The Catholic Lawyer

Volume 3
Number 4 *Volume 3, Autumn 1957, Number 4*

Article 13

Pledge of Allegiance and the First Amendment; Moral Obligation in Negligence Cases; Adoption Statute

RECENT DECISIONS

The Pledge of Allegiance and the First Amendment

The recent addition of the phrase "under God" to the flag salute as presented in the public schools of New York State has provoked an unsuccessful constitutional challenge.

In the case of *Lewis v. Allen*,[1] the petitioners brought a proceeding under Article 78 of the New York Civil Practice Act[2] to compel the State Commissioner of Education to remove the phrase "under God" from the pledge of allegiance to the flag which the Commissioner had prepared for use in the public schools pursuant to section 802 of the New York Education Law.[3] The petitioners contended that the use of the phrase "under God" violated both the state and federal constitutions. The New York State Supreme Court[4] *held* that the pledge as prepared by the Commissioner did not violate the first amendment of the United States Constitution because there was no compulsion binding the student to recite the pledge.

Written references to God in official and semi-official utterances are fairly common. Most of the state constitutions have a preamble invoking the name of God. Typical of these is the preamble to the New York State Constitution, reading: "We, the people of the state of New York grateful to almighty God for our freedom, in order to secure its blessings, do establish this constitution." Proclamations of days of thanksgiving generally contain references to God,[5] and "In God We Trust" has been on our coins since 1864.[6] These various references have provoked little legal action of any consequence.

However, there has been extensive legal action where references to, or recognition of, God take on an active character and require positive action by individuals. Oaths used in courts frequently make reference to God.[7] Nevertheless in recognition of those who have no religious belief, most states have enacted statutes requiring, not an oath, but an affirmation which makes no reference to a deity.[8] While under the common law no person could qualify as a witness in a judicial proceeding unless he believed in a Supreme Being and in a future life of rewards and punishments,[9] this requirement has been abolished by statute or constitutional provision in most states.[10]

Although previous to 1954 the pledge of allegience did not contain the phrase "under God,"[11] the constitutionality of compulsory

[1] 5 M.2d 68, 159 N.Y.S.2d 807 (Sup. Ct. 1957).

[2] The statutory proceeding against a body or office which abolished the classifications, writs and orders of certiorari to review, mandamus and prohibition.

[3] N.Y. EDUC. LAW § 802: "It shall be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag. . . ."

[4] Primarily a trial court with limited appellate jurisdiction.

[5] See, *e.g.*, Exec. Proc. No. 2651, 10 FED. REG. 5169 (1945).

[6] 7 ENCYCLOPEDIA AMERICANA 221 (1957).

[7] See, *e.g.*, N.Y. CIV. PRAC. ACT § 361; CAL. CODE CIV. PROC. ANN. § 2094 (West 1956); ILL. ANN. STAT. c. 101, § 3 (Smith-Hurd 1935).

[8] See, *e.g.*, N.Y. CIV. PRAC. ACT § 362; ILL. ANN. STAT. c. 101, § 4 (Smith-Hurd 1935); MINN. STAT. ANN. c. 595, § 595.05 (1947); N.H. REV. STAT. ANN. c. 516, § 20 (1955).

[9] Marshall v. State, 219 Ala. 83, 121 So. 72, 75 (1929).

[10] The common-law ruling still remains in Delaware, Maryland, New Hampshire, New Jersey, North Carolina, and South Carolina.

[11] 68 STAT. 249, 36 U.S.C.A. § 172 (Supp. 1954).

flag salutes was frequently litigated in the state courts in the late 1930's.[12] These disputes involved members of a religious sect known as Jehovah's Witnesses. They believed that by saluting the flag and pledging allegiance to it that they were ascribing salvation to the flag or the government it represents, forms of worship forbidden by God as revealed in the *Holy Bible*[13] and punishable by eternal destruction. This religious sect found no relief in the state courts because the courts uniformly held that requiring a child to salute the flag where the child objected on religious grounds was not a violation of the religious freedom guaranteed by the first amendment or the various state constitutions.[14]

The United States Supreme Court at first took a similar position in *Minersville School Dist. v. Gobitis*,[15] decided in 1940. In 1943, however, in *Board of Educ. v. Barnette*,[16] it expressly overruled its prior decision and held that to compel a child to salute the flag when an objection was made on religious grounds was a violation of the first amendment. It would therefore appear that although the state may require the flag salute, its coercion of a person who on religious grounds refuses to salute, would constitute an unconstitutional infringement of religious liberty.

Following the reasoning of the *Barnette* case, the Court in the instant case found in favor of the Commissioner of Education. The Court stated that since there exists no force binding the student to recite either the pledge or the phrase, "under God," the present pledge of allegiance would not be said to violate the first amendment. Thus, the Court failed to rule on the underlying issue in the case: whether a compulsory oral reference to God in public schools is valid.

[12] People *ex rel.* Fish v. Sandstrom, 167 Misc. 436, 3 N.Y.S. 2d 1006 (Co. Ct. 1938), *rev'd on other grounds*, 279 N.Y. 523, 18 N.E. 2d 840 (1939); Leoles v. Landers, 184 Ga. 580, 192 S.E. 218, *appeal dismissed*, 302 U.S. 656 (1937); Nicholls v. Mayor, 297 Mass. 65, 7 N.E. 2d 577 (1937); Hering v. Board of Educ., 117 N.J.L. 455, 189 Atl. 629, *appeal dismissed*, 303 U.S. 624 (1937).

[13] "Thou shalt have no other gods before me." Exodus 20:3.

[14] See note 13 *supra*.

[15] 310 U.S. 586 (1940).

[16] 319 U.S. 624 (1943).

Moral Obligation in Negligence Cases

After forty-three years, the New York Court of Appeals has finally erased the last vestiges of the "charitable immunity" doctrine from its state law by ending the immunity of hospitals from liability for certain torts of their employees. In *Schloendorff* v. *Society of New York Hospital*,[1] in 1914, the court had classified doctors and nurses as independent contractors, and, as such, solely liable for torts which were of a professional rather than a ministerial nature. Since then, the *Schloendorff* rule has been altered,[2] questioned,[3] and, finally, overruled by the recent case of *Bing* v. *Thunig*.[4] While this decision makes it inadvisable to review the cases leading to the overruling of "charitable immunity," it is

[1] 211 N.Y. 125, 105 N.E. 92 (1914).

[2] Although the original rule was based on the status of physicians and nurses as independent contractors, subsequent decisions disregarded the skill or professional status of the negligent actor and examined the character of the negligent act. In Phillips v. Buffalo General Hospital, 239 N.Y. 188, 146 N.E. 199 (1924), an orderly who negligently applied a hot water bottle was held to have been performing a medical act, for which the hospital was not liable.

[3] See Becker v. City of New York, 2 N.Y.2d 226, 233, 140 N.E.2d 262, 266-67 (1957); Berg v. New York Soc'y for Relief of the Ruptured and Crippled, 1 N.Y.2d 499, 502-03, 136 N.E.2d 523, 524 (1956).

[4] 2 N.Y.2d 656, 143 N.E.2d 3 (1957).

interesting to note the language which the same court used only five months earlier in *Becker* v. *City of New York*[5] which foreshadowed the *Bing* decision.

In that case the city was sued under the doctrine of *respondeat superior* for the injuries sustained as a result of the alleged negligence of a nurse employed by a municipal hospital. Although under the *Schloendorff* rule *respondeat superior* could not have been applied, the Court held the *Schloendorff* rule inapplicable to a city institution, thereby extending a line of decisions[6] which had made it inapplicable when state institutions were involved. It is interesting to note the Court's reasoning in justifying this exception. The Court decided that when the legislature waived the state's sovereign immunity by the Court of Claims Act it intended that the Act should constitute a

> 'recognition and acknowledgment of a *moral duty* demanded by the principles of equity and justice. It includes only such claims which appear to the judicial mind and conscience to be such as the Legislature may declare to be affected by a *moral obligation* and which the State should satisfy. . . . It admits that in such negligence cases the sovereign ought to and promises that in future it will voluntarily discharge its *moral obligations* in the same manner as the citizen is forced to perform a duty which courts and the Legislatures have so long held, as to him, to be a legal liability. It transforms an unenforceable *moral obligation* into an actionable legal right and applies to the State the rule *respondeat superior*. . . .'[7]

[5] 2 N.Y.2d 226, 140 N.E.2d 262 (1957).

[6] Robison v. New York, 263 App. Div. 240, 32 N.Y.S.2d 388, (4th Dep't 1942), *aff'd without opinion*, 292 N.Y. 631, 55 N.E.2d 506 (1944); Liubowsky v. New York, 260 App. Div. 416, 23 N.Y.S.2d 633 (3d Dep't 1940), *aff'd without opinion*, 285 N.Y. 701, 34 N.E.2d 385 (1941).

[7] 2 N.Y.2d at 235-36, 140 N.E.2d at 268.

The term "moral obligation" has been *most* often used by the courts of states which have not waived their sovereign immunity to suit, and which pay private claims against the state by legislative appropriations.[8] When such an appropriation is challenged as an unconstitutional use of public money for private purposes the court often holds that, although no legal obligation exists, there is a moral obligation, which the state may satisfy.[9] It has been stated that such an obligation arises from ". . . a state of facts appealing to a universal sense of justice and fairness. . . ."[10] The Supreme Court of the United States has held that Congress has the power to pay national debts ". . . based upon considerations of a moral or merely honorary nature, such as are binding on the conscience or the honor of an individual, although the debt could obtain no recognition in a court of law."[11] New York has held that "a moral obligation is a duty assumed in obedience to the rules of right conduct."[12] The standard to be used in determining such obligations rests on common sense conceptions of moral duty.[13]

It is generally conceded that unjust damage resulting from a wrongful act or omission gives rise to a moral obligation to make

[8] See, *e.g.*, Munro v. New York, 223 N.Y. 208, 119 N.E. 444 (1918); State *ex rel.* Bumgarner v. Sims, 139 W. Va. 92, 79 S.E.2d 277 (1953).

[9] Cuvillier v. New York, 250 N.Y. 258, 165 N.E. 284 (1929) (per curiam); Farrington v. New York, 248 N.Y. 112, 161 N.E. 438 (1928); State *ex rel.* Bumgarner v. Sims, *supra* note 8.

[10] Hagler v. Small, 307 Ill. 460, 479, 138 N.E. 849, 856 (1923).

[11] United States v. Realty Co., 163 U.S. 427, 440 (1896).

[12] Evans v. Berry, 262 N.Y. 61, 70, 186 N.E. 203, 206 (1933).

[13] See Evans v. Berry, *supra* note 12.

reparations.[14] However, *respondeat superior* at times obligates one who has done no wrong. When an employer has chosen his servant carefully, instructed him and equipped him properly, then it is difficult to understand how an obligation in conscience to make reparation for his servant's negligence attaches to the employer.[15]

That the law recognizes as moral obligations some which do not bind in conscience[16] is illustrated by the statement of the Supreme Court quoted above, in which the Court distinguishes between obligations binding in conscience and those binding in honor. A concrete example is that of the bankrupt, who has no obligation in conscience to pay the debts discharged in bankruptcy, [17] but whose moral obligation is sufficient consideration to support a subsequent promise to pay.[18]

It appears, therefore, that the moral obligation of which the Court speaks in the *Becker* case is one founded in custom and law, which binds in honor, not in conscience. Public policy dictates that those who have been injured shall be made whole. *Respondeat superior* has been selected as the most feasible means of compensating them in certain situations. It should be recognized however that it is not necessarily a doctrine based upon moral obligation of the type which binds in conscience.

[14] See HIGGINS, MAN AS MAN 239 (1949).

[15] Where the employer fails to choose, equip, or instruct his servant carefully and properly, *respondeat superior* may also apply. In such a case, the obligation of the employer is a true moral obligation binding in conscience.

[16] See POUND, LAW AND MORALS 76-77 (2d ed. 1926).

[17] HIGGINS, MAN AS MAN 306 (1949).

[18] Eric v. Gumpert, 138 Misc. 278, 245 N.Y. Supp. 381 (Sup. Ct.), *aff'd without opinion*, 231 App. Div. 722, 246 N.Y. Supp. 869 (1st Dep't 1930); Federal Nat'l Bank v. Koppel, 253 Mass. 157, 148 N.E. 379 (1925).

New Connecticut Adoption Statute

Private placements for adoption will be largely eliminated by a recently adopted Connecticut legislative provision, to take effect July 1, 1958. In addition, adoptions by out-of-state parties can no longer be based upon private arrangements.

The most significant change brought about by the amendment will be that;

> . . . no application for adoption shall be accepted by the Probate court unless the child sought to be adopted has been placed for adoption by the welfare commissioner . . . or an agency licensed by said commissioner. . . .[1]

This provision is entirely new and, except in the case of children being adopted by close relatives or placed by out-of-state agencies with the written consent of the Commissioner, puts adoption placements completely in the hands of the Commissioner of Welfare or a social agency licensed by him.

The immediate effect of this change seems to be that the Commissioner and the agencies will have a veto in the selection of adopting parents and virtual control over the institution of adoption suits. If the Commissioner sets up adequate regulations, and it seems safe to assume that he will, minimum standards governing the requirements for the selection of adopting parents may be achieved. He will be able to specify the religious, social, financial, mental and physical qualifications of adopting parents with the broad authority vested in him as the head of a state agency.

Children will be protected from the danger of hasty placements and the statute will end the activity of adoption brokers since any service they might formerly have

[1] CONN. GEN. STAT. § 6867, as amended by Public Act No. 203, to take effect July 1, 1958.

been able to perform will now be made impossible. The placement activities of out-of-state adoption agencies within the state will also come under the scrutiny of the Commissioner, since any of these agencies seeking to place children for adoption in Connecticut must first obtain his written consent.

This amendment necessitated a further change in the law regarding the forum in which an appropriate action might be brought, *viz.*;

> . . . the application and agreement of adoption shall be filed in the court of Probate for the district where the adopting parent resides or, in the case of a minor under the guardianship of the welfare commissioner or an agency licensed by him, in the district where the main office or any local office of the commissioner or such agency is located.[2]

The effect of this change would seem to be that every adoption case, discounting the two types covered by the exception, will now have to be brought in the court of probate for the district in which the Commissioner or a licensed agency has an office. This is necessarily so since every child must be placed for adoption by the Commissioner or an agency licensed by him with the exception of the two types of adoption already mentioned. Another logical corollary of this would seem to be that out-of-state parties will not be able to adopt even close relatives within the state except through the Commissioner or a licensed agency since such parties will have no forum in which to commence a court action.

In 1953, this same approach was adopted by Delaware, the only other state with this type of statute.[3] In addition, the Delaware legislation, unlike that of Connecticut, includes a provision allowing an appeal from a decision of the Commissioner or an agency to be taken to the appropriate orphan's court within ten days of the action of the Commissioner or the agency.[4] Since Delaware allows only residents to adopt,[5] the problem of out-of-state adoptions does not exist. The only court authorized to entertain an adoption petition is the orphan's court in the county in which the petitioner resides.[6]

It seems that the protection afforded to the best interests of the child varies directly with the degree of control exercised by the state. In addition to the proper use of that control the substantive aspects of the laws or regulations to be applied should be sound and truly conducive to insuring the best interests of the child. It is hoped the statute in Connecticut will be supplemented by adequate substantive regulations. Nevertheless, the statute itself prevents a doctor, or a lawyer, or even an organization from collecting children and placing them for adoption under private auspices with its attendant irregularity of standards. This revision should further curtail any illegal adoption rings operating within and across the state line.

Further, if this statute is properly implemented by an adequate screening process, the natural hesitancy of judges to give speedy judgment in all but the most certain cases can be overcome. This in turn will speed up adoption proceedings and allow more cases to be handled without impairing the quality of adoptions. If this results in more children being placed in the healthy, normal atmosphere of good private homes, an important advance will have been made in the law of adoption.

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[2] *Ibid.*

[3] DEL. CODE ANN. tit. 13, § 904 (1953).

[4] *Id.* § 905.

[5] *Id.* § 903.

[6] *Id.* § 902.