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occasions. In *Yarborough v. The North Carolina Park Commission*¹⁸ it was decided that private property might be taken by *eminent domain* even for aesthetic purposes if for a public use. The court here is referring to the taking of land to create state parks, thereby preserving the scenic beauty of the state. It is doubtful that this case would support the taking of property on which there was a building which did not constitute a hazard to the public safety, health, morals or welfare, and selling that property to a third party for his private use. In *MacRae v. Fayetteville*,¹⁹ an attempt was made to enforce an ordinance prohibiting building a service station within 250 feet of a residence within the corporate limits of Fayetteville. The court held that "the law does not allow aesthetic taste to control private property, under the guise of police power."²⁰ The court in a later case, deciding that an ordinance restricting the height of walls in the city of Greensboro was valid, said: "[W]hile esthetic considerations are by no means controlling, it is not inappropriate to give some weight to them in determining the reasonableness of the law under consideration."²¹

The Court in allowing the police power to be used for aesthetic considerations seems to be leaving the door open to many abuses. This decision will undoubtedly lead to a great deal more litigation before it is finally determined, if ever, just what aesthetic considerations will be allowed.

PAUL B. GUTHERY, JR.

Constitutional Law—Validity of Adoption Statute—Requirements Concerning Religion of Child and Adoptive Parents

A recent Massachusetts case, *Petitions of Goldman*,¹ upheld the constitutional validity of a statute² which said that whenever practicable, the judge in making orders for adoption, "must give custody only to persons of the same religious faith as that of the child." In the prin-

¹⁸ 196 N. C. 284, 145 S. E. 563 (1928).

¹⁹ 198 N. C. 51, 150 S. E. 810 (1929).

²⁰ *Id.* at 54, 150 S. E. at 812.

²¹ *In re Appeal of Parker*, 214 N. C. 51, 57, 197 S. E. 706, 710 (1938); *appeal dismissed*, *Parker v. City of Greensboro*, N. C., 305 U. S. 568, 59 S. Ct. 150 (1938).

¹ — Mass. —, 121 N. E. 2d 843 (1954); *cert. denied*, 348 U. S. 942 (1955). This case might have been appealed to the Supreme Court pursuant to 62 STAT. 929 (1948), 28 U. S. C. § 1257 (1953).

² MASS. ANN. LAWS c. 210, § 5B (Supp. 1953): "In making orders for adoption, the judge when practicable must give custody only to persons of the same religious faith as that of the child. In the event that there is a dispute as to the religion of said child, its religion shall be deemed to be that of its mother.

"If the court, with due regard for the religion of the child, shall nevertheless grant the petition for adoption of a child proffered by a person or persons of a religious faith or persuasion other than that of the child, the court shall state the facts which impelled it to make such a disposition and such statement shall be made part of the minutes of the proceedings."

cipal case the lower court found that the petitioners, who were Jewish, were morally and financially qualified to bring up the twins, whose mother and "natural father" were Catholic. The court also found that there were many fine Catholic families in the area who had filed applications for adoption with the Catholic Charities Bureau. Therefore, the court affirmed the dismissal of the petitions on the grounds that it was practicable, within the meaning of the statute, to grant the custody of the children only to persons of the Catholic faith.

The subject matter of this note is confined largely to the constitutional aspects of this problem under the Constitution of the United States.³ It is now well settled law that the religious guaranties contained in the First Amendment⁴ are incorporated into the Fourteenth Amendment.⁵

The court in the *Goldman* case held that the statute in question did not effect an establishment of a religion as all religions were treated alike, no sect was subordinated to another, no burden was placed on any religion for the maintenance of another, nor was the exercise of religion required. To the argument that the statute interfered with the mother's constitutional right to determine her children's religion⁶ the court said: "she seems to have consented rather than commanded and seems to have 'been interested only that the babies were in a good home' . . ." and concluded that there was clearly no interference with the mother's wish so long as she retained her status as a parent.

It is a well recognized principle that parents have a fundamental right to rear their children in a particular religious faith.⁷ However, there are certain limitations on the free exercise of religion in this area. Thus where a child distributed religious literature in violation of a child labor statute,⁸ where a father sent his child to a private school which had no secular instruction,⁹ or where a parent, for religious

³ See Note, 54 *COL. L. REV.* 376 (1954) for a thorough and detailed analysis of the cases and statutes relating to religion as a factor in adoption, guardianship and custody.

⁴ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U. S. CONST. AMEND. I.

⁵ "Nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U. S. CONST. AMEND. XIV, § 1; *Hamilton v. Regents*, 293 U. S. 245 (1934).

⁶ *Petitions of Goldman*, — Mass. —, —, 121 N. E. 2d 843, 846 (1954). The children were born in a hospital from which the petitioners took them. The mother of the twins never saw the petitioners, but she knew they were Jewish. The mother gave her written consent to the adoption prayed for.

⁷ See, e.g., *Prince v. Massachusetts*, 321 U. S. 158, 167 (1943); *Pierce v. Society of Sisters*, 268 U. S. 510, 534 (1925); *Lewis v. Spaulding*, 193 Misc. 857, 85 N.Y.S. 2d, 682, 690 (Sup. Ct. 1948).

⁸ *Prince v. Massachusetts*, 321 U. S. 158 (1943).

⁹ *Shapiro v. Dorin*, 199 Misc. 643, 99 N. Y. S. 2d 830 (Dom. Rel. 1950). The only subjects taught to the children were the Bible, the Talmud, and elementary Jewish law.

reasons, refused to provide his child with medical necessities,¹⁰ the states have intervened to protect the child's welfare.

In the foregoing cases, the court felt that state intervention was necessary to protect the child's welfare. It is submitted that in the instant case, the mother's consent to the adoption of the twins by persons of a different religious faith was not the type of parental action which so affected the children's welfare as to warrant the intervention by the state under its police power.¹¹

The second aspect of this problem deals with the "establishment of religion" clause of the First Amendment which the Supreme Court has said means at least this:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which will aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."¹²

Thus, a state may not permit religious teachers of various faiths to use its classrooms, during school hours, to teach religion to children who are compelled by law to attend school;¹³ nor may the state condition probation of a delinquent child on church attendance,¹⁴ because "the First Amendment has erected a wall between Church and State which must be kept high and impregnable."¹⁵

However, government need not be hostile to religion. Thus, it has been held constitutional for a state to reimburse parents of public, private, and parochial school children for bus transportation to and from school;¹⁶ to release children from public school to attend religious in-

¹⁰ *People v. Pierce*, 176 N. Y. 201, 68 N. E. 243 (1903) (criminal prosecution against a member of the Christian Science faith for not providing necessary medical treatment of his minor daughter).

¹¹ See PFEFFER, *CHURCH, STATE AND FREEDOM* 587 (Boston: Beacon Press, 1953).

¹² *Everson v. Board of Education*, 330 U. S. 1, 15 (1946).

¹³ *McCullum v. Board of Education*, 333 U. S. 203 (1948).

¹⁴ *Jones v. Commonwealth*, 185 Va. 355, 38 S. E. 2d 444 (1946).

¹⁵ *McCullum v. Board of Education*, 333 U. S. 203, 211 (1948).

¹⁶ *Everson v. Board of Education*, 330 U. S. 1 (1946). The Court held that the statute did no more than to provide a program for getting all children, regardless of religion, safely to and from schools.

structions in their various faiths off school property;¹⁷ and to permit the reading of verses from the Old Testament and the reciting of the Lord's Prayer to public school children for the purpose of teaching them piety, justice, and truth.¹⁸

It is submitted that religion should be one of the factors taken into consideration in the determination of whether a particular person may adopt a particular child. If the child has reached the age where he has become aware of religion and religious differences, his welfare, which should be protected by the state, demands that a conflicting religious doctrine not be imposed by adoption. Clearly this would not effect the establishment of a religion, because all religions would be treated alike. However, if, as in the *Goldman* case, the child has not reached the age of religious awareness, it would seem that little or no emphasis should be placed on the religious aspect of the child's welfare.¹⁹ In the principal case the court held that even though the children had not been baptized²⁰ and were too young to choose a religion, their religion was Catholic.²¹

¹⁷ *Zorach v. Clauson*, 343 U. S. 306 (1952); *Lewis v. Spaulding*, 193 Misc. 857, 85 N. Y. S. 2d 682 (Sup. Ct. 1948).

¹⁸ *Doremus v. Board of Education*, 7 N.J. Super. 442, 71 A. 2d 732 (1950), *aff'd*, 5 N. J. 435, 75 A. 2d 880 (1950), *appeal dismissed*, 342 U. S. 429 (1952).

¹⁹ In the *Goldman* case the court said: "The petitioners have dark complexions and dark hair. The twins are blond, with large blue eyes and flaxen hair." *Petitions of Goldman*, — Mass. —, —, 121 N. E. 2d. 843, 844 (1954). It might be argued that because of the difference in physical characteristics, it would be in the best interest of the children that they be adopted by parents with similar characteristics. On the other hand, there is a good argument against taking the twins away from the petitioners after the twins had been in the petitioners' home for three years.

²⁰ "A custom has grown up that where a child is once baptized or entered in any prescribed manner into a church, that the child is to be treated as belonging to that church so long as he is a minor. There is no foundation in law for such a position. The English cases have held that it is for the father to determine the religious education of a child during his minority. American law generally * * * recognizes both parents as joint guardians of their children. Where they agree as to the religious education of their children, no question arises, even if such agreement includes a change of adherence from one religion to another during the child's minority. * * * The rights of parents in regard to their minor children has long been recognized, but there is no right in any church to compel continued adherence. Where the parents disagree as to the religious education of their children, the court must consider not only whether there was an admission of the child to any church, but the entire situation. It is important to discover whether there was an antenuptial agreement, whether the child's admission to the church was with the knowledge and consent of both parents, the extent to which the child has received any form of religious education, whether the child has reached years of discretion and, if so, what preference the child feels * * * and finally in which environment the particular child is most likely to develop fully and happily." *In re Vardinakis*, 160 Misc. 13, 289 N. Y. Supp. 355, 359 (1936).

The stress placed upon baptism raises a possible constitutional objection in that it tends to "favor claims of custody of children by adherents of those religions in which faith is determined by baptism as compared with those which view the child's faith as purely derivative until the child is able to understand and accept church doctrines." Note, 65 HARV. L. REV. 694, 695 (1952).

²¹ It will be recalled that the statute in question said: "In the event that there is a *dispute* as to the religion of the child, its religion shall be deemed to be that

In conclusion, it is submitted that the statute in question does not violate the constitutional prohibition against the establishment of religion. However, it would seem that, in the instant case, the statute interferes with the mother's constitutional right to determine her children's religion and that the state should not be allowed to assert that the welfare of the twins necessitated state interference with that religious liberty.

HERBERT S. FALK, JR.

Contempt of Court—Failure to Comply With Court Order to Produce Properties—Inability as Defense

When an individual has failed to comply with a court order requiring him to produce properties, and the court seeks to hold him in contempt, will his professed inability to obey the court order purge him of this contempt? Such a case was recently before the North Carolina Supreme Court, involving an appellant who had been ordered to produce the records of his grocery business. He explained that he was unable to obey the court order since the only records he ever prepared were income tax returns which he no longer possessed, and cash register receipts which he threw away after rats had gnawed them. The Supreme Court held the appellant had been improperly cited for contempt since his uncontradicted testimony showed that he was unable to comply with the trial court's order.¹

It is generally held that a contemner's inability to comply with a court order is sufficient to purge him of contempt, if he is without fault, but it is often added that the contemner's inability is no defense where caused by his own "contumacious" acts.² The general rule seems quite

of its mother." (Emphasis added) The court said: "We do not attempt to discuss the philosophy underlying the concept that a child too young to understand any religion, even imperfectly, nevertheless may have a religion. We have no doubt that the statute was intended to apply to such children, and that in such instances the words 'religious faith * * * of the child' mean the religious faith of the parents, or in case of 'dispute' the faith of the mother." *Petitions of Goldman*, — Mass. —, —, 121 N. E. 2d 843, 846 (1954).

¹ *Galyon v. Stutts*, 241 N. C. 120, 84 S. E. 2d 822 (1954). This able opinion by Mr. Justice Johnson, after defining direct and indirect criminal and civil contempts, restates the necessity of an order to show cause in all contempt proceedings except those for direct criminal contempts.

² *Tucker v. Commonwealth ex rel. Attorney General*, 299 Ky. 820, 827, 187 S. W. 2d 291, 294 (1945): "Defendants [contemnors] are correct and are sustained by authorities cited that the inability of the contemner, without fault on his own part, to obey the order holding him in contempt is sufficient to purge him of the contempt charged. 12 Am. Jur. § 72, p. 438 (1938); *Rudd v. Rudd*, 184 Ky. 400, 214 S. W. 791; *Allen v. Woodward*, 111 Tex. 457, 239 S. W. 602, 22 A. L. R. 1253. But where the contemner 'has voluntarily or contumaciously brought on himself disability to obey an order or decree, he cannot avail himself of a plea of inability to obey as a defense to a charge of contempt.'" *Accord*: McCormick