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GRAFTON, WEST VIRGINIA

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To .... To ......
Reply ....
File ....

(2)

June 8, 1925.

Miss Lucille B. Milner,
American Civil Liberties Union,
New York City.

Dear Miss Milner:

I am enclosing a copy of an opinion recently given by Judge Warren B. Kittle, in the case of J.H.S.Barlow et al v Guy D. Haymond et al, now pending in the Circuit Court of Taylor County, West Virginia. This case promises to arouse a national interest equal to that of the Oregon School Law case, in which the Oregon Supreme Court recently rendered its verdict, and the"Scopes"case, now pending in Tennessee.

As secretary to the Circuit Clerk of Taylor County I have direct and immediate access to the records and proceedings in this case, and can send you verbatim reports from which either editorials or straight news articles could be written. I could also send you material for feature articles, that is, descriptions of the personnel of the Judge, Jury, Counsel, Plaintiffs Defendants or the Court Audiences.

The Counsel for the Plaintiff has suggested that I write to you, and contribute the enclosed material. If you are interested I should like to hear further from you, concerning this matter.

Yours very truly,

Mary M. Brydon

(Box 58)

CIRCUIT COURT

TAYLOR COUNTY, WEST VIRGINIA.

MAY TERM, 1925

J. H. S. Barlow, et al.,

vs///

Guy D. Haymond, et als.,
Members of the Board of
Education of Grafton
Independent School District.

O P I N I O N.

This is a proceeding for a removal from office under Section 7 of Chapter 7 of the Code of West Virginia, 1923, for what is alleged in the petition filed herein as a violation of Article 6 of the U. S. Constitution, and the first Amendment thereto, as well as a violation of Article 3, section 15, of the Constitution of the State of West Virginia; and also as violating Article 4, section 5 of the Constitution of this State, and seeking to remove Guy D. Haymond, Harry A. Abbott, Charles W. Steel, Charles O. King and E. F. Redinger, members of the Board of Education of Grafton Independent School District from office for "official misconduct", "incompetency" and "neglect of duty".

This proceeding is brought by J. H. S. Barlow, a citizen and tax-payer of the Independent School District of Grafton, Taylor County, West Virginia, and all other citizens and tax-payers of said District, and Madeline King, who sues by O. J. King, her father and next friend, of Elkins, in said State. The chief ground for removal as stated in the petition is that petitioner, Madeline King, who is of the Catholic faith, applied to the said Board of Education for the position of teacher in the commercial department of the High School of said

School District, and was, on or about the 27th day of June, 1924, notified that her application as such teacher would not be considered, because said Board had adopted the policy of not employing teachers of the Catholic faith in said School. The communication is dated June 27, 1924, and is in part as follows:

"My dear Miss King:

Your application blank has been received. For your benefit I feel that I must be frank in telling you that it has been the policy of the Board of Education for years not to employ teachers of Catholic Faith in the Grafton Public Schools. For this reason, we shall not be able to consider favorably your application,

Thanking you for your interest, I am,

Very truly yours.
H. A. Rice."

The petition avers that H. A. Rice is the Superintendent of the Grafton Public Schools, under the jurisdiction and control of said Board of Education, and wrote the foregoing letter in behalf of, and under the direction and order of said Board, and with their knowledge and consent. Said petition was duly recorded, and a summons containing a copy thereof, duly served on each of the aforesaid defendants. They each appeared, by counsel, in this proceeding and demur to said petition, and say that the same is not sufficient in law for the following reasons:

First. The two petitioners are improperly joined; one of them, it appears, has absolutely no interest in the support and administration of the Grafton Schools.

Second. The allegations of the petition do not show the Board of Education guilty of "official misconduct", or any other thing which would subject its members to removal.

(We will dispose of this demurrer in the order above set forth)

Section 7 of chapter 7 of the Code does not prescribe Who shall bring the proceeding under that section of the law. But in Dawson vs Phillips 78 W. Va. 14, our Supreme Court held that a citizen and tax-payer might institute such proceedings. The petitioner, Madeline King, is an interested party, who sues by her father and next friend, and who is also a citizen of the State of West Virginia, namely, the city of Elkins, in said state. We see no reason why these parties could not join in the institution of this suit, upon common law principles. At least they are not prohibited from so doing by statute. We overrule the demurrer on this ground.

The second ground of demurrer is the more serious one, and raises all the importain questions in this case. As to violating the provisions of the Constitution of the United States, pointed out in said petition, and as hereinbefore mentioned, we will observe that these provisions apply to the Federal Government only, and 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. Permoli vs. Municipality No. 1 of New Orleans, 3 Howard 589, 11 Law ed. 793; Reynold vs U. S. 98 U. S. 145, 25 Law ed 244; People v. Board of Education District No. 4, 245 Ill. 337, 92 N.E. 251; 12 Corpus J. 942; Black, Constitutional Law 527, (3 ed). The reasons for including these provisions in the Federal Constitution, constitute a long history, which has been many times stated. 2 Watson Const. 1357 et seq; Cooley Const Limita. 571 (6 ed); 2 Story on Const. 1878; Reynolds vs U.S. 98 U. S. 145, 25 Law ed. 244.

In the Colony of Virginia the struggle for religious liberty began long before the formation of the Federal Government. In the light of the history of the past, and in the hope

of the future, Virginia, chiefly through the efforts of Mr. Jefferson and Mr. Madison, in 1785 passed a memorable act of religious tolerance, and which may be found in 12 Hennings Statutes pg.84 Nearly all the states of this Union have copied parts of this Statute, which was translated and discusses all over Europe.

In West Virginia the Constitution provides:

> "No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever; nor shall any man be enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religions opinions or belief, but all men shall be free to profess, adn by argument, to maintain their opinions in matters of religion; and the same shall, in no wise, affect, diminish or enlarge their civil capacities; and the Legislature shall not prescribe any religious test whatever, or conver any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this State, to levy on themselves, or others, any tax for the erection or repair of any house for public worship, or for the support of any church or ministery, but it shall be left free for every person to select his religious instructor, and to make for his support, such private contract as he shall please."
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> Const. W. Va. Art. 3, Sec 15.

This Constitutional provision doew not establish religion but guarantees the free exercise thereof. No man's religious beliefs can be interfered with by the law. Religious tests are prohibited, and the Ligislature cannot confer any particular privileges or advantages on any sect or denomination. Consequently all sects and denominations stand equal before the law. Nor, because of his religious beliefs shall any man's civil capacities be enlarged or diminished or affected. No tax can be laid for the benefit of any religious sect or denomination. The church cannot be supported by the state, but every person is left free to select his own religious instructor, and to join any sect or church he may desire.

While this constitutional provision guarantees and establishes absolute religious freedom, free from restraint by the

state, or other sources, yet, it does not mean, nor was it intended to mean, that any citizen or other person, could do as he pleased under the pretense of religion. Thus, it has been held that religious views are not admitted as a defense against prosecution for acts which are declared to be contrary to the policy of the law, and are made punishable by the criminal laws, or a recognition of which is essential to the administration of justice. Miles v U. S. 103 U. S. 306; Reynolds v U. S. 98 U. S. 145; Morman church V U. S.136 U. S. 1. Sunday laws have been held to be constitutional, and likewise laws prohibiting a teacher in a public school, while engaged in the performance of his duties as a teacher, from wearing any dress, emblem or insignia indicating that he is a member of any religious order, sect or denomination, is constitutional. Com v. Herr et al 229 Pa. St. 132; Ann Cas. 1912A; 78 At. 68; O'Connor V Hendrick 148 N.Y. 421, 6 Ann Cas 432.

In view of the constitutional provisions of this state, above quoted, petitioners aver that Miss King was refused a position in the public school at Grafton, by the School Board, upon the sole ground that she was of the Catholic faith, and aver that the constitution prohibits the board from excluding her upon this ground alone, and that to do so is official misconduct by the members of the Board, Now, the constitution expressly prohibits the Legislature from prescribing any religious tests whatever, or convering any particular privileges or advantages on any sect or denomination. <u>If this prohibition is laid on the Legislature, can the Board of Education of any independend School district exercise that power?</u>

That a school board can employ only Protestants as teachers will be conceeded, and that they could employ only teachers who were Catholics will be conceded, but such Board would have no right to put a ban on either Protestants or Catholics, simply because they were such. In the well known case of Hysong vs.

Gallitzin Borough School District, 164 Pa. St 629, 44 Am. St Rep 632 26 L. R. A. 203, six of the teachers out of the eight were sisters of a religious order of the Catholic church, and it was averred that this made the school sectarian, and that such teachers should not have been employed; but there was no proof that they were appointed because they were Cathholics in preference to others, as well or better qualified, nor that others were rejected because they were Protestants, and the court held in this case, under these circumstances, that the appointment of such teachers was within the discretion of the appointing board, yet, in the opinion in this case, Dean, Judge, said "If by law any man or woman can be excluded from public office or employment because he or she is a Catholic, that is a palpable violation of the spirit of the Constitution; for there can be, in a Democracy, no higher penalty imposed upon one holding a particular religious belier, than perpetual exclusion from public station because of it. Men may disqualify themselves by crime, but the state no longer disqualifies because of religious belier". In the present case it would seem that the Board of Education considered the applicant disqualified merely because of religious belief. The constitutional provisions above mentioned knows no distinction between the Christian and the Pagan, the Protestant and the Catholic. All are citizens and their civil rights are precisely the same. The law cannot see differences,be cause the Constitution has definitely and completely excluded religion from the law's contemplation in considering men's rights. There could be no distinction based on religion. All sects, re ligions or even anti-religious, stand on an equal footing. They have the same rights of citizenship, without discrimination. The public shcool is supported by taxes which every citizen, regardless of his religion or his lack of it, is compelled to pay. The school like the Government, is simply a civil institution. It is secular, and not religious in its purposes. While no one denies the xxxxxx

truths of the Bible; no one denies their importance; no one denies that it should be taught to the youths of the state, and every one is free to exercise his own mind touching religious matters; yet, our constitution expressly declares that the civil capacity of a citizen shall in no wise be affected, diminished or enlarged because of his religious beliefs.

It was argued in support of the demurrer that the school board were only exercising their discretion in refusing to employ Catholic teachers in he school; but in the instant case the petition shows that Miss King was denied the position as a teacher in the school simply because whe was a Catholic, and it was the policy of the Board to hire no Catholics. If such a rule does not exclude Catholic, simply because they are Catholics, then what is its effect? Does such a rule work a hardship? Does it not in fact prescribe a religious test? These very things are prohibited by our Constitution. Can the Board of Education claim on the demurrer herein that such a rule was but the exercise of a sound discretion on their part, and thereby escape its effect? They stated, in the letter of June 27, 1924, no reason for rejecting all Catholics from teaching in the schools. All are excluded, no matter what their claims or qualifications. The law does not allow the rejection of an applicant for a position in a school to be made on account of their adherence to, or belief in, any religious sect. To do so is to set up a religious test, and to infringe on, and diminish their "civil capacities". To teach a school is clearly a civil right, and an honorable voaction. It would seem that the Board had no right to over ride the constitutional provisions above mentioned, and that their "discretion" was restricted on this point.

In Knowlton v Baumhover 182 Iowa, 691, 166 N.W.202,5 A.L.R. 841,858, the court said,

"That this restricted dei

"That this restricted discretion may be so abused as to call for judicial interference we cannot doubt". In the instant case the Board exceeded their powers. In Mechem on Publuc Officers, section 457, page 291, the author says:

> "The official doing of a wrongful act, or the official neglect to do an act which ought to have been done, will constitute the offense, (of misconduct in office) although there was no corrupt malicious motive"

And in 23 A. & E. Enc. Law 2 ed. 442, it is said,

> "By official misconduct is meant any unlawful behaviou in relatbon to the duties of his office, willful in its character, or any officer entrusted in any manner, with the administration of justice or the execution of the law".

While a teacher is not a public officer within the meaning of the law, yet it is an imployment, and is within the "civil capacities" of any citizen qualified to teach. Hartigan v Board of Regents 49 W. Va. 14.

For the foregoing reasons we overrule the demurrer to the petition, also on the second ground.