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The School Prayer Cases; The Dilemma of the Out-of-State Attorney

POSTSCRIPTS

The School Prayer Cases

Recent issues of *The Catholic Lawyer* have contained a number of articles dealing with the subject of religious prayers in the public schools.[1] Since the publication of these articles not a great deal has happened which would surprise one who is familiar with previous decisions. However, a recent case presents a possible divergence with the prior trend. This decision may best be viewed in juxtaposition to the present status of the school prayer "dilemma."

The United States Supreme Court's 1962 decision in *Engel v. Vitale*[2] condemned the New York State "Regents Prayer" on the ground that it violated the establishment clause of the first amendment, applicable to the states by the fourteenth amendment. The *Engel* case was followed in 1963 by decisions of the Court which held that under the establishment clause a state may not *direct* the use of public school teachers and facilities for the recitation of a prayer.[3] The latest case in this series is *Stein v. Oshinsky,*[4] decided by the Second Circuit Court of Appeals on July 7, 1965.

In *Stein,* the principal of a public elementary school ordered his teachers to stop the recitation of all prayers[5] in the school. The Board of Education and the Board of Regents condoned the principal's actions, and instituted a policy ban-

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[1] Regan, *The Dilemma of Religious Instruction and the Public Schools,* 10 CATHOLIC LAW. 42 (1964); Rice, *Let Us Pray—An Amendment to the Constitution,* 10 CATHOLIC LAW. 178 (1964); Kenealy and Ball, *The Proposed Prayer and Bible-Reading Amendments: Contrasting Views,* 10 CATHOLIC LAW. 185 (1964).

[2] 370 U.S. 421 (1962).

[3] School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963); Murray v. Curlett, 374 U.S. 203 (1963).

[4] Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965).

[5] The prayer said by the kindergarten children in the morning session, before they ate their cookies and milk, was as follows: "God is Great, God is Good and We Thank Him for Our Food, Amen!" The prayer in the afternoon kindergarten classes was:

"Thank You for the World so Sweet,
Thank You for the Food We Eat,
Thank You for the Birds that Sing—
Thank You, God, for Everything."

Id. at 1000.

ning all prayers in the public schools, even when the opportunity to pray is sought by the students and their parents.[6]

Suit was instituted by the parents of several pupils to enjoin the school authorities from preventing the children from voluntarily reciting simple prayers in the classrooms. Plaintiffs moved for summary judgment,[7] asserting that the issues were purely constitutional in nature and, therefore, questions of law only, and not of fact, were presented. The district court granted plaintiffs' motion[8] and prohibited interference with the prayer, indicating that a reasonable opportunity for such prayer should be provided each day.

On appeal, plaintiffs contended that the previous decisions of the Supreme Court only prevented a state from *directing* the use of public facilities for the purpose of prayer, *ergo,* these decisions did not prevent a state from *permitting* public school students from engaging in prayer on their own initiative. The court concluded that neither the free exercise of religion clause, nor the guarantee of freedom of speech of the first amendment, compel a state to permit persons to engage in prayer in state-owned facilities wherever and whenever they desire.[9] Though the court stated that it was aware that the situation of school children is somewhat unique in that their attendance at the public schools was compulsory,[10] it concluded that this would not render religious facilities of the general community any less accessible to them than they are to others.[11] The authorities, the court went on to say, acted within their powers in refusing to grant the right to pray; "their action presented no . . . inexorable conflict with deeply-held religious belief. . . ."[12] The court then quoted from the *Everson* decision:

> After all that the states have been told about keeping the 'wall between church and state . . . high and impregnable . . .' it would be rather bitter irony to chastise New York for having built the wall too tall and too strong.[13]

The court therefore held that it was error to grant summary judgment for the plaintiffs and reversed, with directions to dismiss the complaint.[14]

The Supreme Court has refused to review *Stein.*[15] Although the Court's refusal of the appeal was a unanimous one, it "does not [necessarily] indicate that the justices agree with [the] reasoning, but it does suggest that the Court would deal the same way with any other state that adopts the same policy."[16] The chairman of the parents group formed to fight the state law on school prayers, after denounc-

[6] Stein v. Oshinsky, *supra* note 4, at 1000.
[7] FED. R. CIV. P. 56.
[8] Stein v. Oshinsky, 224 F. Supp. 757 (E.D.N.Y. 1963).
[9] Poulas v. New Hampshire, 345 U.S. 395, 405 (1953).
[10] N.Y. EDUC. LAW §§ 3201-29.
[11] School Dist. of Abington Township v. Schempp, *supra* note 3, at 299 (concurring opinion of Brennan, J.); *cf.* Sherbert v. Verner, 374 U.S. 398, 399 n.1 (1963).
[12] Stein v. Oshinsky, *supra* note 4, at 1002. *But see* Sherbert v. Verner, 374 U.S. 398 (1963).
[13] Stein v. Oshinsky, *supra* note 4, at 1002; see Everson v. Board of Educ., 330 U.S. 1, 16-18 (1947).
[14] The decision of the court to direct the verdict was to bring the matter to a close in the most expedient way. Stein v. Oshinsky, *supra* note 4, at 1002.
[15] See N.Y. Times, Dec. 14, 1965, p. 1, col. 6.
[16] *Ibid.*

ing the action of the Court, indicated that the decision would probably rejuvenate advocates of a constitutional amendment to permit school prayers.[17] In contrast, others, like the New York branch of the American Civil Liberties Union cheered the decision, but noted that "the battle against school prayers is not over yet."[18] Though one may debate the desirability of reciting a prayer in the public schools, it is unfortunate that the Supreme Court of the United States did not feel compelled to elaborate on one of the most important and controversial issues of our time.

The Dilemma of the Out-of-State Attorney

In the recently decided case of *Spivak v. Sachs*,[1] the New York Court of Appeals dismissed an action by a California attorney to recover for legal services rendered to a New York resident in the State of New York. The problems resulting from the interstate practice of law were discussed in the Spring 1965 issue of *The Catholic Lawyer*.[2] The decision reached by the Court of Appeals (by a vote of four-to-three) is at variance with the position adopted by the author of that comment.

The plaintiff-attorney in *Spivak* was licensed to practice law in California. The defendant-client, a resident of New York, retained the plaintiff to aid in her divorce litigation. After explaining to the defendant that he was not licensed to practice in New York and, consequently, could do no more than consult and advise, the plaintiff came to New York. He spent fourteen days here giving advice and performing similar legal services for the defendant. The defendant, subsequently, refused to pay the plaintiff's fee and the plaintiff sued. The Court of Appeals took the position that an out-of-state attorney is nothing more than a layman and cannot indulge in legal services without being licensed in New York. The plaintiff being in violation of the penal statutes which forbid the practice of law in New York by any person not licensed by the state,[3] was found not entitled to collect the reasonable value of his services.

The result in this case underscores the conservative approach to the problem of the practice of law in foreign jurisdictions. The penal statutes forbidding this type of activity are not directed at out-of-state attorneys in particular, but rather, are aimed at the person who practices law without being certified. However, the courts apply these statutes to both laymen and out-of-state attorneys. This application does not seem justified in light of modern social and legal developments.

The defendant in *Spivak* desired a specialist in the divorce area. She solicited the plaintiff's services, even though he took great care to make her aware that he was not licensed in New York. There was no question of a holding out or

[17] *Id.* at p. 29, col. 1.

[18] *Ibid.*

[1] 16 N.Y.2d 163, 211 N.E.2d 329, 263 N.Y.S.2d 953 (1965).

[2] Comment, *The Attorney's Dilemma—Practice of Law in a Foreign State*, 11 CATHOLIC LAW. 145 (1965).

[3] N.Y. PEN. LAW §§ 270, 271.

fraudulent representation on his part. While a foreign attorney is not amenable to the supervision and control that the New York courts have over a New York attorney, the defendant in *Spivak* was granted a degree of protection from dereliction of duty on the part of the attorney by the recent "long arm" statutes which would appear to make the California attorney amenable to a malpractice suit in New York.[4]

[4] See, *e.g.*, CPLR 302(a).

The penal statutes that the Court relied upon in reaching its decision exist for the benefit and protection of the public, and not to protect the vested interests of New York attorneys. Their main thrust, it would seem, is aimed at the layman or out-of-state attorney who falsely represents that he is a certified New York attorney. They ought not to be applied to out-of-state attorneys who engage in some legal practice in New York at the request of a resident of the state who, for a variety of possible reasons, desires to employ him.

EVIDENCE

(*Continued*)

tence. Following this, the experts should submit written reports of their findings and then give oral testimony relative to their conclusions.

Although the general law of the Church demands that physicians, expert in the field of psychiatry, be engaged by the tribunal to evaluate available evidence, the judges are enjoined to evaluate their conclusions carefully. Where expert opinion is based on proven facts, it would be rash indeed for the judge to reject such findings. By the same token, if the experts have not logically and properly arrived at their conclusions from factual evidence surrounding the circumstances in a given case, it would likewise be gravely erroneous for the judge to accord such findings favorable acceptance. In nowise are experts to be considered co-judges. They are to be considered as expert witnesses, skilled in their particular profession, whose knowledge has been placed at the disposal of the tribunal.

Summing up this discussion, the following points may be made:

1. Marriage comes into being by the rational consent of the contracting parties;

2. Consent and, therefore, the validity of a marriage may be rendered invalid by mental illness;

3. The ability to give valid consent is couched in the phrase "due discretion proportionate to the marriage contract";

4. The focal point in all trials involving mental illness is the respondent's condition at the moment of the exchange of consent;

5. In cases of alleged invalidity of the marriage contract due to mental

illness, the sources of proof are found in documentary evidence, in the established presumptions of law and in the personal presumptions of the judges, in the sworn depositions of the plaintiff and the witnesses, and, finally, in the opinions of the psychiatric experts engaged by the tribunal.

ADVOCATE

(*Continued*)

simulate their consent. The more plausible and grave, even subjectively, the reason, the more incontestable will the arguments be in favor of nullity. The Advocate will find corroborating proofs in the moral standard of the person simulating consent; in his admission of simulation, particularly if made under oath and immediately or shortly after the marriage ceremony; in circumstances surrounding the case and pointing to simulation; and in the testimony of witnesses or documentary evidence confirming the claim of the parties. It is obvious that the entire process of investigation can be accomplished only by a prepared and totally dedicated mind.

Indeed, there is a great need for the entry of the lay civil lawyer into the field of ecclesiastical case law, either as an able assistant to priest-Advocates, or as the sole advisor to the parties. It may be objected that the introduction of civil lawyers into the tribunals will bring about an increase in the cost of the processes. This is undeniably true, for, when a client can afford it, an Advocate has the right not simply to token fees, but to a just remuneration in proportion to the importance, difficulty and length of the case. Even though the policy of gratuitous legal assistance is well grounded in this country, I am inclined to believe that the question of fees would be an obstacle only for a small segment of the people who approach the tribunal. The great majority of the petitioners will realize the importance, with respect to time and success, of having a qualified Advocate to assist them in a very personal and effective manner. For those who lack adequate means of support, the court itself could supply the Advocate with a reasonable subsidy taken from a special fund provided for by the diocese.

Whatever the type, range, and purpose of the activities of lay civil lawyers, I am convinced that their introduction into ecclesiastical courts would serve to upgrade, sharpen, and develop Church law and adapt it to modern day requirements. In his role as Advocate, the civil lawyer could find a challenging task, and could fulfill an apostolate for which the Church today has so much need.