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Notes on Recent Cases

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BILLS AND NOTES—Consideration an essential. Extension giving holder no new rights void. Action by James Foote, as payee, on a note against Della Foote and George Foote, as makers; the Larimer County Bank & Trust Company, as administrator of the estate of George Foote, being substituted for him as defendant, while the suit was pending. The makers promised to pay $28,000 without interest on or before two years after date. The note contained a provision that the unpaid principal shall bear interest "at six per cent per annum from maturity until paid." $3,300 was paid on the principal, and after maturity there was paid on account of interest the sum of $500. Then the note was extended by the following indorsement:

"7-32-23. This note extended to August 16, 1928, at the same rate of interest and same conditions."

The court held, that the plaintiff's contention that the extension agreement was without consideration and void was correct, because the plaintiff was being promised that to which he was already entitled. The payee must receive some benefit or the makers suffer some detriment in order to furnish consideration for the extension; hence the extension was not binding. *Foote v. Larimer County Bank & Trust Co. et al.* Supreme Court of Colorado, 259 Pac. 1031.

—*Albert T. Frantz.*

CONSTITUTIONAL LAW—Exclusion of Chinese Boy from White School—Schools and School Districts—Separation of Races in Schools. The Supreme Court of Mississippi, in the recent case of *Bond, State Superintendent of Education, v. Tij Fung, et al.,* 114 So. 332, was confronted with the problem of designating the proper niche a member of the Mongolian race should occupy in the public school system of Mississippi under the constitution and laws of that state. Joe Tij Fung, an adult, and Joe Tin Lun, a minor, petitioned the Circuit Court for a writ of mandamus compelling the state superintendent of education and the teachers of the Dublin consolidated public school to allow Tin Lun to register at said school. Tin Lun was a native-born citizen of

China and had been attending said school, but the board of trustees had ordered his withdrawal solely on the ground that he was not a member of the Caucasian race. The Circuit Court granted the writ and defendant appealed to the Supreme Court of the state, where the order of the Circuit Court was reversed and judgment entered for the defendant.

Petitioner contended that the action of the state superintendent of education in excluding him from the school had the effect of depriving him of a valuable property right, contrary to the provisions of the Fourteenth Amendment to the United States Constitution. He further contended that such action was in violation of the Burlingame Treaty with China, whereby it is agreed that Chinese subjects shall enjoy all the privileges of public educational institutions under the government of the United States which are enjoyed in this country by the citizens or subjects of the most favored nation. This latter contention the Supreme Court disposed of by holding that there was no cause for complaint on this ground, since petitioner was given the same rights as we extend to some of our own citizens. He was given the privilege of attending the colored schools, which are established and maintained in the same manner and offer substantially the same advantages as the schools conducted by the state for white persons. Under the laws of this country, negroes born here are American citizens and alien negroes are not excluded by our naturalization laws. Petitioner will not therefore be heard to complain that he has been wronged in that he has not been accorded the privileges given to the subjects of the most favored nation in our schools, when he has been extended the same advantages which we accord our citizens.

The decision in this case, however, was not without its advance shadow on the horizon. To begin with, the federal courts as early as 1878 declared that a Mongolian is not included within the term "white person", and that that term refers only to members of the Caucasian race. In *re Ah Yup, 5 Sawy. 155,* Fed. Cas. No. 104. Then, in *Chrisman et al. v. Brookhaven,* 70 Mississippi 477, 12 So. 458, the Mississippi Supreme Court held that a city has the right to make separate provision for the races in the matter of schools and also the right to levy taxes to support a school established solely for white persons. Next we find a

decision of the same court that the right to attend the public schools is a legal right, enforceable in the courts, and that mandamus is the proper remedy for the enforcement of such right. *Moreau v. Grandich,* 114 Mississippi 560, 75 So. 434. This latter case sustains petitioner in his choice of action and in his contention that a valuable property right is involved. His cause, however, is dealt a fatal blow by the more recent case of *Rice et al. v. Gong Lum et al.,* 139 Mississippi 760, 104 So. 105 (1925). It was there held that "The Legislature is not compelled to provide separate schools for each of the colored races, and, unless it does provide such schools and provide for segregation of the other races, such races are entitled to have the benefit of the colored public schools." The court further declared that the purpose of the segregation of the races in the schools is to preserve the integrity and purity of the white race, and that the purpose of the constitution was to provide schools for the white or Caucasian race to which no other race could be admitted.

—*Henry Hasley.*

CONSTITUTIONAL LAW—Power of a commission to refuse to grant a license. This was an appeal by the defendant, (Industrial Commission), from a judgment of the district court directing the issuance of a peremptory writ of mandamus commanding them to issue to the plaintiff a license to conduct an employment agency in the city of Minneapolis. (*McQueen v. Williams et al.,* 216 N. W. 323.) The Statute provided in substance, that upon the filing of an application with the commission they should cause an investigation to be made as to the character of the applicant, or the person who is to have general management of the office, and as to the general location of the offices. The application shall be rejected if the commission shall find that any of the persons named are not of good moral character and business integrity, or if there be any good and sufficient reason within the meaning and purpose of the act for rejection such application.

The plaintiff made application in due form for a license to operate a class one employment agency; that he was of good moral character and business integrity and had complied with the requirements of the act. The commission rejected the ap-

plication, for the reason that twenty-one class one agencies, already licensed, were located within a radius of five hundred feet from the proposed location of the plaintiff; that no public necessity existed for the additional agency; and that an additional agency would lead to an increased competition and unwarranted representations to attract employees and induce them to change their employment, and to the gathering of disorderly crowds.

The Supreme Court of Minnesota held that the business being legitimate and beneficial, a license cannot be refused arbitrarily to one who is within the requirements of the statute and and has complied fully therewith. (See also *Adams v. Tanner,* 244 U. S. 590, Ann. Cas. 1917 D, 973).

The commission apparently acted upon the theory that, "if there is any good and sufficient reason within the meaning of the statute", that they might reject an application for any reason which they deemed sufficient. If the act vested such power in the commission its validity would be extremely doubtful. The purpose of the act was to protect those dealing with such agencies from dishonesty, overreaching and baneful influences, and to secure to those to whom employment is promised legitimate employment of the character and under the conditions represented.

Whether the legislature can limit the number of such agencies is not necessary to determine, for the act contains nothing indicating any intention to do so, or any intention to confer the power to do so on the commission. The commission plainly assumed to exercise a power which it did not possess. It cannot reject an application merely because, in its opinion, it has already licensed a sufficient number of such agencies to serve the public needs. Such a power vested in a commission would result in the denial, to an individual, the right to engage in a legitimate business for any cause which the commission deemed sufficient.

—*Edward P. McGuire.*

CEMETERIES—Constructive notice as to purchase of lot—Dead Bodies—Right to be undisturbed. On November 16, 1916, Charlie King purchased from the trustees of Wright Township, Wayne County, Iowa, lot 165 in the cemetery in question. The

deed was not acknowledged or recorded in the proper manner, a stub in the record book of the county clerk being the only record of the sale. In 1924 Cynthia Elder purchased the lot and buried the body of her husband there. King brought an action in equity against the township trustees and Cynthia Elder to quiet title and to require the body of John Elder to be removed. *King v. Frame et al.,* Iowa, December 13, 1927.

The court held that King's deed to the lot not being recorded in the proper manner was not constructive notice of the sale to Cynthia Elder, and that as King had made no improvements on the lot nor had buried anyone there the defendant purchased without any notice whatsoever. A proper appreciation of the duty owed to the dead, and a due regard for the feelings of friends who survive, and the promotion of public health and welfare, all require that bodies of the dead should not be exhumed, except under circumstances of extreme exigency. The court concluded that the equities of the case were with the defendant, and that the body should be permitted to "rest in peace". All concurred.

—*William Coyne.*

CRIMINAL LAW—Attempt to Commit Robbery in First Degree. Charles Rizzo and three others were convicted of an attempt to commit robbery in the first degree. From this conviction the defendant Rizzo alone appeals. *People v. Rizzo et al.,* Court of Appeals of New York, Nov. 22, 1927.

It appears that Rizzo and his cohorts planned to rob the messenger of the United Lathing Company of a pay roll estimated as worth about $1,200. With that idea in mind the men went to the bank where they thought the messenger would get the money. However, neither the messenger, Rao, or another messenger, Previti, were at the place. The police then arrested the would-be robbers. That they intended to rob the messenger was clear, but does their conduct constitute an attempt at first degree robbery? In *People v. Mills,* (178 New York 274). it was held that a felonious intent alone is not enough. There must be some overt act which would if carried out effect the result intended unless prevented by some extraneous cause. In *Hyde v. United States* (225 U. S. 347.) it was held that there must be dangerous promixity to success.

So then in this case the defendant could not be convicted of an attempt to commit robbery, when the fact was that it would have been impossible for him to do so, since the means for furthering his end were not presented. A man could not be convicted of an attempt to murder another if he armed himself and then could not find his intended victim.

The judgment of the court below was therefore reversed and a new trial was ordered. As Rizzo was found not guilty of the offense the others who were tried with him were not guilty also. But they have not appealed. The court feels that the others could have been convicted of some other penal offense and for that reason recommends that the district attorney of Bronx bring their case to the attention of the governor to be dealt with in a manner as seems proper in light of this opinion.

—*John P. Berscheid.*

CRIMINAL LAW—Evidence obtained without producing search warrant held inadmissible. Appellant was convicted for the unlawful possession of intoxicating liquor for the purpose of sale and was sentenced to one year's confinement in the Penitentiary. *Field v. State,* Court of Criminal Appeals of Texas 299 S. W. 258 (1927).

The appellant's bills of exception complain that the evidence was received under these circumstances. The officers went to appellant's place of business where he conducted a cold drink and sandwich stand, and the officers testified that they had a search warrant at the time but they did not know where it was. Upon testament made by the district attorney that the state was not relying upon the search-warrant, the appellant objected to the admission of any testimony as to what was done and as to what was found in his place of business by said officers in the course of their search, because the search warrant had not been produced. These objections of the appellant were overruled and the officers were permitted to testify that in the said place of business they found sixteen bottles of beer and several empty bottles.

The court held that the overruling of the appellant's objections was error under Article four of the Texas Code of Criminal Procedure, which prescribes that evidence obtained in searching

a place of business for intoxicating liquor without producing a search warrant is inadmissible. In accord see *Gorman v. State,* 296 S. W. 533; *Stokes v. State,* 296 S. W. 1108; *Chapin v. State,* 296 S. W. 1095.

The court also permitted the officers to testify that they found a drunken man lying down in defendant's place of business. The appellant, testifying in his own behalf, offered to prove that the man found drunk in his place of business had stated to the appellant that he was too drunk to drive his car, and that he wanted to lie down and sober up. This was offered by way of explaining the presence of the drunken man on the premises. This offer of proof by the appellant was objected to and excluded.

The Court of Criminal Appeals held that it was error to exclude this testimony of appellant's. The reason given by the Texas Court is, that if the state had the right to prove the presence of the drunken man on the appellant's premises as an incriminating fact, surely the appellant had the right to explain it. This, by way of showing that the presence of the said drunken man was in no way connected with the supposed unlawful possession of intoxicants by the appellant.

There was no error in receiving evidence of the search of a field near appellant's place of business but not occupied or claimed by him. (294 S. W. 555.)

—*Ivan J. LeBlanc.*

EVIDENCE—Admission of liquor seized by State Troopers in a prosecution by the Federal Government. The defendants, Gambino and Lima, were arrested by two New York state troopers, near the Canadian border; their automobile (while occupied by Gambino and therefore within the protection accorded to his person) was searched without a warrant, and intoxicating liquor found therein was seized. They, the liquor and other property taken were immediately turned over to a federal deputy collector of customs for prosecution in the federal court for northern New York. There the defendants were indicted for conspiracy to import and transport liquor in violation of the National Prohibition Act. They immediately moved for the suppression of the liquor as evidence and for its return, on the ground that the ar-

rest, the search, and the seizure were without a warrant and without probable cause, in violation of the fourth, fifth and sixth Amendments of the federal Constitution. The motion was denied, the evidence introduced at the trial, and the defendants were convicted and on appeal to the Circuit Court of Appeals the judgment of conviction was affirmed. In the above judgments neither court rendered an opinion and this Court granted a writ of certiorari. *Gambino et al v. United States,* (48 Supreme Court Rep. 137).

The government contended that the evidence was admissible because there was probable cause (*Carrol v. United States,* 267 U. S. 132), and also because it was not shown that the state troopers were at the time of the arrest, search, and seizure, agents of the United States. The defendants contended that there was not probable cause, and the state troopers are to be deemed agents of the United States because section 26, title 2, of the National Prohibition Act imposes the duty of arrest and seizure where liquor is being illegally transported, not only upon the Commissioner of Internal Revenue, his assistants and inspectors, but also upon "any officer of the law".

The Mullan-Gage Law, the state prohibition act, had been repealed in New York and in the memorandum filed by the Governor approving the act which repealed that law, he declared that all peace officers, thus including state troopers, are required to aid in the enforcement of federal law "with as much force and vigor as they would enforce any state law or local ordinance", and the repeal of the Mullan-Gage Law should make no difference in their action, except that thereafter the peace officers must take the offender to the federal court for prosecution. Aid so given was accepted and acted on by the federal officials.

The court properly held that the admission in evidence of the liquor wrongfully seized violated rights of the defendants guaranteed by the fourth and fifth Amendments. The wrongful arrest, search, and seizure were made solely on behalf of the United States. The evidence so secured was the foundation for the prosecution and supplied the only evidence of guilt. While the troopers were not shown to have acted under the direction of federal officials in making the arrest, nevertheless the defend-

ants rights under the Constitution were as effectively invaded (*Silverhorne v. United States,* 251 U. S. 385).

While the main decision in this case may be said to be in harmony with our American ideal of security from unreasonable searches and seizures, it nevertheless cites some dangerous precedent, which if followed will lead to a total destruction of individual liberty. The only apparent reason for the rejection of the evidence here sought to be introduced, was the fact that the state troopers were acting for the federal government. Had they been acting for the state of New York the evidence would have been admissible in a Federal Court. (*Weeks v. United States,* 267 U. S. 383, *Center v. United States,* 267 U. S. 575, *Dodge v. United States,* 272 U. S. 530, and *Burdeau v. McDowell,* 256 U. S. 465). In all of the above cited cases the evidence sought to be introduced was acquired by state officials who were not at the time of the arrests and unlawful seizures, acting for the Federal Government. The evidence thus obtained, while not admissible in the state courts was allowed to be used in federal courts and held to be constitutional. The reason for such abuse of the individuals rights was not pointed out by the court and there appears to be no logical reason for such a violation of the Constitution of the United States. The only apparent reason is that the Supreme Court of the United States has resorted to another fiction in an effort to bring about the enforcement of the National Prohibition Amendment. According to this decision, in a state where local prohibition acts have not been abolished, the state might use evidence illegally obtained by federal officials, in a prosecution under the state law and in the state courts. I know of no other criminal cases in which courts have gone so far as to deny protection from unlawful searches and seizures, but if courts in liquor cases are allowed to establish such dangerous precedent there will be no end to the destruction of rights protected by our constitution.

—*Edward P. McGuire.*

FALSE PRETENSES—Auto Finance. The Central States Finance Corporation of Chicago had made an agreement with the plaintiff in error, to discount customer's notes taken by Snyder who was an automobile salesman. The plaintiff in

error had a special form of judgment note, application for insurance and purchaser's statement, and dealer's statement and recommendation. These were supplied to the purchasers when buying a car. It was agreed that the plaintiff in error should draw a sight draft on the Central States Finance Corporation, when a note was to be discounted. This draft to accompany the note, purchaser's statement and dealer's recommendation. (*People v. Snyder,* Supreme Court of Illinois, Oct. 22, 1927.)

A number of transactions were carried out between Snyder and the finance corporation which were regular. On November 19, 1924, the plaintiff in error drew a sight draft on the corporation, accompaning it with a note purporting to be signed by Charles W. Holmes. This note was proved to be fictitious. It was later found out that Snyder had defrauded the Corporation in three other transactions.

Snyder was prosecuted under an indictment charging him with obtaining money and credit from the finance corporation by means of a confidence game. He was tried and found guilty of the charge. The plaintiff in error now brings writ of error.

The court held that the statute operating against games did not apply to Snyder. To be guilty of a confidence game one must have obtained the confidence of the swindled person through some false representation or device. (319 Ill., 168; 310 Ill., 613.) But in Snyder's case the money was not obtained through any means such as the above, Snyder had obtained the confidence of the Finance Corporation through honest dealings insofar as they were regular business practices. Thus a conviction on a confidence game charge would not stand. The plaintiff in error might be charged with obtaining money under false pretenses or some other statute, but not under the statute under which he was convicted. The judgment of the court below was therefore reversed.

—*John P. Berscheid.*

INSURANCE—State's power to refuse non-resident insurance company licence to do business in state—Interstate Commerce and Insurance Companies. The petitioners are receivers of the Employers Mutual Insurance and Service Company, a Maryland corporation, and they sued the defendants, a Minn-

esota corporation, for the amount of an assessment made upon the insured, pursuant to a policy for "strike insurance" issued by the company.

The defendants contended that the Insurance Company (hence its receivers) cannot maintain this action in a court of Minnesota, because they did not, before writing the policy, comply with the Minnesota law relating to foreign insurance companies doing business within the state. *Bothwell et al v. Buckbee-Mears Co.,* 48 Sup. Ct. Rep. 124.

The statutory requirements were not met with, and the contract was effected by the company sending a representative into the state, who solicited the insurance, defendant filling out the application blank in Minnesota and sending it together with a check for the first premium to the company's office in Maryland. Upon receipt of this letter the policy was signed by the company in Maryland and mailed to the defendant.

Justice Brandeis, in affirming the state's approval of the defendant's stand, said: "Such insurance contract made by a corporation domiciled in another state, is not 'interstate commerce'." *New York Life Ins. Co. v. Deer Lodge County,* 231 U. S. 95, *National Union Fire Ins. Co. v. Wanberg,* 260 U. S. 71. Hence Minnesota had the power to prohibit the Employers Company from doing business within the state without first complying with its laws, and could refuse the aid of its courts in enforcing a contract which involved the violation of its laws. *Chattanooga etc., v Denson,* 189 U. S. 408, *Interstate Amusement Co. v. Albert,* 239 U. S. 560, *Mundy v. Wisconsin Trust Co.,* 252 U. S. 499.

"The contract was not a later independent act, but grew out of the illegal solicitation, and was part of the transaction, consequently it was tainted with illegality. Because of such taint, the state would have the right to refuse to enforce it although made in Maryland. *Delamater v. South Dakota,* 205 U. S. 93 *American Fire Ins. Co., v. King Lumber Co.,* 250 U. S. 2.

"But the contract in this case by its very terms was obnoxious to the Minnesota Law viz:—The insurance company agreed to defend, on behalf of the insured, any suits or legal proceedings

against the insured as a result of strikes etc. No place of payment for losses was specified, therefore by common law, it would be in Minnesota. *Penn etc., Ins. Co. v. Meyer,* 25 S. Ct. 485. The insurance company reserved the right to inspect the insured's factory, books of account, papers of the business, and to interrogate persons connected with the company. All appraisals in adjustment of losses were to be done in Minnesota. Consequently all these activities of the insurance company, within State of Minnesota, were prohibited by a valid statute.

"Consequently, by the universal rule of law, a state may refuse to enforce a contract which provides for doing within it an act prohibited by its laws.

"The receivers contended that since the contract was made in Maryland and was valid there, it was not subject to the prohibitions of the Minnesota law, and Minnesota could not refuse the aid of its courts from enforcing it."

They based this contention principally on *Allgeyer v. Louisiana,* 165 U. S. 578, one of the leading cases on insurance contracts. At first blush one might think that this case is in point, but upon investigation the discrepancy is plain. In the Allgeyer Case *supra* A made a contract of insurance with the B company, in New York, insuring goods in Louisiana. The contract was valid in New York. By the terms of the policy, A was to mail certain notifications to the B company, such notices being condition precedent to attaching of the risk. A statute of Louisiana prohibited such acts in that state, to effect insurance on property within the state, by any insurance company not complying with the laws of Louisiana. The B company had not complied with these laws.

Juistice Peckham said: "We think that statute is a violation of the fourteenth amendment and that it deprives the defendants of their liberty without due process. The 'liberty' mentioned in that amendment means, not only the right of the citizen to be free from the physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or

avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

The mere fact that a citizen may be within the limits of a particular state does not prevent his making a contract outside its limits while he himself remains within it. *Millken v. Pratt* 28 Am. Rep. 241, *Tilden v. Blair* 22 L. Ed. 632.

The giving of the notice is a mere collateral matter. It is not the contract itself, but is an act performed pursuant to a valid contract, which the state had no right or jurisdiction to prevent its citizens from making outside the limits of the state.

The Allgeyer Case holds that a state may not prohibit a citizen or a resident from doing an act in another state. The Bothwell case does not prohibit or tend to prohibit any act outside of the State of Minnesota.

Under the Allgeyer case the parties had the constitutional right to make this contract in Maryland, despite the Minnesota prohibition. But the company had no constitutional right to solicit the insurance in Minnesota.

In the Allgeyer case, the sending of the notification was merely collateral. Nothing had been done, or was to be done, that would cause the foreign company to come into the state and carry on any activities. The entire transaction took place outside of the state.

In the Bothwell case the court is merely protecting a sovereign right. They do not prohibit or punish the acts. But the court says, "Unless you comply with our requirements you cannot expect the aid of our courts." The company violated the law of the state in solicitation, and in carrying out the policy would continue to violate the law; it is not logical to suppose that after this violation the courts of Minnesota would aid them.

The acts in the Allgeyer case grew out of the contract which was valid at its inception, but in the Bothwell case the contract was a part of the illegal solicitation and furthermore contemplated still further illegal acts in the state of Minnesota.

In the Allgeyer case the "liberty" referred to, "Is liberty of natural, not artificial persons". And as said by Justice Brandeis

in a previous case: "A state may not, except in the reasonable exercise of the police power, impair the freedom of contract of a citizen, but it can prevent the foreign insurers from sheltering themselves under his freedom."

—*E. F. McClarnon.*

MASTER AND SERVANT—Workman's Compensation Act—Incident of Vocation. James H. Norris was killed while employed in unloading cans of milk from railway cars placed in the yard of his employer, the New York Central Railroad Company.

On the night of October first, 1925, the workman, Norris, was assigned to unload milk cans from a car placed on a railway track just north of one of the railways called A, and near the convergence of Eleventh Avenue. Norris came to work at about eleven o'clock at night and made his preliminary check up on the number of cans. He then proceeded to deliver cans on board a consignee's motor truck, making one delivery, and then followed a temporary lapse of time until the motor truck of the consignee would return. So at about one o'clock in the morning Norris was seen walking along roadway A, easterly toward Eleventh Avenue, when perhaps he was headed for the flag shanty in which to warm himself, or to go to the yard-master's toilet. He was struck by a motor truck at Eleventh Avenue where the two roadways converged, and he died as a result of the injury. Questions arose whether the State Industrial Board justly found, under the circumstances stated, that Norris was in the course of his employment when the motor truck ran him down, in spite of the fact that he was not actually at work at the time at the spot where he was usually employed.

This is a clear case of the doctrine under Workman's Compensation Acts relating to injuries following from acts which are merely incidental to the vocation. The incidental right of ceasing to work and of going to a comfort station is well recognized as being a natural part of the every day working world. The cases are quite unanimous on that proposition. See *North Carolina R. R. Co. v. Zachary,* 232 U. S. 248, where a locomotive engineer who was killed while temporarily going to his boarding

house situated nearby was held to be in the course of his employment, and which case cites additional cases following the rule.

When the courts follow the rule as laid down in the principal case, *Norris v. New York Cen. R. R. Co.*, 246 N. Y., 307, 158 N. E., 879, then justice to the working man and his family will be accomplished to the fullest extent; but for the few cases which go to the contrary, the injustice is most apparent.

—*Seymour Weisberger.*

CONSTITUTIONAL LAW.—Religious Liberties—Reading of Bible in Public Schools. This case presents a question that has, of late years, been one of great interest in many of our largest cities, not only to constitutional lawyers, but to the general public as well. It attempts to determine just what religious exercises or instructions are within the prohibitions of the state constitution defining religious liberty, forbidding the use of the public moneys for religious teaching, or for the support of religious sects or societies, providing that no one should be compelled to attend, erect, or support any place of worship, or maintain any ministry against his consent, and that no preference shall be given to any religious establishment or place of worship. (*Kaplan v. Independent School District of Virignia et al.* Supreme Court of Minnesota, 1927. 214 N. W. 18.)

The first amendment to the Federal Constitution, prohibiting Congress from making any law respecting an establishment of religion or prohibiting the free exercise thereof, leaves the states free to enact such laws as they may deem proper in respect to religion, restrained only by limitations of the respective state constitutions. Thus it is a question of interpretation of the state constitution alone. But although the state constitutions on the subject are substantially the same, some of them precisely so, the courts are far from being in harmony on the point involved.

In the case before us, the school board of the independent school district of Virginia, Minnesota, was requested by the Ministerial Association of that city to place a copy of the Bible in every schoolroom, and to direct the superintendent to make suitable selections to be read daily, without note or comment, by the teacher in each room at the opening of school. This was

done, a copy of the King James version of the Bible being placed in each schoolroom. Where the parent of any child objected to such reading, or the pupil himself objected, he might leave the room. The parents of the children attending the school included Protestants, Roman Catholics, Christian Scientists, and Jews. The action was brought to enjoin the reading of these selections in the schools. The lower court found as conclusions of law that "the reading of the Bible in the public schools does not constitute any infringement of the plaintiff's constitutional rights, and is lawful," denying the injunction.

On appeal, the Supreme Court affirmed the decision, holding that it did not violate the following provisions of the Minnesota Constitution:

"The right of every man to worship God according to the dictates of his own conscience, shall never be infringed, nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any . . . . ministry against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship."

In 1895, and again in 1913, the Attorney General had given his opinion that the reading of the Bible in the public schools was unconstitutional. Section 2848, G. S. Minnesota, 1923, makes the opinions of the Attorney General as to school matters controlling law until overruled by the courts. In this case his opinion did not carry much weight.

In its opinion, the court quotes section 2906, G. S. 1923, which reads: "The teachers in all public schools shall give instructions in morals," etc., and then eloquently exclaims: "What is more natural than turning to that Book for moral precepts which for ages has been regarded by the majority of the peoples of the most civilized nations as the fountain of moral teachings?" But the court fails to distinguish between the teaching of general morals and the instilling of the basic principles of a particular religion. If there were but one bible, the court's reasoning would be more convincing. But "that Book" cannot be construed as a general term, and used as a "fountain of moral teachings" for the adherents of all religions. Practically every religion has its own Bible, and that, in most cases, radically different from

all others. True, the person reading the selection is ordered to make no note or comment, but how can that satisfy the religions that refuse to allow their members a private interpretation of their own Bible?

It is argued that the fact that a pupil may retire during the reading prevents it from violating anyone's rights. But, as said by Chief Justice Wilson in his able dissenting opinion: "To excuse some children is a distinct preference in favor of those who remain and is a discrimination against those who retire. The exclusion puts the child in a class by himself. It makes him religiously conspicuous. It subjects him to religious stigma. It may provoke odious epithets. His situation calls for courage."

The decision of the Minnesota Supreme Court in this connection represents the majority opinion. There is, however, an imposing array of authorities holding squarely the opposite. Probably the most important case holding the other way is that of *State ex rel. Weiss v. School District,* 76 Wis. 177, 44 N. W. 967. The Minnesota Constitution contains the same provisions as that of Wisconsin, and was presumably adopted because of Minnesota's territorial connection with that state. Nevertheless, Minnesota has placed upon the same provisions an interpretation directly contrary to that of Wisconsin. In the Wisconsin case it was held:

"The 'sectarian instruction' prohibited in the common schools by Const. art. 10, sect. 3, is instruction in the doctrine held by one or other of the various religious sects, and not by the rest; and hence the reading of the Bible in such schools comes within this prohibition, since each, with few exceptions, bases its peculiar doctrines upon some portion of the Bible, the reading of which tends to inculcate those doctrines. Such practice can receive no sanction from the fact that pupils are not compelled to remain in the school while it is being read, for the withdrawal of a portion of them at such time would tend to destroy the equality and uniformity of the pupils sought to be established and protected by the Constitution."

In *People ex rel. Ring v. Board of Education,* 245 Ill. 334, it was held that the reading of the Bible, singing of hymns, and repeating of the Lord's Prayer in a public school is violative of the Illinois Constitution guaranteeing the free exercise and enjoyment of religious profession and worship without discrimination.

Herold v. Parish Board School Directors, 136 La. 1034, 68 So. 116, held that the reading of the Bible, including the Old and New Testament, in public schools was a preference given to Christians, and a discrimination against Jews, and in violation of the Constitution.

In the case at hand, the dissenting opinion of the Chief Justice seems to be much sounder, both on principles of reason and of policy than the majority opinion. He bases it mainly on the Constitutional provision, "nor shall any control of or interference with the rights of conscience be permitted", which clause the majority opinion ignored altogether. Rights of conscience in religion he defines as "the privilege of resting in peace or contentment according to one's own judgment"—"a recognition of a right to religious complacency"—and argues to the effect that the individual may not only worship as his conscience dictates, but also has the right not to be annoyed by those things which directly interfere with what he genuinely believes to be right, even though they act upon only an incidental, but to his mind, an important angle of his worship.

We are inclined to agree with him when he says that to require Jewish children to read the New Testament, which extols Christ as the Messiah, is to tell them that their religious teachings at home are untrue, and a violation of the rights of conscience. We are inclined to agree with him when he calls it an interference with the rights of conscience to compel a Catholic child to read in school a Bible whose dedication assails the pope as "the man of sin", and accuses him of desiring to keep the people in ignorance and darkness. Certainly no one will dispute with him in this:

"The conclusion reached will necessarily be the source of much religious strife. It was the intention of the men who framed our Constitution to avoid all of the evils of religious controversies. There is no fight like a religious fight. The conclusion now reached offers a new qualification for members of local school boards and injects in school elections an element which will be detrimental to the general welfare. It is, indeed, the beginning of religion in our civil affairs. This decision will not settle anything. It merely adds fuel to the flames."

—*Thomas J. Griffin.*