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Canon Law and Wills; State Efforts to Combat Obscenity; State Aid to Private Schools;

POSTSCRIPTS

Canon Law and Wills

In the last issue, *The Catholic Lawyer* reprinted an article by Father Charles Connors entitled "Canon Law and Wills."[1] This brief but interesting discussion purported to set down some of the practical considerations of which the conscientious lawyer should be aware in order to fulfill his client's intent. One such practical consideration pointed out by the author was the possible differences in the tax consequences of bequests to "religious."

In a recent case[2] decided by the United States Court of Appeals for the Second Circuit, the possibility of differing tax consequences alluded to by Father Connors was put into sharp focus. Section 812(d) of the Internal Revenue Code of 1939 (now section 2055) states that bequests "to or for the use of" a religious institution are not includible in the taxable estate. The testatrix in this Second Circuit case executed her will in 1941, making her son, a scholastic in the Society of Jesus, a beneficiary. In 1950, two days before the son was to take his solemn vows of poverty, chastity and obedience, he executed a written renunciation of all his property rights, disposing of all properties and rights, known or unknown, in favor of the Society. The renunciation took effect after his solemn vows, and was a contract enforceable at law.[3] The testatrix learned of her son's solemn vows in 1953 and wrote her attorney as follows:

> Lewis has been supported by the Jesuit Order for 18 years, so naturally I would like to remember him more than Frank, Jr., or Bing, not that he will be able to keep it for himself, but will be only too happy to pass it on to the order. . . .[4]

Upon the death of the testatrix in 1954 the executors sought to qualify the bequest as one "to or for the use of" the Society of Jesus, and thereby reduce the estate taxes. They made two arguments: first, that the bequest was to the Society, and second, that the son was a constructive trustee for the Society. As to the first contention the Court stated that the testatrix's subsequent knowledge of her son's vows did not alter the fact that her bequest was to him, not the Society. And, as to his being a constructive trustee, the Court held there was no basis for such a claim:

> There is no evidence whatever that Lewis induced such a bequest by word or deed. The bequest was made not because of any representation to the testatrix that it would go to the society. . . . It was Lewis' renunciation and assignment which was to be the operative dispositive act – as the testatrix plainly recognized. She did not, *as she readily might have done,* by her will, create any interest of any kind, equitable or legal, conditional or executory in the society.[5]

Under canon law the son could not acquire property after his solemn vows. Testatrix was apparently generally aware of his ina-

[1] 7 CATHOLIC LAWYER 308 (1961).

[2] Cox v. Commissioner (U.S. Ct. App. 2d Cir. Dec. 5, 1961), 147 N.Y.L.J., Jan. 15, 1962, p. 1, col. 1.

[3] Burt v. Oneida Community, Ltd., 137 N.Y. 346, 33 N.E. 307 (1892). See also St. Benedict Order v. Steinhauser, 234 U.S. 640 (1914).

[4] Cox v. Commissioner, *supra* note 2.

[5] *Id.* at col. 2 (emphasis added).

bility to keep the property. Nevertheless, as far as the courts are concerned it was his renunciation, viewed as a contract, which transferred the property *from him* to the Society; the contract, not the canon law was given effect. In the words of Father Connors, "regrettable situations have resulted from conformance with canon law exclusively, while ignoring civil law."[6]

State Efforts to Combat Obscenity

It is hardly necessary to reiterate here the very difficult problems faced by any state in its efforts to halt the increasing influx of obscene publications onto local newsstands.[1] The constitutional safeguards of individual rights, although most desirable from the point of view of freedom of thought and expression, have nonetheless greatly reduced the number of weapons in the state arsenals available to combat this enemy of society. In times less sensitive to individual freedoms, the ingenuity and even the patience of the various state legislatures was not so heavily, nor so often, taxed with such little ultimate success. Nevertheless, the problem remains and fortunately the various states and even private citizens continue to expend their energies in serious efforts to cope with it within constitutional limits.

One such effort by the Legislature of Rhode Isiand was recently subjected to constitutional attack in that state's high court, and survived it.[2] The Legislature had created the Rhode Island Commission to Encourage Morality in Youth and charged its members by Resolution No. 73 as follows:

> It shall be the duty of said commission to educate the public concerning any book, picture, pamphlet, ballad, printed paper or other thing containing obscene, indecent or impure language, as defined in chapter 11-31 of the general laws . . . and to investigate and recommend the prosecution of all violations of said sections. . . .[3]

In exercising their legislative mandate, the Commission members compiled lists of publications which they felt were "completely objectionable for sale, distribution or display for youths under eighteen years."[4] They sought to gain the cooperation of local distributors by voluntary removal of the objectionable items, stating that receipt of such cooperation would bar the necessity of their recommending prosecutions to the attorney general. Various distributors complied with these suggestions, and returned their supplies of paperbound books on the list to the publishers.

Two publishers attacked Resolution No. 73 as an unconstitutional infringement of their first amendment freedom of the press, and further alleged that as construed by the Commission the resolution was unconstitutionally applied. In what was perhaps a refreshing change of pace in this area, the Court found "no difficulty in declaring the resolution constitutional."[5] The Court analyzed Resolution No. 73 in the following words:

> On its face it does not authorize previous restraint of freedom of the press. . . . The functions conferred are solely educative and

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[6] Connors, *Canon Law and Wills*, 7 CATHOLIC LAWYER 308, 309 (1961).

[1] See generally, St. John-Stevas, *Obscenity, Literature and the Law*, 3 CATHOLIC LAWYER 301 (1957); Sheerin, *Censorship in Contemporary Society*, 3 CATHOLIC LAWYER 292 (1957); Tobin, *State and Federal Censorship*, 3 CATHOLIC LAWYER 312 (1957).

[2] Bantam Books, Inc. v. Sullivan, – R.I. –, 176 A.2d 393 (1961).

[3] *Id.* at –, 176 A.2d at 394-95.

[4] *Id.* at –, 176 A.2d at 395.

[5] *Ibid.*

> investigative in aid of the legislative policy to prevent the dissemination of obscene and impure literature, especially as it affects the morality of youth.[6]

The Court very carefully pointed out that a distributor might with impunity refuse to respond to any Commission suggestions, and also that the Commission could recommend prosecution but could not *order* it.

In handling the alleged unconstitutional application of the resolution by the Commission, the Court overruled this objection on the ground that the Commission did no more than seek and receive the *voluntary cooperation* of the distributors. It stated that

> it is no justification for petitioners to argue as they do that because the local distributor will not want to oppose the commission such a practice has the inevitable result of suppression of their books by censorship.[7]

A dissenting opinion concurred with the majority insofar as it found the resolution constitutional, but disagreed as to the actions of the Commission. It was the view of the dissent that the Commission had construed its authority to include the *prevention* of the sale or distribution of publications deemed objectionable, and had acted on this premise. The dissent concluded, not that the Commission's actions were unconstitutional, but more simply, that it had exceeded its authority. Thus, quite easily, the dissent decided it was not necessary to pass upon the constitutionality of the Commission's actions.

Resolution No. 73 was held to be free of constitutional objection. Perhaps, the only difficulty with this type of legislation is the efficiency with which it can be carried out in the face of constitutional restrictions. In this particular, majority and dissent differed, but even here constitutional problems were quite cleverly avoided by the approach of the dissent.

[6] *Ibid.*

[7] *Id.* at –, 176 A.2d at 397.

State Aid to Private Schools

Many states have had to resolve the problem of whether their respective constitutions permitted them to pass legislation providing bus transportation, textbooks or lunches for students in nonpublic schools.[1] When finally presented to the particular state's high court for a constitutional determination, as such legislation generally is, the results have differed. The reasons for this difference in conclusions at times lie in the specific wording of the state constitution involved, but, more often, the question seems to turn on the attitude of the state court toward the "child-benefit" theory, the most consistent argument raised to support such legislation.

Recently, the Assistant Superintendent for Pupil Personnel and Special Education Services of Tulsa requested an opinion involving a ramification of this constitutional problem from its attorney. It is to be noted that the opinion in no way represented a court adjudication; it was advisory in nature. Specifically, the assistant superintendent wished to know the responsibility, if any, of the Tulsa public schools for providing special services, such as those of the reading clinic, the tests and measurements department or speech therapy, to children who live within the school district but who are enrolled in nonpublic schools.

It was the opinion of the school district's attorney[2] "that the Tulsa School District

[1] See Reed, *The School Bus Challenge*, 5 CATHOLIC LAWYER 99 (1959); see also 6 CATHOLIC LAWYER 323 (1960).

[2] Since the opinion was of an advisory nature and involved no court adjudication, it has not, to the

[had] no obligation to provide special services to any child who [was] not enrolled in the Tulsa Public Schools." He was "further of the opinion that the school district [was] prohibited from furnishing such services to those children who have elected to attend a parochial school rather than public schools." The basis for this latter conclusion was a decision of the Supreme Court of Oklahoma involving bus transportation legislation,[3] and an advisory opinion of the State Attorney General to the State Superintendent of Public Instruction concerning the availability of the National School Lunch Program to parochial school students.

The Oklahoma constitution, Article 2, Section 5 provides:

> No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.

The Oklahoma legislature passed a bus transportation bill in 1939, making such transportation available to children attending nonpublic schools along or near the transportation route to the public schools. In *Gurney v. Ferguson,*[3] the Supreme Court of Oklahoma held the statute unconstitutional. The argument made in defense of the statute was that it benefited the children, not the schools. Terming this argument "not impressive" the Court stated:

> It is true that this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child. We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has not authority to maintain a sectarian school. . . .
>
> If the cost of the school bus and the maintenance and operation thereof was not in aid of the public schools, the expenditure therefor out of the school funds would be unauthorized and illegal. Yet we assume it is now acquiesced in by all that such expenditures are properly in aid of the public schools and are authorized and legal expenditures. . . . [I]t would seem necessarily to follow that when pupils of a parochial school are transported that such service would likewise be in aid of that school.[4]

The opinion of the Attorney General was in response to a question posed by the State Superintendent of Public Instruction. The latter official asked whether public school cafeterias operated under the National School Lunch Program could be opened to parochial school students in the district, on the theory that their release at noon from the parochial schools placed them under public school supervision on the lunch hour. The Attorney General in his opinion stated that the *Gurney* principle would seem to preclude such a program. On the basis of these events, the attorney for the Tulsa School District was of the opinion that special services were equally unavailable to nonpublic school students.

Certainly, the *Gurney* case seemed to lay to rest the "child-benefit" theory in Oklahoma. Nevertheless, it is difficult to see how a reading clinic or speech therapy

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knowledge of the Editors, been published in any source of general circulation. The *Catholic Lawyer* gratefully acknowledges the kindness of Mr. C. H. Rosenstein, Attorney for the Independent School District No. 1 of Tulsa County, Oklahoma, in providing this publication with information concerning the basis for his opinion.

[3] 190 Okla. 254, 122 P.2d 1002 (1941).

[4] *Id.* at –, 122 P.2d at 1003-04.

for parochial school children can endanger the principle of separation of church and state in that state. So long as school funds are used to finance such special services, the *Gurney* argument to the effect that school funds must be used for the support of schools would be available to defeat a "child-benefit" approach. The same result might equally be predicated if general funds were used, under the Oklahoma constitution. However, were general public funds appropriated for this purpose, it would seem possible to contend that such legislation was in fact in aid of the child and sustainable as a general welfare measure. The benefit to the private school, in such a case, would appear to be most incidental to the interests of the child, which the state may properly protect. It would be a torturous piece of reasoning that would place a parent in the position of having to sacrifice his natural right to select his child's training in order to guarantee the child the benefits of speech therapy.