The Catholic Lawyer

Volume 5
Number 2 *Volume 5, Spring 1959, Number 2*

Article 11

Foster Home Policy Upheld; Legal Control of Church Property; Religious Control of Commercial Television;

Follow this and additional works at: https://scholarship.law.stjohns.edu/tcl

 Part of the Catholic Studies Commons

This Recent Decisions and Developments is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

RECENT DECISIONS AND DEVELOPMENTS

Foster Home Policy Upheld

The New York Court of Appeals recently sustained the Jewish Child Care Association's petition for a writ of habeas corpus compelling appellants, foster parents, to return a child whom the agency had left in their care. The custody of the child had been given to the appellants upon the express understanding that the child would eventually be returned to its natural parent. The petition was necessitated by the refusal of the appellants to return the child, who had been with them for 4½ years, and their attempt at adoption, which is contrary to the known policies of Child Care. The writ was sustained on the basis of a natural mother's primary love and custodial interest in the care and welfare of the child.[1]

Habeas corpus proceedings involving the custody of a child are governed by equity and, above all, by the welfare of the child.[2] Included, however, in this concept of the child's welfare, is a presumption that a child should be in the custody of his natural parents.[3] It is conceivable, nevertheless, that in cases involving parents and non-parents, the welfare of the child may come in conflict with this common-law presumption. Where the natural parents are "unfit" there seems to be no problem in decreeing for the non-parents.[4] Where this is not the case an examination of the several elements of "the child's welfare" is difficult. The determination is further complicated by the fact that the right of the natural parent to raise his child is a fundamental and predominant one[5] — so fundamental that the United States Supreme Court has stated that the right to establish a home and rear children is included in the guarantee afforded by the Fourteenth Amendment.[6] The courts in these cases act as *parens patriae*[7] and examine the special facts of each case.[8] The character of the natural parents,[9] their ability to care for the child, the child's sex, age, religion, and wishes are all considered.[10]

For a child to be adopted, it is imperative that it be determined whether the consent of the natural parents is necessary, inasmuch

[1] In the Matter of Jewish Child Care Ass'n, 5 N.Y. 2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959).

[2] See Vzga v. Dunn, 200 Misc. 732, 104 N.Y.S.2d 93 (Sup. Ct. 1951); People *ex rel.* Riesner v. New York Nursery and Child's Hosp., 230 N.Y. 119, 124, 129 N.E. 341, 343 (1920).

[3] People *ex rel.* Grament v. Free Synagogue Child Adoption Comm., 194 Misc. 332, 337, 85 N.Y.S. 2d 541, 545 (Sup. Ct. 1949). See 1 SCHOULER, MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 744, at 798 (6th ed. 1921).

[4] See, *e.g.*, In the Matter of Vanderbilt, 245 App. Div. 211, 281 N.Y. Supp. 171 (1st Dep't 1935); Vzga v. Dunn, *supra* note 2; Reimann v. Reimann, 39 N.Y.S.2d 485 (Sup. Ct. 1942).

[5] People *ex rel.* Kropp v. Shepsky, 305 N.Y. 465, 468, 113 N.E.2d 801, 803 (1953); see Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (dictum).

[6] Meyer v. Nebraska, *supra* note 5.

[7] People *ex rel.* Kropp v. Shepsky, *supra* note 5.

[8] Watson v. Watson, 134 S.C. 147, 132 S.E. 39 (1926).

[9] Vzga v. Dunn, 200 Misc. 732, 104 N.Y.S.2d 93 (Sup. Ct. 1951).

[10] See Israel v. Israel, 38 Misc. 335, 77 N.Y. Supp. 912 (Sup. Ct. 1902).

as adoption takes away legally-recognized parental rights.[11] Once having given consent, what right does a natural parent have to withdraw it? This problem has particularly perplexed New York courts.[12] While no general rule has been formulated to govern such cases,[13] the courts will sometimes give effect to the parents' "change of heart" and allow the child to return to the natural parents. This is especially true if the final adoption order has not been decreed.[14] It has been suggested that this right of revocation be made conditional upon its being in the best interest of the child.[15]

A source of disturbance in this area is found in the cases involving extended care by foster parents of a child placed by a welfare and child care agency[16] such as the petitioner in the present case. When a child has been surrendered for adoption and has become acclimated to a new environment, the natural parents' desire to recover him has been met with deserved dismissal.[17] However, when the foster parents know at the outset that the child will not be with them permanently and the child nevertheless becomes thoroughly integrated as a part of the foster home, the determination as to future custody becomes a weighty one indeed. One New York court granted custody to the agency, pending release to the natural parents, stating that where both parties are proper guardians, the one with the "superior right"[18] would be awarded custody. Another determination rejected this "superior right" doctrine, and stated that the welfare of the child was the paramount consideration and, on that basis, awarded custody to the foster parents.[19]

While it is true that the primary concern in such cases must be the child's welfare, there is an important policy consideration involved.[20] The New York Social Welfare Law empowers an authorized agency to place and board out children whose parents are not able to care for them.[21] The law grants the agency discretion to determine whether a child should be removed from the home in which it was placed.[22] This grant, however, is limited by a court of equity's discretion to arrange for custody if the facts of the case necessitate it.[23] The legislature's intent in granting such powers to private agencies would seem to be that in view of conditions presently existing in New York City, the efforts of the Department of Welfare to find enough responsible foster families are well supplemented by voluntary agencies such as the petitioner.[24] Concurring in this appraisal, the Greater

---

[11] See Note, 30 ST. JOHN'S L. REV. 75 (1955).

[12] *Id.* at 77.

[13] *Ibid.*

[14] *Id.* at 77-78.

[15] *Id.* at 82. This "best interest of the child" doctrine is presently the criterion used in determining custody cases.

[16] See, *e.g.*, Convent of the Sisters of Mercy v. Barbieri, 200 Misc. 112, 105 N.Y.S.2d 2 (Sup. Ct. 1950); People *ex rel.* Our Lady of Victory Infant Home v. Venniro, 126 Misc. 135, 212 N.Y. Supp. 741 (Sup. Ct. 1925).

[17] See People *ex rel.* Harris v. Commissioner of Welfare, 188 Misc. 919, 70 N.Y.S.2d 389 (Sup. Ct. 1947).

[18] People *ex rel.* Our Lady of Victory Infant Home v. Venniro, *supra* note 16, at 139, 212 N.Y. Supp. at 745.

[19] Mary I— v. Convent of Sisters of Mercy, 200 Misc. 115, 104 N.Y.S.2d 939 (Sup. Ct. 1951).

[20] See Convent of the Sisters of Mercy v. Barbieri, *supra* note 16.

[21] N.Y. SOC. WELFARE LAW § 374(1).

[22] N.Y. SOC. WELFARE LAW § 383(2).

[23] Mary I— v. Convent of Sisters of Mercy, *supra* note 19, at 121-22, 104 N.Y.S.2d at 945.

[24] See People v. Whitted, 124 N.Y.S.2d 189, 193 (Mag. Ct. 1953).

New York Fund made a special grant to several private agencies to help them increase their facilities for these children.[25]

When a child is placed by an agency in a foster home, the foster parents are carefully appraised of the function of the agency, as well as their own responsibility of preparing the child for its eventual return to its family.[26] During this period the agency's personnel assist the natural parents in preparing for the return of their child.[27] The agency pays the foster parents an agreed sum of money for the child's room and board, as well as for clothes and medical care.[28] Persons accepting such children are expressly told that adoption is not permitted.[29] In order to maintain ties between the child and its natural parents, the program contemplates periodic visits by the natural parents with the child at the foster home.[30]

In deciding a case such as this, the court must weigh the initial bewilderment and fear a child experiences in being removed from the only home he has ever consciously known, against the blow to the welfare of thousands of children who have been aided or will be aided, through foster homes administered by child care agencies.[31] Had a contrary decision been rendered, it is conceivable that parents who desperately needed this help would not seek it for fear of losing their child. In such a situation, the child would be the one to suffer most. In view of the natural parents' predominant right to the custody of their child and the long-range benefit that the State feels is rendered to the child by such foster plans, it is felt that the Court decided wisely in sustaining the petition.

[25] *Ibid.*

[26] In the Matter of Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959).

[27] *Id.* at 225, 156 N.E.2d at 701, 183 N.Y.S.2d at 66.

[28] *Id.* at 225, 156 N.E.2d at 701, 183 N.Y.S.2d at 67.

[29] *Ibid.*

[30] *Ibid.*

[31] See Convent of the Sisters of Mercy v. Barbieri, 200 Misc. 112, 113, 105 N.Y.S.2d 2, 4 (Sup. Ct. 1950).

Legal Control of Church Property

The historical development of the control of church property in Pennsylvania was highlighted by the recent case of *St. Peter's R. C. Parish* v. *Urban Redevelopment Authority,* decided in that state's Supreme Court.[1] St. Peter's Roman Catholic Church in Pittsburgh was part of a ninety-acre blighted area condemned by the Urban Redevelopment Authority. The Authority had exempted from the redevelopment project another church within the blighted area. Later, the Bishop of the Diocese of Pittsburgh, as trustee of the property of St. Peter's congregation, agreed with the Authority to accept 1¼ million dollars in settlement of the taking and destruction of the parish property. Some parishioners of St. Peter's then brought this suit in equity against the Authority for abuse of its discretion. The Court held that, since a statute gave to the Bishop-trustee alone the power to dispose of the church property, plaintiff-beneficiaries had no standing to sue, absent allegations that the trustee had exercised his powers either in bad faith or in contravention of the canon law constituting the terms of the trust.

The statute which was dispositive of the

[1] 394 Pa. 194, 146 A.2d 724 (1958).

case does not reflect the traditional Pennsylvania law on the control of church property. Prior to its enactment in 1935,[2] this Bishop would have been powerless to transfer parish property to the condemning municipal body, for the previous statute, passed in 1855, placed the control and disposition of any property held by any person in trust for a religious group solely in the hands of the lay members of that religious group.[3] The courts construed this statute as vesting absolute ownership in the congregation and making the named trustee but a passive, silent depository of legal title, who held without interest and without power.[4] The rule that the trustee of title had no interest in the property led to such interesting holdings as that a lay group might compel the Bishop-trustee to transfer his title to anyone of their choosing,[5] and that notice of a municipal claim against parish property was not proper statutory notice when given to the Bishop who was trustee of the title to the property.[6]

Exactly what rules were to govern the lay members of the congregation in their control of its property was dubious; at least one case indicated that the property of a Roman Catholic congregation must be held as the Church canons require,[7] while another case indicated that only the uses and trusts to which the property had lawfully been dedicated determined the lay trustees' control.[8] An amendment in 1913 cleared up this difficulty by subjecting the control of lay members "to the rules and regulations, usages, canons, discipline and requirements of the religious body or congregation to which such church, congregation, or religious society shall belong."[9] This act was construed as limiting the laity's control only by those rules of the church which did not nullify the essential lay control demanded by the statute.[10] Thus, where a by-law of the congregation required the Bishop's sanction for the disposition of the congregation's property, it was held that the by-law was in contravention of the statute and not civilly lawful.[11]

However, if the heart of the dispute between laity and clergy was of an ecclesiastical nature, even though the result affected the congregation's property, the courts did not upset the ruling of the proper church authorities.[12] A common example of an ec-

---

[2] PA. STAT. ANN. tit. 10, § 81 (1939).

[3] See Krauczunas v. Hoban, 221 Pa. 213, 70 Atl. 740 (1908). "Act April 26, 1855 (P.L. 330), § 7, provides that 'whensoever any property . . . shall hereafter be bequeathed, devised or conveyed to any ecclesiastical . . . or other person, for the use of any church, congregation, or religious society for religious worship or sepulture, or the maintenance of either, the same shall not be otherwise taken and held, or inure, than subject to the control and disposition of the lay members of such church, congregation, or religious society, or such constituted officers or representatives thereof. . . .' " 70 Atl. at 745.

[4] See Carrick Borough v. Canevin, 243 Pa. 283, 90 Atl. 147 (1914); Krauczunas v. Hoban, *supra* note 3.

[5] Krauczunas v. Hoban, *supra* note 3.

[6] Carrick Borough v. Canevin, *supra* note 4.

[7] Dochkus v. Lithuanian Ben. Soc'y of St. Anthony, 206 Pa. 25, 55 Atl. 779 (1903).

[8] Krauczunas v. Hoban, 221 Pa. 213, 70 Atl. 740 (1908). In this parishioners' action to compel a Roman Catholic Bishop to convey his title to parish property to a person chosen by the lay trustees, it was considered no defense to the Bishop that he was the proper owner of the property according to Church canon.

[9] See Maceirinas v. Chesna, 229 Pa. 70, 149 Atl. 94, 95 (1930).

[10] *Ibid.*

[11] *In re* St. Mary's Immaculate Conception Greek Catholic Church, 296 Pa. 307, 145 Atl. 862 (1929).

[12] See *In re* Trustees of St. Casimir's Polish R. C. Church, 273 Pa. 494, 117 Atl. 219 (1922).

clesiastical determination with reverberations in the property area is the dissolution of a parish or the transfer of certain parishioners from one parish to another. Thus, when the elected representatives of certain parishioners who were transferred from one parish to another sued to have title transferred from the Bishop to them, the court denied what would otherwise have been their right to choose the trustee of title on the ground that disassocation from the parish severed their rights in the parish property.[13] The court explained that while membership in the congregation gave property rights, it was not a property right in itself, and was a matter of sole ecclesiastical jurisdiction.

The present statute,[14] passed in 1935, wrought a radical change in the state's approach to church property.[15] Property control is no longer in lay members but in those persons to whom the rules of the religion would give control. As under the previous statute, the persons having control are to exercise it according to the internal laws of the religious society.

The trust principle invoked by the Court in the principal case is the well-established one that it is for the trustees and not the beneficiaries to sue a third party acting adversely to the trust.[16] The Court states that the plaintiffs could have availed themselves of exceptions to this principle, had they alleged on the part of their Bishop-trustee either contravention of the canon law or bad faith.

The circumstances surrounding the transfer of the church building are treated cursorily in the opinion, and there are no allegations involving canon law. It is thus left to conjecture which canons the plaintiffs might have brought into issue. It seems probable that the canons regulating the administration[17] and alienation[18] of church property would bear on the Bishop's act in accepting damages for the condemned church. The objection might be raised that the transfer was not an alienation within the meaning of canon law, on the reasoning that the alienation canons are part of the Title "On Contracts" in the Code of Canon Law,[19] that all acts regulated by that Title

---

[13] *In re* Trustees of St. Casimir's Polish R. C. Church, *supra* note 12.

[14] "Whensoever any property . . . has . . . or shall hereafter be bequeathed, devised, or conveyed to any ecclesiastical corporation, bishop . . . for the use of any church . . . for or in trust for religious worship . . . , the same shall be taken and held subject to the control and disposition of such officers or authorities of such church . . . having a controlling power according to the rules . . . of such church . . . , which control and disposition shall be exercised in accordance with and subject to the rules and regulations . . . of the religious body . . . to which such church . . . shall belong. . . ." PA. STAT. ANN. tit. 10, § 81 (1939).

[15] See Post v. Dougherty, 326 Pa. 97, 191 Atl. 151 (1937); Canovaro v. Brothers of Order of Hermits of St. Augustine, 326 Pa. 76, 191 Atl. 140 (1937). The *Canovaro* case held the act of 1935 constitutional, even though it acted retroactively to deprive the lay members of religious congregations of their existing control over the congregation's property. The court held that the right of control was not a vested interest, in that it was a control not only severely limited by the laws of the church but also one lacking the usual discretionary power had by a trustee over the res.

[16] 3 SCOTT, TRUSTS § 282, at 2144 (2d ed. 1956).

[17] CODEX IURIS CANONICI, Cans. 1518-28. On all references to the canons, see generally BOUSCAREN & ELLIS, CANON LAW: A TEXT AND COMMENTARY 797-845 (2d rev. ed. 1951). On the question of the alienation canons, see generally HESTON, THE ALIENATION OF CHURCH PROPERTY (Catholic University of America Canon Law Studies No. 132, 1941).

[18] Cans. 1529-43.

[19] Title 29 of Book 3, containing canons 1529

are contractual in the canonical sense, which imports consent,[20] while submission to a condemnation order is not a consensual act. However, it appears that, in the act of submission, consent may be found negatively in either of two ways: first, by the relinquishment of the pre-eminence that the Church considers she has over the civil power in the disposition of her property;[21] and second, by the failure to civilly appeal the order of the condemning authority. If, then, the alienation canons are applicable, in this transfer of property of permanent value it was incumbent upon the Bishop to receive a written appraisal of its value from trustworthy experts, to have a just cause for such an alienation of church property, and to receive the permission of his legitimate superior,[22] here the Holy See.[23] Although not helping the plaintiffs here to prove an invalid alienation, the fact is yet of interest that the proceeds of an alienation must be invested carefully, safely, and usefully for the benefit of the parish which owned the property,[24] unless the assets of that parish are canonically transferred to a new parish[25] or other ecclesiastical entity.[26]

The canons on the administration of church property might also afford plaintiffs a ground for challenging the action of their Bishop-trustee. Since all church property is owned not by individual persons but by moral persons, [27] *i.e.*, dioceses, parishes,[28] it is necessary that there be administrators to assume responsibility for the management of the property.[29] While the local Ordinary is to watch over the administration of the property within his jurisdiction,[30] he is the immediate administrator only of what might be called strictly diocesan property.[31] He may not take on himself the immediate administration of property which by law has its own administrator,[32] and a reading of canons 1182 and 1183 together indicates that the pastor is the administrator of such parish property as would include the church building. Thus, had the Bishop-trustee transferred the property without the consent of its immediate pastor-administrator, the plaintiffs again might have

---

through 1543, is entitled "De Contractibus."

[20] See Cahill, *What Law Governs Church Contracts?*, Catholic Building and Maintenance, Nov.-Dec. 1958, p. 7.

[21] See Can. 1495, § 1. See generally Cahill, *supra* note 20.

[22] Can. 1530, § 1, nn.1, 2, 3.

[23] Can. 1532, § 1, n.2 provides that where property is worth more than 30,000 lire or francs, the legitimate superior is the Holy See. The equivalent amount in the United States is $10,000. See BOUSCAREN & ELLIS, CANON LAW: A TEXT AND COMMENTARY 834-35 (2d rev. ed. 1951).

[24] Can. 1531, § 3.

[25] Can. 1500 provides that upon division of a parish, either by a union of part of it with another parish or by the establishment of a part of it as a new parish, the property which has been intended for the benefit of the whole shall be divided rightly.

[26] Can. 1501 provides that when a parish no longer exists, its property passes to the immediately superior body.

[27] Can. 1495, § 2.

[28] Cans. 99; 100.

[29] Administration is the preservation and improvement of property held, the production of income from such property, and the application of that income to the proper persons. BOUSCAREN & ELLIS, CANON LAW: A TEXT AND COMMENTARY 822 (2d rev. ed. 1951).

[30] Can. 1519, § 1.

[31] See Cans. 1357; 1359, § 1; 1182, § 1; 1483.

[32] Can. 1519, § 2 provides that the Bishop, in regulating the administration of property, must take into account legitimate customs. In the present organization of the Church, each moral person enjoys financial autonomy and the administration of its own property. See BOUSCAREN & ELLIS, *op. cit. supra* note 29, at 823.

brought themselves within the exception to the rule that the beneficiaries of a trust have no standing to sue a third party.

Failing to allege a contravention of canon law, a few examples of which were suggested above, or bad faith, which plaintiffs took pains to deny expressly, the plaintiffs as beneficiaries of the property held by the Bishop as trustee did not have standing before the Court. As pointed out by Justice Musmanno in his concurring opinion, it was indeed unfortunate that they were thus unable to save that "ecclesiastical monument of rare and priceless beauty."[33]

Religious Control of Commercial Television

Foreign control of American Catholic religious orders is not often the subject of judicial inquiry by our courts. In the recent case of *Noe v. FCC*,[1] such a problem was placed in issue when a Catholic non-profit, non-stock educational corporation run by the Jesuit order applied for a license to operate a commercial television station. Objection was made, based on the connection of the corporation with the international order of the Society of Jesus, the present superior of which is a Belgian citizen residing in Rome. The incorporated university was claimed ineligible to hold a license under the Federal Communications Act as a "representative" of an "alien"[2] and as a corporation whose stock was "voted" by "representatives" of aliens.[3] All its directors were American citizens. The Court of Appeals for the Fifth Circuit decided that the statutory provision is concerned primarily with preventing alien activities during time of war, that the chain of authority in the Jesuit order is merely ecclesiastical, and that the only indications of alien control were a limited power to appoint and promote officials within the religious community and not officers and directors of the corporation.

Religious ownership of commercial broadcasting stations is not unusual in this country,[4] although Catholic religious are precluded by canon law from engaging in any profit-seeking, strictly industrial business ownership.[5] Generally, it would seem that the only proper subjects of inquiry upon an individual's application for a license are citizenship, character, and financial and technical qualifications.[6] A li-

---

[33] St. Peter's R. C. Parish v. Urban Redevelopment Authority, 394 Pa. 194, 146 A.2d 724, 728 (1958).

[1] 260 F.2d 739 (D.C. Cir. 1958), *cert. denied*, March 2, 1959.

[2] 48 STAT. 1086 (1934), 47 U.S.C. § 310(a) (1952).

[3] *Ibid.*

[4] See, *e.g.*, Churchill Tabernacle v. FCC, 160 F.2d 244 (D.C. Cir. 1947); Evangelical Lutheran Synod v. FCC, 105 F.2d 793 (D.C. Cir. 1939); Trinity Methodist Church v. FRC, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933).

[5] BOUSCAREN & ELLIS, COMMENTARY ON CANON LAW 119 (2d ed. 1951). A recent Papal encyclical, however, concerning motion pictures, radio and television, calls for increasing and making more effective Catholic religious programs through the use of these means of communication. Encyclical Letter of Pius XII, *Miranda Prorsus*, reprinted in The Pope Speaks, pp. 319, 340 (Winter 1957-58).

[6] 47 C.F.R. § 3.24 (1958). This rule is the codification of various judicial decisions. See FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); Mester v. United States, 70 F. Supp. 118 (E.D.N.Y.), *aff'd*, 332 U.S. 749 (1947). Other requirements in the Code of Federal Regulations do not seem to affect an individual's *personal* qualifications for a license.

censed broadcaster, while not divested of his constitutional right of free speech, has been characterized as a " 'trustee' for the public"[7] whose business is "impressed with a public interest."[8] As such, broadcasting is one of the few areas where licensing of speech is permitted. However, the Federal Communications Commission, as licensor, is expressly prohibited from imposing any censorship of station programming.[9]

The right to determine, select and supervise programs is inherent to the holding of a station license.[10] This power may not lawfully be delegated.[11] The regulations promulgated by the FCC clearly indicate that any outside "control"[12] over a licensee is illicit.[13] During the course of the years, the courts have implemented this aversion to undue influence on the part of unlicensed parties. Considered a pertinent factor is local ownership of the prospective licensee, since this is deemed a fair assurance that he will operate in the public interest.[14] Similarly, newcomers into the field are preferred over existing licensees. This policy has been labelled the "diversification of control" doctrine[15] and is aimed at preventing public dependence on any single person or group for commercial radio or television communications. For purposes of ownership and control, even persons outside the business organization may be considered principals. Thus, in *WLOX v. FCC,*[16] a major creditor of a corporation applying for a TV license was deemed subject to investigation as to his own qualifications for a license.

The most important determinative factor which the FCC considers in granting or renewing a broadcasting license is the public interest, convenience or necessity.[17]

> An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts.[18]

Thus, a broadcaster who constantly projects his own personal business interests in the operation of his station, even though much of the programming is entertaining and unobjectionable, is operating contrary to the public interest.[19] A licensee will

---

7 See McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597, 599 (3d Cir. 1945), *cert. denied,* 327 U.S. 779 (1946).

8 See KFKB Broadcasting Ass'n v. FRC, 47 F.2d 670, 672 (D.C. Cir. 1931).

9 47 U.S.C. § 326 (1952).

10 Regents of New Mexico College v. Albuquerque Broadcasting Co., 158 F.2d 900, 905 (10th Cir. 1947).

11 *Ibid.*

12 The Federal Communications Act defines "control" in more than one place. "The word 'control' as used herein is not limited to majority stock ownership, but includes actual working control in whatever manner exercised." 47 C.F.R. § 3.35 n.1 (1958). See also 47 C.F.R. § 3.636 n.1 (1958). Regulations and rules promulgated by the Commission, pursuant to its statutory authority, have the force and effect of law. Columbia Broadcasting Co. v. United States, 316 U.S. 407, 418 (1942).

13 47 C.F.R. § 3.131 (1958) (banning exclusive affiliation of a station to any one network); 47 C.F.R. § 3.133 (1958) (limits term of network affiliation to two years); 47 C.F.R. § 3.135 (1958) (forbids networks from rejecting or compelling the broadcast of any program).

14 See Pinellas Broadcasting Co. v. FCC, 230 F.2d 204, 206 (D.C. Cir.), *cert. denied,* 350 U.S. 1007 (1956).

15 McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 918 (1957).

16 260 F.2d 712 (D.C. Cir. 1958).

17 47 U.S.C. 307(a) (1952).

18 FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

19 See KFKB Broadcasting Ass'n v. FRC, 47 F.2d

violate the "public interest" if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.[20] However, the fact that a new station will provide some economic injury to existing stations does not so conflict with the public interest as to preclude additional licensing.[21]

Also embraced within the public interest doctrine is the likelihood that a station owner will give a "fair break" in his programming to those who do not share his own views.[22] Counterbalanced against this public responsibility of fairness is the right of a broadcaster, clothed as he is with the protection of the first amendment and operating pursuant to a nondelegable stewardship over a public medium of communications, to determine his own programming. The Third Circuit, in *McIntire v. Wm. Penn Broadcasting Co.*,[23] faced with this dichotomy of interest, decided that a radio station which had made it a practice to devote one-fifth of its available broadcasting time to paid religious programs could legitimately cancel all executory contracts for such programs. The court agreed with the FCC's determination that the choice of programs rests exclusively with the licensee[24] and upheld the new policy of the station to run a series of religious broadcasts of general interest on sustaining time.[25] Of course, a station owner would not be allowed to adopt a policy of vilifying a particular religious institution over the air waves.[26]

Noe v. FCC, [27] apparently the first case decided under the "alien provision" of the Federal Communications Act, indicates that ownership of communication media by American Catholic ecclesiastics does not conflict with the high degree of autonomy required by the law. A judicial deaf ear was turned to the plea that the educational corporation was a mere "instrumentality of the Holy Roman Pontificate." The court buttressed its opinion by pointing to the "fair break" tendencies already exhibited by the university in allowing local Protestant clergymen to utilize a university-run radio station for religious Sunday morning programs. Further, a distinction was made between ownership by the leaders of a religious community and by men of business. In this regard, the court expressly left undecided whether persons with similar powers of appointment and authority over applicants in a business organization would be considered principals for purposes of ownership.

This case is in accord with the unified thread of judicial decision proclaiming that the entire purpose of the Federal Communications Act is to protect the public interest and to keep broadcasting media in the control of U.S. citizens. These principles do not seem incompatible with station ownership by an American affiliate of an in-

670 (D.C. Cir. 1931).

[20] Massachusetts Universalist Convention v. Hildreth & Rogers Co., 87 F. Supp. 822 (D.C. Mass. 1949), *aff'd*, 183 F.2d 497 (1st Cir. 1950).

[21] See FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 475 (1940).

[22] See WNBX Broadcasting Co., 12 F.C.C. 837, 841 (1948).

[23] 151 F.2d 597 (3d Cir. 1945), *cert. denied*, 327 U.S. 779 (1946).

[24] *Id.* at 599.

[25] Sustaining time refers to a program which is transmitted without a sponsor.

[26] See Trinity Methodist Church v. FRC, 62 F.2d 850 (D.C. Cir. 1932), *cert. denied*, 288 U.S. 599 (1933).

[27] 260 F.2d 739 (D.C. Cir. 1958).

ternational non-business organization. It is suggested that the non-business distinction applied in the *Noe* case can be extended to areas other than the religious. For example, even a secular organization such as the American Association for the United Nations[28] should not be denied a broadcasting license merely because of its inextricable connection to the international organization.

Further, it should be noted that the "fair break" doctrine does not constitute an absolute gauge to guide station programming. The tenor of the *McIntire*[29] opinion strongly indicates that a broadcaster has considerable leeway in his determination of the character and type of programs transmitted. However, where a station is dependent upon commercial sponsorship for its broadcasting, the owner is peculiarly attuned to the attitude of the community.[30] This practical consideration alone would militate against most programs offensive to a vocal minority. Thus, the commercial necessities of the situation dictate that programs in the public interest must interest the listening public.

[28] The AAUN, located at 345 E. 46th St., New York, N.Y., is an organization dedicated to building a strong public opinion in support of the United Nations.

[29] McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597 (3d Cir. 1945), *cert. denied,* 327 U.S. 779 (1946).

[30] For an interesting article concerning this problem of commercial broadcasting see N. Y. Times, Dec. 7, 1958, § 6 (Magazine), p. 26.