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# Wearing Religious Garb, Bible Distribution in Public Schools, Zoning Restrictions on Churches, Rectory Held Tax Exempt, Religion and Adoption Laws, Court Permits Child to Choose Religion

# RECENT DECISIONS

## *Wearing Religious Garb*

On September 28, 1954, the state Circuit Court of Franklin County, Kentucky, in the case of *Rawlings* v. *Butler* [unreported], ruled that sisters of the Roman Catholic Church may teach in the public schools while wearing their religious garments. The suit had been filed on October 13, 1953, by the Rev. James W. Rawlings, a retired Methodist minister and chairman of the Kentucky Free Public School Committee, an affiliate of the Protestants and Other Americans United for Separation of Church and State, and was directed against the State Superintendent of Education, Wendell P. Butler, and six county boards which employ nuns as public school teachers.

The case was submitted on an agreed statement of facts, it being agreed that some 84 nuns were teaching in Kentucky public schools and that they wore their religious garb at all times while serving as employees of the six county school boards. The plaintiffs argued that the teaching by nuns wearing religious garments constituted a violation of the requirement of separation of Church and State and was therefore unconstitutional. In a brief filed by the Attorney General on behalf of the Superintendent of Education and the nuns, it was argued that the barring of Catholic nuns from teaching in the public schools because of their religious garb would be a violation of their civil rights. The brief pointed out that the only restriction on nuns teaching in Kentucky public schools is that like all teachers, they may not teach "sectarian doctrine."

"So long as a Roman Catholic, Baptist or Protestant teacher respects and observes these constitutional restraints . . . it is none of the business of the school board to question his or her religious faith or practice in their private life, or the clothes they wear privately or publicly, so long as those clothes are decent. . . ." "The intent and purpose of the Kentucky Constitution is to bar ecclesiastical training in the public schools of Kentucky. You cannot acquire from these garbs any information as to the doctrines or ceremonial practices of the denomination to which the wearer belongs, and the wearing of these garbs does not constitute instruction in religious doctrine and practice." "For Kentucky school authorities to interfere with qualified Catholic sisters serving in our public schools because they wear the uniform of their religious order while teaching constitutes a persecution of the persons who are members of that order on account of their religion." In upholding the rights of the nuns to teach, the court restated the problem and its answer in the following manner: "The only question here is, may sisters of the Catholic Church, while garbed in the habiliment of nuns, teach in the public schools? On this question we find nothing in the Constitution, the statutes or the Kentucky recorded cases that prevents such teaching."

The case as presented to the Kentucky court did not, by any means, involve a novel point of law. The question here under discussion has been before the courts of eight states and the province of New Brunswick, Canada in a total of eleven cases. It has further been the subject of legislation in three states. The earliest case dealing with the problem was decided in 1894 by the Supreme Court of Pennsylvania [*Hysong* v. *School District of Gallitzin Borough,* 164 Pa. 629, 30 Atl. 482 (1894)]. It was there held that the wearing of religious garb by nuns teaching in the public schools was not "sectarian teaching" and hence was not violative of the constitutional injunction against sectarian teaching in the public schools. Within a year after this decision, the Legislature of Pennsylvania enacted a law specifically prohibiting the practice approved in the *Hysong* case. The statute was subsequently upheld as constitutional [*Commonwealth* v. *Herr,* 229 Pa. 132, 78 Atl. 68 (1910)] in a case involving a criminal indictment of school board directors who had permitted nuns to teach in the public schools in violation of the statute.

The second state to rule upon the question was New York in two cases which arrived at different, but reconcilable, conclusions. In the first [*Sargent* v. *Board of Education,* 76 App. Div. 588, 79 N.Y. Supp. 127 (4th Dep't 1902)], it was stated that the garb "can in no way affect the children injuriously while they are receiving the secular instruction." The second [*O'Connor* v. *Hendrick,* 184 N.Y. 421, 77 N.E. 612 (1906)], however, held that while the wearing of religious garb may not amount to the teaching of denominational doctrine as proscribed by the New York Constitution (now Art. 11, §4), it gave rise to an influence that was sectarian and hence it was within the legitimate power of the Superintendent of Public Instruction to prohibit it by departmental regulation. Despite the absence of a clear prohibition against the wearing of religious garb, and even though no such regulation as existed in the *O'Connor* case presently exists, counsel for the State Education Department has unofficially advised that the State, since the *O'Connor* case has assumed that, as a matter of law, it is improper to wear such garb in the public schools.

Between 1918 and 1941, five states considered the problem. In *Knowlton* v. *Baumhover,* 182 Iowa 691, 166 N.W. 202 (1918), there was strong dicta against the legality of wearing religious garb. In *State ex rel Public School District No. 6 of Cedar County* v. *Taylor,* 122 Neb. 454, 240 N.W. 573 (1932), the wearing of religious garb was one of the many factors which induced the court to hold that the school was sectarian and therefore not entitled to public funds. In two other cases [*State ex rel. Johnson* v. *Boyd,* 217 Ind. 248, 28 N.E. 2d 256 (1940) and *Gerhardt* v. *Heid,* 66 N.D. 444, 267 N.W. 127 (1936)], however, the court held that it was not unconstitutional for nuns so garbed to teach in the public schools. [See also *Rogers* v. *Trustees of School Dist. No. 2 of Bathhurst,* 1 N.B. Eq. 266 (1896)]. In the fifth case, the court declined to pass on the question, preferring to base its holding on other factors in the case. [*Harfst* v. *Hoegen,* 163 S.W. 2d 609 (Mo. 1941)].

During this period, two other states joined with Pennsylvania in specifically prohibiting the wearing of religious garb by any persons teaching in the public schools. [See Neb. Rev. Stat. §79-1274 (1950 Reissue); Ore. Rev. Stat. §342.650 (1953)]. Both statutes provide for the suspension of any teacher violating its provisions and the Nebraska statute further provides that violation thereof shall constitute a misdemeanor.

The most thorough discussion of the problem since the decision in the *Hysong* case in 1894 is found in the recent opinion delivered by the Supreme Court of New Mexico [*Zellers* v. *Huff,* 55 N.M. 501, 236 P. 2d 949 (1951)]. The court there considered in detail the various statutory and constitutional provisions involved and reversed the trial court judgment with reference to the question of religious garb. In ordering the issuance of an injunction, the court held that "[n]ot only does the wearing of religious garb and insignia have a propagandizing effect for the church but by its very nature it introduced sectarian religion into the school."

Despite the strong language of the *Zellers* case, the Kentucky Court was apparently unmoved by the doctrine enunciated therein. The *Rawlings* case has not been reported and, therefore, it is not possible to quote the Court's opinion.

The Attorney General of Kentucky has advised that the plaintiffs, although they had not taken the appeal as of December 1, 1954, have designated the record in the lower court for appeal.

### *Bible Distribution in Public Schools*

The parents of two students, one Catholic and the other Jewish, brought an action to restrain the distribution of the King James version of the Bible in the public schools of the borough in accordance with a resolution of the borough's Board of Education. Subsequent to the institution of the action, the Catholic child transferred to a parochial school and, since the action became moot as to him, it was continued solely in the name of the Jewish parent, Tudor. The Gideons Inter-

national, the non-profit corporation who had offered to distribute the Bibles, intervened as a party defendant.

The resolution adopted by the Board of Education was passed, one member dissenting, over the opposition of a Catholic priest and Jewish rabbi who attended the meeting. The resolution provided that the Bibles were to be distributed to those children whose parents, by means of a signature request card, might so wish. Prior to the distribution of the Bibles, the present action was instituted and a temporary injunction was granted on Feb. 19, 1952 and continued on Feb. 29, 1952, restraining the distribution until further determination of the action. After full hearing on March 30, 1953, the trial judge vacated the restraining order and, while an appeal was pending before the Appellate Division of the Superior Court, the New Jersey Supreme Court ordered certification on its own motion.

The Supreme Court of New Jersey, finding as a matter of fact that the King James version was repugnant to the tenets of both the Catholic and Jewish religions and therefore sectarian, reversed the trial court and struck down the resolution of the Board of Education *holding* that the distribution of a sectarian book is favoritism and a preference of one religion over another and therefore violative of the establishment of religion clause of the First Amendment to the United States Constitution. *Tudor* v. *Board of Education of Borough of Rutherford,* 14 N. J. 31, 100 A.2d 857 (1953).

On May 3, 1954 an appeal was filed in the United States Supreme Court and on Oct. 14, 1954 that court denied certiorari *sub nom. The Gideons International* v. *Tudor,* 75 Sup. Ct. 25 (1954).

### *Zoning Restrictions on Churches*

A significant case involving the constitutionality of zoning ordinances as applied to construction of churches* is presently sub judice in *Matter of Diocese of Rochester* v. *Planning Board of Brighton.* (Supreme Court, Monroe County, N. Y.).

The Town of Brighton, New York, is a residential community lying east and south of the city limits of Rochester. Its population, which has been growing rapidly, is over 23,000, of which more than 6,000 are Catholics. The zoning ordinances of the town provide that churches and schools may be erected in residential areas only with the consent of the Town Planning Board.

There is at present only one Catholic parish in the township, located in the western portion. The church and parochial school are both badly overcrowded. The Diocese of Rochester accordingly erected a new parish, dedicated to St. Thomas More, in the eastern part of the township, and acquired a piece of property on which to erect a church and parochial school. Substantially all of the territory of the new parish, and the great majority of the entire township, are zoned as residential areas. On November 15, 1954, the Board denied the application of the Diocese, on the stated ground that it would prefer to see the property cut up into single-family residence lots which would bring in substantial taxes.

The zoning ordinance provides for a review of the action of the Planning Board by the Town Board. The statute provides for a review by the courts. Because of doubts as to the proper course to pursue, and in view of the 30-day limitation provided in Section 267 of the Town Law, the Diocese decided to pursue both remedies. Its petition for review to the Town Board was presented on November 26th, but has not yet been acted on. On December 9th, the Diocese commenced a proceeding under Article 78, in which it was joined as petitioner by the Estate of William A. E. Drescher, present owner of the property, attacking the action of the Planning Board (a) as an abuse of discretion and (b) as unconstitutional. The petition is returnable in Supreme Court, Monroe County on January 11, 1955.

**For an interesting discussion of the subject, see Zoning Laws and the Church, 27 St. John's Law Review 93 (1952).*

## *Rectory Held Tax Exempt*

St. Stanislaus Kostka Parish owns an entire city block in Wilmington, Delaware, on which is located the Church building, a school, a convent and a rectory. The City of Wilmington has since 1921 assessed taxes upon the rectory, which the parish has refused to pay. The Church brought an action for a judgment declaring the assessments void. Under the Delaware Code, the rectory would be exempt from state taxation, but the Wilmington City Charter does not specifically exempt such property from municipal taxation. The Court, nevertheless, held that the rectory was exempted from taxation. In so holding, the court, following the rationale of *Mayor of Wilmington* v. *Town Hill School Ass'n,* 2 W.W. Harr. 277, 122 Atl. 442 (1923), indicated that "the General Assembly must be presumed, when it includes in a city charter the exemption from municipal taxation of such other classes of property 'as may be exempted by law,' to have intended the city to be bound by the general tax exemption policy laid down by general law." *Mayor of Wilmington* v. *Saint Stanislaus Kostka Church,* 108 A. 2d 581 (Del. 1954).

## *Religion and Adoption Laws*

An eight year old child, orphaned as the result of the murder of her parents, was placed by a Michigan probate court in the custody of her deceased mother's sister and brother-in-law. The decree awarding custody of the child was granted without a hearing although it was known that the child's paternal grandmother also sought custody of the child. Since the decree was granted without complying with the procedural safeguards, the Circuit Court in Michigan, on appeal, vacated the decree. Thereupon, the child's paternal grandmother instituted a proceeding for a writ of habeas corpus in Pennsylvania, where the infant then resided with her maternal aunt and uncle, to determine the custody of the child. The trial court, after careful examination of the evidence, found that both parties were of good moral character, that both were financially able to care for the child, and that the environment in both homes was substantially the same. Consequently, in awarding custody of the child to the grandmother, the court based its decree on kinship and religion. The court noted that the grandmother was more closely related to the child than the aunt. It also observed that the child was Roman Catholic, and the grandmother was of the same religious faith. The child's aunt and uncle, however, were Presbyterians, and testified that they would raise the child as a Presbyterian.

Upon appeal, the Superior Court of Pennsylvania reversed the decree. The appellate court stated that religion and kinship were not controlling factors, and was of the opinion that it would be better for the child to live away from the scene of her parents' murder. It also pointed out that the child's aunt and uncle were younger than the grandmother, and had several children at about the same age as the infant. *Commonwealth ex rel. Kuntz* v. *Stackhouse,* 108 A. 2d 73 (Pa. 1954).

On November 1, 1954, the Supreme Court of Pennsylvania denied a petition for an appeal from the judgment of the Superior Court. Subsequently, the plaintiffs filed a petition for reconsideration and were joined in the petition by the Catholic Children's Bureau, Inc. By analogy to the provisions of the Juvenile Court Act of 1933, the Fiduciaries Act of 1949 and the Adoption Act of 1953, the court stated that ". . . the religious faith of the child's parents must be given *very serious consideration* in the placing of the child. . . ."

Although the court announced its intention not to depart from that principle, it denied the petitions for reconsideration stating that: "Under the facts of the present case, however, the Superior Court, which is vested with jurisdiction in such matters, determined that a paramount and imperative regard for the welfare of the child required that it be removed from the locality where its parents were murdered. Finding in this exercise of its judgment no violation of the

principle above stated we refused the petition for the allowance of an appeal."

The attorneys for the plaintiff have indicated that they may file a petition for certiorari to the Supreme Court of the United States on the ground that the judgment of the Pennsylvania court violates the Fourteenth Amendment.

Under Massachusetts law, persons wishing to adopt a child must be, where practicable, of the same religious faith as the child. If the child's religion is disputed, he is deemed to have the religion of his mother. The constitutionality of this law was recently litigated in an adoption proceeding in which a husband and wife, members of the Jewish faith, sought to adopt twins, whose mother and natural father were Catholics. The children, who were not baptized, had lived with the Jewish couple since they were two weeks old. The evidence indicated that the couple would rear the children in the Jewish faith. The trial court held that the best interests of the children would not be served by permitting their adoption by the Jewish couple, notwithstanding the Catholic mother's consent to the adoption with the knowledge that the children would be reared in the Jewish faith. The trial court also found that local Catholic agencies had listed many Catholic couples which could provide the same material advantages as the Jewish couple. Upon appeal, the Supreme Judicial Court affirmed on the ground that the evidence sustained the finding that adoption by the Jewish couple would not be for the best interests of the children.

Petitioners argued that the Massachusetts statute was unconstitutional in that it contravened the First Amendment. In rejecting the contention that the statute was a law "respecting the establishment of religion or prohibiting the free exercise thereof," the Court pointed out that all religions were treated equally, and no burden was placed upon anyone to maintain any religion. The Court also rejected the argument that there was interference with the mother's right to determine the religion of her offspring. "[T]here is clearly no interference with any wish of hers as long as she retains her status as a parent. It is only on the assumption that she is to lose her status that . . . [the statute] becomes operative. The moment an adoption is completed all control by the mother comes to an end." *Petitions of Goldman,* 121 N.E. 2d 843 (Mass. 1954).

The American Jewish Congress has indicated that a petition for certiorari to the Supreme Court of the United States will be filed.

### *Court Permits Child to Choose Religion*

In a separation action, custody of the child was awarded to the mother, a Christian Scientist, with the stipulation that the boy be reared as a Catholic. At the time of her marriage to the child's father, a Catholic, the mother had promised in writing, as required by Church law, that any issue of the marriage would be reared in the Roman Catholic faith. Although the child was baptized a Catholic, he was sent, despite his father's protests, to a Christian Science Sunday School. The mother thereupon sought to void the stipulation included in the separation decree. On the hearing in 1953, the court permitted the child to testify as to his religious preferences, and, as a result, voided the stipulation. The Appellate Division affirmed without opinion. However, Justices Wenzel and Murphy in a strong dissent voted to reverse the order and to deny the motion to modify the judgment, with the following memorandum: "Appellant and respondent entered into an antenuptial agreement that all children of their union were to be brought up in the Roman Catholic faith. The marriage was solemnized in 1938, and in 1940 a son was born and baptized as a Catholic. The wife, contrary to her agreement and her husband's desires, sent the child to a Christian Science Sunday school at an early age. The husband and wife separated in 1947. In 1949, in an annulment action brought by the husband, based on the breach of the antenuptial agreement, the wife prevailed on her counter-

claim for a separation. The judgment, however, provided that the child be brought up in the Roman Catholic religion in accordance with the agreement of the parties. The wife has now asked that this judgment be modified so that the boy shall be permitted to attend the public schools and receive instruction in Christian Science. The modification of the judgment has been granted in that respect. In the formative years of a child's life it must be guided in its religious and secular education by its parents until its mind is sufficiently mature to make its own decisions. That degree of maturity is not reached at the age of twelve. If, as the mother claims, the child is now confused, the fault is entirely hers. She has continuously violated the aforesaid provision in the agreement and the judgment. She should be required to fulfill her promise and the earlier direction of the court. The tenets of all religions as well as the law require the observance of a solemn obligation." *Martin* v. *Martin,* 283 App. Div. 721, 127 N.Y.S. 2d 851 (2d Dep't 1954).

On December 31, 1954 the Court of Appeals affirmed in a per curiam opinion. Judge Desmond dissented in the following opinion in which Judge Conway concurred.

"I dissent for these reasons:

1. There is no finding and no testimony that enforcement of the religious training provision of the 1949 judgment (and of the 1938 agreement which it confirmed) would damage, or has damaged, the boy, mentally, physically or in any other way. All statements as to his becoming 'unhappy' or 'mentally disturbed' or "ill-adjusted' are taken from the mother's ex parte affidavit which is a mere pleading, not proof. Neither the mother, nor the boy nor anyone else gave any testimony as to any such mental hurt or disturbance. The Referee's decision makes no such finding. The Referee amended the decree solely because, so he found, this twelve-year-old boy 'has a mind of his own,' because failure to amend the decree 'would strip him of his independent judgment in matters of this kind,' and because (so held the Referee) 'neither the mother's wishes nor the father's wishes should control what is to be done here***.' True, at the end of the decision, the Referee said he was doing what 'is best for the boy' but it is impossible to read the decision as based on anything except the boy's own wishes and his supposedly mature and considered choice of a religion for himself. That was not within the Referee's competency, in the face of a Supreme Court judgment as to the place and nature of his religious training, based on a solemn prenuptial agreement.

2. The idea that a child of twelve is competent to make a choice binding on the Supreme Court and on his parents in such a matter, is not only contrary to our decisions (see *Bunim* v. *Bunim,* 298 N. Y. 391), and contrary to all human experience, but is directly opposed to the parens patriae public policy of New York (Citing Statutes).

3. This sort of pre-nuptial agreement is enforcible like any other, unless and until its enforcement is shown to be harmful to the child. 'Agreements between parents for a particular sort of religious upbringing have in general been held valid in this country' (*Weinberger* v. *Van Hessen,* 260 N. Y. 294, 298). Particularly must this be so when the agreement has been confirmed by, and written into, a judgment.

4. Although the child's welfare is a paramount consideration in every custody case, we cannot close our eyes to fundamental principles as to judgments and agreements, and we cannot forget ancient maxims denying equitable relief to suitors whose hands are unclean. Respondent failed to prove that an amendment to the decree was suggested by anything except the boy's own desires. She did prove affirmatively that she herself had created this troublesome position by violating not only her solemn agreement, but the plain condition under which custody was decreed to her."