of the ordinance or statute.[14] Thus if, as in the instant case, the intent of the legislative body was merely to raise revenue and not to regulate or limit the distribution of literature in any way, the tax would be valid.

The latter view overlooks the fact that as a practical matter many groups may be denied the opportunity to express and circulate their ideas freely by a tax which exceeds their individual financial resources. Since unrestricted circulation of ideas is largely dependent upon the sale of literature to defray the cost of publication, the suggestion of the present and other courts that the tax may be avoided by giving the literature free of charge[15] is without merit.[16] Therefore it is submitted that in cases involving freedom of speech as affected by a tax, the validity of the tax should depend on its tendency to limit the free circulation of ideas.

D. C.

CRIMINAL LAW—APPEAL IN FORMA PAUPERIS OR IN PROPRIA PERSONA—AFFIRMATIVE DUTY OF JUDGE TO INFORM ACCUSED OF HIS RIGHTS—[Federal].—Within the period allowed for appeal, plaintiff, convicted under the pandering act,[1] wrote a letter to the trial judge from prison stating that he wished to appeal, that he was uncertain of the intentions of volunteer and assigned counsel, and that he requested that these latter proceed with an appeal in his behalf. After the time for noting appeal had expired, the judge notified petitioner that matters of this sort must be taken care of by counsel, and that he was forwarding petitioner's letter to counsel who had represented him. These latter notified petitioner that they did not care to represent him. After further correspondence, the judge called in the former counsel and the district attorney for a conference, at which it was decided that appellant had only a remote chance of reversal; the judge notified the prisoner that as a consequence he did not feel justified in appointing new counsel to prosecute an appeal. Petitioner sought habeas corpus on the ground that the court's action deprived him of the right of appeal in *propria persona* as well as by counsel, solely on account of his poverty, which constituted an unconstitutional discrimination, rendering his conviction, sentence, and further detention invalid. *Held:* Accused was not entitled to immediate freedom on habeas corpus, since an appeal was to be considered as taken and pending. The trial court owed an affirmative duty to petitioner to inform him of his rights. *Boykin v. Huff*.[2]

The opinion of the appellate court leaves the reader in doubt as to

---

14. Accord: Giragi v. Moore (1936) 48 Ariz. 33, 58 P. (2d) 1249, 64 P. (2d) 819, 110 A. L. R. 314.

15. The Arkansas Supreme Court in the recent case of Cole v. City of Fort Smith (Ark. 1941) 151 S. W. (2d) 1000, invalidated an ordinance taxing the free distribution of literature while upholding an ordinance taxing the sale of literature.

16. See Hannan v. Haverhill (C. C. A. 1, 1941) 120 F. (2d) 87, cert. den. (1941) 62 S. Ct. 81. For a well reasoned opinion by a lower court on this point see Mullaly v. Banks (1938) 168 Misc. 515, 6 N. Y. S. (2d) 41.

1. (1910) 36 Stat. 833, c. 404, §3, D. C. Code (1940) tit. 22, §2707.

2. (App. D. C. 1941) 121 F. (2d) 865.

several material points: (1) for what relief it considered the petitioner was asking in his letters; (2) what it thought the lower court was trying to do; (3) the precise nature of the lower court's error. The solution to each of these problems, in turn, would depend upon what the appellate court believed the petitioner's letters to mean. Analytically considered, the correspondence might have constituted any one or all of the following: a petition for assignment of counsel, for appeal in *forma pauperis*, or for appeal in *propria persona*.

Although the government contended that the trial judge had regarded the correspondence as presenting in part an application for assignment of counsel, the appellate court did not pass upon this contention. The trial court could in its discretion have refused to appoint counsel if it thought the appeal was frivolous or malicious.[3] Furthermore, it could deny the appeal under the *forma pauperis* statute if it were not taken in good faith.[4] The appellate court pointed out that petitioner had not specifically asked for an appeal in *forma pauperis*. Since he had not, the trial court had no discretionary right to deny the appeal upon the merits of the case.[5] If, under the *forma pauperis* statute, the trial judge could have denied the appeal to a poor person on grounds which would not suffice if the appellant had sufficient means to prosecute a formal appeal, there might be some doubt as to the constitutionality of the statute. Due process under the Fifth Amendment,[6] as under the Fourteenth,[7] does not require appellate review,

3. (1892) 27 Stat. 252, c. 209, §4, 28 U. S. C. A. §835. This statute provides for dismissal if the "allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious."

Failure to take an appeal because not advised by counsel does not invalidate a judgment. Lovvorn v. Johnston (C. C. A. 9, 1941) 118 F. (2d) 704. Further, it has been held that an allegation that petitioner was unable to secure further assistance of counsel did not disclose circumstances justifying issuance of habeas corpus, since appeal was not necessary to due process. DeMaurez v. Swope (C. C. A. 9, 1939) 104 F. (2d) 758.

4. (1922) 42 Stat. 666, c. 246, 28 U. S. C. A. §832. This section provides for aid "unless the trial court shall certify in writing that in the opinion of the court such appeal or writ of error is not taken in good faith, * * *."

5. The trial judge is given no authority concerning the taking of appeals in criminal cases. Rule III, 28 U. S. C. A. §723a, now 18 U. S. C. A. §688 provides that "Appeals shall be taken by filing with the clerk of the trial court a notice, in duplicate, stating that the defendant appeals from the judgment, and by serving a copy of the notice upon the United States Attorney."

6. It is considered that the right to review by an appellate court of a judgment of conviction is not essential to due process of law, since all the rights of the accused necessary to due process are fully protected in the trial court. Haywood v. U. S. (C. C. A. 7, 1920) 268 Fed. 795, cert. den. (1921) 256 U. S. 689; United States v. St. Clair (C. C. A. 8, 1930) 42 F. (2d) 26. Consequently, the right is purely statutory and may be made to depend upon conditions. American Surety Co. v. U. S. (C. C. A. 5, 1917) 239 Fed. 680, 152 C. C. A. 514; Williams v. U. S. (C. C. A. 8, 1924) 1 F. (2d) 203; United States v. St. Clair (C. C. A. 8, 1930) 42 F. (2d) 26; DeMaurez v. Swope (C. C. A. 9, 1939) 104 F. (2d) 758.

7. The practice prevalent in this country is to allow appeal in criminal cases as a matter of right, Smyth, The Limitation of the Right of Appeal in Criminal Cases (1904) 17 Harv. L. Rev. 317. However, the right is

but when the right to review is granted by statute, it is a substantial one.[8] If petitioner had been deprived of that right on grounds which would not suffice if he had sufficient means, and if there was no way to remedy the error, habeas corpus might have been granted.[9] Historically, in civil litigation, there has often been discrimination between rich and poor.[10] In most states, however, aid in some form is granted to indigent defendants in criminal cases.[11] Where life and liberty are concerned, a stricter view of

---

granted purely as a matter of statute or constitution in the individual state, and is not required as a matter of due process. Reetz v. Michigan (1903) 188 U. S. 505, 508; State v. Guerringer (1915) 265 Mo. 408, 178 S. W. 65. See also 24 C. J. S. 205, §1623, 212, §1628, and cases cited.

8. Smyth, Limitation of the Right of Appeal in Criminal Cases (1904) 17 Harv. L. Rev. 317. 17 C. J. 14, n. 53; 24 C. J. S. 214, §1628, and cases cited at n. 43. See also Orfield, Federal Criminal Appeals (1936) 45 Yale L. J. 1223 for a discussion of the scope of the right of appeal.

The court in the instant case indicates the substantiality of the right of appeal by reference to the volume of reversals in criminal cases. During the fiscal year ending June 30, 1940, reversals were had in 24% of criminal cases in which appeals were taken to the United States Circuit Courts of Appeals and the Court of Appeals for the District of Columbia. Annual Report of the Director of the Administrative Office of the United States Courts (1940) 59.

9. Thus it has been held that one convicted without counsel, and ignorant of the right to appeal or proceedings of appeal was entitled to habeas corpus. Johnson v. Zerbst (1938) 304 U. S. 458. In State v. Guerringer (1915) 265 Mo. 408, 415-416, 178 S. W. 65, where a convicted defendant had no opportunity to file a motion for new trial owing to the expiration of the term of court immediately upon return of the verdict, it was said: "While the right of appeal is not essential to due process of law (Reetz v. Michigan, 188 U. S. 508), yet if an appeal be allowed to some persons and not to all persons similarly situated, such deprivation of the right to an appeal is equivalent to the denial of due process of law, * * *."

The court in the instant case did not decide the point, since it considered the appeal as pending.

10. See Maguire, Poverty and Civil Litigation (1923) 36 Harv. L. Rev. 361, which deals with *forma pauperis* proceedings in the trial courts.

11. See Note (1936) 100 A. L. R. 321, which sets forth the different types of aid granted. In Missouri, the statutes provide merely that a free transcript of the evidence shall be furnished. R. S. Mo. (1939) §13354. It seems, however, that the statute applies only in counties and cities over 100,000 population.

Mandamus has been granted to require the judge to order the stenographer to furnish such a transcript. State ex rel. Martin v. Wofford (1894) 121 Mo. 61, 25 S. W. 851; State ex rel. Lashley v. Ittner (1926) 315 Mo. 68, 292 S. W. 707. State v. Pieski (1913) 248 Mo. 715, 154 S. W. 747 indicated that although there was no express statutory authority for prosecuting an appeal in a criminal case in *forma pauperis*, there could be such an appeal by implication from other statutory provisions; but that orders granting such an appeal were not binding except in the court where the order was made. In addition, the application to prosecute an appeal as a poor person must be made within the one year period allowed for perfecting appeals. State v. Moulton (1914) 262 Mo. 137, 170 S. W. 1111.

The provision for transcripts, without more, is apt to become a burden upon the courts. In State v. Ernest (1899) 150 Mo. 347, 349, 51 S. W. 688, 688, the court said: "Why the legislature should impose upon this court, with an overburdened docket, the duty of reading immense transcripts

due process might be taken than where only property rights were involved.

If petitioner's correspondence constituted an application for an appeal in *propria persona*, the objection could be made that the federal rules of criminal procedure were not followed. Since these rules were especially designed in the interest of dispatch, and appellant neither filed his formal appeal within the five day limit nor paid the $5.00 filing fee required, his appeal had not been perfected formally.[12] The appellate court said, however, that since the trial court had erred in not performing its duty to inform petitioner of his right to appeal in *propria persona*, it had prevented him from perfecting an appeal according to the formal requisites.[13] The right to appeal in one's own person has long been recognized. The common law rule was that all persons should appear in person.[14] Even the constitutional provision for counsel in a criminal trial is permissive and conditional upon the pleasure of the accused.[15] Where, as here, a person without counsel, ignorant of the law, and confined to prison, has expressed his desire to take an appeal, it seems just to require the trial judge to inform him of his rights.[16] Consequently, although it is generally said that habeas corpus cannot be used as a substitute for an appeal,[17] here the appellate

---

in search for errors without the aid of briefs on either side is past our comprehension. * * * The circuit judges of St. Louis have no discretion. The law requires them to order the free transcript, but the circuit courts in the country have a discretion, and we think it should only be exercised in giving free transcripts where they have grave doubts as to their judgments."

12. Rule III, 28 U. S. C. A. (Supp. 1940) §723a, now 18 U. S. C. A. §688. In re Crum (C. C. A. 9, 1938) 94 F. (2d) 746; United States v. Tousey (C. C. A. 7, 1939) 101 F. (2d) 892. That filing the appeal within the five day period is jurisdictional, see Fewox v. U. S. (C. C. A. 5, 1935) 77 F. (2d) 699; Burr v. U. S. (C. C. A. 7, 1936) 86 F. (2d) 502. This period is expressly tolled during the pendency of an ordinary motion for new trial, provided the motion is timely. O'Gwin v. U. S. (C. C. A. 9, 1937) 90 F. (2d) 494; Decker v. U. S. (C. C. A. 5, 1938) 97 F. (2d) 473. An appeal from the denial of a motion to modify a judgment was rejected as a mere attempt to circumvent the rule. Dembrofsky v. U. S. (C. C. A. 1, 1936) 86 F. (2d) 677. See also Note (1939) 52 Harv. L. Rev. 984.

13. The court said: "In our view, therefore, the appeal should be considered as having been taken in time. Consequently the jurisdiction of this court attached to the cause. Nor do we think it has been lost by the failure to perfect the record and present the appeal. The trial court's action prevented appellant, as well as itself and its officials, from taking steps to this end in accordance with the usual procedure under the rules." Boykin v. Huff (App. D. C. 1941) 121 F. (2d) 865, 873.

14. State ex rel. Wolfe v. Kirke (1868) 12 Fla. 278, 95 Am. Dec. 314. At common law prisoners accused of felony were denied the right to counsel. See 5 A. J. 267.

15. State v. Yoes (1910) 67 W. Va. 546, 68 S. W. 181, 140 Am. St. Rep. 978. See also 5 A. J. 267.

16. In ex parte Ah Sam (1890) 83 Cal. 620, 24 Pac. 276, it was said that the contention could not be raised on habeas corpus that petitioner had not been informed of his rights but might be raised on appeal. See also Jacoby v. Waddell (1883) 61 Iowa 247, 16 N. W. 119.

17. Ex parte Watkins (U. S. 1830) 3 Pet. 193; Re Lincoln (1906) 202 U. S. 178; United States ex rel. Morgan v. Hill (C. C. A. 7, 1932) 56 F.

court, on habeas corpus, in effect gave petitioner a declaratory judgment that his appeal was pending.

L. E. M.
V. M.

TAXATION—BEQUEST TO CHARITABLE OR RELIGIOUS CORPORATION—EFFECT OF POLITICAL ACTIVITY—[Federal].—Testatrix died in 1933 leaving a bequest to the Board of Temperance, Prohibition and Public Morals of the Methodist Episcopal Church. Petitioner, executor of deceased, contended that this bequest came within the provisions of the Revenue Act of 1926[1] which authorized the deduction from the value of the gross estate of the amount of all bequests "to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes." The certificate of incorporation of the beneficiary stated that its objects were to promote temperance by every legitimate means and to aid such causes as would advance public welfare.[2] The beneficiary having no by-laws of its own, operated under the constitution of the church which expressly stated among its purposes the securing of legislation throughout the world to suppress traffic in liquor and narcotics.[3] In practice, the Board of Temperance participated in political activity and published propaganda. The Board of Tax Appeals disallowed the deduction on the ground that the Board of Temperance was not engaged *exclusively* in any or all of the purposes enumerated in the statute.[4] *Held:* reversed, for petitioner. The beneficiary was organized exclusively for religious purposes, and its political activity was merely an incidental and natural part of its attempt to spread its views. One judge dissented. *Girard Trust Co. v. Commissioner of Internal Revenue.*[5]

Two questions are apparent in this case. First, do the purposes of the beneficiary qualify as one or more of the five kinds listed by the statute?

(2d) 146, cert. den. (1932) 286 U. S. 550; Ex parte Clay (1889) 98 Mo. 578, 11 S. W. 998; Ex parte Mitchell (1891) 104 Mo. 121, 16 S. W. 118; Finkelnburg and Williams, *Missouri Appellate Practice* (2d ed. 1906) 244; 25 A. J. 157.

1. Revenue Act 1926, 44 Stat. 9, c. 27, §303(a)(3), 26 U. S. C. A. Int. Rev. Acts, p. 234.

2. "To promote the cause of temperance by every legitimate means; to prevent the improper use of drugs and narcotics; to render aid to such causes as in the judgment of the board of trustees, tend to advance the public welfare."

3. Article 478 of the Discipline of 1922 provides: "Section 2. Article 1. The object of this Board is to promote voluntary total abstinence from all intoxicants and narcotics, to promote observance and enforcement of all existing constitutional provisions and statutory enactments that suppress the liquor traffic and the traffic in narcotic drugs, to promote the speedy enactment of such legislation throughout the world, and to defend and maintain established civil and religious liberties."

4. Girard Trust Company and W. Nelson L. West, Executors of the Estate of Ida Simpson, deceased (1940) 41 B. T. A. 157.

5. (C. C. A. 3, 1941) 122 F. (2d) 108.