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A Child's Right to Choose His Own Religion; Durham Rule Rejected by Massachusetts and Eighth Circuit; Church and State; Education Bill

POSTSCRIPTS

A Child's Right to Choose His Own Religion

THE CATHOLIC LAWYER has frequently discussed the legal aspect of the religious upbringing of children.[1] A recent case, *Hehman v. Hehman*,[2] allowed the thirteen-year-old child of legally separated parents to choose his own religion. The husband was Lutheran, the wife Catholic. Their pre-nuptial agreement had provided that the first child be reared a Catholic and the second a Lutheran. Their separation decree had awarded custody of their three children to the mother, but gave the father the right to visit the second child, John, on Sundays for the purpose of attending to John's religious education. The husband now moved to punish his wife for her failure to observe his right to educate John in the Lutheran religion, averring that she had surreptitiously influenced the child to embrace Catholicism.

After pointing out, in an extended dictum,[3] the dangers inherent in mixed marriages, the court stated that John was a ward of the court. It continued that a pre-nuptial agreement concerning the child's welfare must be disregarded if the court sees that the child's best interests would not be protected by observing the agreement. To force John to be a Lutheran, thereby observing the agreement, is to disrupt an all-Catholic household; to force John to be a Catholic, although furthering domestic harmony, is to deprive him of his right to espouse freely a particular religion. The court resolved the dilemma of choosing John's religion by allowing him to choose his own, citing as controlling law *Martin v. Martin*,[4] where the Court of Appeals allowed the same choice to a twelve-year-old. The court felt that John "has been made acquainted with both credal points of view and forms of worship, and with the heart of a child he may speed directly to what is truth for him more quickly and accurately than we adults. . . ."[5]

In decreeing that the child choose his own religion, the court is in harmony with the natural law principle which prohibits direct interference with the dictates of the conscience of one who has attained the age of reason.[6] Thus, even if a court saw, as the *Hehman* court did, that the paramount temporal welfare of the child lay in embracing Catholicism, the court could not force him to choose a religion which his conscience could not accept.

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[1] See generally Leen, *Justice Denied — The Ellis Case*, 4 CATHOLIC LAWYER 83 (Winter 1958); Recent Developments, 4 CATHOLIC LAWYER 361 (Autumn 1958), 1 CATHOLIC LAWYER 158 (April 1955), 1 CATHOLIC LAWYER 66 (January 1955).

[2] Hehman v. Hehman, 178 N.Y.S. 2d 328 (Sup. Ct. 1958).

[3] *Id.* at 329-30.

[4] 308 N.Y. 136, 123 N.E. 2d 812 (1954) (per curiam). See discussion of the *Martin* case in 1 CATHOLIC LAWYER 66-67 (January 1955).

[5] Hehman v. Hehman, *supra* note 2, at 331.

[6] See generally HIGGINS, MAN AS MAN 125-38 (1949).

Durham Rule Rejected by Massachusetts and Eighth Circuit

Two more jurisdictions – one state and one federal – have expressly rejected the *Durham* rule of insanity in favor of the traditional *M'Naghten* test of mental disease and criminal responsibility as supplemented by the "irresistible impulse" rule. The *M'Naghten-Durham* controversy was explored in a symposium discussion in the last two issues of THE CATHOLIC LAWYER.[1]

Massachusetts, in *Commonwealth v. Chester*,[2] condemned the *Durham* or "product" test that controls in the District of Columbia[3] for its "broad language and ambiguities,"[4] noting that such key terms as "disease," "defect," and "product," are left undefined under the *Durham* rationale. The court instead applied the existing Massachusetts standard of legal insanity, basically a broadened application of the *M'Naghten* rule, that exculpates the accused from criminal responsibility for his conduct if at the time of the criminal act he was suffering from such a mental condition as to render him incapable of resisting the impulse to do the act.

In the federal jurisdiction the Eighth Circuit declined to adopt the *Durham* rule in *Voss v. United States*.[5] Said the court:

> We think it can be no concern of this Court whether the M'Naughten Rule is, from a psychological, medical, or scientific standpoint, accurate or not. The Rule has thus far, with few exceptions, constituted the test for determining legal responsibility of those accused of crime. Certainly, a federal trial judge who follows the teachings of the United States Supreme Court in this regard cannot justifiably be held to have committed an error of law.[6]

In the course of their opinions, both courts indicated some dissatisfaction with the traditional tests of legal insanity as viewed against the growing fund of scientific knowledge on the workings of the human mind. However, both also reached the conclusion that the *Durham* rule was not the solution to the problem of the mentally deranged defendant before the bar of justice.

Church and State

The New York Supreme Court has again refused to enjoin the erection of a Nativity Scene on public school property. A petition to enjoin, pendente lite, the school board of Ossining, New York from authorizing the Creche was denied in 1957[1] on the ground that the alleged damages were too vague and speculative.[2] Denying permanent injunctive relief in December of 1958, the Court held that the only taxpayer who had standing to sue had not shown danger of irreparable injury; nor was it shown that there was, at this time, an application for approval pending – hence there was nothing to enjoin.[3] In addition to the injunction, plaintiff also sought a declaratory judgment. Dicta in last year's suit indicated that the

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1 *Mental Disease and Criminal Responsibility – A Symposium*, 4 CATHOLIC LAWYER 294 (Autumn 1958), 5 CATHOLIC LAWYER 3 (Winter 1959).

2 – Mass. –, 150 N.E.2d 914 (1958).

3 See Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).

4 Commonwealth v. Chester, – Mass. –, 150 N.E. 2d 914, 920 (1958).

5 259 F.2d 699 (8th Cir. 1958).

6 Voss v. United States, *supra* note 5, at 703.

1 Baer v. Kolmorgen, 170 N.Y.S.2d 40 (Sup. Ct. 1957). This case was treated in 4 CATHOLIC LAWYER 281 (Summer 1958).

2 Plaintiffs alleged deleterious psychological effects on the minds of school children from this "preferential" act. 170 N.Y.S.2d at 42.

3 Baer v. Kolmorgen, 181 N.Y.S.2d 230 (Sup. Ct. 1958).

court felt that there had been no violation of the constitutional guarantee of freedom of religion. The nature of the controversy prompted the present Court to examine the plaintiff's right to the declaratory relief sought, but the constitutionality of such an action by the school board was upheld.

Mr. Justice Gallagher's opinion is noteworthy for its clear statement and careful application of the First Amendment. The Court insisted on construing the Constitution, rather than its commentators, and stated two general bases for attacking a statute or resolution on constitutional grounds:

> First: Where a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting that unconstitutional requirement; second: Where a person is deprived of property for unconstitutional purposes (such as a direct or indirect tax to support a religious establishment). . . .[4]

Since neither public funds nor the time of any school personnel were involved, the second basis failed. Against plaintiff's contention that pupils were subjected to religious influences and ". . . obliged to attend and participate in the veneration of sectarian religious symbols . . . ,"[5] the Court observed that since school was not in session during the period of the display, the allegation of "teaching" and obligatory attendance were patently fallacious, and felt, moreover, that religious symbolism, inescapable during this season, could not be said to have any greater influence when displayed on public rather than private property. *McCollum v. Board of Educ.*[6] was distinguished on its facts. There public property was used for actual religious instruction. Here, not only were there no classes in session but there was an absence of proof ". . . that instruction was given as to the meaning of the Creche or that it was in fact employed as a means of teaching."[7]

The Court not only upheld the constitutionality of this "accommodation of religious groups" but approved the ". . . spirit of cooperation which prompted it. . . ."[8] On the authority of *Zorach v. Clauson,*[9] the doctrine of absolute separation of church and state was rejected:

> If such accommodation violates the doctrine of absolute separation between church and state, then it is time that that doctrine be discarded once and for all. Absolute separation is not and never has been required by the Constitution.[10]

Kerala Communist Education Bill Signed

The President of the Republic of India has signed into law a communist-sponsored bill designed to subject Catholic schools to state control in the Red-dominated province of Kerala.[1]

The Kerala Education Bill, first passed by the legislature of Kerala in September, 1957, and discussed in previous issues of THE CATHOLIC LAWYER,[2] confers power on the state government to assume the management of state-aided private schools throughout Kerala. Communist Party candidates have a majority in the Kerala Legis-

[4] *Id. at* 237.

[5] *Ibid.*

[6] 333 U.S. 203 (1948) (religious instruction by clergymen in public schools held unconstitutional).

[7] Baer v. Kolmorgen, *supra* note 3, at 238.

[8] *Id.* at 239.

[9] 343 U.S. 306 (1952) (released time for students attending religious instruction held constitutional).

[10] Baer v. Kolmorgen, 181 N.Y.S.2d 230, 238-39 (Sup. Ct. 1958).

[1] N. Y. Times, Feb. 21, 1959, p. 4, col. 7.

[2] Minattur, *The Kerala Education Bill,* 4 CATHOLIC LAWYER 233 (Summer 1958); 4 CATHOLIC LAWYER 366 (Autumn 1958).

lature and most of the state-aided private schools in the province are operated by the Catholic Church.

The Education Law took effect in late February after the President approved a revised version of the 1957 bill. The bill as first passed by the Kerala Legislature had been termed unconstitutional by the Supreme Court of India on May 22, 1958, in an unprecedented advisory opinion requested by the President.

The court said that provisions of the bill authorizing the state legislature to either acquire the private schools outright, or to take over management of the private school system and to set fee systems, violated the constitutional right of religious or linguistic minorities — "to establish and administer educational institutions of their choice."[3]

Acting on the basis of the court's opinion, the President refused to sign the first bill. The Kerala Legislature passed a revised version of the act in November, 1958, and it is this version that the President has signed. The law as adopted does not contain the clauses found objectionable by the Supreme Court but still provides that the schools must appoint teachers from a list supplied by the state's Public Service Commission.

Archbishop Mather Kavukattu of Changanacheri recently presided at a meeting at which it was decided that, rather than submit to communist-appointed teachers, the Catholic schools will not reopen after the summer vacation.[4]

[3] INDIA CONST. art. 30(1) (1950).

[4] N.Y. Times, April 30, 1959, p. 16, col. 6.