply to both the structures and the land. Therefore, unless the construction loan finances the purchase of the land as well, the juridic person executing a construction mortgage immediately places existing stable patrimony at risk.

It should also be noted that the existence of

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[130]Nelson and Whitman, 2: 156-157, §12.2.

nonrecourse financing is relevant to a construction loan. The administrator of a public juridic person should attempt, where possible, to obtain a true nonrecourse loan, which, as explained above, would spare the administrator from having to qualify under the alienation requirements by virtue of canon 1295. Generally, a borrower with nonrecourse financing is assured that, regardless of what default occurs under the loan documents, in no event will the lender be permitted to seek damages from other assets after foreclosing its lien against the property.

A failure to address the issue of personal liability in the loan documentation will normally result in a borrower's being personally liable for the promise to pay.[131] A lender

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[131]Uniform Commercial Code §§3-104, 3-413(1), *Uniform Laws Annotated*, 2: 25-26, §3-104; 2A: 208, §3-413(1). Negotiable instruments, including promissory notes, are dealt with in Article 3 of the Uniform Commercial Code.

Section 3-104(a) defines a "negotiable instrument" in relevant part as:

". . . an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) is payable to bearer or order at the time it is issued or first comes into possession of a holder;

(2) is payable on demand or at a definite time;

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money . . ."

Section 3-413(1) provides that the maker of a negotiable instrument engages that he will pay the instrument according to its tenor. A negotiable instrument is an unconditional promise to pay. Therefore, if a promissory note contains the elements found in §3-104(a) it is a negotiable instrument, which, if transferred to another party by the original holder (the lender) gives that party the right to demand payment from the maker of the note (the borrower) from *whatever* assets the maker has, even if the lender has breached the loan contract. This is why a

is not required to advise the maker of a promissory note (i.e., the borrower) that a note containing no exculpatory language carries personal liability and that the maker of a note is charged as a matter of law with notice of its provisions.[132]

Language in a promissory note stating that the sole security for the note is the property described therein or in the mortgage or deed of trust, and that, in the event of default, the maker shall not be liable for a deficiency is nonrecourse language.[133] Further, it has been held that a note merely stating that the maker of the note has no personal liability for the failure to make payments on the note is a nonrecourse note.[134] F. A. St. Claire observes that a more complete form of disclaimer states that the maker has no personal liability for failure to make payments on the note or for any other default on the note, mortgage or deed of trust, or other security instruments and that, in the event of any such default, the mortgagee agrees to look

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borrower should be sure that conditions be placed in the body of a note, such as that the property subject to the loan shall be the sole source of satisfaction in the event of default.

[132]*Texas Export Dev. Corp.* v. *Schlederer*, 519 S.W.2d 134, 135, 139 (Tex. Civ. App. 1974); *Town North Nat'l Bank* v. *Broaddus*, 569 S.W.2d 489, 490, 492 (Tex. 1978).

[133]*LeBoef* v. *Davis*, 306 S.W.2d 185, 186, 187 (Tex. Civ. App. 1957); *Heim* v. *Kirkland*, 356 So.2d 850 (Fla. App. 1978).

[134]*Gierke* v. *Hayes*, 724 S.W.2d 282, 283, 285 (Mo. App. 1987).

only to the security for the payment of the note and will not sue the maker of the note for any deficiency remaining after foreclosure.[135]

It is also advisable to include such language in the recorded mortgage or deed of trust. St. Claire notes that this may prevent ambiguities from arising if the language in the note is insufficiently broad, and may also counter the argument that there is independent liability under the mortgage or deed of trust distinct from the note.[136]

8. Refinancing

J. D. Hannan discussed refinancing debt with respect to immovable property in the context of the 1917 code.[137] The principles involved are equally applicable to canon 1295 of the 1983 code. His discussion may be analyzed according to two cases.

(i) Case 1: The lender transfers a mortgage to another

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[135]F. A. St. Claire, "Nonrecourse Debt Transactions: Limitations on Limitations of Liability," in S. A. Keyles, et. al., *Commercial Real Estate Finance, A Current Guide to Representing Lenders and Borrowers* (Chicago: American Bar Association, 1993) 91. This additional language may be significant because the mortgage or deed of trust usually contains several covenants in addition to the obligation to pay the note, such as the covenant of title to the property and the covenants to insure the property, pay *ad valorem* taxes, not to commit waste, and to assign rental from the property as security.

[136]Ibid., 90. *Laclede Inv. Corp.* v. *Kaiser*, 596 S.W.2d 36, 37, 39 (Mo. App. 1980).

[137]Jerome D. Hannan, "Refinancing a Mortgage," *The Jurist* 2 (1942) 57-58.

party to become the new mortgagee, without the borrower being a party to the transfer. Such a transaction, according to Hannan, was not subject to the requirements of canons 1533 and 1538 of the 1917 code (and, hence, would not be subject to canon 1295 of the 1983 code) because it was outside the control of the juridic person.[138] Presumably, the promissory note and the original mortgage contained no restriction on the assignability of the mortgage, which would make the possibility of assignment implicit in the original mortgage, and, hence, would be implicit also in the approval originally received from the relevant ecclesiastical authority or authorities.

While Hannan made reference only to the transfer of the mortgage, the promissory note would need to be assigned as well. Applying this example to contemporary assignments, it underscores the necessity of providing in the note itself language to the effect that adequate notice will be made to the public juridic person prior to an assignment of the note, and any assignment thereof will relieve the public juridic person of further liability to the original lender (in order to prevent additional payments from having to be made to the original lender).

Moreover, Hannan stated that the assignment of the mortgage would not require ecclesiastical approval for an additional reason, namely, that mere assignment does not in

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[138]Ibid., 57.

any way alter the terms so as to render, even potentially, the patrimonial condition of the juridic person *legally* worse.[139] The assignee might be more exacting than the original lender-mortgagee as to promptness of payment and might even be more disposed to foreclose as soon as a default takes place, but that would only be within legal rights which the original lender enjoyed as well.[140]

(ii) Case 2: If, in connection with the assignment of a mortgage, the terms placed more property of the juridic person at risk, the alienation provisions would have to be observed:

> If a bond were required by the new mortgagee as additional protection whereas it was not required by the original mortgagee, it would seem to be such a contract as would tend under the terms of Canon 1533 to place the church in a worse condition than previously, and the permission of the Holy See would seem to be required. Under the bond, the mortgagee could sue for a judgment lien on any piece of property belonging to the parish, not merely foreclose on the plot subject to the mortgage.[141]

This is but an affirmation of the principle that an extension of liability from *in rem* (involving one specific patrimonial good) to *in personam* as well is a worsening of patrimonial condition, which brought canon 1533 into play under the 1917 code, and just as clearly would bring canon 1295 into play under present law.

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[139]Ibid., 58.

[140]Ibid.

[141]Ibid.

Hannan also stated that if the new mortgage exceeded the amount permitted in the original rescript of the Sacred Congregation of the Council, permission would also be needed for the refinancing by virtue of canon 1538 of the 1917 code.[142] Actually, it would be more precise to state that permission would be required if the new loan and mortgage represented a sum larger than the then outstanding balance of the original loan, which would be some amount less than the original loan before payment had begun.

W. J. Doheny also made several observations regarding refinancing. First, if the refinancing consisted in renewing the loan upon the expiration of the period stipulated in the Apostolic Indult which granted permission in the first place, permission of the Holy See would be required for the refinancing, with Doheny noting that the Holy See usually stipulated the time within which debt authorized by the Apostolic Indult was to be paid off.[143] While, unlike canon 1538 of the 1917 code, there is no provision in the 1983 code which calls for amortization of debt over the shortest possible period, Doheny's point is still relevant since the original petition to the competent ecclesiastical authority under the 1983 code should have all relevant information, including the proposed amortization

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[142]Ibid.

[143]W. J. Doheny, *Practical Problems in Church Finance* (Milwaukee: The Bruce Publishing Company, 1941) 64.

period. To amend the debt instruments later with respect to the maturity of the debt is a substantial revision to the original agreement and would require approval if the outstanding balance of the debt is still above one of the threshold figures referred to in canon 1292. Moreover, where the outstanding debt is still substantial at the time the administrator contemplates the refinancing, an extension of the term means the additional accrual of interest expense. Once a loan is finalized, the payment schedule is explicit and predictable, at least in the case of loans with fixed interest rates, so there should be ample time to request approval from the competent ecclesiastical authority for an extension before the debt would otherwise mature.

On the other hand, Doheny saw no reason to obtain ecclesiastical permission for refinancing in order to secure more favorable interest rates, when the other terms of the loan were not adversely affected.[144] This applies in the context of the 1983 code as well; canon 1295 would not apply to the new arrangement because the effect is to reduce the risk of default and loss of stable patrimony, not to increase it.

Doheny also mentioned refinancing which would involve a complete financial reorganization, either through the issuance of bonds or debentures in the public market or to private investors in order to raise additional capital, or

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[144]Ibid.

by merging the assets of a diocese by changing the mode of incorporation from corporation aggregate to corporation sole.[145] While the topic of bonds and debentures is discussed in more detail elsewhere in Section I.E of this chapter, it is mentioned here because, insofar as it is true refinancing (i.e., it is replacing existing debt with new debt), the analysis is the same as if the administrator were approaching an original or new lender to refinance the debt. If refinancing results in an extension in the maturity date of the debt, approval from the competent ecclesiastical authority must be sought, owing to canon 1295. Anytime refinancing is negotiated, one can expect that there will be some trade-offs to consider. Refinancing through bonds or debentures may, for example, entail lower interest rates while converting the debt from nonrecourse to recourse, or it may do the opposite. While the administrator may skillfully evaluate the net impact of these effects on the public juridic person, compliance with canon 1295 is nonetheless necessary.

With regard to the corporate reorganization of a diocese hypothesized by Doheny, the merger of assets would have the effect of burdening parish property with debts, even though such a plan might secure better loan terms for the diocese because of the consolidation of assets.[146] The

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[145]Ibid., 64-65.

[146]Ibid., 65.

financial strength of parishes which theretofore had little or no debt could be seriously weakened.[147] Doheny emphasized that the applicability of canon 1533 was not based upon a necessary outcome but, rather, on "any contract whatsover in virtue of which the status of the Church MAY become less secure."[148] Similarly, apart from the feasibility of prevailing upon creditors to accede to a plan of corporate restructuring which affects their holdings,[149] one should expect that any corporate restructuring which leads to a debt restructuring is likely to entail the application of canon 1295, since that canon aims at transactions which *may* worsen the patrimonial condition of a public juridic person.

The issue of the application of canon 1295 to refinancing is especially topical because of the relatively recent proliferation of new financing techniques as alternatives to the traditional long-term fixed rate mortgage.[150] The most common and basic alternative is the

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[147]Ibid., footnote 3.

[148]Doheny, 65, quoting canon 1533, with his emphasis added.

[149]Indeed, in many debt instruments a restructuring would trigger a default.

[150]See M. R. Levin and P. E. Roberts, "Future Forms of Financing - Lending Devices Addressed to Inflation and Tight Money," in B. J. Strum, et al., ed. *Financing Real Estate During the Inflationary 80s* (Chicago: American Bar Association, Section of Real Property & Trust Law, 1981), 31. Tight credit is usual in a period of high inflation because lending institutions are reluctant to make long-term

variable interest rate loan or mortgage,[151] whereby the interest rate increases or decreases according to a referenced index that reflects changes in the cost of funds to the lender or in the general market. Future payments are, therefore, unknown at the time the loan is originated.[152] The lender can afford to offer it for a longer term because the interest rate is subject to adjustments. M. R. Levin and P. E. Roberts maintain that the best index upon which to base the interest rate is a weighted average of the cost of funds to the lending institution, but a number of other indices may be used, such as the consumer price index, the price index of the international dollar ("LIBOR"), the prime rate and

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commitments at interest rates which could well be outstripped by price increases. With the reduction of inflation during the 1980s and 1990s, however, fixed rate mortgages remain a viable option for most lenders.

[151]Other types of alternative mortgage instruments include graduated payment mortgages; graduated payment adjustable mortgages; renegotiable rate mortgages; rollover mortgages; shared appreciation mortgages; price level adjusted mortgages; deferred interest mortgages; flexible loan insurance program mortgages; equity participations; convertible mortgages; joint ventures; loans with short terms; and loans with kicker interest. Ibid., 32.

[152]Recall that a negotiable instrument is a promise to pay a sum certain, under UCC §3-104(a). Therefore, a promissory note that contains a variable interest rate provision is not a negotiable instrument. This can be a technical advantage to a borrower, because if the original lender sells the obligation to another party but then fails to honor the loan commitments which it has made to the borrower, the borrower may then legally justify non-payment to the new holder.

comparable AA utility bond or commercial paper rates.[153]

New mechanisms for debt may, in some instances, render the analysis of the effect of canon 1295 on refinancing more complicated. Variable rate versus fixed rate mortgages is a case in point. Construction loans, for example, are customarily written at variable rates.[154] A public juridic person as borrower may wish to refinance the loan in favor of a fixed rate loan. While one might conclude, under the traditional analysis of Hannan or Doheny, that such refinancing would trigger canon 1295, one might validly argue that canon 1295 would not apply because the effect of the refinanced loan would be to *reduce* the risk to stable patrimony rather than to increase it.[155] The reasoning would, of course, be that payments are stabilized by creating an upper limit on the interest expense over the term of the loan. The argument would only apply, however, if the new loan contained no terms which could jeopardize the juridic person's patrimony, such as converting

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[153]Levin and Roberts, 33.

[154]G. Lefcoe, "Chapter 97, Construction and Development Law: Construction Contracts and Commercial Leases," in *Thompson on Real Property, Thomas Edition*, 12: 183, §97.07(n).

[155]Refinancing that is not subject to canon 1295 might well qualify as an act of extraordinary administration. Not only is there a major change in the terms of borrowing, but there may be substantial transactional costs associated with terminating the old loan and processing a new one, such as any premium that the lender might charge to accomodate the borrower.

nonrecourse liability to recourse liability or changing the maturity. There are other ways of refinancing which can reduce the risk to stable patrimony,[156] and, for that reason, would not involve the application of canon 1295 and, hence, are beyond the scope of this dissertation.

In summary, whether a proposed refinancing plan is subject to canon 1295 depends on the specific terms. Changes in the maturity of the loan and changes which put more patrimony at risk, such as a conversion from non-recourse to recourse debt, cause canon 1295 to apply if the exposure exceeds the monetary thresholds established by the relevant episcopal conference for alienations. Sometimes, however, refinancing may actually stabilize the debt payments and thereby reduce risk, rendering canon 1295 inapplicable.

D. LOANS SECURED BY MOVABLE CORPOREAL PROPERTY OR INCORPOREAL PROPERTY

1. Overview of transactions secured by movable corporeal property or incorporeal property

When a juridic person takes out a loan, it typically may be expected to convey collateral to the creditor, at least if the transaction is conducted in an arm's-length manner. Conversely, if a juridic person transfers property as a loan to another party, it should seek security

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[156]Two possibilities are interest rate "swaps" and the purchase of interest rate "caps." See Lefcoe in *Thompson on Real Property, Thomas Edition*, 12: 183-187, §97.07(n)-(o).

therefor.

When the collateral is immovable property (real estate), the arrangement is understood to be a mortgage. When the collateral is movable corporeal property (tangible personal property) or incorporeal property (intangible assets), a "security interest" in the collateral is conveyed to the lender, or the collateral is physically transferred, or "pledged,"[157] to the lender. The typical practice in the United States is for the debtor to execute a promissory note and, if there is to be a security interest involved, a written security agreement, with the promissory note making reference to the security agreement and vice versa. The debtor also executes a promissory note if the loan is secured by a pledge.

It is appropriate to examine the mechanics by which this is accomplished in more detail, because it bears on the reliability of such interest to the creditor and the repercussions of arranging a security interest which fails.

The various States have commercial statutes which are similar in content. The common root of this legislation has been a model set of laws known as the Uniform Commercial Code. Article 9 of the Uniform Commercial Code is entitled

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[157]*Black's Law Dictionary* defines a pledge as follows: "Pledge. A bailment, pawn, or deposit of personal property to a creditor as security for some debt or engagement. . . . A pledge, considered as a transaction, is a bailment or delivery of goods or property by way of security or debt or engagement, or as security for the performance of an act." *Black's Law Dictionary*, 1153.

"Secured Transactions; Sales of Accounts and Chattel Paper," and it covers the law of security interests in tangible assets.

A threshold question concerns what a security interest is. The basic scope-provision of Article 9 is section 9-102(1):

> Except as otherwise provided in section 9-104 on excluded transactions, this Article applies
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> (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper or accounts; and also
>
> (b) to any sale of accounts or chattel paper.[158]

Then section 1-201(37) defines a security interest as being "an interest in personal property or fixtures which secures payment or performance of an obligation."[159] The Official Comment to section 9-102 states that the breadth of Article 9 is that of all consensual security interests, except for certain types of transactions mentioned in section 9-104.[160] The article applies to security interests which arise, for example, from loans, as well as from certain sales of tangible or even intangible property (often called assignments, as where a party sells its accounts receivable prior to collection).

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[158]*Uniform Laws Annotated*, 3: 73.

[159]Ibid., 1: 67.

[160]Ibid., 3: 75.

In order for a party to obtain a security interest in property, it is necessary, first of all, that the party to be secured give something of value to the debtor, as in selling property on credit to the debtor or providing the debtor with a loan. Secondly, and usually correlative to the first requirement, the debtor must acquire rights to the collateral (or maintain some rights if the debtor had a pre-existing right to the collateral). Thirdly, the collateral must be placed in the possession of the secured party (the creditor), or a security agreement which grants the security interest to the creditor must be executed under UCC sections 9-201 and 9-105.[161] In the typical case wherein the debtor executes a promissory note in favor of the creditor for a loan or for the unpaid balance in a credit purchase, the security agreement may be incorporated into the promissory note, or it may be a separate instrument. Once these three requirements have been satisfied, the security interest is said to have "attached."

However, in order to achieve maximum possible precedence, it is necessary that the creditor give proper notice of its security interest, a procedure known under the Uniform Commercial Code as "perfecting" the security interest. It is perfected in one of three ways, but the two most relevant to a public juridic person as a party to the transaction entail (i) the transfer of physical possession

[161]Ibid., 3: 358 (§9-201) and 208 (§9-105).

of the collateral to the secured party, as in the pledge of stock certificates or other investment securities under sections 9-304(4) and 9-115(4)(a),[162] or (ii) the common case of filing a "financing statement" with the proper State or county. Under section 9-402, the financing statement requires only the names, addresses, and signatures of the parties and a description of the types of collateral covered.[163]

Having stated the basic procedure for obtaining a security interest in personal property under the Uniform Commercial Code and the manner of perfecting that security interest, some comments are in order with respect to the precedence that a creditor with a security interest has relative to other creditors, in the event the debtor defaults under the terms of the credit sale or loan. In such connection, it should be noted that the term "default" is not specifically defined in the Uniform Commercial Code. The circumstances under which a default may take place are a matter of agreement between the parties. The secured party will attempt to define the term as broadly as possible,

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[162]Ibid., 3A, pocket part: 29 (§9-304(4)); 2C, pocket part: 146 (§9-115(4)(a)).

[163]Ibid., 3A: 546. The third way a security interest may be perfected is upon its attachment under §9-302(1)(d), relating to the purchase of consumer goods other than motor vehicles and fixtures (Ibid., 3A: 50). Based upon the kind and dollar value of these types of transactions, they are not apt to involve the stable patrimony of a public juridic person.

commonly including as default any impairment of the collateral such as a failure to insure, any impairment of the personal obligation such as bankruptcy of the debtor, or any perception that the prospect for payment is uncertain in accordance with UCC section 1-208.[164] In the absence of any definition of default in the security agreement, default only occurs on a failure to pay.

The secured creditor with the strongest position is generally one who holds a perfected "purchase money security interest." According to UCC section 9-107:

> A security interest is a "purchase money security interest" to the extent that it is:
>
> (a) taken or retained by the seller of the collateral to secure all or part of its price; or
>
> (b) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.[165]

With a purchase money security interest, the collateral is the specific property that the creditor has sold to the debtor, or is the specific property purchased pursuant to the terms of the loan (i.e., the debtor contracted with a lender-creditor for a loan in order to purchase specific property from a third party; the debtor has done so and has granted a security interest to the lender in that same property).

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[164]Ibid., 1: 152.

[165]Ibid., 3: 251-252.

If the secured party is the seller of the property on credit, the seller's purchase money security interest can be created either by the debtor's express grant of a security interest or by the seller's retention of title as collateral, to goods that have been sold to the debtor on a conditional sales contract.[166] Inability to identify either the collateral sold or the unpaid balance of its price precludes the recognition of a purchase money security interest.[167] A lender's purchase money security interest likewise is contingent upon the identifiability of both the collateral financed and the unpaid balance of the loan.[168]

The operative provision governing the precedence of purchase money security interests in property which is not inventory in the hands of the debtor is section 9-312(4)[169]:

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[166]*Raleigh Indus., Inc.* v. *Tassone*, 141 Cal. Rptr. 641, 642, 647 (1977) (express grant); *First Nat'l Bank* v. *Smoker*, 286 N.E.2d 203, 204, 209 (Ind. App. 1972), *rehearing denied*, 287 N.E.2d 788 (1972) (retention of title to goods).

[167]*Roberts Furniture Co.* v. *Pierce* (*In re Manuel*) 507 F.2d 990, 991, 993 (5th Cir. 1975) (inability to identify unpaid balance of price); *Raleigh Indus., Inc.* v. *Tassone*, footnote 166, *supra*. (seller of initial inventory could not have purchase money security interest in replacement inventory sold by others).

[168]*Northwestern National Bank S.W.* v. *Lectro Sys., Inc.*, 262 N.W.2d 678, 680 (Minn. 1977) (loaned funds must be used for purchase of identifiable asset); *In re Simpson*, 4 U.C.C. Rep. Serv. 250, 254 (W.D. Mich. 1966) (collateral that was security for previous and future loans as well as purchase price not shown to involve purchase money security interest).

[169]A perfected purchase money security interest in what is inventory in the hands of the debtor is accorded separate treatment in UCC §9-312(3). The likelihood, however, of a

> A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral or its proceeds if the purchase money security interest is perfected at the same time the debtor receives possession of the collateral or within ten days thereafter.[170]

There is a logic to granting a perfected purchase money security interest priority over other perfected security interests in the same property even if they were perfected prior in time, and over other liens that arose prior in time, such as various judicial liens; the party that has made possible for the debtor the acquisition of a particular asset is the one that should enjoy priority with respect to that same item in the event of the debtor's insolvency. Other creditors with blanket security interests over all property or specified classes of property held by the debtor, including after-acquired property,[171] which arise in

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public juridic person incurring debt substantial enough for canon 1295 to apply pursuant to a plan to acquire property to be held by the public juridic person as inventory, is so remote as to render a discussion of §9-312(3) unnecessary. The same is true of the obverse hypothetical case of a public juridic person coming under canon 1295 because it contemplates lending substantial stable capital to another party to finance that other party's inventory; the possibility is too unlikely to warrant investigation. On the other hand, that a public juridic person might incur substantial debt to finance the purchase of equipment, or might extend a loan to another party to purchase equipment, as in a joint venture involving the acquisition of costly medical equipment, is a scenario which may well occur. Accordingly, a review of §9-312(4) is in order.

[170]*Uniform Annotated Laws*, 3A: 350.

[171]"After-acquired" property clauses in security agreements provide that the security interest attaches not only to the property that the debtor owns currently, but

connection with a general extension of credit, and creditors who have obtained liens in court over all assets of the debtor in a given jurisdiction, are rightfully subordinate to the perfected purchase money secured party. Were this not the case, a debtor with a blanket security interest against its property would be severely limited in any effort to finance future business operations or personal acquisitions, even though it were able to service additional debt obligations as they came due.

As section 9-312(4) states, perfection must occur within ten days after the debtor receives possession, in order for a purchase money security interest to receive precedence over other security interests that were perfected prior in time, namely, security interests in after-acquired property of the debtor, and judicial liens.[172] In the absence of such timely perfection, the general rule of section 9-312(5) applies, under which the first to file or

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also to all specified classes of assets which the debtor may acquire in the future until the debtor discharges its obligation to the secured party. The security interest attaches as soon as the debtor acquires such property, and if the security interest has been perfected, perfection as to after-acquired property occurs with the acquisition as well.

[172]As will be seen, this also holds true in situations in which a purchase money security interest arises after bankruptcy proceedings have been initiated with respect to the debtor's bankruptcy estate.

perfect a security interest[173] or to attain a judicial lien (which is really analogous to a perfected security interest inasmuch as the creditor obtaining it is giving public notice of his legal interest) is the party with precedence.[174]

One might ask, then, whether there is any value to a purchase money security interest, or any security interest, for that matter, if it has not been perfected. The answer is that it does have a limited value. First, UCC section 9-201 states the following:

> Except as otherwise provided by this Act a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors.[175]

In accordance with the first clause of section 9-201, Article 9 does go on to include several provisions, such as section 9-312 discussed above, which modify the effectiveness of security agreements. However, on the basis

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[173]There is a distinction between filing a security interest and perfecting one. It was noted above that perfecting can take place without filing a financing statement, as where the secured party physically retains certain types of collateral such as investment securities. It is also possible to file a financing statement before the actual perfection of the security interest takes place: when the parties execute a security agreement with an after-acquired property clause, the creditor may prudently file the corresponding financing statement immediately thereafter; but there can be no perfection as to the after-acquired property until the security interest attaches to it, which is, of course, when the debtor subsequently acquires such property.

[174]*Uniform Laws Annotated*, 3A: 350.

[175]*Ibid.*, 3: 358.

of section 9-201 it can at least be concluded that an unperfected security interest has precedence over general creditors who have not yet taken measures to obtain a judicial lien. Therefore, upon a default by the debtor and before the general creditors have inititated any action, the creditor with an unperfected security interest may act in accordance with the security agreement, such as by foreclosing on the collateral if the agreement so allows.

Second, according to section 9-301(1)(c), the buyer of property which is not sold by a debtor as part of the ordinary course of business, is subject to the unperfected security interest of a creditor on that same property, if such buyer had *actual* knowledge of the security interest.[176]

It may be concluded that an unperfected security interest is more advantageous for the holder thereof than no security interest, but this is only for as long as the general creditors have not learned of any default and have not filed their claims in court.

In summary, it may be stated that a secured party has a right *in rem* to specific property or classes of property of the debtor. The most effective type of security, from the point of view of the creditor, is one by which it has a purchase money security interest which it has perfected in a timely manner. In such case, it has precedence over any other creditor with respect to the property covered

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[176]*Ibid.*, 3A: 10.

thereunder. This may be of limited interest to a public juridic person as debtor, but, as will be seen in Section I.G, is of importance when the administrator contemplates making a loan of stable patrimony owned by a public juridic person.

Often a loan may be secured by the borrower's transfer of investment securities to the lender. Articles 8 and 9 of the Uniform Commercial Code govern the manner of establishing and perfecting a security interest in investment securities, or, "securities."[177] Securities may be held three ways: (i) directly by the owner as a "certified security," that is, by possession of a certificate registered with the issuing company;[178] (ii) without a certificate but by way of registration on the issuing company's books, denominated as an "uncertified

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[177]A "security" is defined in the 1994 version of UCC §8-102(a)(15) (the most recent version) as: ". . . an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:

"(i) which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of an issuer;

"(ii) which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

"(iii) which:

(A) is, or is of a type, dealt in or traded on securities exchanges or securities markets; or

(B) is a medium for investment and by its terms expressly provides that it is a security governed by this Article ." *Ibid.*, 2C, pocket part: 64.

[178]UCC §8-102(a)(4). Ibid., 2C, pocket part: 63.

security;"[179] and (iii) through an account with a broker or other securities intermediary, so that the owner has neither a certificate nor is registered on the issuing company's books as the owner.

Regardless of the way in which a security is held by the owner, a security interest may be granted to a lender and may be perfected either through giving "control" of the security to the lender, or by executing a security agreement in accordance with UCC section 9-203 and filing the same with the appropriate state office.[180] "Control" is a technical term defined in UCC section 8-106 with respect to each of the three ways in which securities may be held.[181] For example, if the owner-borrower holds the security as a certified security, control by the lender is achieved through a physical delivery of the certificate to the lender together with an indorsement thereon in blank by the owner-borrower (if the certificate is in bearer form, however, there is no indorsement necessary).[182] Control in itself

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[179]UCC §8-102(a)(18). Ibid., 2C, pocket part: 64. As an example of uncertified securities, the Official Comment (by the Permanent Editorial Board for the Uniform Commercial Code) to UCC §9-115 (defining "investment property") notes that "mutual funds typically do not issue certificates, but the beneficial owners of mutual funds shares commonly are direct holders of the shares, whose interests are recorded on the books of the issuer." Ibid., 2C, pocket part: 148.

[180]Official Comment to 1994 version of UCC §9-115. Ibid., 2C, pocket part: 147-149.

[181]Ibid., 2C, pocket part: 74-75.

[182]UCC §8-106(a)(b). Ibid., 2C, pocket part: 74.

constitutes a perfection of the security interest.[183]

As between lenders with competing security interests in an investment security, the one who has perfected a security interest by control has precedence over someone who has perfected by filing a financing statement after having executed a security agreement.[184]

2. The relationship of the foregoing principles to canon 1295

The application of canon 1295 to loans which are secured by movable corporeal property or by incorporeal property basically parallels its application to loans which are secured by immovable property. A public juridic person may obtain a loan by granting a security interest in stable patrimony which, in civil terms, is either tangible personal property or intangible property. The security interest is a right *in rem*. Canon 1295 clearly applies to security interests if they exceed the thresholds of canon 1292, whether or not they are perfected (perfection bears on the value of the security interest to the creditor relative to other creditors, but unperfected security interests are also enforceable). The security agreement may also have an after-acquired property clause pertaining to the types of property described therein, but after-acquired property clauses are not particularly relevant to canon 1295. If the

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[183]UCC §9-115(4)(a). Ibid., 2C, pocket part: 146.

[184]UCC §9-115(5)(a). Ibid., 2C, pocket part: 146.

public juridic person defaults and the original property securing the loan is insufficient to cover the default, the lender will pursue other assets held by the public juridic person, whether they are subject to an after-acquired property clause or not. One may conclude that, in assessing whether the loan exceeds the threshold which engages canon 1295, the relevant dollar amount is the greater of (i) the initial amount of the loan or (ii) the fair market value of the stable patrimony offered as security when the loan is taken out.

A security interest which arises in connection with a line of credit presents an interesting question concerning the application of canon 1295. As an illustration, if a hospital sponsored by a public juridic person obtains a line of credit from a bank, it may have to grant a security interest in its hospital equipment to the bank. Since this type of loan is not made by the bank to enable the hospital to make a specific acquisition, the security interest is not a purchase money security interest. The equipment, which is stable patrimony is placed at risk, and, accordingly, canon 1295 must be dealt with if the value involved exceeds the minimum threshold established by the episcopal conference. The important question that arises concerns the basis upon which such a value is to be determined; is it the value of the equipment or the amount of credit? Logically, the point of reference should be the amount of stable patrimony that

may be lost. A line of credit does not entail an immediate transfer of proceeds; the borrower draws on the credit as needed. Therefore, it is a potential loan, with sums to be drawn incrementally at indeterminate points in time. It is difficult to base the application of canon 1295 on the credit limit, because the public juridic person may not borrow to such limit.

In the opinion of this writer, the appropriate measure of value should be the greater of the amount of the loan initially taken against the line of credit and the fair market value of stable patrimony specifically offered as security. If the hospital defaults on a loan which is for less than the value of the security, the security must in any event be forfeited or liquidated to satisfy the secured creditor's claim. If, upon liquidation of the equipment and satisfaction of the balance owed the bank, there is an excess of proceeds, the hospital is entitled to them (assuming there are no other unsatisfied creditors); but the equipment has still been lost.[185] Moreover, in the event of

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[185]A distinction should be noted between the purchase money mortgage given for real estate, discussed above, and the security being here discussed. In the case of a real estate purchase money mortgage, it was stated that the value of the new patrimony is the net equity, which only equals the downpayment on the date of purchase. If there is a subsequent default, the loss of patrimony equals the equity position in the real estate on the date of default. The situation depicted here, however, is fundamentally different in that the public juridic person that places the equipment as security has full equity in it, so that its value as stable patrimony to the public juridic person is the same as its fair market value, not less than that.

default, it may be impossible to dispose of the equipment for an amount equal to its fair market value as of the date the initial loan and line of credit was granted. If the outstanding loan balance exceeds the liquidation value of the equipment, the bank may proceed against other assets of the hospital as a general creditor, with a right *in personam* convertible to a right *in rem* (though perhaps a weak right, if there are other creditors competing for the same remaining assets).

A public juridic person may seek to finance an acquisition of movable corporeal property through the seller or through a third party such as a bank. The party financing the purchase will probably insist on a purchase money security interest in the property to be acquired. As has been explained, this type of security interest, when perfected in a timely manner, gives the financing party unassailable precedence over other creditors in the asset financed, in the event of default.

A purchase money security interest represents a special case with respect to canon 1295, following along the lines of a purchase money mortgage.[186] A purchase money security interest normally should not bring the canon into play because, at the time the transaction is entered into, the property purchased represents new stable patrimony which is financed by the loan itself. The only circumstance in which

[186]See pp. 222-231, *supra*.

canon 1295 would apply to a purchase money security interest is when the public juridic person pays from its existing stable patrimony an amount which exceeds one of the thresholds established by the episcopal conference pursuant to canon 1292 and negotiates the loan in order to finance the balance. In such case, from the outset of the transaction the public juridic person has placed a substantial amount of its patrimony at risk. Only the amount financed by the loan is new patrimony, but, in the event of a default, the purchase money secured lender could force a liquidation of the asset representing old and new patrimony in order to satisfy its debt.

If the lender agrees to limit its remedy to particular property in the event of default, this in effect is nonrecourse financing. Canon 1295 does not apply if the value of the property secured does not exceed the mininum threshold of canon 1292, even if the loan is in excess of that threshold.

A public juridic person may hold investment securities as part of its stable patrimony. A subsequent pledge (or "hypothecation") of those securities to secure a loan places them at risk. If the fair market value of the securities at the time of the proposed loan is large enough, compliance with canon 1295 becomes necessary.

E. BONDS

Bonds, which are a form of indebtedness, are relevant

to public juridic persons which are also civilly incorporated religious, charitable or educational institutions. A bond is a long-term debt instrument, which may be secured by a mortgage or deed of trust on corporate property. Bondholders are protected by contractual provisions contained in an "indenture," which is a contract between the issuing corporation and an indenture trustee, usually a bank, that acts on behalf of the bondholders. If bonds are unsecured they are referred to as debentures, which are also issued pursuant to an indenture agreement.[187]

In the case of a nonprofit corporation which has also been erected under canon law as a public juridic person separate and distinct from its sponsor, and which qualifies as a section 501(c)(3) organization for federal income tax purposes, bonds may in special circumstances be a particularly effective way to raise large sums of capital. Sections 103 and 145 of the Internal Revenue Code provide that interest income from so-called "qualified 501(c) bonds" is exempt from federal income tax. This means that investors may be willing to purchase these bonds even though they may offer lower interest, because the after-tax yield is still competitive with the other investments that do not yield tax-exempt income. "Qualified 501(c) bonds" must be issued with the approval of the State or local municipality

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[187]L. D. Soderquist and A. A. Sommer, Jr., *Understanding Corporation Law* (New York: Practicing Law Institute, 1990) 103.

where the enterprise is to be located.

The analysis of the application of canon 1295 to bonds issued by a public juridic person is conceptually the same as the application of the canon to other kinds of indebtedness incurred by a public juridic person, such as secured and unsecured loans. Before an incorporated public juridic person issues bonds with an aggregate value in excess of the minimum threshold under canon 1292, it must comply with canon 1295. This holds not only for bonds secured by specific stable patrimony but for debentures as well, because debentures expose the public juridic person to a risk of losing stable patrimony (in the event of default) just as much as an unsecured loan negotiated with a specific lender does. Only in the case of a bond issue which (under the terms of the indenture) limits liability to the bond proceeds, or the property earmarked for purchase with such proceeds, is compliance with 1295 not required. Such case would be analogous to a nonrecourse loan.

F. ANNUITIES

The Sacred Congregation for Religious in 1936 held that both the issuance of bonds and debentures, and agreements to pay annuities, were alienations in the wide sense, referring to canons 1533 and 534 of the 1917 code.[188] The same would seem to apply to such transactions under canon 1295 of the

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[188]*CLD* 2: 162.

1983 code, although canonists no longer properly speak in terms of "alienation in the wide sense"; these transactions give rise to debts which may endanger the patrimonial condition of a public juridic person.

Under a classic fixed annuity agreement, the annuitant receives a constant periodic payment for life (single or joint and survivor) or over the term of the annuity if it is not payable over the entire life of the annuitant. The money, securities, and other assets which are received under the annuity agreement become part of the public juridic person's stable patrimony dedicated to servicing the contract.[189] Nevertheless, if there is a depletion of the cash or other property transferred to the public juridic person before the annuity terminates, the public juridic person is still obligated to continue payments. This may require liquidating other stable capital, and, hence, the relevance of canon 1295 becomes apparent.

On the other hand, there now exist so-called "variable" annuities which base the payout on the investment performance of the assets forming the annuity principal. In the context of canon 1295, a variable annuity is analogous to a purchase money mortgage incident to nonrecourse debt. The obligor receives property, but is not obligated to make payment to the obligee from other assets. Accordingly, a public juridic person should not be subject to canon 1295

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[189]Heston, "Stable Patrimony," 126.

for the issuance of variable annuities, inasmuch as all payments to the annuitants will come from the cash or other property received, together with the income generated by the principal.

In summary, an annuity which obligates the public juridic person to make constant payments to the annuitant such as to entail recurring to other stable patrimony should the property initially received from the annuitant prove inadequate to fund the payments, will occasion the application of canon 1295. However, if the annuity provides (i) that payments are to be calculated as a percentage of the assets in the trust fund, (ii) that payments are limited to the principal and accrued income of the fund, or (iii) that fund investments are to be guaranteed in order to ensure the annuity payments, canon 1295 does not apply.

G. THE PUBLIC JURIDIC PERSON AS CREDITOR

A public juridic person may on occasion lend some of its stable patrimony. This may consist in a loan of movable corporeal property or immovable property, usually to another juridic person in the Church. It may also involve a loan of money or other liquid assets which have been incorporated into stable capital.

The "loan" of immovable property is more properly called a lease when it grants exclusive possession of the property, although leases can also pertain to movable corporeal property. Leases are governed by canon 1297 and

are outside the scope of this dissertation. Interests in immovable property that do not amount to exclusive possession may also be granted. Included in these types of interests are easements, profits *a prendre*, and licenses. These are treated in Section II.A of this chapter.

In Chapter One, two types of loans which a public juridic person can make were discussed: loans for consumption (*mutuum*) and loans for use (*commodatum*).[190] The latter, it will be recalled, consist in the lender transferring nonfungible property to a borrower for use and enjoyment without compensation to the lender; the specific property is to be returned to the lender at some particular time or on demand by the lender, depending on the terms of the agreement. In general, such loans are short-term and present a negligible risk. However, if they do involve stable patrimony and do give rise to a risk of considerable loss or damage, canon 1295 applies.

A loan of costly equipment by one public juridic person to another for use in a hospital or other health-care facility comes readily to mind.

If the term of the loan is lengthy, it is usually appropriate to negotiate a lease for compensation, in which case canon 1297 applies. If the loan is to be noncompensatory and short-term, it is possible to avoid canon 1295 through a written binding agreement, under which

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[190]Pp. 67-70, *supra*.

adequate physical security is provided, a right of inspection accorded to the public juridic person, and, if appropriate, insurance to be purchased (according to terms acceptable to the public juridic person).

A loan for consumption involves property which is fungible and, hence, consumable in its use. Loans of stable patrimony for consumption were considered subject to canon 1533 of the 1917 code. Canon 1295 should similarly apply. Cash which is part of stable patrimony was the most relevant example in the context of the 1917 code;[191] it is given attention in the present discussion as well, because, as a practical matter, it is unlikely that fungible "goods" will constitute stable patrimony.[192]

In connection with loans of money, there is a distinction to be made between a loan and an investment. The administrator of a public juridic person may allocate money to investments in securities according to the prescription of canon 1284 §2, 6°, the money thereby becoming part of stable patrimony. The securities need not

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[191]See pp. 67-68, *supra*.

[192]One might, however, envision a public juridic person maintaining a stable, substantial inventory of essential supplies which comprise stable patrimony. One example would be that of the medicines and nonreusable medical supplies held by a hospital that has been erected as a public juridic person. The aggregate value of the inventory could constitute a major, stable asset; hence, lending it out in bulk would bring canon 1295 into play (provided, of course, that the value thereof exceeded one of the applicable thresholds under canon 1292).

be equity; they may also be debt securities traded on an exchange. Moreover, as discussed in Chapter Two, changes in an investment portfolio by the administrator may require the approval of the Ordinary; and if the change is so substantial as to alter the nature of the portfolio, it may also require compliance with the alienation provisions as an alienation, canon 1295 being irrelevant.[193] In any event, the risk with respect to a given security may be reduced by the fact that it may be traded on an exchange at any given time. On the other hand, a loan of money as a type of "loan for consumption," if the loan is large enough, will require compliance with canon 1295 and the implementation of certain safeguards to minimize the risk of loss.

Based upon the discussion of debtor-creditor law in this chapter, the most important safeguard would be that of a purchase money mortgage in real estate, to be recorded as soon as practicable, or a purchase money security interest in tangible or intangible personal property of the debtor, perfected within the ten-day period following attachment as required under the Uniform Commercial Code. It will be recalled that the term "purchase money" denotes that the creditor is taking as collateral the property which the debtor proposes to purchase with the proceeds of the loan.

Anything less than a purchase money mortgage or security interest, perfected in a timely manner, exposes the

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[193]See pp. 140-141, *supra*.

public juridic person to the danger that other creditors may have priority in the event of the debtor's insolvency. This is particularly important because federal bankruptcy law affords trustees in bankruptcy special powers to void many security interests and other liens of creditors. In effect, a trustee in bankruptcy is considered to be a preferred creditor.

Once a bankruptcy petition is filed in the bankruptcy court, all other pending judicial actions and non-judicial actions against the debtor are automatically stayed; that is, creditors are restrained from taking further action to collect their claims or enforce their liens extra-judicially or in other state or federal courts.[194] They may continue or commence their actions against the debtor only if the stay is lifted by the bankruptcy court, and any actions taken before the stay is lifted are void.[195]

Further, Section 547 of the Bankruptcy Code authorizes the trustee to set aside any transfer made to a creditor within ninety days prior to the filing of the bankruptcy petition[196] if the debtor was insolvent[197] when the transfer

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[194]11 U.S.C. §362(a).

[195]*Maritime Elec. Co.* v. *United Jersey Bank*, 959 F.2d 1194, 1195, 1204 (3d Cir. 1991).

[196]This period is extended to one year before the filing of the petition if the transferee is an "insider" (as defined in 11 U.S.C. §101(31), e.g., a relative or partner of the debtor, or a director or officer if the debtor is a corporation) who had reasonable cause to believe that the debtor was insolvent at the time of the transfer.

occurred, the transfer was made on account of a debt that already existed (an "antecedent debt"), and the creditor received more than could have been obtained through a federal bankruptcy liquidation. The invalidation of preferences under Section 547 reaches absolute transfers such as payments of money, gifts, and sales, and security transfers such as the creation of mortgages and security interests.

Section 547(c) does contain seven exceptions to this general rule of setting aside preferential transfers, but the one which is most relevant to a public juridic person as creditor is the "enabling loan" exception described in Section 547(c)(3): the purchase money security interest of a creditor in the property which the debtor purchases pursuant to the extension of credit or a loan, if perfected within ten days after such security interest attaches, will not be voidable by the trustee.

The public juridic person should also insist on insuring the security if it is subject to loss or damage, with a payment clause in favor of the public juridic person.

Having taken proper measures to safeguard the property securing a loan, the issue remains whether or not canon 1295 applies. The conclusion of this author is that compliance with canon 1295 is required. Even if the security remains

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[197]11 U.S.C. §547(f) creates a rebuttable presumption of insolvency for the ninety days preceding the filing of the bankruptcy petition.

intact and the public juridic person maintains a clear preference in regard to it in the event of the debtor's default, the value of the security is subject to the vagaries of the economy, with the risk increasing in proportion to the term of the loan. Therefore, while the measures described above may reduce the risk attending a substantial loan and may increase the probability of the administrator receiving the necessary approval from competent ecclesiastical authority, such measures do not relieve the administrator of seeking such approval in compliance with canon 1295.

H. THE PUBLIC JURIDIC PERSON AS GUARANTOR OR SURETY

An alternative to a public juridic person acting as a creditor by lending stable capital directly to another entity is for it to act as a guarantor or surety with respect to a loan made to that other entity by a third party, such as a bank. Acting in such capacity may be more feasible, in fact, for a public juridic person; one might expect circumstances to be relatively rare in which a public juridic person would have substantial free capital or stable capital which the administrator would willingly divert to a loan.

Acting as a guarantor or surety, however, carries significant risk as well. It places the public juridic person in the position of being both a potential debtor and creditor. If the debtor fails to make timely payment, the

public juridic person is left with the responsibility, although, upon discharging the debt, it is generally subrogated to the rights of the original creditor and may then proceed against the original debtor for reimbursement.

The matter of endangering stable patrimony by serving as guarantor or surety was briefly mentioned in Chapter One. Although there may arise situations in which a public juridic person acts as surety on a debt, the more common arrangement is for it to guarantee a debt. For example, a juridic person such as a diocese may guarantee a debt incurred by another juridic person such as one of its parishes, or one parish may act as guarantor in order for another parish to procure a loan.

A juridic person acting as guarantor or surety would be subject to canon 1295 if the financial exposure is sufficiently great to exceed the threshold amounts established by the episcopal conference.

Under the classical concepts of guaranty and surety, a guarantor's liability is collateral; the creditor must first pursue its remedies against the debtor before it can turn to the guarantor to make good on any shortfall. With a surety relationship, on the other hand, the creditor may pursue the party acting as the surety if payment is not made in a timely manner, without recurring first to the debtor and obtaining a court judgment.[198]

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[198]Pp. 74-75, *supra*.

Agreements for loans of large sums will generally involve the execution of promissory notes. Normally promissory notes are negotiable instruments.[199] Article 3 of the Uniform Commercial Code, as adopted by various States, is the primary body of American law to be applied to negotiable promissory notes. If Article 3 does apply, it can alter the position of a guarantor significantly. If a guarantor signs a negotiable promissory note guaranteeing payment by the principal, the guarantor loses any right it otherwise might have to presentment and notice of dishonor.[200] Otherwise stated, the guarantor becomes primarily liable on the note just as a surety would be.

There are two ways for a guarantor to avoid such primary liability. One is to add to its signature the words "collection guaranteed" or an equivalent phrase.[201] The effect of guaranteeing collection (as opposed to "guaranteeing payment"[202]) is that the guarantor agrees that if the note is not paid when due the guarantor will pay according to its tenor but only after the holder of the note

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[199]It will be recalled that a negotiable instrument is an unconditional written promise to pay the holder thereof (i.e., payable to order or bearer, and therefore transferrable) a sum certain of money, such payment to be made on demand or at a definite time. UCC §3-104(1), *Uniform Laws Annotated*, 2: 25-26.

[200]UCC §3-416(5). *Uniform Laws Annotated*, 2A: 295.

[201]UCC §3-416(2). Ibid.

[202]UCC §3-416(1). Ibid.

has reduced his claim against the maker (i.e., the debtor) to a judgment which has been executed and returned unsatisfied, or it is apparent that the maker has become insolvent.[203] The other solution is to sign as guarantor on a separate guaranty agreement rather than on the negotiable promissory note. A guaranty agreement signed separately from a note does not fall within the Uniform Commercial Code and is governed by traditional contract law outside the UCC.[204]

In summary, a public juridic person may expose its stable patrimony to loss if it acts as an accommodation party to a loan. Its exposure as a surety would tend to be greater than as a guarantor. A guarantor, however, may find itself essentially in the position of a surety if Article 3 of the Uniform Commercial Code applies, although precautions may be taken to avoid this. An administrator should keep these distinctions in mind when seeking permission for the public juridic person to act as an accommodation party, and the competent ecclesiastical authority which is to approve the transaction should also be cognizant of them. What is essential, in any event, is that canon 1295 applies to guaranty and surety agreements if the potential loss of stable patrimony exceeds the thresholds established

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[203]UCC §3-416(2). Ibid.

[204]*Simpson* v. *Milne*, 677 P.2d 365 (Colo. App. 1983).

by the episcopal conference.[205]

I. THE APPLICABILITY OF CANON 1295 TO TRANSFERS BETWEEN SEPARATE CIVIL ENTITIES THAT ARE PART OF THE SAME PUBLIC JURIDIC PERSON

J. Hite points out that a transfer of assets from a civilly-incorporated religious institute to a separately incorporated hospital or college sponsored by the same religious institute is not an alienation because the same juridic person retains canonical ownership.[206] A. J. Maida and N. P. Cafardi express a similar view:

> The separate incorporation of an apostolate is not an alienation, even when title to immovable property is then placed in the new corporation, provided that the new corporation remains responsible to the sponsoring public juridic person for any subsequent transfer of its property.[207]

Therefore, it is important to recognize that a transfer of ownership under civil law does not always coincide with an alienation under canon law. A public juridic person may,

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[205]It is to be noted here that exposure of stable patrimony implies that the public juridic person acting as guarantor or surety does not have sufficient free capital to defray the liability. Therefore, any free capital that would be available for such purpose should be considered. For example, if the administrator contemplates committing the public juridic person to a guaranty of $2,000,000 in debt and the public juridic person has $700,000 in surplus free capital, it is logical that the potential loss of stable patrimony should only be $1,300,000.

[206]J. Hite, "Church Law on Property and Contracts," *The Jurist* 44 (1984) 128.

[207]A. J. Maida and N. P. Cafardi, *Church Property, Church Finances, and Church-Related Corporations* (St. Louis: The Catholic Health Association, 1983) 86.

for example, have some patrimony held in one civil corporation and other patrimony held in another corporation, trust, or partnership. Assets may be shifted from one of the civil entities to the other, such conveyances qualifying as transfers of ownership under civil law, but not so under canon law.

The application of canon 1295 to indebtedness presupposes that, canonically speaking, the creditor is distinct from the debtor. A debtor-creditor relationship might exist between two separate civil law entities, such as two nonprofit corporations, which canonically comprise, or are part of, the same public juridic person. In the establishment of such a debtor-creditor relationship there is no danger of the public juridic person losing stable patrimony and so no question of having to comply with canon 1295; the possibility that the debtor corporation may not repay the stable patrimony to the creditor corporation does not in itself trigger the application of canon 1295, for to argue such would be equivalent to maintaining that a public juridic person could incur indebtedness to itself and thereby be subject to canon 1295. This is a fundamental point; confusion is generated at times when one fails to keep in mind the distinction between canonical juridic persons and civil corporations.

Nevertheless, occasionally canon 1295 *will* apply to indebtedness incurred by a civil law entity in relation to

another civil law entity where both are part of the same public juridic person; and canon 1295 *might* even apply to conveyances between such entities. The rare circumstances under which such a result could obtain are as follows: two civil corporations, X and Y, carry on their activities as part of the apostolate of the same public juridic person. Corporation X lends substantial stable patrimony to Corporation Y, or transfers to Y the title to substantial stable patrimony. Y, however, is already indebted to third party creditors. Should Y default on its indebtedness to those creditors, they will look to the patrimony transferred by X to Y to discharge their claims.

It has been shown in this chapter that a creditor may obtain a judicial lien against the unencumbered assets of a debtor that has defaulted. Further, some secured creditors insist on after-acquired property clauses in their security agreements, which makes property newly acquired by a corporation subject to debts that had been contracted earlier. Hence, it is important for a public juridic person holding different properties in different civil law corporations to take appropriate steps to insulate assets from the claims of third party creditors. To transfer assets from a debt-free corporation to one that is undergoing financial difficulty may immediately improve the position of the latter, but it also places the transferred assets in jeopardy.

The application of canon 1295 is more likely to take place when there is an outright transfer of stable patrimony from one corporation to another under the same public juridic person, than when one corporation simply lends stable capital to the corporation which is already indebted. The reason is that the lending corporation can obtain a purchase money security interest or purchase money mortgage in the property that it has loaned or the property which the debtor will purchase with a loan of capital, thereby placing it ahead of other creditors with respect to that specific property, should the debtor corporation become insolvent and be unable to pay its debts.

In summary, outright conveyances between civil law corporations which are part of the same public juridic person are not alienations in the context of canon law. However, they may occasionally be subject to canon 1295, and loans between such entities may also be subject to canon 1295, if the corporation that is receiving the property in fee or as a loan is substantially indebted to third parties at the time of the transfer.

II. CANON 1295 AND TRANSACTIONS OTHER THAN INCURRING DEBT

A. EASEMENTS, PROFITS, AND LICENSES

Apart from transferring ownership of one's immovable property, or encumbering one's ownership with mortgages or other forms of security interests, a public juridic person

may grant to others one or more of a number of "rights" in regard to immovable property. Such rights may take several forms and arise in a variety of ways. They can include, for example, the right to prevent a landowner from engaging in certain acts on the landowner's own premises to the extent that such activity would constitute a "nuisance"; the right to limit an owner's use of land in accord with certain restrictions contained in a deed; or a tenant's rights in the land of the landlord in accord with terms contained in the lease.

"Nuisance" is a civil law expression referring to a landowner's physical use of property in such a way as to cause injury to other parties.[208] It does not refer to any "transaction" of the landowner, as that term is used in canon 1295. Accordingly, canon 1295 is not applicable to the rights of others that arise from nuisance. Similarly, the matter of restrictions to land use incidental to a deed generally have nothing to do with a "transaction" for

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[208]California law, for example, defines a nuisance as "anything which is injurious to health or is indecent or offensive to the senses," as well as anything which is "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use." California Civil Code §3479. P. B. Bergfield observes that, where a person's conduct on his land is found to be unreasonable under the circumstances, he is subject to liability for intentional invasion of an injured party's interests; he is liable for unintentional invasions when his conduct is negligent or ultrahazardous. P. B. Bergfield, *California Real Estate Law* (Homewood, IL: Richard D. Irwin, Inc., 1974) 104.

purposes of canon 1295. Moreover, the 1983 code has a special provision dealing with leases, canon 1297.

This section, then, confines itself to a discussion of the relationship between canon 1295 and certain types of transactions by which a public juridic person cedes some aspect of control over its immovable stable patrimony, namely, easements, profits, and licenses.

1. Easements

An easement is an interest which one person has in land belonging to or in the possession of another person which entitles the owner of the easement to limited use of the land. In canon law, it is referred to as a "servitude."[209]

It may be expected, in contemporary society, that an owner does not have an untrammeled right of use to one's land, inasmuch as limitations are often imposed as a matter of general law, as with zoning ordinances, or as a matter of specially created rights which another party enjoys with respect to one's land. Easements belong to the latter category of limitations upon ownership usage.

Under Anglo-American property law, an easement in land differs from a so-called "estate" in land. The owner of an

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[209]It also will be recalled that the term "servitude" is normally employed in Anglo-American law to refer to the correlative obligation borne by the person who owns the land over which the easement runs. Therefore, while "servitude" in canon law is equivalent to "easement" in Anglo-American law, the term "servitude" in Anglo-American law usually denotes the burden which accompanies the easement right.

estate in land (as, for example the title holder to the property or a tenant) is entitled to occupy and use it, whereas the easement owner is entitled to use the land only for limited purposes. The owner of an estate in land is said to have a possessory right; the easement holder has a nonpossessory interest since he has no right of occupation but only a right to limited use of the land.[210]

Nevertheless, because most courts in the United States treat easements as property interests rather than contractual ones, they are usually subject to the statute of frauds.[211] To satisfy the statute of frauds, an expressly created easement must be in writing (as with a deed), described as to location and any limitation, with the parties named, and signed by the person granting it.[212] In order to protect the easement holder from later losing it when someone without actual notice of the easement buys the

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[210]Bergfield, 137; *Thurston Enterprises, Inc.* v. *Baldi*, 519 A.2d 297, 298, 300 (N.H. 1986); *Boucher* v. *Boyer*, 484 A.2d 630, 631, 636 (Md. 1984).

[211]*Cooper* v. *Re-Max Wyandotte County Real Estate, Inc.*, 736 P.2d 900, 906 (Kan. 1987), *Judge* v. *Rago*, 570 A.2d 253, 256 (Del. 1990), and *Darsaklis* v. *Schildt*, 358 N.W.2d 186, 187, 190 (Neb. 1984) (subject to statute of frauds); but *contra*, *Double I Ltd. P'shp* v. *Plan & Zoning Comm'n*, 588 A.2d 624, 629 (Conn. 1991) (easement can be various types of interest in real estate or chattel interest according to its duration). It should be noted that the statute of frauds applies to expressly created easements; easements by necessity and other implied easements are outside the statute of frauds.

[212]*Winters* v. *Alanco, Inc.*, 435 So.2d 326, 329 (Fla. App. 1983).

property burdened with the easement, the easement must have been recorded in the county recorder's office.[213]

Easements may be classified in several ways: (i) as active or passive; (ii) as appurtenant or in gross; and, (iii) according to the manner in which they are created, as express, implied (including necessary) or by prescription.

(i) An active (sometimes called "affirmative") easement entitles the easement holder to perform acts which, were it not for the easement, would make him a trespasser. A public utility easement is one example of such. A passive (sometimes called "negative") easement gives the easement holder the right to prevent the owner of the land from doing certain acts he would otherwise be entitled to do; the easement holder in such case does not enter upon the land.[214]

(ii) Easements may also be characterized as "real" or "personal." This corresponds to the division of easements in American law as "appurtenant" or "in gross," respectively. An easement appurtenant is one which is created in one parcel of land to benefit another parcel.

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[213]*Jones* v. *Fuller*, 856 S.W.2d 597, 598, 603 (Tex. App. 1993).

[214]One example of a negative easement is an easement of view, discussed in *8,960 Square Feet, More or Less* v. *State Dept. of Transp. and Pub. Facilities*, 806 P.2d 843, 845-846, 848 (Alaska 1991). The court therein held that one may not prevent a neighbor from blocking one's view without buying an easement of view. Such an easement, then, must be by express grant under Alaskan law, rather than by implication or necessity.

The land burdened with the easement is the "servient tenement" and the land which it benefits is known as the "dominant tenement."[215] The adjective "appurtenant" refers to the dominant tenement.[216] Such an easement runs with the land that benefits from it (the dominant tenement) rather than belongs to a particular individual, even though the individual owning the land that benefits from it at any point in time is the party who can enforce it.[217] An example of this type of easement is the right of way over a servient tenement to give the occupants of a dominant tenement access to a public road.

An easement in gross is an easement that belongs to the owner of it independently of any land that he may own or occupy, and for this reason it is sometimes said to be "personal."[218] There is no dominant tenement in this type

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[215]Bergfield, 139; *Kikta* v. *Hughes*, 766 P.2d 321, 323 (N.M. App. 1988); *Consolidation Coal Co.* v. *Mutchman*, 565 N.E.2d 1074, 1076, 1083 (Ind. App. 1990).

[216]In defining the term "appurtenant" *Black's Law Dictionary* states, "A thing is deemed to be incidental or *appurtenant* to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another." Black's, 103.

[217]See *Kikta* v. *Hughes*, 766 P.2d at 323, wherein the court stated, "An appurtenant easement runs with the land to which it is appurtenant, and passes with the land to a subsequent grantee with passage of the title of the dominant estate."

[218]Bergfield, 139; *Abbott* v. *Nampa School Dist. No. 131*, 808 P.2d 1289, 1295 (Idaho 1991); *Shingleton* v. *State*, 133 S.E.2d 183, 185 (1963).

of easement, only the servient tenement. An example of an easement in gross is a public utility's right of way across land for lines and poles.

(iii) Easements are further distinguished according to whether they are express, implied (including necessary), or by prescription.[219] An easement may be express by grant or reservation. A grant of an interest in real estate is a transfer or conveyance of that interest from one party to another, and an express grant is a transfer wherein the grantor's intent to convey the easement is disclosed by words.[220] This is usually accomplished by deed, although occasionally such intent may be manifested in a last will and testament. In fact, no particular formula of words is necessary to create an express easement, as long as the intention is clear.[221] A reservation of an interest in real estate occurs when the grantor conveys less than all of his total interest in real estate, retaining for himself some limited rights.[222] In the case of an express easement, this would be retention by the grantor of an easement, manifested in a clause contained in the deed.

In an implied easement, the circumstances of the

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[219]*Boyd* v. *McDonald*, 408 P.2d 717, 720 (Nev. 1965).

[220]Bergfield, 140.

[221]Scanlan v. Hopkins, 270 A.2d 352, 355 (Vt. 1970); *Coomer* v. *Chicago & N.W. Transp. Co.*, 414 N.E.2d 865, 869 (Ill. App. 1980).

[222]Bergfield, 140.

transaction are such that, in the event of litigation, the courts would infer or conclude that the parties intended to create such a right, even though there is no language to such effect in the written instrument of conveyance.[223] The implication is based on an intention which is unexpressed but probable in light of the facts of the transaction. It is usually created when the owner of a parcel of real estate divides his property and transfers part of it to another person, retaining the other portion. Before the property was divided and sold, however, the owner was using one portion of the property for the benefit of the other part. Typical examples would include drains, sewers, and irrigation ditches on the servient tenement which service or increase the usability of the dominant tenement. When the owner conveys one part of the property (the servient tenement) and retains the other (the dominant tenement), an easement arises if the prior use is obvious and permanent at the time that the land is so divided and is reasonably necessary to the portion of the land that benefits from it (the dominant tenement retained by the seller).[224] It should be noted that easements by implication are not favored by law, and this is particularly so when the easement burdens the property that the grantor conveys in

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[223]Ibid., 141; *Boyd* v. *McDonald*, 408 P.2d 717, 721 (Nev. 1965).

[224]*Fischer et al.* v. *Hendler*, 121 P.2d 792, 793 (Cal. App. 1942); California Civil Code §1104.

favor of the property that he retains.[225]

An easement by necessity is really a type of implied easement that arises, however, irrespective of any prior use to which a divided parcel of land has been put. It is created when a grantor conveys a part of a larger parcel and, in so doing, landlocks the transferred tract. It is landlocked when it is entirely surrounded by the land of the grantor, or by the land of the grantor or other persons in such a way as to shut it off from access to any street or road. In keeping with the presumed intent of the parties and with public policy favoring the usage of land, a right of way across the grantor's land is implied in such case.[226] For the easement to obtain, however, the grantee must have a strict necessity for the easement. If there are other means of ingress or egress, however inconvenient, an easement of necessity will not be implied.[227]

Easements may also be created by prescription, or adverse use. In addition to "canonizing" civil law with respect to contracts under canon 1290, the 1983 code, in canons 197 and 1268, similarly "canonizes" or specifically defers to civil law in the matter of prescription. Applying these provisions to the law of prescriptive easements as it

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[225]*Jordon et al.* v. *Henck, et. al.*, 333 P.2d 117, 120 (Cal. App. 1958).

[226]Bergfield, 145. *Broadhead* v. *Terpening*, 611 So.2d 949, 953 (Miss. 1992).

[227]Bergfield, 146.

exists in the United States, an adverse user acquires a right in real property when he enters and uses the land continuously for a statutory period of time. Moreover, the use must be hostile or adverse to the owner of the land,[228] as well as open and notorious, meaning that it is sufficiently obvious to make a reasonably observant owner aware of the unauthorized use. The law permitting easement by prescription is, in effect, a form of statute of limitations, based upon the objectives of protecting long-established positions of parties and bringing about a relatively prompt termination of controversies. In California, for example, the period of continuous use is five years, but the laws of the States vary.[229]

Easements may be subject to canon 1295, as they were to canon 1533 of the 1917 code, and may be examined according to whether (i) the public juridic person in some way permits an easement to arise in favor of others with respect to property which it owns, or (ii) loses an easement which it has enjoyed.

(i) With respect to easements over land which public juridic persons own, it is clear that when a public juridic person grants an express easement in immovable property

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[228]One example given by Heston of hostile and adverse use is that of the encroacher using a path through the owner's land and protecting it by building a fence. Heston, *Alienation*, 139.

[229]California Code of Civil Procedure §320 and California Civil Code §1007.

which is part of its stable patrimony, such stable patrimony may suffer a loss in value because the public juridic person loses exclusive dominion and enjoyment. The patrimonial condition of the public juridic person is thereby worsened. The applicability of alienation requirements to such a canon 1295 transaction will then depend on the monetary measure of such change in patrimonial condition.

The 1983 code is silent with respect to the method of measurement. In the context of canon 1533 of the 1917 code, Heston maintained that the norm for determining the monetary effect of an easement on stable patrimony was the financial outlay that would be required to provide the easement holder with an alternative set of rights, as, for example, the cost of providing a new road or path for the one acquired by easement.[230] This seems unsatisfactory, first, because there may be no alternative, or, indeed, the alternatives may be so varied in type and cost as to render comparison meaningless; and, second, the focus is not on the value of the easement but on the effect that the easement has on the the value of the servient tenement owned by the public juridic person.

The following procedure for evaluation appears appropriate in the opinion of this writer. The administrator should obtain appraisals of the property with and without the easement. At least two sets of appraisals

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[230]Heston, *Alienation*, 140.

should be taken,[231] and, as a minimum, the smaller or smallest difference between the appraised values with and without the easement should logically measure the adverse effect on the patrimonial condition. Again, what the administrator actually receives as an offer for the transfer of easement rights is not the relevant figure, because what matters for purposes of canon 1295 is the effect on the underlying property, which is measured by its fair market value before and after the easement is granted.[232]

The reservation of an express easement, however, should not be subject to canon 1295, for the simple reason that the public juridic person is the entity holding the easement, a remnant of the complete property ownership that it held before. The focus of compliance with canons 1291 through 1294 will be on the patrimony that is alienated, not on the easement right that is retained.

With respect to easements by implication, canon 1295 is obviously not an issue when the easement arises in favor of the public juridic person which is alienating some of its

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[231]At least two sets of appraisals should be sought because there is no reason to think that, given their similarity in language, canon 1293 §1, 2° of the 1983 code should be interpreted differently from the common interpretation of canon 1530 §1, 1° of the 1917 code, *viz.*, that there be at least two appraisals made.

[232]This is so, although one would expect that, in an arm's length negotiation, the offer for the easement in many instances would be close to the estimated (appraised) change in the value of the underlying land in the hands of its owner as a result of the grant of the easement.

property. That can occur when a juridic person divides immovable property and alienates a portion thereof while retaining the remainder and later successfully demonstrates that it enjoys an implied easement.

Canon 1295 would seem relevant, however, in the reverse situation, that is, where the grantee of the property alienated by the juridic person can successfully argue that it holds an implied easement in the tract still retained by the juridic person. As with any easement, once it is established that an implied easement exists, the value of the property burdened with the easement, the servient tenement, is negatively affected. The practical problem here is that the issue of easement by implication typically arises in the context of litigation sometime after the transfer of the dominant tenement took place, and the "implication" may not reflect the actual intention of the parties at the time of conveyance.[233] Had the parties thought about addressing the question in their negotiations,

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[233]In this connection, the matter of a right of ingress and egress is typically covered in negotiations. However, other easement rights can be easily overlooked. Even though the law requires that a use constituting an implied easement must be "obvious and permanent," as well as "reasonably necessary" to the portion of the property that benefits from it, the parties, or at least the grantor, may *in fact* not have considered the matter at the time the dominant tenement was conveyed. This was the case in *Fischer et al. v. Hendler*, 121 P.2d 792 (Cal. App. 1942). That controversy involved water drainage from one lot to another. The appellant-grantor sold a lot which enjoyed drainage to the lot she retained. Later, she attempted to curtail this drainage. The case was decided against her both at trial and on appeal.

it is likely that the deed or other instrument conveying the parcel of land would have contained language that expressly granted the easement in the property that the grantor retained. But when the issue emerges at a later point in time, it is too late to comply with canon 1295. Easements by implication, then, are an instance where the public juridic person, prior to alienating a parcel of immovable property, must be alert to the impact that such conveyance will have on any contiguous land that it retains, for it is at the time of alienating the parcel that the demands of canon 1295 should be met in regard to any likely easement that will result.

Similarly, were a public juridic person to convey a tract of land in such a way as to create an easement by necessity across any property that it retained, the retained property could depreciate. If the loss in value were substantial enough, that is, exceeding one of the thresholds established by the episcopal conference with respect to alienations, canon 1295 would apply. An easement by necessity is, of course, more easily determined than other forms of easement by implication, because an easement by necessity pertains only to the problem of land which is landlocked. Nevertheless, vigilance is required when alienating a tract of land contiguous to other property which the grantor will continue to own. If there is some question as to the necessity of an easement, it should be

addressed in the contract to sell the dominant tenement, with a contingency provision to the effect that any easement rights to adjacent property owned by the grantor-public juridic person will be subject to approval from ecclesiastical authority in conformance with canon law.

An easement which arises by prescription does not bring canon 1295 into play. The reason is that it results from a failure on the part of the owner of the land to respond in a timely way to the open and notorious use of such property by the party in favor of whom the prescriptive easement eventually runs. If the administrator of a public juridic person neglects to act in the face of encroachment, thereby allowing a prescriptive easement to result, there still has been no "transaction" with respect to which canon 1295 may be invoked.[234]

Finally, canon 1295 is not limited to those easements which are appurtenant; it may also apply to easements in gross as well. In an easement in gross, only one parcel of land is relevant, the one that is burdened by the easement, that is, the servient tenement. There is no other parcel that "enjoys" the easement, no dominant tenement. Rather, the easement is personal to an individual or artificial person which owns it. Nevertheless, even though such an

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[234]This is not to assert that the negligent administrator would not violate principles of canon law, for canon 1284 §2, 2° calls upon administrators to safeguard the ownership of ecclesiastical goods through civilly valid methods.

easement may terminate with the death or dissolution of the owner thereof, it may still reduce the value of the land burdened, particularly if the owner of the easement is a corporation with perpetual life. This is key to the application of canon 1295.

It will be recalled that Vromant listed "real servitudes," a term which basically corresponds to easements appurtenant, as a class of interests to which canon 1533 of the 1917 code applied.[235] He made no mention of personal servitudes, which are likened to easements in gross, and such an omission may have reflected a conscious distinction on his part. Indeed, there would be a consistency between such a distinction and the general principle at common law in American jurisdictions that easements in gross were not assignable by the owner to another party. But that is no longer the prevailing rule of law, at least in the United States.[236] Easements in gross may be transferred.

Therefore, over and above the fact that an easement in gross which was non-assignable and of limited duration could nonetheless substantially depress the value of the land burdened with it, there may now exist easements in gross which are assignable and of indeterminate duration, thereby imposing a clear burden on the servient tenement.

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[235]P. 81, *supra*.

[236]*Collier et al.* v. *Oelke et al.*, 21 CaR 140, 142 (Cal. App. 1962).

Accordingly, the applicability of canon 1295 cannot be ruled out with regard to this type of easement.

(ii) The focus of discussion thus far has been on the application of canon 1295 to a transaction in which the public juridic person cedes an easement right to immovable property. However, it is necessary also to consider an easement itself as stable patrimony, and therefore susceptible to the application of the laws governing alienation. In the words of Heston:

> By renouncing an easement which it has legitimately acquired against another organization, the Church would be abdicating a legally obtained right. Since rights and privileges are considered part of a church body's stable capital, being assimilated to immovable property, such renunciation is tantamount to a diminution of patrimony. It thus falls within the scope of the rules on alienation.[237]

To employ the terminology of Heston, the "renunciation"[238] of an easement by a public juridic person may occasion application of the laws on alienation (if the

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[237]Heston, *Alienation*, 140.

[238]Presumably Heston used the term "renunciation" to describe the alienation of an easement as generically as possible. Usually, a pre-existing easement is alienated for value pursuant to a sale, and if the sale is to the owner of the servient tenement it is customarily referred to as a "release." Of course, the public juridic person may truly renounce its easement to no party in particular.

Besides release, the usual ways in which easements terminate include expiration, merger, abandonment, estoppel, forfeiture for misuse, changed conditions, laches and adverse possession. J. H. Pearson, "Chapter 60, The Law of Easements: Rights in the Property of Another," in *Thompson on Real Property, Thomas Edition*, 7: 476, §60.08 and 484, §60.08(b)(4).

value is large enough), a proposition as valid under the 1983 code as it was under the 1917 code. In such a case, however, canons 1291 through 1294 of the current code would apply not through canon 1295 but directly because the conveyance of an easement is an alienation.

In summary, easements are created and may be categorized in a number of ways. Some easements may have no relation to canon 1295, most notably an easement by prescription. Other easements may relate to canon 1295, depending on the negative effect they have on the value of the properties burdened by them. The worsened patrimonial condition for purposes of canon 1295 is susceptible to measurement by way of evaluations made of the servient tenement before and after the proposed transaction which creates the easement. This is a logical procedure to pursue whenever there is a reasonable possibility that an easement could depress the underlying value of stable patrimony in a magnitude approaching the minimum threshold referred to in canon 1292 §1. An easement itself may be stable patrimony and therefore subject to the laws governing alienation, but in such case the direct alienation of property has taken place without any application of canon 1295.

2. Profits

A "profit," or, more technically, a "profit *a prendre*," is a nonpossessory right of one person to enter upon the

land of another and take something from it.[239] It may be part of the land itself, such as minerals, or it may be an appendage to it, such as timber.[240]

The principles of American law pertaining to easements are generally applicable to profits. In fact, despite attempts in some judicial opinions to distinguish between profits and easements, a Special Note to section 450 of the *Restatement of the Law of Property* points out that no decision could be found in the United States which contained a rule of law applicable to either a profit or an easement that was not also applicable to the other.[241]

Nevertheless, specialized bodies of law have developed around certain industries where the basic relationship of a profit *a prendre* exists, as in the oil and gas, timber, and coal industries. Accordingly, there continues to be a separate discussion of profits. For example, even though the Uniform Commercial Code is a model law adopted by many States to govern sales of "goods" (movable property), it also applies to one party harvesting timber from the land of

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[239]Bergfield, 182.

[240]The court in *Burlingame* v. *Marjerrison*, 665 P.2d at 1139 (Mont. 1983), described a profit as "a right to take the soil or substance of the soil, such as the right to take wild game or fish," and gave as additional examples the right to feed cattle on another's land and to take gravel, stone or minerals from another's land.

[241]American Law Institute, *Restatement of the Law of Property* (St. Paul: American Law Institute Publishers, 1936) 5 ("Servitudes"): 2901-2902, §450, Special Note.

another.[242]

In any event, whether one characterizes a profit *a prendre* as but a variation of easement in gross or as a property interest clearly distinguishable from easements, a public juridic person that grants a profit is potentially subject to the provisions of Book V, Title III of the 1983 code. What makes a profit distinctive is that it may be subject to Title III for more than one reason: the transaction constitutes a direct alienation and may, at the same time, be a potential detriment to stable patrimony under canon 1295.

One may take the case of timber cutting, which, as noted above, is considered in at least some American jurisdictions to be a sale of goods under the Uniform Commercial Code. Timber located on immovable property owned by a public juridic person may be deemed a part of the stable patrimony. Its severance and sale is therefore an alienation of stable patrimony.

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[242]See UCC §2-107(2): "A contract for the sale . . . of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or the seller even though it forms part of the realty at the time of the contracting, and the parties can by identification effect a present sale before severance." *Uniform Laws Annotated*, 1: 234-235.

In construing a document involving the sale of timber, the court in *United States* v. *3035.73 Acres of Land*, 650 F.2d 938, 940 (8th Cir. 1981), stated that it could see no difference between a contract for the sale of timber and the conveyance of timber under principles of real estate law, and the court therefore applied UCC §2-107(2) to the contract.

On the other hand, one might argue that the extraction of the timber may (in fact, probably will) depreciate the value of the land owned by the public juridic person, thereby bringing canon 1295 into play. The depreciation may be measured not only by the value of the resource that is sold but also by the deterioration of aesthetical appearance, obstructions caused by the purchasing party regularly entering the land to cut and transport the timber, or other form of resulting diminished utility. As a hypothetical example, if a public juridic person with forested land executes a contract for sale of timber rights priced at $1,000,000, and the fair market value of the land is thereby reduced by $1,500,000, it would be reasonable to calculate that an alienation of $1,000,000 of stable patrimony takes place, as well as a deterioration in the value of the remaining patrimony of $500,000. The $1,000,000 is subject to canons 1291 through 1294 as an alienation, and the $500,000 is subject to those same canons by virtue of canon 1295. A petition to the competent ecclesiastical authority for approval of the transaction should contain both components.

Finally, profits *a prendre* are frequently called "leases" by the parties thereto, especially in contracts relating to the extraction of oil and gas. This results in an effort to characterize these relationships as landlord-tenant relationships, particularly when the instrument

denominated as a lease contains a term of duration measured in years. Such an effort, however, is mistaken because these documents do not extend a general possessory right that is characteristic of a lease; they give only a right of access to land for the purpose of removing a designated substance, leaving the landowner's general right of possession intact.[243] This distinction is relevant to the present discussion in order to point out that, in the context of Title III of Book V, profits *a prendre* should have nothing to do with canon 1297, which governs leases.

3. Licenses to use immovable property

As a principle of real property law in the United States, Bergfield defines a "license" as follows:

> A *license* is a privilege to do an act or a series of acts on land in the possession of another person. It is a personal, nontransferable permission given by a licensor to a licensee. The licensee acquires no estate or interest in the licensor's property, but is merely permitted to do things on the land that would otherwise amount to a trespass.[244]

Actually, a license may be extended by any person who has a present or future right to be on land even though that

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[243]See R. W. Polston, "Chapter 65, Profits a Prendre," in *Thompson on Real Property, Thomas Edition*, 8: 62-63, §65.06(b).

Kennecott Corp. v. *Union Oil Co.*, 242 Cal. Rptr. 403, 404, 408 (1987) ("A profit interest in geothermal resources is not an ordinary leasehold at all. Rather it is a means by which a party may explore for and extract resources until it chooses in its sole discretion to surrender the right to do so." 242 Cal. Rptr. at 408).

[244]Bergfield, 183.

person may not himself be the owner. Whereas an easement confers an interest in the land and may not be terminated at the pleasure of the servient owner,[245] a license as such is revocable at will by the licensor.[246] This is easily enough understood in the case of a gratuitous license, because a license is commonly understood as being in the nature of a privilege to enter upon land.

However, even if a license is obtained for value it may still be revocable by the licensor,[247] even though this would not preclude the licensee from suing the licensor for monetary damages under a breach of contract. A commonly cited class of licenses issued for consideration is that of purchased entertainment tickets.[248]

Another line of cases, more pertinent to public juridic persons, in which a contractual relationship is sometimes held to result in nothing more than a license, is that in which the owner of a building gives another a concession to conduct business therein. For example, a hotel or church

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[245]*Louisville Chair & Furniture Co.* v. *Otter*, 294 S.W. 483, 485 (Ky. App. 1927).

[246]Ibid. A license is also distinguishable from a lease, which is important because canon 1297 applies to leases. If an agreement gives a person exclusive possession of the premises, it is a lease. If it merely confers a privilege to occupy for a limited purpose, it is a license. Bergfield, 183.

[247]*Marrone* v. *Washington Jockey Club*, 227 U.S. 633, 637 (1913), in which the holder of a theatre ticket was considered a licensee.

[248]Ibid.

might grant to another a concession to operate a gift shop. Concession relationships are often difficult to categorize, and courts sometimes conclude that they are easements or leases rather than licenses. Concession agreements typically resemble easements in that the concessionaire is given access for a limited purpose, and they resemble leases in that a particular space is occupied and periodic payments are made to the owner of the premises. What seems to occur frequently is that, if a court finds categorization as a lease or easement to be untenable, the description of the relationship as a license becomes a catch-all category.[249] If both parties attempt to make a license irrevocable over a certain period, it indeed is not a license but, rather, an easement. Since easements are subject to the statute of frauds and licenses are not, if the arrangement is to extend for a period exceeding one year, it will be valid as against third parties only if it has been made pursuant to a written agreement.

Although the general principle is that a license to enter and use premises is revocable by the licensor at any time, it should be noted that there are circumstances under which a license cannot be revoked under the so-called doctrine of "estoppel." A seminal California case, *Stoner*

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[249]R. W. Polston, "Chapter 64, Licenses," in *Thompson on Real Property, Thomas Edition*, 8: 6, §64.01(e) and 23, §64.03(c)(3).

v. *Zucker et al.*,[250] provided the reasoning for the application of estoppel to licenses to use land. In that case, the licensees had entered upon the licensor's land to construct an irrigation ditch costing over $7,000. The licensor subsequently notified the licensees that their license was terminated, but the licensees continued to enter the land to make repairs to the ditch. In suing to enjoin the licensees from using the ditch or entering upon his land, the licensor argued that a license by its nature is a revocable permission and that a licensee could not, in effect, unilaterally change that legal relationship into one of an easement simply by making improvident expenditures in the hope of continuing the license. The doctrine of estoppel did not apply, according to the licensor, because he had not deceived the licensees but had merely asserted a right which had been absolutely reserved to him by the nature of a license. Moreover, to convert a parol license (i.e., an oral permission) into a grant of easement would be violative of the statute of frauds.

The court rejected the licensor's argument according to the following principle:

> . . . where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of a license, the license becomes irrevocable, the licensee will have right of entry upon the land of the licensor for the purpose of maintaining his structures, or, in general, his rights under his license, and the

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[250]83 P. 808 (Cal. 1906).

> license will continue for so long a time as the nature of it calls for. . . . the license becomes in all essentials an easement, continuing for such length of time under the indicated conditions as the use itself may continue.[251]

It should be pointed out that the court's application of estoppel did not presuppose that the owner worked any fraud upon the licensee or even affirmatively acted in such a way as unintentionally to give the licensee the impression of continuous license. It evidently sufficed, in order to convert the license to an easement by estoppel, that the owner failed to intervene in time to prevent the licensee from committing money, labor or materials to the project pursuant to the license.[252]

Turning to the relationship of canon 1295 to licenses in regard to immovable property, a license normally should not bring canon 1295 into play. Given the revocable nature of a license, one would not expect it to have an adverse effect on the marketability of the underlying property and, hence, on its value. This is because the public juridic person as licensor could re-establish peaceful enjoyment of

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[251]83 P. at 810.

[252]The fact that a licensor may be estopped from revocation, however, should not be interpreted as equivalent to a "license by prescription." In the case of estoppel, the licensor at least gave an initial permission to the licensee to enter upon the land and use it. A "license by prescription," on the other hand, does not exist; a license can never be created by adverse use. According to Bergfield, "Rights to use the land of another which arise from prescription are always easements, not licenses." Bergfield, 185.

its land simply by terminating the license.[253]

However, were a license to become in some way obligatory on a public juridic person, such as by estoppel, for example, so that it was no longer terminable at will by the juridic person, it could depress the value of the land connected with it, thus running the risk of worsening the patrimonial condition of the public juridic person as owner and licensor. In effect, the license would have become an easement rather than a true license. And since granting access to the non-owner is a "transaction," canon 1295 would apply in instances where the monetary exposure exceeded the minimum sum referred to in canon 1292 §1. The practical problem is to determine when, if ever, such a risk takes place, as well as its magnitude in monetary terms.

First, if it is a true license it will be terminable by the public juridic person, although there may be damages to pay if the licensee has given value for access to the land. One would not, however, expect there to be a significant effect on stable patrimony; the only detriment to the public juridic person would be the damages it would have to pay for terminating the license. If it is not terminable by the

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[253]It should be added, however, that a non-owner can depress the value of immovable property not only by a continuing presence but also by any permanent damage that his activities might entail. Therefore, the revocability of a license affords the licensor or owner the opportunity to terminate the ongoing presence and activity of the licensee, and to intervene quickly enough to prevent such activity from entailing permanent damage to the property that would detract from its value or utility.

public juridic person, it is not really a license but rather an easement, with the measure of its effect on stable patrimony for the purpose of canon 1295 being the estimated decrease in the value of the immovable property according to an expert appraisal.

In the case of a gratuitous license, there could be exposure to loss in value of the immovable property of a public juridic person as licensor, if the licensee were in a position to show that the principle of estoppel was applicable upon the juridic person's attempt to revoke the license. Again, by estoppel is meant that the licensor is precluded from terminating the license because the licensee had reasonably relied on the durability of that license. Implicit in the notion of reasonable reliance is that the licensor had somehow held out to the licensee that the license would not be revoked at will, or had failed to revoke it in a timely manner, that is, before the licensee expended labor, money or materials in expectation of a commensurate benefit. Estoppel essentially converts a license to an easement.

Nevertheless, this does not mean that an administrator should have to comply with canon 1295 before granting a gratuitous license. The conclusion that canon 1295 does not, or at least need not, apply is not based upon the speculative nature of the damages, which can only be measured with exactitude at an undetermined point in time

after a revocation is unsuccessfully attempted by the licensor-juridic person. Rather, the reason why an administrator should be able to avoid canon 1295 is because exposure to estoppel can be rendered negligible by making the license explicitly conditioned on the public juridic person's right to terminate it at any time irrespective of any prior usage or improvements by the licensee to the land. In effect, a written license with terms that deny estoppel, duly ackowledged by the licensee prior to the grant, prevents the issue from later arising.

B. THE APPLICATION OF CANON 1295 TO PATRIMONY AFFECTED BY A TRANSACTION WITHOUT BEING AN OBJECT OF THE TRANSACTION

Canon 1295 is generally applied in the context of patrimony which is the immediate object of the prospective transaction. Thus, a mortgage against real estate belonging to a public juridic person is executed in order to secure a loan to the same public juridic person. This clearly places the real estate in a vulnerable position, and it is the classic example of a transaction falling within the ambit of canon 1295.

One may inquire, however, whether the canon also applies to patrimony belonging to a public juridic person which is not the object of the transaction. One line of investigation concerns the effect that the sale of one tract of land by a juridic person has on contiguous parcels owned by the same entity. The property to be sold is a direct

alienation. Accordingly, it may or may not be subject to the canons on alienation, depending upon whether it is stable patrimony and has a value in excess of the minimum threshold prescribed by the relevant episcopal conference. In any event, adjoining or neighboring land owned by the same public juridic person may be adversely affected.

When, for example, the sale of one tract of land by a public juridic person entails an easement across adjoining or neighboring land owned by the same juridic person, the implications for canon 1295 are clear; for purposes of canon law, the transaction involves not only the sale of the one parcel, but also the resulting effect on the value of the property over which the buyer is to enjoy an easement. The alienation canons apply to the property to be sold, but, by virtue of canon 1295, they may also apply to the remaining property which is subject to the easement.

Stipulating for purposes of discussion that the land subject to the easement is stable patrimony, the determination of whether it comes under the laws governing alienation as a result of canon 1295 will depend upon the decrease in its value that results from the grant of the easement. If the decrease exceeds the minimum threshold determined by the episcopal conference, approval from competent ecclesiastical authority must first be sought.

The matter of easements is relatively simple because an easement which is ancillary to the alienation of a

neighboring tract is a direct restriction of the owner's dominion over the property to which the easement pertains. Other cases are more obscure. One may ask, for example, whether canon 1295 extends to transactions in which the purchaser of a tract of land from a public juridic person obtains no rights over neighboring property still held by the same juridic person, but the value of the neighboring property nonetheless becomes depressed as a result. One might envision a public juridic person with two contiguous parcels of land, one of which has a church and parking lot and the other functions as a rarely utilized overflow parking lot. The parcels are located in an area without zoning restrictions but which is primarily residential. With no foreseeable need for the overflow parking lot, the juridic person sells it to a commercial enterprise which proceeds to operate an entertainment business thereon, thereby depressing the value of the contiguous land retained by the juridic person.

At issue is the determination of whether a worsening of the patrimonial condition of a public juridic person which is the focus of canon 1295 refers only to the possibility of stable patrimony being confiscated or otherwise lost, or whether it also contemplates a diminution in *value* of that patrimony while still remaining in the hands of the public juridic person.

In the case of the easement, the owner suffers the

inconvenience or nuisance of having to share enjoyment of the land with another party, even though the property has not been lost. The value of the property nonetheless decreases, particularly when the easement is perpetual. The marketability of the land is reduced because subsequent owners would take the property subject to the right of the easement holder, and the public juridic person's patrimonial condition is therefore worsened.

By analogy, when a public juridic person holds a portfolio of investments as stable patrimony, any transaction which reduces or may reduce the monetary value of the portfolio in a substantial way should rightfully be considered as falling within the requirements of canons 1291 through 1294, either because it is an alienation or because it is a transaction which may otherwise worsen the patrimonial condition of the entity under canon 1295. The reason is not because of any irreplaceable utility which the asset to be disposed of or placed in jeopardy may have, but, rather, because of the actual or possible diminution in the value of the patrimony, which is the investment portfolio in the aggregate.

It is this writer's opinion that any transaction which may adversely affect the value of patrimony may be subject to canon 1295, even though the patrimony in question is not subject to physical loss or damage. Accordingly, where the alienation of one article of stable patrimony may adversely

affect the utility or value of other stable patrimony, be it because of an easement, a "nuisance" or otherwise, the administrator must include two elements in the request for approval from the competent ecclesiastical authority, one for the alienation of the one asset and another, owing to canon 1295, for the consequent adverse effect (measured in monetary terms) on other stable patrimony.

The clearest illustration is the sale of a parcel of real estate which may reduce the value of a contiguous tract to be retained by the same public juridic person because, for example, of the projected use to which the sold parcel is to be put. It must, of course, be acknowledged that there could be instances in which an alienation could actually enhance the value of the contiguous parcel to be retained (a factor which would wisely be referred to in the administrator's petition for alienation), as, for example, if the purchaser's plans for developing the alienated property were such as to make all surrounding property more attractive or useful. The proper procedure should be to obtain appraisals of the contiguous parcel, both as to its current value and the projected value in the event that the other tract is alienated. If the sum of the value of the property to be alienated and any projected reduction in value, resulting from such alienation, of the remaining property exceed the threshold established by the episcopal conference, approvals both on the basis of the alienation

and on the basis of the additional worsening of the patrimonial condition, according to canon 1295, are required.

C. OPTIONS TO PURCHASE AND CANON 1295

A public juridic person may have stable patrimony that the administrator wishes to alienate, but under circumstances favoring the issuance of an option to a prospective purchaser rather than immediately entering into a sales contract.

1. Advantages of option to purchase to selling juridic person.

An option to purchase allows the juridic person to obtain some consideration for its property without a commitment to sell immediately if the option given is not exercisable until some time in the future. For example, the public juridic person may need to use the property for a period of time. Or the administrator may assure himself that the juridic person will be able to retain the optionee's consideration if the latter fails to proceed with the purchase.

The option may be particularly useful when an administrator who is considering the sale of stable patrimony desires the right to retain it upon the occurrence or non-occurrence of some contingency. For example, if the administrator tentatively wishes to sell land to a developer in anticipation that the developer's plans will enhance the

value of other property owned by the public juridic person, the administrator may want the right to retain the land if the development fails.[254] For that matter, the administrator may want the option contract to provide that the developer must obtain financial or regulatory approvals or otherwise have already successfully developed any neighboring properties which are part of the same project (thereby virtually ensuring the success of the project and the appreciation of, say, other contiguous tracts of land held by the juridic person) before the developer may exercise the option to purchase the parcel owned by the juridic person which is the grantor of the option.

2. Advantages of option to purchase to prospective buyers

Of course, options to purchase carry benefits to prospective buyers, the affording of which may ultimately be the only feasible way for a public juridic person to dispose of property in a slow market. A prospective buyer may not be willing to purchase immediately, but may be amenable to committing itself to an option until it makes a decision, arranges financing for the purchase, or makes further investigations of the property.

There may be instances in which a potential buyer foresees a rise in the value of property and is willing to

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[254]See D. Augustine and S. H. Zarrow, *California Real Estate Law & Practice* (New York: Matthew Bender & Co., Inc., 1986) 4: 90-14, §90.40.

purchase an option based upon the current market value. In effect, the optionee is speculating on the rise in value with a minimum of investment, risking only the option price if the value falls.[255]

A prospective purchaser may also use an option in order to avoid contingencies and conditions in the sales contract. This is of particular advantage in a complex transaction which contains many such conditions. The prospective purchaser merely purchases the option and proceeds to ascertain over time whether it can fulfill the requisite conditions, risking only the option price if it cannot.

The optionee may also turn to an option to avoid publicity that would otherwise occur were an outright purchase to be made, thereby revealing the optionee's plans or driving up the price of neighboring tracts which the optionee may also want to purchase. Also, options are simpler to draft and execute, avoiding the necessity of involving title companies, banks and other third parties.

Options are often employed in land development. The developer is granted options on contiguous parcels which can be exercised on successive dates. In this way, the developer-optionee reserves sufficient land for expansion if the project succeeds, but does not commit itself to purchase all tracts unless and until they are needed.[256]

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[255]Ibid., 90-13, §90.40.

[256]Ibid., 90-13 and 90-14, §90.40.

3. Effect of canon 1295 on options to purchase

In general, granting an option to purchase stable patrimony would be subject to canon 1295. The optionee may or may not exercise the option, but the danger of losing the stable patrimony clearly exists. Accordingly, before issuing an option the public juridic person must secure the appropriate permission before proceeding, if the value of the stable patrimony exceeds one of the thresholds established by the episcopal conference.

However, if the option were to contain a condition that any sale would be subject to permission from the competent ecclesiastical authority in conformance with canon law (and without penalty to the juridic person should such permission be denied), the issuance of the option would not be subject to canon 1295. This, of course, would affect the price that a prospective optionee would be willing to pay for the option itself, but such an option might be feasible in limited cases, such as when an optionee desired not only to purchase the property but also to foreclose competitors from making the purchase.

It should be noted that some transactions may involve both canons 1295 and 1297; leases frequently include an option to purchase. A short-term lease with an option to purchase is often used by a potential buyer who cannot immediately or conveniently arrange conventional financing. The term of the option is used to acquire the necessary

financing, or it is agreed that the lease payments will go towards the eventual purchase price.

D. CORPORATE STRUCTURING

Every public juridic person has an individual charged with administering property pertaining to such public juridic person.[257] In the case of the most common public juridic persons--dioceses, parishes, and religious institutes--these persons are diocesan bishops, pastors, and religious superiors (who direct their finance officers in carrying out the administration of goods), respectively.[258] These are the proper individuals to act for the entities which they represent in matters of finance and administration.

The financial and administrative powers of the administrators are not unbounded. For example, canon 1276 §1 provides that an Ordinary is to "supervise carefully" (*sedulo advigilare*) the administration of goods which belong to public juridic persons which are subject to him; that is, the Ordinary oversees and regulates the acts of the

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[257]Canon 1279 §2 states that if a public juridic person fails to provide for the appointment of an administrator by law, documents of foundation, or statutes, the Ordinary to which the public juridic person is subject is to appoint an administrator for a three-year, renewable term.

[258]Cc. 393, 532, 636.

administrator.[259] The existence of limitations on the authority of an administrator is also clear from the discussion above of the provisions in canons 1291 through 1297 regarding alienation, transactions that jeopardize stable patrimony, and leasing. The various transactions discussed in canons 1291 through 1297 are proposed by administrators for approval by competent ecclesiastical authority.

In order to discharge their functions according to Book V of the 1983 code, administrators and the ecclesiastical authority to which they are subject must be in a position where they can exercise ultimate control over the use and disposition of Church property entrusted to them. This requires that the status of the apostolates of public juridic persons under civil law be compatible with the status of these same entities under canon law, and that the role of the individuals whom civil law regards as having authority over the administrative and financial affairs of such entities be compatible with the role of administrators. If, for instance, civil law assigns to the board of trustees of a nonprofit corporation, under which patrimony of a

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[259]An Ordinary, on the other hand, is the administrator of property belonging to the public juridic person over which he is directly placed and must obtain consent from others prior to performing certain acts of administration. For example, a diocesan bishop is the administrator of diocesan property, and, according to canon 1277, he must obtain consent from the finance council and the college of consultors before engaging in an act of extraordinary administration with respect to such property.

public juridic person is held, the legal authority for encumbering and conveying the assets thereof, without regard to competent ecclesiastical authority, there will be little that can be done, as a practical matter, to ensure compliance with the requirements of Book V (which call for competent ecclesiastical authority to approve such transactions in order for them to be valid).

The application of canon 1295 seems clear. At issue are the actions of the canonical administrator who allows such a state of affairs to develop in the first place by permitting stable patrimony to be held and administered in a civil-law structure which does not allow for the exercise of appropriate control by the administrator. When an administrator loses control over decisions relevant to alienation and other matters which could worsen the patrimonial condition of the juridic person, the stable patrimony is, in effect, placed at risk, and, hence, the requirement of canon 1295 must be fulfilled.

This devolution of control can take place in a variety of ways, depending upon the particular form of civil-law structure chosen for a particular apostolate. Consider, for example, the charitable trust, a frequently used civil-law structure in the United States. Depending on who the trustee is and the terms of the trust with respect to trustee powers and the conditions under which the trustee may be replaced, the canonical administrators may lose

control of stable patrimony in such a way as to violate canon 1295.[260]

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[260]Maida and Cafardi note that a significant number of dioceses in the United States are unincorporated, along with their parishes. The property of such dioceses is usually held in a charitable trust or in an aggregation of charitable trusts (each parish corresponding to a separate trust). The bishop is the trustee for diocesan assets, and trustee for each set of assets held under a parish trust. The pastor of a parish serves as administrator for the parish assets in accordance with canon 532. The beneficiaries of each parish trust are the parishioners, and the beneficiaries of a diocesan trust are the faithful of the diocese. Maida and Cafardi, 130-131. Also, M. E. Phelan notes that a deed from a bishop as trustee passes good title to the property. M. E. Phelan, *Nonprofit Enterprises, Law and Taxation* (Deerfield, IL: Clark, Boardman, Callaghan, 1993) 2: 44, §14.12.

Phelan points out that, absent the express establishment of a trust, a conveyance of property to a church is deemed to be held in an implied trust for the benefit of the members or for the general church, depending upon the church structure. Phelan, 2: 44, §14.12. See also T. F. Donovan, *The Status of the Church in American Civil Law and Canon Law* (Washington, D.C.: Catholic University, Canon Law Studies, n. 446, 1966) 84. Donovan notes that if a bishop holds ecclesiastical property in fee simple, courts today will generally declare an implied trust to prevent the property from passing to his heirs. Phelan categorizes a church government as either the congregational form or the hierarchical form, stating that, with respect to the latter category, "Local hierarchical churches are but an integral and subordinate part of a larger church and are under the authority of the general church; consequently, civil courts generally give effect to the duly made decisions of the highest body within the hierarchy that has considered the dispute." Phelan, 2: 15, §14.04 and 2: 44, §14.12. See also, *Mills* v. *Baldwin*, 362 So.2d 2 (Fla. 1978).

Fee simple ownership by the diocesan bishop, referred to in the preceding paragraph, is still employed in some dioceses (such as the diocese of Rockford, Illinois, according to R. L. Kealy, in "Methods of Diocesan Incorporation," *Proceedings of the Canon Law Society of America* [1986] 167), even though the Congregation of the Council in 1911 issued a directive which called for the abandonment of this practice. S. Congregatio Concilii, "De Methodis Possidendi et Administrandi Bona Ecclesiastica in Stat. Americae Foed," *American Ecclesiastical Review* 45 (1911) 585-586; *CLD* 2: 444-445.

In the United States, Church property is generally held in some form of corporate structure. At the diocesan level, property is held through a corporation sole or, more commonly, through a nonprofit or religious corporation.[261] Parishes may operate as part of a diocesan corporation or as separate corporations.[262]

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[261]H. L. Oleck describes the corporation sole as an "incorporated church (one-man) bishopric." H. L. Oleck, *Nonprofit Corporations, Organizations, and Associations*, 5th ed. (Englewood Cliffs, N.J.: Prentice Hall, 1988) 20. Kealy describes it as follows:

> A corporation sole is a one person corporation; the bishop is the sole officer and can operate with all of the legal rights granted to corporations. The legal identity of the corporation sole is distinct from the personal, legal identity of the person who holds the office of diocesan bishop. Kealy, 168.

A public juridic person will more probably, however, incorporate an apostolate under a State's nonprofit corporation statutes or, should a State have such legislation, under its specific religious corporation statutes. For example, the *Revised Model Nonprofit Corporation Act of 1987*, which serves as a pattern for State legislation, defines a "religious corporation" as a corporation organized exclusively for religious purposes, and the model act requires religious corporations to specify themselves as such in their articles of incorporation. Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section of the American Bar Association, *Revised Model Nonprofit Corporation Act of 1987* (Englewood Cliffs, N.J.: Prentice Hall & Business, 1988) §§1.40(30) and 2.02.

[262]According to Maida and Cafardi:

> In dioceses that use the corporation sole, individual parishes themselves either hold title through individual parish corporations sole or through operating divisions of the one diocesan corporation sole. In dioceses that use the nonprofit or religious corporation, the parishes either themselves use similar incorporated forms

The topic of corporate structuring and restructuring as it relates to canon 1295 differs from other areas of the canon's application which have already been treated in this dissertation. When incurring indebtedness, granting easement rights, and so forth, there are often compelling reasons for proceeding with a transaction that jeopardizes stable patrimony and, therefore, seeking to comply with the alienation requirements that canon 1295 mandates. The corporate structure, however, must enable the administrator of a public juridic person to decide whether or not a future alienation, mortgage, or other action affecting stable patrimony is advisable. If an administrator believes an alienation or related action is advisable, the administrator must be able to seek permission from competent ecclesiastical authority before the transaction can be completed. Therefore, the corporate structure must be

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for their property or do so as operating divisions of the one diocesan nonprofit or religious corporation. Maida and Cafardi, 131.

It should be noted that, in a 1911 directive, the Congregation of the Council advocated the usage of the "parish corporation" in whatever jurisdiction available and relegated the corporation sole to civil jurisdictions which did not recognize parish corporations. S. Congregatio Concilii, "De Methodis Possidendi et Administrandi Bona Ecclesiastica in Stat. Americae Foed," 45 *American Ecclesiastical Review* 45 (1911) 585-586; *CLD* 2: 444-445.

Kealy points out that parish corporations are utilized in conjunction with a diocesan form called the "corporation aggregate," which he describes as follows: "The non-parochial property is part of a diocesan corporation and all of the parishes are separately incorporated. The entirety of the property of the diocese consists of the aggregate of these corporations." Kealy, 167.

designed so as not only to facilitate efficiency by granting adequate management authority to those with the requisite expertise, but also to preserve the authority that the canonical administrator must have with respect to basic decisions relating to stable patrimony. Not to be so designed is to cause the corporate structuring and restructuring itself to require ecclesiastical approval pursuant to canon 1295 because of the risk of harm to the patrimonial condition of the juridic person.

Those individuals who, in accordance with Book V of the 1983 code, are charged with the responsibility of administration or of giving or seeking approval for certain acts of administration, alienation, and canon 1295 transactions, may ensure that they are in a position to do so within a corporation in one of two general ways: (i) by acting as trustees in numbers sufficient to control the board of trustees (i.e., by having at least 51% of the voting power of the board) and so manage the affairs of the corporation in a substantially direct way, or (ii) by having a two-tiered corporate structure composed of both trustees and members, designating as members *ex officio* those with canonical authority to approve transactions as the 1983 code may require and, in the articles of incorporation, reserving to themselves as the members powers of approval with respect to major corporate undertakings, such as disposition of property, encumbering property, engaging in major borrowing,

making investments, mergers, dissolutions, disposition of property upon dissolution, corporate reorganizations, and amendment of the articles of incorporation.[263] So far as preventing the exposure of stable patrimony to loss is concerned, the second alternative, based upon the corporation having two levels of authority, is preferable to the first alternative.

This preference becomes clear upon examining the ramifications of forming a corporation which fails to provide for a membership layer. To begin with, relying on strict control over the board of trustees may open the public juridic person to an unnecessary risk of incurring civil liability for corporate acts. If canonical administrators and others who are charged with the responsibility of approving alienations and canon 1295 transactions in accordance with Book V of the 1983 code also control the board of trustees, they assume some exposure to personal liability for the untoward consequences of the corporation's activities.[264] More importantly, the fact

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[263]This is the recommendation of Maida and Cafardi, 123, 156, 246. For a comparison of the nonprofit corporation containing only a board of trustees with the nonprofit corporation containing both a board of trustees and members, see also P. G. Kauper and S. Ellis, "Religious Corporations and the Law," 71 *Michigan Law Review* (1973) 1539-1540.

[264]An example is the case of *Stern* v. *Lucy Webb Hayes National Training School for Deaconesses and Missionaries*, 381 F. Supp. 1003 (D. D.C. 1974), wherein the directors of a nonprofit hospital were liable for negligence in their delegation of duties to officers, employees, and outside contractors.

Phelan notes that the directors of a nonprofit enterprise have a duty to manage the affairs of the organization so that its property will be used for the public purposes for which it is established. Inasmuch as the law is not as developed for nonprofit corporations in the area of director responsibility as it is for directors of for-profit corporations, the standards governing directors of for-profit corporations generally apply to directors of nonprofit corporations as well. Phelan, 1: 4-2, §4.02 and 4-15, §4.09.

Some statutes spell out the standards of care required of trustees in a nonprofit corporation. For example, the *Revised Model Nonprofit Corporation Act of 1987* provides that a director shall discharge his or her duties in good faith and with the care that an ordinary prudent person in a like position would exercise under similar circumstances. He or she must discharge his or her duties in a manner consistent with a reasonable belief of what is in the best interests of the corporation. The director may rely upon information submitted by an officer or employee reasonably believed to be competent, as well as by legal counsel, public accountants, or a committee of the board of which the director is not a member as to matters within its jurisdiction. *Revised Model Nonprofit Corporation Act of 1987*, §8.30(a)-(b). These standards are in keeping with those of director responsibility in a for-profit business corporation.

However, when the corporation is not only nonprofit but also *charitable*, which is typical for an enterprise sponsored by a public juridic person, the question of what standard to apply is murkier. Although directors of all corporations are subject to a duty of loyalty and a duty of care to the corporation, the duties of directors are less stringent than those required of trustees of trusts. Phelan, 1: 4-7, §4.04; *Stern* v. *Lucy Webb Hayes*, 381 F. Supp. at 1013. In *Stern*, a federal court held that the general corporate standard is applicable to nonprofit corporations, namely, that a director is liable only for gross negligence; whereas the trustee of a trust would be liable for simple negligence. The court stated that lesser standards have been applied to the corporate director based upon the theory that corporate directors have many areas of responsibility, whereas trustees are often said to be charged with only the management of trust funds, and thus, can devote more time and expertise to the task. Ibid., 1013. The charitable nonprofit corporation presents a dilemma because it is much the same as a charitable trust, and the issue is whether the less stringent corporate standard should apply simply because of the organizational structure. The current trend, according to Phelan, is to

that those individuals who dominate the board of trustees have hierarchical authority in the public juridic person may be construed to mean that the corporation is but an instrument of the public juridic person, with negligent or otherwise culpable decisions attributable to the public juridic person as a whole, exposing not only corporate assets to claims arising from torts or breach of contract but the other patrimony of the public juridic person as well.[265]

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apply corporate standards rather than trust standards to charitable nonprofit corporations. Phelan, 1: 4-16, §4.09; and see *Stern* v. *Lucy Webb Hayes*, 381 F. Supp. at 1003, 1013, and *Midlantic National Bank* v. *Frank G. Thompson Foundation*, 405 A.2d 866, 867, 871 (N.J. 1979).

[265]When the board of directors of a for-profit corporation consists substantially of officers or directors of a corporation which owns most of the former corporation's outstanding shares (the former corporation being a "subsidiary" of the other, which is known as the "parent" corporation), this may be indicative of the subsidiary essentially being a mere instrument of the parent. This, of course, is analogous to the situation in which all or a majority of the trustees of a nonprofit corporation are canonical administrators or otherwise have a canonical authority or function within or over the public juridic person. See J. A. Bryant, Jr., "Liability of Corporation for Contracts of Subsidiary," 38 *A.L.R.3rd* 1119, §5. This so-called "alter ego" theory has found recognition in nonprofit corporation litigation, as, for example, in *Roman Catholic Archbishop of San Francisco* v. *Superior Court of County of Alameda*, 15 Cal. App.3d 405, 93 Cal. Rptr 338 (1971).

There are a number of other factors, however, that a civil court would scrutinize in deciding whether the liability of one corporation should be imputed to other corporations or apostolates of the public juridic person. Examples of such factors would include whether the corporation failed to maintain its own separate books and records in a complete and timely manner, including minutes of board meetings; whether the funds and assets of the corporation were commingled with those of other entities and

A similar problem may arise when, in addition to the public juridic person, other parties have contributed money or property to the corporation and later allege that decisions made by the board of trustees led to the actual or attempted enrichment of the public juridic person to the detriment of the corporation. When the trustees exercise control over corporate activities and assets in such a way that the putative purposes of the corporation (articulated in the articles of incorporation) are subordinated to those of the public juridic person and are thereby compromised or ignored altogether, the minority trustees, contributors or other interested parties may attempt to impute liability to the sponsoring public juridic person for ensuing corporate

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activities of the public juridic person, or were siphoned off or used indiscriminantly for those other entities and activities; whether the corporation was consistently represented as being part of the public juridic person, analogous to a subsidiary corporation being held out as a "division" of the parent corporation rather than as a separate corporation; and whether the personnel of the public juridic person who were not in positions of authority within the corporation itself nonetheless directed the officers and employees of the corporation, which in effect would blur the distinction between the public juridic person and the incorporated enterprise. Maida and Cafardi, 203; R. W. Hamilton, *The Law of Corporations* (St. Paul: West Publishing Co., 1987) 91-94.

A court will examine these and other factors, with no single factor being determinative of the ultimate issue, which is whether the corporation's separate identity was substantially disregarded in order to further the ends of the parent company or, in the context of canonical relationships, the public juridic person. The dominant presence of individuals with canonical authority on the board of the corporation would carry significant weight, should any of the other factors cited above also point to the corporation being a mere "alter ego" of the public juridic person.

losses. While the purposes and ends of the corporation should certainly fit within the larger framework of the public juridic person's mission, the corporation's civil legal existence must be respected and the assets and resources of the corporation must be totally dedicated to serving the ends and purposes expressed in corporate documents.

If, on the other hand, control of the board of trustees is relinquished to individuals without knowledge of or commitment to the requirements of canon law, competent ecclesiastical authorities may find themselves in the position of being unable to prevent transactions which violate canonical requisites. Even before such a board of trustees entertains a proposal to alienate stable patrimony, the loss of control by the canonical administrator will already have placed the patrimony at risk; and that is what would make such a corporate structure itself subject to canon 1295.

Providing in the articles of incorporation that the corporation shall have members, naming those who comprise competent ecclesiastical authority as such members, and reserving only limited powers to the members affords the public juridic person greater protection from vicarious liability for corporate acts. The use of a two-tiered corporate authority liberates those who are part of competent ecclesiastical authority from the responsibilities

that they would otherwise bear as trustees under civil law. Moreover, the two-tiered corporate structure, with reserved powers in the members, can prevent a loss of control over major decisions concerning stable patrimony (as well as basic policy matters), while allowing the trustees to oversee and plan effectively in other corporate activities. This also has the advantage of allowing laypersons with valuable technical expertise to act as a majority on the board of trustees.[266]

Delineating which powers should be reserved to the members requires study. In this connection, H. L. Oleck's recommendation that the board of trustees be invested with authority to decide "routine affairs" and that the members have final authority over "extraordinary affairs" appears somewhat simplistic.[267] A challenge in structuring a nonprofit corporation is to safeguard the mission of the enterprise and ensure compliance with the canonical norms with respect to major property transactions and, at the same time, repose sufficient confidence and authority in the board of trustees to enable it to discharge its function well and attract capable individuals to serve as trustees.[268]

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[266]Maida and Cafardi, 245-246.

[267]Oleck, 780.

[268]Corporations without members are not, however, immune from the problem of attracting and maintaining capable people to serve as trustees. A person with impressive business qualifications may, for example, find little motivation for remaining as a trustee if he is unable to

In addition to the applicability of canon 1295 to any civil-law structuring or restructuring of a corporate apostolate that would entail loss of control over stable patrimony by canonical administrators, three other canons should be mentioned as relevant to corporate restructuring. They are canons 121 through 123. These canons pertain to juridic persons which are "joined" (*coniungantur*, the equivalent of merger or consolidation), divided, or dissolved. Canon 121 provides that in a merger the new public juridic person assumes the assets and liabilities of the public juridic persons that have merged to form it, taking into account the intentions of the founders and the donors of property, as well as any other acquired rights. Canon 122 states that when a public juridic person is divided, patrimony in general is to be divided in due proportion among the resulting juridic persons, excluding that particular property which is to be distributed in accordance with (i) the intention of the donors, (ii) any rights specifically acquired to such property, and (iii) the approved statutes of the juridic person or persons. Canon 123 governs the dissolution of a juridic person, stating that the property of a public juridic person will be

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make a significant contribution to a large board. In fact, the two-tiered corporation may be advantageous in this regard, because, in differentiating between members and trustees, such a structure may enable the board of trustees to be smaller and more cohesive than if the organization did not have members.

distributed to the next highest juridic person, subject to any prevailing law or statutes.

E. SETTLEMENT OF LITIGATION

With regard to ecclesiastical disputes, Title III ("Methods of Avoiding a Trial") of Part III ("Certain Special Procedures") of Book VII ("Processes") of the 1983 code suggests settlement, reconciliation, and arbitration as alternatives to ecclesiastical trials.[269] The provision which explicitly establishes the connection between the norms pertaining to the avoidance of trial contained in Title III and the norms which deal with alienation in Book V is canon 1715 §2, which states as follows:

> If it is a question of temporal ecclesiastical goods, whenever the matter requires this, the formalities specified by law for the alienation of ecclesiastical goods are to be observed.[270]

Canon 1715 §2 makes clear that both settlement (*transactio*) and arbitration (*compromissum*) must conform to the formalities required by the alienation provisions of Book V if the dispute concerns temporal goods. In the case of arbitration, the point at which the administrator of a public juridic person should petition ecclesiastical authority in accord with the laws governing alienation is when he or she has determined that submission of the

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[269]C. 1713.

[270]"Si agitur de bonis ecclesiasticis temporalibus, serventur, quoties materia id postulat, sollemnitates iure statutae pro rerum ecclesiasticarum alienatione."

controversy to arbitrators[271] would be in the best interest of the juridic person, not at the subsequent point when the duly appointed arbitrators have come to a decision which automatically binds the parties.

Canon 1715 §2 states that a settlement or compromise must conform to the formalities required for alienation "whenever the matter requires this." The matter requires the formalities of alienation whenever transfer of ownership is or could be involved, and whenever, even if no alienation is involved, there is the potential for a worsening of the patrimonial condition of a public juridic person. A settlement or arbitration, therefore, may require compliance with the alienation formalities either because the agreement calls for, or the decision in arbitration may call for, the alienation of stable patrimony by a public juridic person, or entails or may entail placing the stable patrimony of the public juridic person at risk (as, for example, in requiring the public juridic person to guarantee a loan made to another public juridic person). The latter would bring canon 1295 into play, which, in turn, makes applicable the alienation formalities.

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[271]In the 1917 code a distinction was made between "arbiters," who decide issues in accordance with the substantive and procedural norms of canon law, and "arbitrators," who decide according to principles of equity and prudence. For the sake of brevity, the single term "arbitrator" is used in the current discussion, but with the understanding that it refers to both an arbiter and an arbitrator as those terms have been employed in canonical tradition.

Unlike a settlement, which, depending on its terms, may or may not be subject to canon 1295, submitting to binding arbitration to determine the ownership or conveyance of, or other transfer of interest in, stable patrimony *always* pertains to canon 1295 (provided the monetary value of the patrimony is large enough), because the point at which the competent ecclesiastical authority must be petitioned is prior to the decision in arbitration itself. Submission to the arbitrators is the act which in itself places the patrimony at risk.

As noted in Chapter Two, the application of canon 1295 can carry over to disputes in the civil forum.[272] Substituted agreements and novations often occur without litigation having been initiated.[273] At other times, a settlement agreement may take place after a lawsuit has been filed. In either event, the parties essentially enter into a contract which affects property; such a contract may provide for the alienation of stable patrimony (which entails compliance with the formalities of alienation if the

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[272]P. 133, *supra*. Note also that the 1983 code canonizes civil law in a subordinate way with respect to disputes in an ecclesiastical forum: canon 1714 provides that the parties may agree on the norms applicable to their negotiations or arbitration procedures, with the norms established by the episcopal conference to apply if the parties do not establish norms themselves, and the norms of civil law to apply if neither the parties nor the episcopal conference have established norms.

[273]See pp. 77-78, *supra*, for a description of substituted agreements and novations.

value of the property is sufficiently high), or the contract may entail the possibility of placing stable patrimony at risk (again, requiring fulfillment of the alienation formalities if the patrimony is sufficiently valuable).

Although a settlement agreement which calls for the transfer of stable patrimony or the placing of an encumbrance thereon may need to conform with the alienation formalities (either as a direct alienation or as a transaction to which c. 1295 applies), it should be borne in mind that a party which refuses a settlement offer may be rejecting a means of reducing the risk of losing stable patrimony. In either an ecclesiastical or civil forum, a party which declines an offer may eventually lose on the merits of the case, or may obtain a judgment in which such party receives less than it would if it had accepted the settlement offer. An additional risk factor to consider arises in the civil forum, as illustrated by Rule 68 of the Federal Rules of Civil Procedure (which are the procedural rules governing civil disputes[274] in the federal court system of the United States). Rule 68 provides that the defendant in a federal civil suit may make a written offer to settle up to ten days before trial begins.[275] If the

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[274]The term "civil" may be understood as pertaining to the laws and courts of secular states, as distinct from "ecclesiastical" laws and courts. In the context of this illustration of federal procedural rules, however, the term "civil" refers to non-criminal legal actions.

[275]28 U.S.C. Appendix - Rules of Civil Procedure, n. 68.

plaintiff rejects the offer but subsequently fails to obtain a judgment in an amount greater than that which the defendant offered, the plaintiff cannot recover its own costs and must also pay the costs of the defendant from the date of the offer.[276] Moreover, in such a situation, if attorney fees were otherwise recoverable as costs by the plaintiff under a substantive statute, the plaintiff cannot recover post-offer attorney fees.[277] Attorney fees and other court costs can be substantial. There are state statutes which go further, in that they allow the plaintiff also to make settlement offers.[278] In addition, a standard settlement conference before trial is usually compulsory, the parties having no choice but to attend even though the settlement judge has no power to determine the outcome.[279]

It may be stated that in federal civil courts (and in state courts with procedural rules similar to Rule 68), the rejection of a settlement offer constitutes a "transaction" because the rejection is an affirmative act. In the case of an administrator of a public juridic person who rejects such a settlement offer, additional stable patrimony may be placed at risk as a result of the rejection, namely, the

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[276]Ibid.

[277]*Marek* v. *Chesny*, 473 U.S. 1, 9 (1985).

[278]E.g., California Code of Civil Procedure §998.

[279]E. F. Lynch et al., *Negotiation and Settlement* (Rochester, N.Y.: Lawyers Cooperative Publishing, 1992) 206.

extra legal costs which the juridic person may incur by reason of Rule 68 (or a similar state procedural rule if the dispute takes place in state court) should the trial not yield a successful outcome. This may entail the application of canon 1295, depending on the amount of increased exposure. The only feasible way to measure the exposure is to obtain an estimate after the settlement offer has been made, probably from the juridic person's legal counsel. If the estimate, less the amount of free capital that the juridic person would have available to defray such expense, exceeds one of the thresholds established by the episcopal conference, canon 1295 applies.

On the other hand, although rejecting a settlement offer in an ecclesiastical forum is a "transaction" in that the administrator makes an affirmative act with financial consequences, the public juridic person does not stand to lose more stable patrimony than it did *before* the offer was made. Therefore, even though settlement offers should not be dismissed lightly, canon 1295 does not apply to the rejection of such offers in an ecclesiastical forum.

As has been stated, binding arbitration requires compliance with the laws governing alienation because of the application of canon 1295, assuming the value of stable patrimony in dispute is sufficiently high or the dispute may otherwise entail the liquidation or loss of substantial stable patrimony if the public juridic person does not

prevail in the process.

Binding arbitration is similar to litigation in that it aims at a decision rather than an agreement between the parties. However, it has several potential advantages over litigation, as pointed out by E. F. Lynch et al.:[280]

(i) It is private, meaning that the parties can avoid publicity or at least minimize it;

(ii) It is generally more rapid than waiting for a trial to commence and terminate, and may therefore be less expensive;

(iii) It is not necessary to gamble on the emotions of a jury;[281]

(iv) The parties can agree to modify the procedural and evidentiary rules.[282]

There are, however, some alternative approaches to dispute resolution which are not binding, and not even all arbitration is binding on the parties. If the arbitration or other type of dispute resolution contemplated is not binding, then canon 1295 does not apply before the parties

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[280]Ibid., 208-209.

[281]This is a point which is relevant to a civil forum, not an ecclesiastical forum.

[282]These are *potential* advantages. It may happen that one party may desire that the matter proceed to trial for a number of reasons, such as a desire to gain notoriety, to establish precedent, because it believes that a jury would be more favorably disposed to its position than an arbitrator, or because it believes that it has sufficient economic resources to conduct protracted litigation while its adversary does not.

themselves agree to adopt the solution proffered by the third party.

A non-binding method of dispute resolution may be useful as a preliminary measure of the strength of one's case, and it may also be a valuable settlement tool, where one party believes that the other has a rather inflated opinion of the value of its case.[283] In such instance, non-binding arbitration may be justified if the public juridic person has substantial stable patrimony at stake.

One such alternative to binding arbitration is mediation, whereby the parties bring into the dispute a mutually acceptable third party with the attributes of neutrality and expertise in evaluating the issues. Unlike litigation and arbitration, mediation focuses on encouraging an agreement rather than merely arriving at a decision.[284] The mediator cannot force a binding decision on the parties; the objective is for them to come to a consensual solution with the mediator's help. Hence, the act of agreeing to the introduction of a mediator does not cause canon 1295 to apply.

There are variations to the foregoing illustrations of neutral parties who are employed to help resolve disputes. For purposes of applying canon 1295, however, the principle which emerges is that any agreement to the appointment of

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[283]Lynch et al., 209.

[284]Ibid., 207.

such a third party must be preceded by the approval of the competent ecclesiastical authority only if the third party has authority to bind the public juridic person to a resolution which could cause it to relinquish control of stable patrimony of value in excess of one of the thresholds established by the episcopal conference pursuant to canon 1292, or which otherwise could expose the public juridic person to a worsening of its patrimonial condition.

SUMMARY

Canon 1295 is directed to transactions which may worsen the patrimonial condition of a public juridic person. Essential to such transactions is that they give rise to a risk that the juridic person may lose stable patrimony or suffer the loss of exclusive dominion or enjoyment of stable patrimony (other than by way of a lease). The risk of a loss of stable patrimony or the actual loss of an exclusive right to it can result from civil-law transactions dealing with money or property.

This chapter has focused on those transactions enforceable under the laws of the United States which may cause canon 1295 to apply. The logical starting point was to consider indebtedness incurred by a public juridic person and how that indebtedness may place its stable patrimony at risk. The indebtedness need not be secured by stable patrimony in order to render such patrimony vulnerable. As

soon as an unsecured creditor perceives that a default has occurred, the creditor has an incentive to seek to freeze the assets of the debtor and prevent their diversion until the creditor can obtain a definitive judgment. Attachment and prejudgment garnishment are the most desirable means of achieving this from the point of view of the creditor because they provide the creditor with a lien on the assets, thereby lifting the creditor out of the status of an "unsecured" creditor. Receivership does not offer this advantage to particular creditors, but at least it enables the court to conserve the debtor's property pending a resolution of the case.

Once a case is decided in favor of a creditor, he may convert an attachment or prejudgment garnishment into a post-judgment lien and proceed to recover specific assets of the debtor. The assets may be immovable or movable property or, for that matter, valuable incorporeal property such as investment securities, all of which may be stable patrimony. Basing the application of canon 1295 on the existence of a "special mortgage," as some canonists argued was required in order to apply canon 1533 of the 1917 code, would be erroneously narrow; under the debtor-creditor laws of the United States an unsecured creditor may initiate a legal proceeding upon default of the debtor and thereby convert himself into a secured creditor.

The most valuable stable patrimony held by a public

juridic person is typically immovable property, or real estate and the improvements thereon. Accordingly, the most important application of canon 1295 is to that indebtedness which gives rise to a mortgage against real estate. The three most common methods of securing real estate are the classical mortgage which contains a defeasance clause, the deed of trust under which a neutral third party holds title to the property until the loan is paid, and an installment sale under which the seller retains title until full payment.

Real estate is generally mortgaged in order to secure loans or to secure a purchase of the property subject to the mortgage. The latter form of mortgage is called a purchase money mortgage. A loan secured by immovable property which the public juridic person already owns is subject to canon 1295 if the value of the property exceeds the minimum threshold established by the episcopal conference pursuant to canon 1292. A purchase money mortgage does not occasion the application of canon 1295 even though the value of the property purchased and subject to the mortgage is in excess of the minimum threshold, unless the public juridic person makes a downpayment in excess of the threshold. Nonrecourse financing obviates consideration of canon 1295 for loans in excess of the minimum threshold if the immovable property that the lender agrees to limit itself to in the event of default is under the threshold in value.

When a public juridic person receives a gift of property subject to a mortgage, it is analogous to a purchase money mortgage situation. Provided that the fair market value of the property exceeds the outstanding mortgage balance at the time of the gift, there is no application of canon 1295.

Construction loan mortgages are similar to purchase money mortgages in the sense that they are a type of installment purchase; the borrower is essentially buying new property to be constructed. If the mortgage is limited to the improvements that the public juridic person contracts to have built, canon 1295 is not involved. As a practical matter, however, a mortgage usually covers the underlying land as well. Therefore, if the public juridic person already owns that land and it has a value in excess of the minimum threshold, compliance with canon 1295 will be necessary.

Refinancing existing debt is subject to the requirements of canon 1295 if the terms of the arrangement may increase the risk of default. Renegotiating the manner in which the interest rate is calculated or the maturity of the loan, for example, may do this.

Debt secured by movable corporeal property and incorporeal property (such as investment securities) is similar to debt secured by immovable property. It is possible to have purchase money security interests in these

types of assets, and they may be the object of nonrecourse financing. Perfected purchase money security interests are not subject to canon 1295 unless the downpayment by the public juridic person exceeds the minimum threshold in force.

Bonds are another example of indebtedness which may bring canon 1295 into consideration, whether the bonds are secured or unsecured. So, too, when the principal amount received for an annuity exceeds the minimum threshold, canon 1295 applies to the classic case of an annuity as a promise by a public juridic person to make periodic payments to the annuitant.

At times a public juridic person may act as a creditor. The case of a cash loan brings canon 1295 into play when the cash is stable patrimony. Certainly, the risk can be ameliorated if the public juridic person as creditor obtains a perfected purchase money security interest in the property purchased by the debtor with the proceeds of the loan. Nevertheless, the security itself may be subject to fluctuations in market value, and the canon therefore continues to apply to substantial loans.

A public juridic person which acts as a guarantor or surety for a loan made to another party essentially is in the same position as that of a debtor with respect to canon 1295.

Normally, transfers of property and loans between two

civil entities that are part of the same public juridic person would not entail compliance with canon 1295. However, if the transferee entity has outstanding debt payable to outside parties, canon 1295 would apply to the property it receives from the other entity because the outside creditors can reach such property in the event of a default. An exception exists, however, if the entity transferring the property procures a purchase money security interest in it and promptly gives public notice of that security interest (i.e., perfects the interest); such action should constitute adequate protection from the claims of outside creditors.

The second general area of focus in this chapter was on a number of classifications of transactions which do not involve indebtedness or loans but which nonetheless affect stable patrimony. The first category of transactions in this area concerned the transfer by a public juridic person of a right of access to or use of its immovable property. The foremost example is that of granting an easement over land. The measure of the worsened condition for purposes of applying the minimum threshold should logically be the decrease in market value. Sometimes the easement may be an implied incident to the alienation of a contiguous parcel of land by the same public juridic person. In such case, any application for approval of the alienation of the one tract should be accompanied by information concerning the

depressed value of the remaining tract which is subject to the easement. "Profits *a prendre*," by which a public juridic person as landowner grants permission to another to enter and extract resources from land, should similarly be assessed as to the effect on the property's value. Gratuitous licenses to enter upon a public juridic person's land should not bring canon 1295 into play because the juridic person can unilaterally terminate them; but if they becoming binding, they must be treated as a form of easement.

The second category of transactions which do not involve indebtedness or loans but which nevertheless may affect stable patrimony concerns a public juridic person alienating (or otherwise engaging in a transaction with respect to) a tract of its immovable property with a resulting diminution in value or utility of other immovable property which the juridic person continues to own. For example, a public juridic person may contemplate selling a parcel of real estate to a party which plans to use it in such a way as will foreseeably cause the fair market value of other land held by the juridic person to depreciate. For the purpose of considering whether the juridic person must comply with the alienation requirements, the administrator must take into account not only the value of the property to be alienated, but also the estimated decrease in value of the retained property which will result from the alienation.

In other words, in assessing whether the minimum threshold under canon 1292 is exceeded, both the alienation and the estimated reduction in value of the remaining property which brings canon 1295 into play must be added together as part of the same transaction.

Finally, a public juridic person may at times consider issuing to a prospective purchaser of its immovable property an option to purchase such property. If the option is binding, it places stable patrimony at risk and, accordingly, canon 1295 is relevant. If, however, the option explicitly states that the sale shall be subject to the approval of competent ecclesiastical authority in its sole discretion, the option falls outside canon 1295. Not infrequently a lease contract contains an option to purchase; a public juridic person as owner-lessor of stable patrimony which is the subject of such transaction must deal with canons 1295 and 1297.

Often administrators and their superiors must consider the most effective civil-law structure under which a public juridic person should hold stable patrimony. Usually, some form of corporation is utilized. In planning the structure of the corporation, due consideration must be given to allocating sufficient authority to those charged with the management and direction of the apostolic, charitable, or educational activity of the enterprise, which includes asset management. At the same time, if controlling authority to

sell or encumber stable patrimony is given to trustees (or directors) who are not the canonical administrators of the public juridic person's property (or otherwise have a canonical position with respect to the management or disposition of such property), the corporate structure itself is subject to canon 1295. The reason is that a disposition of stable patrimony could be made by the trustees without recurring to competent ecclesiastical authority beforehand.

One way to alleviate this problem is for administrators and ecclesiastical authorities to act as trustees or directors in sufficient numbers to control the board. This, however, brings with it other difficulties. First, canonical administrators and authorities may not have the requisite expertise to engage in areas of planning and oversee some of the operational activities of the enterprise. Second, the property would most likely have been placed in corporate form in order to insulate other patrimony of the juridic person from risk associated with that corporation's activities. If administrators and authorities of the public juridic person dominate the management of the corporation, civil liability incurred by the corporation might be imputed as well to the public juridic person, thereby rendering the juridic person's other patrimony susceptible.

The preferred solution is that of a two-tiered

corporate structure, that is, one with members and a board of trustees. The articles of incorporation and bylaws grant to the members the final authority to approve or veto important decisions concerning stable patrimony made by the board of trustees. It is sufficient that the canonical administrators and authorities control the membership in order to prevent canon 1295 from coming into play with respect to the corporate structure itself. Moreover, the corporate documents may provide wide latitude to the board of trustees in managing the operational affairs of the corporation in accord with its expertise without fear of implicating the juridic person's other patrimony in whatever liabilities the corporation may incur.

Finally, the relevance of canon 1295 to settlements and arbitration as alternative methods of dispute resolution was considered. Whether the dispute is resolved in the canonical or civil forum, canon 1295 is applicable whenever a public juridic person commits itself to a negotiated settlement or to an arbitration procedure which may require it to alienate or encumber stable patrimony exceeding in value the minimum threshold of canon 1292.

CONCLUSIONS

1. Canon 1295 of the 1983 code provides that the requirements contained in canons 1291 through 1294, which pertain to alienation, are applicable to any transaction through which the patrimonial condition of a public juridic person may be worsened. Canon 1295 also mentions that the statutes of a public juridic person must conform to what is contained in canons 1291 through 1294.

2. Canon 1295 is based upon canon 1533 of the 1917 code. Canon 1533 dealt with transactions which were considered alienations in the wide sense. These transactions amounted to transfers of rights in property but without transferring ownership of the property itself. The entities to which canon 1533 applied were moral persons in the Church. The property to which canon 1533 applied was "stable patrimony." If canon 1533 did apply to a transaction involving the stable patrimony of a moral person, compliance with the requirements of canons 1530 through 1532, which governed strict alienation (i.e., the transfer of the ownership of stable patrimony), was necessary.

3. The term "stable patrimony" was not defined in the 1917 code. It was a term which commentators employed, and

they derived it from the requirements of canon 1530 §1 for a valid alienation of immovable ecclesiastical property and movable ecclesiastical property which was not consumed in its use. Stable patrimony could include incorporeal property. Stable patrimony could also include fungible property, such as money, if it could be established that there was an intention to hold such property in a stable manner. A designation of property as stable patrimony could be implied, as when a moral person purchased immovable property, or it could be explicit. If property was included as stable patrimony, then, upon its disposition, any proceeds received by the moral person as part of the exchange would assume the status of stable patrimony.

4. Canon 1533 applied to transfers of rights *in rem*, short of ownership, in regard to specific stable patrimony. A typical example would be where the moral person executed a mortgage on immovable property which it owned in a stable manner in order to qualify for a loan. It also applied to other legal commitments of a moral person which would not involve specific stable patrimony, but which could place its stable patrimony in general at risk. These were called transfers of rights *in personam*. An example of such a transfer was the unsecured borrowing of money by a moral person; if the moral person defaulted on the debt, the creditor could convert the right *in personam* to a right *in rem* by obtaining a lien on specific property owned by the

moral person.

5. In connection with indebtedness incurred by a moral person, canon 1538 of the 1917 code constituted a specific application of canon 1533. Canon 1538 called for a regular amortization of a debt, with its discharge to be accomplished as soon as possible. In addition to indebtedness incurred by a moral person, which included annuities, canon 1533 applied to loans which a moral person made to another party. A moral person could make a loan for consumption (*mutuum*), in which the borrower consumed the stable patrimony it borrowed, such as cash, and was obligated to return the same kind or quality of property to the moral person. A moral person could also loan nonfungible stable patrimony to be returned to the moral person by the borrower at a later time and without compensation; this was a loan for use (*commodatum*). A moral person could also loan its patrimony under lease agreements, but these arrangements (including a type of long-term lease called *emphyteusis*) were governed by other provisions of the 1917 code. Therefore, this author agrees with the opinion that leases were not a form of alienation in the wide sense and were not subject to canon 1533.

6. A moral perscn was also subject to canon 1533: when it acted as a guarantor or surety for debt incurred by another party; when the moral person engaged in settlement agreements or subjected itself to arbitration, either in the

canonical forum or the civil forum, if such could result in placing the moral person's stable patrimony at risk; when the moral person agreed to the revision of a contract which could abridge its rights in stable patrimony; and when the moral person granted to another party a servitude or easement with respect to immovable property, because the arrangement could impede the moral person's enjoyment of the property or devalue the property.

7. While the subjects of canon 1533 of the 1917 code were moral persons, canon 1295 of the 1983 code refers to the artificial persons to which it applies as "juridic persons." Juridic persons may be "public" or "private." Public juridic persons are closely governed by ecclesiastical authority, acting as they do *in nomine Ecclesiae*. Private juridic persons act in their own name and exercise greater autonomy than public juridic persons. As a reflection of this fact, canon 1257 §2 provides that the temporal goods of private juridic persons are regulated by their own statutes except where Book V of the 1983 code expressly provides otherwise. Canon 1295 incorporates the requirements of canons 1291 through 1294 by reference, applying them to the transactions to which canon 1295 pertains. Canons 1291 through 1294 apply only to public juridic persons, and, accordingly, the reach of canon 1295 is restricted to public juridic persons.

8. Canon 1295 applies to transactions which may

jeopardize the patrimonial condition of a public juridic person. Negligent inaction is not a transaction and, therefore, does not bring the canon into play. Canon 1295 does not apply to acquisitions and investments unless they are accompanied by obligations or are financed in such manner as to place the existing stable patrimony of a public juridic person potentially at risk.

9. Canons 1291 through 1294 contain requirements which govern alienation, and they also pertain to transactions falling within the ambit of canon 1295. The requirements of canons 1291 through 1294 may be summarized as follows:

(i) There must be just cause for the alienation;

(ii) Prior approval must be granted by competent ecclesiastical authority. When the value of the property is above a threshold figure set by the episcopal conference for its region and recognized by the Congregation for the Clergy, the authority competent to grant permission is determined according to the statutes of the juridic person involved in the alienation, if it is a juridic person that is not subject to the diocesan bishop. If the juridic person in question is subject to the diocesan bishop, the bishop is the competent authority, but the consent of the finance council, the college of consultors, and the interested parties are also required for the alienation to be valid. If the value of the property exceeds an additional threshold amount, as determined by the episcopal

conference and recognized by the Congregation for the Clergy, the Congregation for the Clergy must also grant permission in order for the alienation to be valid. The upper threshold has been determined to be $3,000,000 in the United States. The lower threshold appears to be $500,000, but the National Conference of Catholic Bishops has not yet promulgated that amount as such;

(iii) A written appraisal must be submitted of the property to be alienated;

(iv) There must be set in place such safeguards as competent ecclesiastical authority may specify in order to prevent harm to the Church;

(v) The proceeds from the alienation generally must equal or exceed the value of the property alienated (as estimated by expert appraisers);

(vi) The proceeds must be invested carefully or expended wisely in accord with the purposes of the alienation.

10. As with canon 1533 of the 1917 code, canon 1295 applies to a wide range of transactions. It applies to secured and unsecured debt incurred by a public juridic person, including annuities and bonds. However, debt secured by purchase money mortgages or purchase money security interests typically will not be subject to canon 1295, because the property being purchased provides the security to the seller rather than other property already

owned by the public juridic person. A gift of property which a public juridic person takes subject to an existing mortgage follows the same analysis as a purchase money mortgage or purchase money security interest. Although the same rationale may apply to exclude construction loan mortgages from the reach of canon 1295, canon 1295 does apply if the mortgage includes land which the juridic person already owns and upon which the project is to be constructed.

11. A public juridic person making a loan of stable patrimony may place it at risk, and the juridic person may also expose its stable patrimony to loss when it acts as a guarantor or surety. These transactions cause canon 1295 to apply. Occasionally, transfers and loans of stable patrimony between civil entities that are part of the same public juridic person may expose the property to outside creditors of the civil entity receiving the property, thereby bringing canon 1295 into play.

12. With respect to other transactions involving immovable property, a public juridic person planning to grant an easement or profit *a prendre* or to issue a binding option to purchase its property must comply with canon 1295 when the value of the stable patrimony is substantial. If a public juridic person considers alienating some property which will depress the value of other property which it also owns and will retain, canon 1295 requires that the estimated

decrease in value of the property to be retained be added to the value of the property which is to be alienated for the purpose of adhering to the requirements of canons 1291 through canon 1294.

13. Placing the stable patrimony of a public juridic person under a civil-law structure will occasion the application of canon 1295 if such structure eliminates the ability of an administrator and competent ecclesiastical authority to make final decisions with respect to alienations and encumbrances of stable patrimony.

14. A public juridic person that considers committing itself to a settlement or to binding arbitration in either a canonical or civil forum is subject to canon 1295 if the outcome may obligate the juridic person to alienate, encumber, or otherwise lose dominion over substantial stable patrimony.

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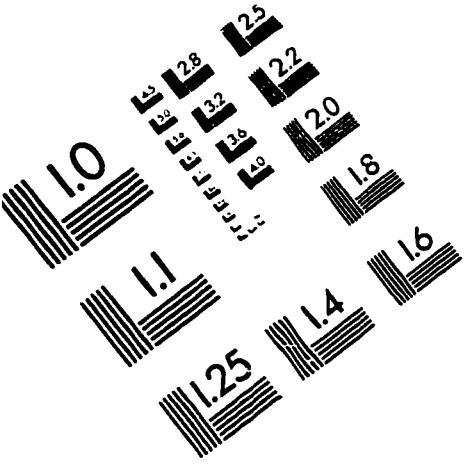

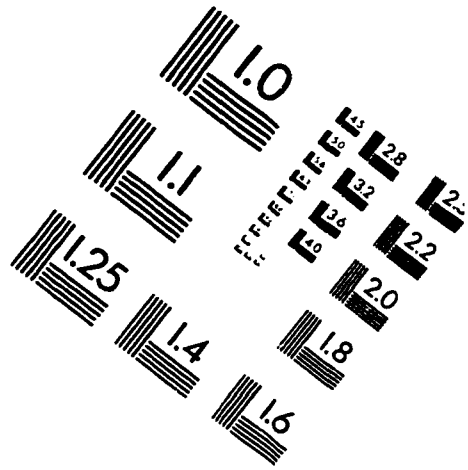

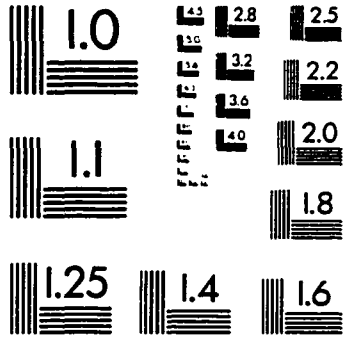

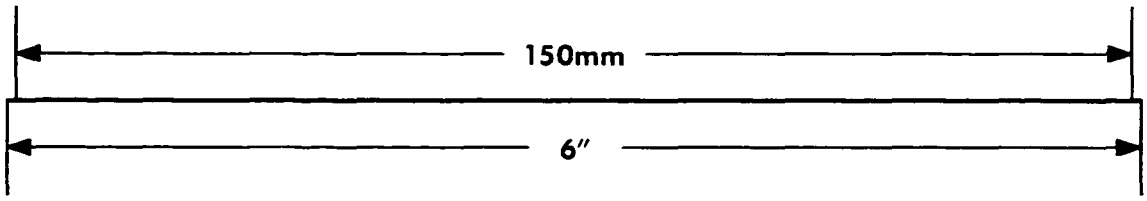

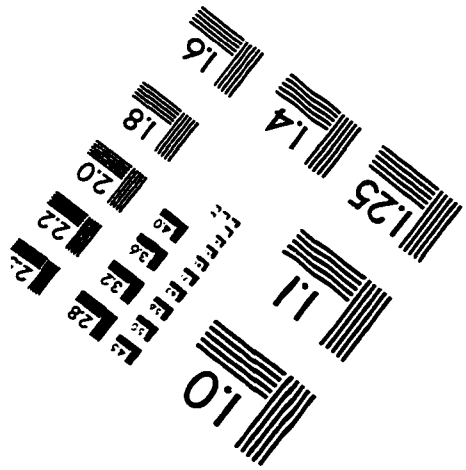

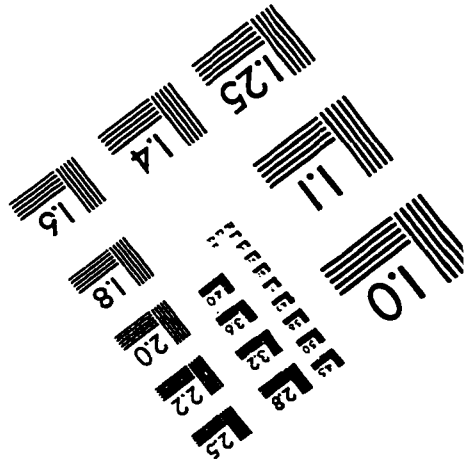

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