

1954

State of Utah v. Elsie Johnson Black et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

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STATE OF UTAH,

Respondent,

In the Interest of

Elsie Johnson Black
Emily Johnson Black
Vaughn Johnson Black
Ivan Francis Johnson Black
Wilford Marshall Johnson Black
Orson Johnson Black
Lillian Johnson Black
Spencer Leon Johnson Black,
Alleged neglected, dependent
children,

Case No. 8220

Appellants.

BRIEF OF APPELLANT

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Salt Lake City, Utah

FILED
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Clk. R. Supreme Court, Utah

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IN THE SUPREME COURT
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STATE OF UTAH,

Respondent,

In the Interest of

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Emily Johnson Black

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Spencer Leon Johnson Black,

Alleged neglected, dependent children, :

Appellants. :

BRIEF OF APPELLANT

NATURE OF THE CASE

This action was commenced upon petition of
Jay R. Huntsman, Probation Officer of Washington

County, Utah, to have the subject children declared dependent, neglected children contrary to the provisions of the statutes of Utah. The matter was heard by the Juvenile Court of the Sixth District, in and for Washington County, State of Utah, before David F. Anderson, Judge, on March 20, 1954, and the subject children were adjudged and decreed on May 11, 1954, to be neglected children within the meaning of the laws of Utah and the natural parents, Leonard Black and Vera Johnson, deprived of custody and control of the said children, and the said children made wards of the court. The custody and control of the children was awarded by the court to the Utah State Department of Public Welfare, but the children were to be permitted to remain with their parents upon certain specific conditions. From this Decree and Judgment this appeal is taken upon all questions of law and fact.

STATEMENT OF THE FACTS

The Juvenile Court entered its Findings of Fact and Conclusions of Law, after hearing in this matter, to the effect that the subject children were neglected within the meaning of Section 55-10-6, Utah Code Annotated, 1953, and that the parents of the children should be deprived of their custody and control, this conclusion being based on 19 findings of fact drawn to indicate that these children, who live with their mother in Short Creek, Utah, were not being provided with "the proper maintenance, care, training and education contemplated and required by law and morals."

The parents of these children are what is commonly known as Fundamentalist Mormons, accepting as the Law of God the doctrine of Plural and Celestial Marriage as, in their sincere religious convictions, that doctrine was revealed and restored by God through his Prophet Joseph Smith in

Section 132 of Doctrine and Covenants of the Church of Jesus Christ of Latter Day Saints. The community in which they live is essentially a pioneering farming community on the Utah-Arizona border, the great majority of the residents of which hold to the same religious beliefs as do these parents.

The Juvenile Court was unable to find any evidence that these children were being deprived of any of the essentials of life and, in fact, in Findings of Fact 16 specifically found "That there was no evidence that any of the children were destitute and without proper sustenance, clothing or medical care." Nevertheless, the Juvenile Court concluded because of the religious beliefs of the parents and their neighbors that their home constituted an immoral environment for the rearing of the children, this despite the fact that these parents had ceased to cohabit as man and wife prior to the filing of the petition

in this matter.

The children are all in good health, are being given all the educational opportunities available in the community, and are being raised by their parents in such a manner as to greatly enhance their prospects of becoming exemplary citizens of both state and nation.

The Juvenile Court in its Decree and Judgment, however, declared and adjudged these children to be neglected children within the meaning of the laws of Utah, depriving the parents of their right of custody and control of the children, and made the children wards of the court. The court then awarded the right of custody and control of the children to the Utah State Department of Public Welfare, authorizing the Department to place the children in suitable foster homes, but permitting the children to remain in the actual custody of their parents,

provided the parents would meet certain conditions. The conditions specified by the court would require the parents to submit a sworn statement to the following effect: That they would agree to comply with the laws of Utah relating to marriage and sexual offenses; that they would refrain from counseling, encouraging and advising their children to violate such laws, but would counsel and advise them to obey such laws and that they could satisfy this latter requirement not merely by "the pretense of telling the children that they have 'free agency', but it is intended that the parents shall affirmatively encourage their children to abide by the laws of Utah, and that the children should do so in disregard of any religious doctrines to the contrary"; that they would report to the probation officers with the children monthly, and that they would file a written sworn statement with the court each month of compliance with the court's requirements.

The Juvenile Court further ordered in its Decree and Judgment that its judgment should not be stayed pending an appeal to this court, taking its authorization from Section 55-10-35, Utah Code Annotated.

The parents of these children being unable, without violating their consciences, to file the oath demanded by the court, the children in due course were forcibly taken from their mother by the officers of the Juvenile Court and the Department of Public Welfare and were placed in a home in Utah County.

STATEMENT OF POINTS UPON WHICH
APPELLANTS RELY

Point 1. The Decree and Judgment is unconstitutional and void in that subparagraph (f) of subparagraph 3 thereof requires the parents to swear that they are willing to comply with the requirements of subparagraph 3(a) through (e),

which require the parents to report to the court once a month and file with the court each month an affidavit to the effect that they have complied with the laws of Utah relating to marriage and sexual offenses; that they have refrained from counseling, encouraging and advising the children to violate such laws; that they have counseled and advised the children to obey such laws not merely by telling the children that they have "free agency", "but it is intended that the parents shall affirmatively encourage their children to abide by the laws of Utah, and that the children should do so in disregard of any religious doctrines to the contrary," which requirements are contrary to the provisions of Sections 1, 4 and 15 of Article 1 of the Constitution of Utah and Amendments 1 and 14 of the Constitution of the United States of America, in that said requirements violate the constitutional guarantees

of freedom of speech and freedom of religion.

Point 2. The Decree and Judgment operates to take the custody of children from their natural parents without due process of law, the court having no jurisdiction to enter the Decree and Judgment which it has entered, all of which constitutes the taking of life, liberty or property without due process of law in violation of the 14th Amendment to the Constitution of the United States of America and Section 7 of Article I of the Constitution of Utah.

Point 3. Section 55-10-35, Utah Code Annotated, 1953, under which the juvenile court in subparagraph 5 of its Decree and Judgment purports to act in stating that the execution of its judgment shall not be stayed pending an appeal, is unconstitutional if it can be invoked in a case like the case at bar, in that, it is a violation of due process of law and an overextension of the doctrine of parens patriae, under

which doctrine Juvenile Court statutes must be justified.

Point 4. Section 55-10-6, Utah Code Annotated, 1953, under which the Juvenile Court in 1. of its Conclusions of Law finds the children "neglected children" is unconstitutional, in that it is vague and uncertain.

Point 5. The Findings of Fact 14, 17, 18 and 19 are not supported by the evidence, and said Findings of Fact being essential to the Conclusions of Law entered by the court, said Conclusions of Law are, therefore, not based upon the evidence before the court, and the Judgment and Decree based upon said Findings of Fact and Conclusions of Law is, therefore, erroneous.

ARGUMENT

Point 1. The Decree and Judgment is unconstitutional and void in that subparagraph (f) of subparagraph 3 thereof requires the parents

to swear that they are willing to comply with the requirements of subparagraph 3(a) through (e), which require the parents to report to the court once a month and file with the court each month an affidavit to the effect that they have complied with the laws of Utah relating to marriage and sexual offenses; that they have refrained from counseling, encouraging and advising the children to violate such laws; that they have counseled and advised the children to obey such laws not merely by telling the children that they have "free agency", "but it is intended that the parents shall affirmatively encourage their children to abide by the laws of Utah, and that the children should do so in disregard of any religious doctrines to the contrary," which requirements are contrary to the provisions of Sections 1, 4 and 15 of Article 1 of the Constitution of Utah and Amendments 1 and 14 of the Constitution of the United States of America, in that said re-

quirements violate the constitutional guarantees of freedom of speech and freedom of religion.

Subparagraphs (b) and (c) of Subparagraph 3 of the Decree and Judgment of the Juvenile Court are as follows:

"(b) That the parents and each of them shall at all times refrain from counseling, encouraging and advising the children to violate the laws of Utah relating to marriage and sexual offenses.

"(c) That the parents and each of them shall counsel and advise the children to obey the laws of Utah relating to marriage and sexual offenses. This requirement shall not be satisfied by the pretense of telling the children that they have 'free agency', but it is intended that the parents shall affirmatively encourage their children to abide by the laws of Utah, and that the children should do so in disregard of any religious doctrines to the contrary."

Subsection (f) of subparagraph 3 of the said Decree and Judgment requires the parents to submit a sworn statement to the court of willingness to comply with its requirements as a condition to their retaining the actual custody of their children.

The court is, in effect, saying to these parents

and to the mother in particular, that in their own home they cannot teach their own religion to their own children.

The First Amendment to the Constitution of the United States of America is as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States of America is, in part, as follows:

"... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The pertinent portions of the Article 1 of the Constitution of Utah are as follows:

SECTION I

"All men have the inherent and inalien-

able right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

SECTION 4

"The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election; nor shall any person be incompetent as a witness or juror on account of religious belief or the absence thereof. There shall be no union of Church and State, nor shall any Church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment. No property qualification shall be required of any person to vote, or hold office, except as provided in this Constitution.

SECTION 15

"No law shall be passed to abridge or restrain the freedom of speech or of the press..."

The right of people to be free of governmental interference in their own homes has long been recognized in English and American jurisprudence.

Lord Coke's maxim in Semayne's case is an example: "The house of every one is to him as his castle and fortress, as well for his defense as for his repose." It is well to note also the words of the elder Pitt in his speech on the Excise: "The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail; its roof may shake; the wind may enter - but the King of England cannot enter. All his forces dare not cross the threshold of the ruined tenement."

The Juvenile Court in this matter seeks to enter the home these parents provide for their children and to force the parents to tell their children that what they conscientiously believe to be the word of God should be disregarded by these children. This would seem to be a novel concept of the powers of American Courts, for diligent search does not reveal a case in which the courts have attempted to exercise such authority, and it is inconceivable that had any court

so acted its action would not have been challenged by appeal to higher tribunals.

The higher courts have not had too great an occasion to deal with decisions of lower courts which go so far as to declare, in effect, what is a right or a wrong belief in God, as does the Juvenile Court in this case, but when called upon to do so they have been quick to say that such is not the province of the courts.

Ann. Cas. 1914A., at pages 752 and 753 quotes from *In re DOYLE*, 16 Mo. App. 159, with reference to the right of a parent to teach his religion to his children and the power of the courts to take their custody from him for such teaching, as follows:

"A great deal has been said in the argument as to the religious question. In determining what will be best for the child, we cannot, under the system of law we are appointed to administer, look at that. The state of which we are citizens and officers does not regard herself as having any competency in spiritual matters. She looks with equal eye upon all forms of so-called Christianity and subjects no one to any disability for rejecting the generally accepted doctrines

of natural religion. A father in Missouri forfeits no right to the custody and control of his child by being, or becoming, an atheist, nor are his rights in this respect increased before the law by his behaving rightly. The law does not profess to know what is a right belief... It is manifest that anything which interferes with the natural right of the father to direct the religious education of his child strikes a blow at the family, which, in the last analysis, is the foundation of the state. Few men would be willing to assume the burdens of a legal paternity, if they supposed that their children could, against their will, be taken from them to be educated in religious systems which they believed to be false, and to be taught thus to despise their father for his superstition, or for his infidelity, as the case might be. To the Protestant, the Catholic religion must be a system of superstition; to the Jew, it must be one of imposture, and to the unbeliever, the old historic religions of the Jew and the Catholic, and the various sects of Protestantism, are alike false, and the profession of any of them a confession, so far, of moral or intellectual weakness. I can conceive no more poignant anguish than that of the true father who sees his child, against his will, brought up before his eyes in a religious system which he abhors, as being, according to his belief, injurious to the spiritual interests of his child; and, if he believes sincerely in any form of religion, his anguish at seeing his child brought up in religious indifferentism cannot be less..."

The record in this case is replete with references

to the religious beliefs of the people involved. Mr. Knowlton in his statement to the court at the beginning of the hearing on page 3 of the transcript of the testimony said "... Mr. Black, and his entire family had accepted as true the 132nd Section of the DOCTRINE AND COVENANTS of the L.D.S. Church..." Much of the testimony at the hearing revolved around the religious beliefs of the parents and the children and the likelihood of the children following those beliefs in violation of Utah statutes.

In UNITED STATES v. BARLOW 56 F.Supp. 795 (1944), to be discussed more fully below, the court was dealing with a matter involving people who professed the same faith in God as do the people who were before the Juvenile Court in this case. On page 796 of the report the court sets out an editorial from TRUTH MAGAZINE which substantially sets out that faith, at least in so far as it differs with the faith of the mod-

ern Church of Jesus Christ of Latter Day Saints.

The editorial as quoted by the court is, as follows:

"'The Lord restored the principle of Celestial or plural marriage in line with his promise that in this the last dispensation there would be a restoration of all things and that there should be no taking away again. Plural marriage is one of the laws of Heaven that has been restored never again to be taken from the earth or given to another people. It is a law that cannot be abrogated, modified or postponed. The hackneyed claim that the Woodruff Manifesto of 1890 was given by revelation from the Lord to abrogate His law of Plural Marriage has been exploited by the leaders to a shocking degree, and as often has been exploded. Any person with 8th grade intelligence reading the Manifesto will discover nothing in it savoring of revelation, or as an injunction from the Lord against the continued practice of the principle. True, the subsequent interpretation given it by Wilford Woodruff, while under pressure by the enemy, and so far as it was ratified by the Church, bound the Church to a monogamic marriage system. But it was the Church that was bound, and not God!"

What the Decree and Judgment of the Juvenile Court does, in effect, is to say that these things may not be taught by these parents to these children. This is nothing more than the court saying

that the position of one faction is correct and that of the other faction is wrong. American courts are not called upon to arbitrate these matters. This question was considered by the court in GLOVER v. BAKER, 67 N.H. 393, 83 A. 916 (1912). The case concerned the validity of a trust set up by the will of Mrs. Mary Baker Eddy, the founder of the Christian Science religion. Chief Justice Parsons dealt with the matter of courts concerning themselves with the truth of a particular faith on p. 932 A, as follows:

"With the truth of the religious theories inculcated the court has no concern. Even if, upon examination of Mrs. Eddy's writings, the members of the court should entertain the opinion expressed by Sir John Romilly of Joanna Southcate in Thornton v. Howe, and believe her to be 'a foolish, ignorant woman', and her teachings absurd and illogical delusions, the personal opinions of the members of the court would not affect the question. Mrs. Eddy had the constitutional right to entertain such opinions as she chose, to make a religion of them, and to teach them to all others; and their rights of belief are as extensive as hers...Whether her opinions are theologically true 'the courts are not competent to decide.'"

Another case which took up this matter was KNOWLTON v. BAUMHAVER, 182 Iowa 691, 166 N. W. 202 (1918). The case involved the question of sectarian teaching in the public schools. The court held that sectarian teaching must be kept out of the public schools. In considering court interference with religion the court quoted, at page 208 N.W., the following from Board v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233:

"True Christianity asks no aid from the sword of civil authority. It began without the sword, and wherever it has taken the sword it has perished by the sword. To depend on civil authority for its enforcement is to acknowledge its own weakness, which it can never afford to do. It is able to fight its own battles. Its weapons are moral and spiritual and not carnal..... True Christianity is a solecism, a contradiction of terms. When Christianity asks the aid of government beyond mere impartial protection, it denies itself. ...The state can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person, or class of persons. If it embarks in this business, whose opinion shall it adopt?...Let the state not only keep its hands off, but let it also see to it that religious sects keep their hands

off each other. Let religious doctrines have a fair field, and a free, intellectual, moral, and spiritual conflict. The weakest,-that is, the intellectually, morally, and spiritually weakest- will go to the wall, and the best will triumph in the end. This is the golden truth which it has taken the world 18 centuries to learn and which has at last solved the terrible enigma of 'church and state'. ... The state will impartially aid all parties in their struggles after religious truth, by providing means for the increase of general knowledge, which is the handmaid of good government, as well as of true religion and morality. It means that a man's right to his own religious conviction and to impart them to his own children, and his and their right to engage in harmless acts of worship toward the Almighty, are as sacred in the eyes of the law as his rights of person or property, and that, although in the minority, he shall be protected in the full and unrestricted enjoyment thereof."

The position of governments with respect to religion is considered in *ILLINOIS ex rel MCCOLLUM v. BOARD OF EDUCATION*, 333 U.S. 203, 68 S. Ct. 461, 92 L.Ed. (Adv. 451), 2 A.L.R. 1338 (1948). The case dealt with the use of public school property for religious instruction and held such use unconstitutional. Justice Black in his opinion in *A.L.R.*, p. 1347, quoted from *Everson v. Board of*

Education, 330 U.S. 1, 67 S.Ct. 504, as follows:

"Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to 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 for 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. In the words of Jefferson, the clause against establishment of religion was intended to erect 'a wall of separation between church and State.'"

The issue is dealt with in COOLEY ON CONSTITUTIONAL LIMITATIONS 7th Ed., p. 663, et seq.,

"Those things which are not lawful under any of the American constitutions may be stated thus:-

"1. Any law respecting an establishment of religion. The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete

religious liberty where any one sect is favored by the State and given advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorable, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege...

"4. Restraints upon the free exercise of religion according to the dictates of the conscience. No external authority is to place itself between the finite being and the Infinite when the former is seeking to render the homage that is due, and in a mode which commends itself to his conscience and judgment as being suitable for him to render, and acceptable to its object.

"5. Restraints upon the expression of religious belief. An earnest believer usually regards it as his duty to propagate his opinions, and to bring others to his views. To deprive him of this right is to take from him the power to perform what he considers a most sacred obligation..."

And on p. 673

"The constitutional provisions for the protection of religious liberty not only include within their protecting power all sentiments and professions concerning or upon the subject of religion, but they guarantee to everyone a perfect right to form and to promulgate such opinions and doctrines upon religious matters, and in relation to the existence, power, attributes, and providence of a Supreme Being as

to himself shall seem reasonable and correct. In doing this he acts under an awful responsibility, but it is not to any human tribunal."

And on p. 676,

"Whatever deference the constitution or the laws may require to be paid in some cases to the conscientious scruples or religious convictions of the majority, the general policy always is, to avoid with care any compulsion which infringes on the religious scruples of any, however little reason may seem to others to underlie them..."

The broad nature of these guarantees is considered by the Massachusetts Court in GLASER v. CONGREGATION KEHILLATH ISRAEL, 263 Mass. 435, 161 N.E. 619, (1928). In speaking of the protection of religious liberties by the Massachusetts Constitution on p. 620 N. E., the court said,

"These great guarantees of religious liberty and equality before the law of all religions are not confined to adherents of the Christian religion or to societies and corporations organized for the promotion of Christianity. They extend likewise to the adherents of the ancient religion whose sacred scriptures form a part of the Bible. We are of the opinion that Jew as well as Christians are protected by these explicit declarations of religious equality..."

In STATE v. LEVIN, 109 N. J. Law. 503,
162 A. 909 (1932), the Court, in dealing with
the right of witnesses to testify where they re-
fused because of conscientious scruples to take
an oath, being atheists, said, on Page 912A.,

"We consider that the constitutional
provision is a direction that the belief
or the disbelief of any person on religious
topics shall not debar him from rights which
the law affords to others."

In MACINTOSH v. UNITED STATES, 42 F. (2d) 845,
(1930), the court held that citizenship was im-
properly denied an applicant who was a conscien-
tious objector to bearing arms. Judge Manton dis-
cusses the rights of individuals to worship God
unmolested on page 848, as follows:

"... Story in his work on the Constitu-
tion, vol. II § 1876, says, 'The rights of
conscience are, indeed, beyond the just
reach of any human power. They are given by
God and cannot be encroached upon by human
authority, without a criminal disobedience
of the precepts of natural, as well as re-
vealed religion'. The rights of conscience
are unalienable, which the citizen need not
surrender and which the government or society
cannot take away.

"'Every individual has a natural and unalienable right to worship God, according to the dictates of his own conscience and reason'; and it is also his 'natural and unalienable right' not to be 'hurt, molested, or restrained in his person, liberty, or estate for worshiping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion', provided he does not disturb others.' Hale v. Everett, 53 N. H. 9, 60, 16 Am. Rep. 82. "

Another case considering the scope of the freedom is LEWIS v. BOARD OF EDUCATION OF NEW YORK CITY, 285 N.Y.S. 164 (1935). In a case involving the reading from the Bible in the public schools, in speaking of religious freedom, at page 169 the court says,

"The sanctified principle of freedom of religious belief does not distinguish between believers and nonbelievers. It embraces both and accords one as much protection and freedom as the other. A sect or tenet which is intolerant of those of a different sect or tenet is the precise antithesis of religious liberty. Freedom is negated if it does not comprehend freedom for those who believe as well as those who disbelieve. The law is astute and zealous in seeing to it that all religious beliefs or disbeliefs are to be given unfettered expression. Authentic free thinking involves the indubitable right to believe in God, as well as the unfettered license not to believe or to disbelieve in a Deity."

These authorities indicate that the courts of this country should never place themselves, directly or indirectly in the position of favoring one creed over another. The decision of the Juvenile Court places it squarely in a position of favoring the teaching of the creed of the modern Church of Jesus Christ of Latter-Day Saints as opposed to the teaching of Fundamental Mormonism with respect to the truth of the 132nd Section of the DOCTRINE AND COVENANTS of the L. D. S. Church. If these parents were required to teach their children as demanded by the Juvenile Court in this case, the effect of such teaching would be that these parents would have to teach their children a religious doctrine repugnant to their own beliefs and which contravenes their faith in God.

The requirement that these parents take an oath is a requirement that they do an act. The oath which the Juvenile Court would require these

parents to take would require them to teach something which contravenes their faith in God. This amounts to requiring these parents to do an act which contravenes their faith in God under pain of losing custody of their children if they do not do the act. Such a requirement no American court is empowered to make. An excellent case on this point and on the freedoms of speech and religion handed down in recent years is WEST VIRGINIA STATE BOARD OF EDUCATION v. WALTER BARNETT, 319 U.S. 624, 63 S. Ct. 1178 (1943). The facts in the case were these: The West Virginia legislature, Sect. 1734 W. Va. Code (1941 Supp.), by valid act approved by the Governor and thus made law, gave the state board of education the power and duty to prescribe courses of study in the schools with reference to U. S. history and civics and in the Constitution of the United States and of the State of West Virginia. In pursuance of such statute the School Board of West Virginia

by otherwise valid resolution required all school children to salute the United States Flag and to take the pledge of allegiance. The penalty for refusal, under grounds that such refusal was insubordination was dismissal from school. Readmission was denied by statute, Section 1851 (1) W. Va. Code (1941 Supp.) until compliance. In the meantime the expelled child is "unlawfully absent" under said Section 1851, and may be proceeded against as a delinquent under Sec. 4904 (4) W. Va. Code (1941 Supp.). His parents or guardians are liable to prosecution under § 1851, supra, and if convicted are subject to fine not exceeding \$50.00 and a jail term not exceeding 30 days under § 1851, supra. The United States Supreme Court looked upon the combination of school board rulings and statutes as giving the order of the school board the force of law.

Plaintiffs sought to enjoin the Board to restrain the enforcement of these laws

and resolutions against Jehovah's Witnesses on the ground that members of such faith look upon the flag as a "graven image" and are enjoined by Exodus, Chapter 20, Verses 4 and 5 from bowing down to such or serving the same. Some of the Plaintiffs' children were expelled from school, others threatened with expulsion and by proper officials threatened with being sent to reformatories for criminally inclined juveniles. The parents were prosecuted and threatened with prosecutions for causing delinquency.

The Board moved for dismissal of the complaint denying any infringement of constitutional guarantees to these Plaintiffs. The United States District Court restrained the Board, which Board then took a direct appeal to the Supreme Court of the United States.

The holding in the case was essentially that the Board requirements amounted to a compulsion of students to declare a belief contrary to their

religious convictions and such a requirement constitutes a violation of religious freedom as contained in the First Amendment to the Constitution of the United States of America. The court affirmed the judgment below.

The majority opinion written by Justice Jackson is, in part, as follows:

"The freedom asserted by these appellees does not bring them into conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual.

"...The State asserts power to condition access to public education on making a prescribed sign and profession and at the same time to coerce attendance by punishing both parent and child. The latter stand on a right of self-determination in matters that touch individual opinion and personal attitude.

"Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means...

"...The issue here is whether this slow and easily neglected route to arouse loyalties

constitutionally may be short-cut by substituting a compulsory salute and slogan...

"Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It required the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights...

"It is also noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind... It is now a common-place that censorship or suppression of opinion is tolerated by our constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish... To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind...

"Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting bill of rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength of individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and

disastrous end...

"Observation of the limitations of the Constitution will not weaken government in the field appropriate for its exercise...

"There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."

(Speaking of the courts' duty to apply the Bill of Rights): "We must transplant these rights to a soil in which the laissez-faire concept or principle of non-interference has withered at least to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened government controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this court when liberty is infringed."

"Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no

deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast-failing efforts of our totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."

"It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or the nature of the origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is controlled by public opinion, not public opinion by authority.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

"...Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization... We can have intellectual individualism and rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

Justices Black and Douglas concurred in an opinion in which they stated:

"Words uttered under coercion are proof of loyalty to nothing, but self interest. Love of country must spring from willing hearts and free minds, inspired by a fair administration of wise laws enacted by the people's elected representatives within the bounds of express constitutional prohibitions. These laws must, to be consistent with the First Amendment, permit the widest

toleration of conflicting viewpoints consistent with a society of free men."

Justice Murphy also concurred stating:

"...But there is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

"The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all, except in so far as essential operations of government may require it for the preservation of an orderly society--as in the case of compulsion to give evidence in court.....Official compulsion to affirm what is contrary to one's religious beliefs is the antithesis of freedom of worship which, it is well to recall, was achieved in this country only after what Jefferson characterized as the 'severest contests in which I have ever been engaged'...

"The trenchant words in the preamble to the Virginia Statute for Religious Freedom remain unanswerable: 'All attempts to influence (the mind) by temporal punishments, or burdens, or civil incapacitations, tend only to beget habits of hypocrisy and meanness.'

"...It is in that freedom and the example of persuasion, not in force and compulsion that the real unity of America lies."

In dissenting Justice Frankfurter had this to say about oath tests:

"The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief or curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the State putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right of freedom of thought and freedom of speech protected by the Constitution."

Mr. Justice Murphy in his dissent in *PRINCE v. COMMONWEALTH OF MASSACHUSETTS*, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645 (1944) had this to say about religious freedom:

"No chapter in human history has been so largely written in terms of persecution and intolerance as the one dealing with

religious freedom. From ancient times to the present day, the ingenuity of man has known no limits in its ability to forge weapons of oppression for use against those who dare to express or practice unorthodox religious beliefs. And the Jehovah's Witnesses are living proofs of the fact that even in this nation, conceived as it was in the ideals of freedom, the right to practice religion in unconventional ways is still far from secure. Theirs is a militant and unpopular faith, pursued with a fanatical zeal. They have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes... To them, along with other present-day religious minorities, befalls the burden of testing our devotion to the ideals and constitutional guarantees of religious freedom. We should therefore hesitate before approving the application of a statute that might be used as another instrument of oppression. Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger.."

A point of grave importance in the instant matter is whether a point has been reached under the facts presented to the Juvenile Court which would justify the State through its courts in intervening.

The justices of the Supreme Court of the United States had occasion to consider this matter in a case which came to the court from this State involving this same teaching as is now before the court. In *MUSSER v. UTAH*, 333 U.S. 95, 68 S. Ct. 397, 92 L. Ed. 562 (1948), the court sent back to the Utah Supreme Court for statutory construction a conspiracy conviction under Section 103-11-1 (5) Utah Code Anno., 1943, which, the court said "so far as relevant, defines conspiracy: (5) to commit any act injurious to the public health, the public morals or to trade or commerce or for the perversion or obstruction of justice or the due administration of the laws..."

Mr. Justice Jackson in the opinion of the court at page 565 L. Ed., said,

"It is obvious that this is no narrowly drawn statute. We do not presume to give an interpretation as to what it may include. Standing by itself, it would seem to be warrant for conviction any act which a judge and jury might find at the moment contrary to his or its notion of what was good for

health, morals, trade, commerce, justice or order. In some states the phrase 'injurious to public morals' would be likely to punish acts which it would not punish in others because of the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling. This led to the inquiry as to whether the statute attempts to cover so much that it effectively covers nothing...."

Justice Black concurred in the result.

Justice Rutledge dissented in opinion joined in by Justices Douglas and Murphy.

P. 567, 568 "... The Utah statute was construed to proscribe any agreement to advocate the practice of polygamy. Thus the line was drawn between discussion and advocacy.

"The Constitution requires that the statute be limited more narrowly. At the very least the line must be drawn between advocacy and incitement, and even the state's power to punish incitement may vary with the nature of the speech, whether persuasive or coercive, the nature of the wrong induced, whether violent or merely offensive to the mores, and the degree of probability that the substantive evil will result. See *Bridges v. California*, 314 U. S. 252, 262, 263, 86 L. Ed. 192, 202, 203, 62 S. Ct. 190, 159 ALR 1346.

"It is axiomatic that a democratic state may not deny its citizens the right to criticize existing laws and urge that they be changed. And yet, in order to succeed in an

effort to legalize polygamy it is obviously necessary to convince a substantial number of people that such conduct is desirable. But conviction that the practice is desirable has a natural tendency to induce the practice itself. Thus, depending on where the circular reasoning is started, the advocacy of polygamy may either be unlawful as inducing a violation of the law, or be constitutionally protected as essential to the proper functioning of the democratic process.

"In the abstract the problem could be solved in various ways. At one extreme it could be said that society can best protect itself by prohibiting the substantive evil and relying on a completely free interchange of ideas as the best safeguard against demoralizing propaganda. Or we might permit advocacy of lawbreaking, but only so long as the advocacy fall short of incitement. But the other extreme position, that the state may prevent any conduct which induces people to violate the law, or any advocacy of unlawful activity, cannot be squared with the First Amendment. At the very least, as we have indicated, under the clear-and-present-danger rule, the second alternative stated marks the limit of the state's power as restricted by the Amendment."

Justice Rutledge cited in note 7 the following excerpt from a letter by Thomas Jefferson to Elijah Boardman:

"We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and

especially when the law stands ready to punish the first criminal act produced by false reasonings; these are safer corrections than the conscience of a judge."

And in note 8 he quotes from Mr. Justice Brandeis, concurring in *Whitney v. California*, 274 U.S.357, at 376, 71 L. Ed. at 1095, 47 S. Ct. 641, at follows:

"But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on."

There can be no "clear and present danger" here. These children are not ready for marriage. Even the oldest son nowhere indicates a present intention of marrying and certainly the court makes no finding to the effect that he immediately intends marriage. These children are not being told to violate the law; they are being taught what their parents believe to be the word of God handed down in Revelation through the hand of His Prophet Joseph Smith. The clear-and-present-danger rule implies

that the danger must be vastly more imminent than that shown by the facts before the Juvenile Court. What it means with reference to the curtailment of speech in the United States may be seen by referring to a dissenting opinion in ABRAMS v. UNITED STATES, 250 U.S. 616, 40 Sup. Ct. 17 (1919). The Supreme Court affirmed a conviction under the Espionage Act. Mr. Justice Holmes wrote an eloquent dissent with reference to free speech. It is, in part, as follows:

"Persecution for the expression of opinions seems to me to be perfectly logical. If you have no doubt of your premise or your power, and want a certain result with all your heart, you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct, that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the com-

petition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system, I think that we should be eternally vigilant against attempts to check the expression of opinions that we loath and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of law that an immediate check is required to save the country....Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law abridging the freedom of speech'...I regret that I cannot put into more impressive words my belief that in their conviction upon this indictment the defendants were deprived of their rights under the Constitution of the United States."

The criminal statutes of this State and the powers of its courts to enforce them are quite sufficient to handle the matter of violations of the criminal law when they occur. In the case before the court it would seem that the Juvenile Court of Washington County is seeking to reach out and punish these parents by taking away the custody of their children for a possible future

violation of the law by those children which violation might well never occur. In the same sense, the Juvenile Court would be punishing these children by depriving them of the loving care of their natural parents for a possible future violation of the law by these children which violation might well never occur. To say that the clear-and-present-danger rule can be applied to clothe the Juvenile Court with such overriding power, is to say that the inherent right of an American citizen to have a particular faith in God and to teach that faith to his children in his own home exists only so long as his concept of God's Word agrees with the concept of a particular judge as to what God's Word is. To say such and to enforce that idea by the power of the courts is to do so in violation of both the Constitution of Utah and the Constitution of The United States of America.

Point 2. The Decree and Judgment operates to take the custody of children from their natural

parents without due process of law, the court having no jurisdiction to enter the Decree and Judgment which it has entered, all of which constitutes the taking of life, liberty or property without due process of law in violation of the 14th Amendment to the Constitution of the The United States of America and Section 7 of Article I of the Constitution of Utah.

The right of parents to the care and custody of their children is a right protected from infringement by the due process clause of the 14th Amendment to the Constitution of The United States of America set out in the argument under Point 1 above and by Section 7 of Article I of the Constitution of Utah which reads as follows:

"No person shall be deprived of life, liberty or property without due process of law."

A parent is entitled to the services and earnings of his minor child. When the child is taken from its parent by a decree of a court act-

ing in excess of its jurisdiction the parent is deprived of property without due process of law.

Mr. Vernier in 4 AMERICAN FAMILY LAW § 232, page 20 says:

"The father is clearly entitled to the services and earnings of the child under the common law. There is some dispute in the cases as to whether the surviving mother is so entitled, but the weight of authority and better opinion confers the right upon her. As indicated above, the cases often fallaciously base the rule on a so-called reciprocal duty of support in the parent. A more logical basis of the rule is that the parents are entitled to the child's earnings in order to better enable them to control him."

There have been statutory variations made on the rule, and these are pointed out by Mr. Vernier; however, the right of the parents to the earnings of their minor children, with certain protections for the children, is well established in all jurisdictions.

This question was dealt with in BROOKS v. DeWITT, Tex. Civ. App., 178 S.W. (2d) 718, (1944), wherein the court spoke of due process and the property right of parents over their children,

as follows:

"While the State undoubtedly has an interest in the status of infants within its jurisdiction and may prescribe by statute reasonable tests and standards from which it may be determined whether or not parents by neglect or unsocial conduct have in fact lost their rights in and to a child, it is also true that the rights of parents over their children are in the nature of property rights and protected by the due process clause of the Fourteenth Amendment of the United States Constitution."

The issue was considered by the California Court in *ODELL v. LUTZ*, 78 Cal. App. (2d) 104, 177 P (2d) 628, (1947), where the court also went into the question of the right of the state to interfere with parental direction of children. The court said:

"Although the rights of parenthood are not absolute, but subject to the superior right of the state to intervene and protect the child against abuse of parental authority, the state may not constitutionally interfere with the natural liberty of parents to direct the upbringing of their children... The supremacy of the mother and father in their own home in regard to the control of their children is generally recognized. 'It is said that the natural rights of a father... are greater than those which any guardian can have...The legal

obligations of parenthood include the duties of support, of care and protection, and of education. As compensation therefor, the law recognizes certain rights in the parent... So fundamental are the rights of parenthood that infringements thereof have been held to constitute an encroachment on the personal liberty of the parent forbidden by the Constitution...' 39 Am. Jur. 593, 594."

This right of parents to the care and custody of their minor children is a natural right which far transcends our concept of property. It is such a right that it will be interfered with by courts only for the gravest reasons, which reasons, do not exist here. The extent of this right and the power and position of the state with reference to its minor children will be more thoroughly dealt with in the discussion immediately hereinafter following under Point 3 with reference to the doctrine of *parens patriae*.

Point 3. Section 55-10-35, Utah Code Annotated, 1953, under which the Juvenile Court in subparagraph 5 of its Decree and Judgment purports

to act in stating that the execution of its judgment shall not be stayed pending an appeal, is unconstitutional if it can be invoked in a case like the case at bar in that, it is a violation of due process of law and an overextension of the doctrine of *parens patriae*, under which doctrine Juvenile Court statutes must be justified.

In the taking of custody of children from their parents the state takes away the liberty of both the parent and the child. Such action is quite as serious as any criminal matter. The protections afforded those deprived of such liberty in order to meet due process requirements should be no less than those afforded the accused criminal. There are many instances in the law when bail is granted to persons convicted of crimes in the lower courts pending appeal of their convictions.

Section 55-10-35 Utah Code Annotated, 1953, is as follows:

"Stay pending appeal -- . An appeal,

with or without bail, in the case of a child, shall not suspend the order of the juvenile court, nor shall it discharge the child from the custody of the juvenile court, or of the person, institution, or agency to whose care such child shall have been committed, unless the juvenile court shall so order."

Such a statute could never have been intended by the legislature to have been invoked in a case like the case at bar. By its very wording, it implies that it is meant to apply only in a case in which bail might be appropriate. When anyone thinks of bail, he thinks of a criminal violation. These children have not been accused of any criminal violation; they were not taken into custody for anything which they may have done. The setting of bail in a case such as this would have been manifestly absurd. Even if it be held that the section was intended to apply only when a minor has been apprehended for, accused of, and tried by the juvenile court for an act which, had it been done by an adult, would be denominated a bailable offense, it is doubtful if the statute is constitutional

since the power of the juvenile court to refuse the stay depends upon nothing, so far as the statute is concerned. The court seems to be given unlimited discretion, and the statute would almost permit the juvenile court to refuse the stay without reason, regardless of the circumstances of the case or the offense involved. Such authority would seem to go too far, especially in juvenile matters, since the duty of juvenile courts under the doctrine of *parens patriae* is to administer justice tempered with mercy.

Irreparable harm can be done children by taking them forcibly from their mother's protecting arms, even for one day. It is a matter of common knowledge that these children were forcibly taken from their mother. Whether irreparable harm was done to these children by such act only the passage of time will disclose. Perhaps time will heal those wounds as it has healed many others, but a youthful impression of justice or injustice is

very seldom changed, except to be deepened, by time.

When should a juvenile judge grant a stay?

The statute certainly doesn't say. The juvenile judge is given no standard to go by, certainly not a standard set by the statute.

The Juvenile Judge of Washington County, Utah in this case in Subparagraph 5 of his Decree and Judgment decided that "the judgment shall not be stayed in the event of any appeal to the Supreme Court of Utah." Why did the court see fit to include this statement in its Decree and Judgment? The matter was heard on March 20, 1954. The decision was rendered on May 11, 1954. Conditions were so bad in this home that the court had already left the children there almost two months before making his decision and was willing to let them remain there indefinitely if the parents would only take and subscribe and file the oath which the court prescribed. Could those conditions have been so bad that upon the parents' failure to agree to the

conditions set by the court these children would have been greatly harmed by leaving them with their mother pending an appeal to this court from a decision which seems to have been one of first impression? But the statute does not require the court to exercise any discretion. The statute can only be constitutional under the doctrine of *parens patriae* if it implies that the court must exercise reasonable discretion. If the statute does so imply, there is no evidence that any reasonable discretion was used by the court in this case.

The right of the courts to interfere with parental upbringing of their children, particularly with reference to their religious instruction, is certainly sufficiently nebulous as to appraise any court that in so interfering he may well be mistaken in his concept of his authority. The case of *DENTON v. JAMES*, 107 Kan. 729, 193 Pac. 307, 12 A.L.R. 1146 (1920) goes into the matter of the power of the state in this regard in a

manner well-suited to appraise anyone of the need for great discretion in these matters. In that opinion the Kansas court reasoned, in part, as follows:

"...Any court will say that the criterion of parental right to custody of a child is welfare of the child. The criterion, however, is not always judiciously applied. Sometimes it is declared that the rearing of children is a function which the state delegates to parents, and which it may resume at will, for its welfare, through the welfare of the child. The rearing of children is not in fact a function delegated by the state to the citizen, any more than the begetting of children is a delegated state function, and the theory of government recognized by the declaration is responsible for absolutism in its most tyrannical form. The theory is expressly repudiated by the first two sections of the Bill of Rights of this state:

'1. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

'2. All political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit....'

"Gen. Stat. 1915 §§ 105, 106.

"Man has no higher right or interest or happiness than that for which the words 'family' and 'home' stand. Very often it is said, with a touch of derision, that a child is not a chattel, and a parent has no property in his child giving him right to custody, which is very true.

The interest which a parent has in the nurture of his own offspring, and in nearness to them for that purpose, lies in a different plane from that occupied by property; it transcends property. On the child's side, it has no higher welfare than to be raised by their parents, and free government is instituted for the protection and benefit of parenthood as one of the natural rights which the citizen possesses. Acting on these principles, this court holds that welfare of a child is best subserved by leaving it with its natural guardian until it is demonstrated that the parent is unfit to discharge the duties which are correlative to his right. Then, and not until then, does his right yield. The latest decision on the subject was made in March of this year, in the case of *Crews v. Sheldon*, 106 Kan. 438, 186 Pac. 498. Previous decisions are collated in the opinion.

"...Section 7 of the Bill of Rights of this state reads as follows:

'The right to worship God according to the dictates of conscience shall never be infringed, nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship...' Gen. Stat. 1915 § 111.

"In the case of *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666, the Supreme Court of the United States enunciated a principle which is applicable here, as it was in the controversy under decision:

'In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the

laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma...' 13 Wall. 728, 20 L. Ed. 666.

"Aside from limitations of the general character indicated, the courts have no authority over that part of a child's training which consists in religious discipline, and in a dispute relating to custody, religious views afford no ground for depriving a parent of custody who is otherwise qualified."

Another case which throws light upon this subject, as well as upon the matter considered under Point 4, *infra*, is a case well-seasoned with age, *THE PEOPLE ex rel v. TURNER*, 55 Ill. 280, 8 Am. Rep. 645 (1880). This case involved commitment of a 16 year old boy to the Reform School of the City of Chicago as one who was "destitute of proper parental care, and growing up in mendicancy, ignorance, idleness or vice". The court held the statute unconstitutional. It said:

"What is proper parental care? The best and kindest parents would differ, in the attempt to solve the question. No two scarcely agree; and when we consider the watchful supervision, which is so unremitting over the domestic affairs of others, the conclusion is forced upon us, that there is not a child in the land who could

not be proved, by two or more witnesses, to be in this sad condition.... In our solicitude to form youth for the duties of civil life, we should not forget the rights which inhere both in parents and children. The principle of the absorption of the child in, and its complete submission to the despotism of, the State, is wholly inadmissible in the modern civilized world.

"The parent has the right to the care, custody and assistance of his child. The duty to maintain and protect it, is a principle of natural law. He may even justify an assault and battery, in the defense of his children, and uphold them in their law suits. Thus the law recognizes the power of parental affection, and excuses acts, which, in the absence of such a relation would be punished. Another branch of parental duty, strongly inculcated by writers on natural law, is the education of children. To aid in the performance of these duties, and enforce obedience, parents have authority over them. The municipal law should not disturb this relation, except for the strongest reasons. The ease with which it can be disrupted under the laws in question; the slight evidence required, and the informal mode of procedure, make them conflict with the natural right of the parent. Before any abridgment of the right, gross misconduct or almost total unfitness on the part of the parent, should be clearly proved. This power is an emanation from God, and every attempt to infringe upon it, except from dire necessity, should be resisted in all well governed States. 'In this country, the hope of the child, in respect to its education and future advancement, is mainly

dependent upon the father; for this he struggles and toils through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift. The violent abruption of this relation would not only tend to wither these motives to action, but necessarily, in time, alienate the father's natural affections.'"

A very well reasoned case by the Colorado court deals with the position of the state as regards interference with the relationship of children to their natural parents. In NELSON v. MITCHELL, 48 Colo. 454, 111 Pac. 21, 30 L.R.A. (N.S.) 507 (1910), the father of the minor child having died, her divorced mother, who had remarried, sought custody by habeas corpus from the paternal grandparents of her daughter. In awarding the custody to the mother, the court considered the general problems and legal theories involved as follows:

"... But as governments should never interfere with the natural rights of man, except only when it is essential for the good of society, the state recognizes and enforces the right which nature gives to parents to the custody of their own chil-

dren, and only supervenes with its sovereign power when the necessities of the case require it. The experience of man has demonstrated that the best development of a young life is within the sacred precincts of a home, the members of which are bound together by ties entwined through 'bone of their bone and flesh of their flesh'; that it is such homes and under such influences that the sweetest, purest, noblest, and most attractive qualities of human nature, so essential to good citizenship, are best nurtured and grow to wholesome fruition; that, when a state is based and builded upon such homes, it is strong in patriotism, courage, and all the elements of the best civilization. Accordingly these recurring facts in the experience of man resulted in a presumption establishing prima facie that parents are in every way qualified to have the care, custody, and control of their own offspring, and that their welfare and interests are best subserved under such control. Thus, by natural law, by common law, and, likewise, the statutes of this state, the natural parents are entitled to the custody of their minor children, except when they are unsuitable persons to be intrusted with their care, control, and education, or when some exceptional circumstances appear which render such custody inimicable to the best interests of the child.

"In *Re Neff*, 20 Wash. 652, 56 Pac. 383, 384, it is said: The father 'has the natural and legal right to the custody and control of the children, unless so completely unfit from duties that the welfare of the children themselves imperatively demanded another disposition of their custody.' In *Miller v. Wallace*, 76 Ga. 479, 486, 2 Am. St. Rep. 48,

it is said, 'Prima facie, the right of custody of an infant is in the father; and when this right is resisted, upon the ground of his unfitness for the trust, or other cause, a proper regard to the sanctity of the parental relation will require that the objection be sustained by clear and satisfactory proofs.' A clear and strong case 'must be made to sustain an objection to the father's right.' And in *McKercher v. Green*, supra, the doctrine is announced that, save in exceptional cases, where it is clear the welfare of the child demands otherwise, the parents' right to the custody is paramount, and should be recognized. In *United States v. Green*, 3 Mason 482, 485, Fed. Cas. No. 15256, the court, speaking through Justice Story, after declaring that, in a general sense, the right of the father to have the custody of his infant child is certain, continues: 'But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presumes it to be for its interest to be under the nurture and care of his natural protector, both for maintenance and education.' The rule announced in 29 Cyc. Law & Proc. p. 1603, is that 'the existence of circumstances which would deprive the parent of the right to custody of the child, such as unfitness, inability to care for it, or relinquishment of the parental right of custody, will not be presumed, but must be proved by the person opposing the parent's right.' It is also there announced that the place selected by a parent for the care and support of his children is presumed suitable, and a person claiming otherwise has the burden of proof.

"We are firmly of the opinion that in

all cases of this character the presumption is that the parents are fit and suitable persons to be intrusted with the care of their minor children, and the interests and welfare of such children are best subserved when under such care and control; that such presumption is like unto the presumption of innocence in a criminal case,--ever present, throughout the controversy, until overcome by the most solid and substantial reasons, established by plain and certain proofs. Indeed, this presumption is essential to the maintenance of society, for without it man would be denaturalized, the ties of family broken, the instincts of humanity stifled, and one of the strongest incentives to the propagation and continuance of the human race destroyed... In such proceedings the power to make orders touching the care and custody of minor children must be held to be limited to the conditions and circumstances existing at the time such orders are made. The court cannot then anticipate what may possibly thereafter happen, and provide for such future contingencies."

The Wisconsin court considered this problem, as well as the important question of due process, in *LOCHER v. VENUS*, 177 Wis. 588, 188 N.W. 613, 24 A.L.R. 403 (1922). The court in considering the taking of children from their parents by the state, touched upon the most serious nature of such action, as follows:

"The unit of the state is the individual, its foundation the family. To protect the unit in his constitutionally guaranteed right to form and preserve the family is one of the basic principles for which organized government is established. Cooley, Torts, 3 d. ed. p. 27.

"That natural parenthood implies both substantial responsibilities and gives substantial rights needs no discussion. That wilful neglect to perform the one may properly result in the forfeiture of the other is also not open to debate, and not here for consideration.

"A natural affection between the parents and offspring, though it may be nought but a refined animal instinct and stronger from the parent down than from the child up, has always been recognized as an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and pursuit of happiness, our government is formed. We trust that it will never become the established doctrine that the state shall say to the parents, and particularly to the mother, --she who doth travail, and in great pain bring forth her child, and after labor doth rejoice that the child is born,--that there is but a mere privilege, and not a right, to subsequent affection, comfort, and pride of and in such child...

"If a man's money shall not be legally taken away from him save by due process of law, much less shall his child. We do not deem it necessary to base this decision upon or dwell at any length upon such possible sordid, because material, grounds for our conclusion, but rest it upon the natural

right of parenthood, a far finer and higher quality, and for that reason more sacredly to be upheld.

"The normal man and woman who have exercised their inherent right to form the family relationship, and have brought children into this world, and who have not by wilful omission or commission on their part renounced that relationship, cannot and ought not to have such relationship destroyed, even by attempted action in the name of the state, save and except through due process of law."

Mr. Justice McReynolds in *PIERCE v. SOCIETY OF SISTERS*, 268 U. S. 510, 45 S.Ct. 571, 69 L. Ed. 1070 (1925), a case involving private v. public schools, said,

"The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

It could be assumed, no doubt, that preparation for additional obligations might well include preparing him to meet what his parents conscientiously believe to be man's obligations to His Maker.

Even when the matter of deprivation is before the court the doctrine of *parens patriae* is a limited one.

CLARK v. LYON, 82 Neb. 625, 118 N. W. 472, 20 L.R.A. (N.S.) 171 (1908), was a case involving the right of a divorced father to custody of his children after his ex-wife's death. The court in speaking of the position of the state with reference to minors said,

"The statute does not make the judges the guardians of all children in the state, with power to take them from their parents, so long as the latter discharge their duties to the best of their ability, and give them to strangers because such strangers may be better able to provide what is already well provided. If that were the law, it would soon be changed by revolution, if necessary."

The Washington court goes into the question of how far a state can go in the matter of taking children from their parents in *LOVELL v. HOUSE OF THE GOOD SHEPHERD*, 9 Wash. 419, 37 Pac. 660. A widowed mother left her daughter with the defendant orphanage. Later the mother's parents adopted the child, demanded her from the defendants and brought a habeas corpus action to obtain custody. The court held that the writ should issue.

In considering the question as to when children should be taken from their parents, the court went generally into the problem. The opinion by Chief Justice Dunbar is, in part, as follows:

"...While it is true that the welfare of the child should be the first consideration of the court, yet the right of the parent is not to be disregarded; and it is a grave responsibility to deprive parents of the care, control, custody, and education of their children because they do not come up to the standard of perfection that we have established for our own action in that respect. There is scarcely a day but that children may be seen, who, in the ordinary estimation are neglected, and of whom the popular verdict would declare that they would be better off, and stand a better chance of becoming useful members of society, if they were removed from the pernicious influence of their parents. Yet it would not do for that reason to interfere with the domestic relations, or to set up our particular standard for the guidance of families in general. There is such a diversity of religious and social opinion, and of social standing and of intellectual development and of moral responsibility, in society at large, that courts must exercise great charity and forbearance for the opinions, methods, and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or social standing, before a parent

should be deprived of the comfort or custody of a child. It is doubtful that the appellant Mrs. Lovell has not been the most exemplary mother; that the care of her children has not been of that kind which would commend itself to many mothers. That she is a passionate woman, with an uncontrollable temper - coarse, vulgar, and pugnacious - is evident from the record. But if every coarse, vulgar, and passionate woman were deprived of the custody of her children, our orphan asylums would be filled to overflowing; and if every man who is given to brutalizing himself by the excessive use of intoxicants, and by other debasing habits, were to be deprived of the custody of his children, the said institutions would be found altogether inadequate. Even immorality of the mother is not always a sufficient reason for depriving her of the custody of her child. It is the universal holding of the courts, and in many states is made a provision of the statute, that the mother of an illegitimate child, in the absence of special reasons, is entitled to its custody, and of course the fact of illegitimacy is proof of the mother's immorality. The maternal instinct can generally be relied upon to protect the child far better than strangers, who act simply from a cold and unsympathetic feeling of duty to society. Of course, when it becomes apparent that nature's appeal to the parental heart meets with no response, and a parent has become so brutalized and lost to the promptings of nature that she is willing to sacrifice either the physical or moral well-being of her children to the gratification of her own debased propensities or vicious habits, it becomes the imperative duty of the court to reach forth its hand for the protection of the children. But, as we have

before said, we do not think the result in this case shows a necessity for judicial interference; and, even though it may appear that three years ago the mother was not a competent person to maintain control of this child, the difficulties then alleged to exist have now passed away. Hence, the necessity of separating the mother and child has ceased to exist."

Another case of note on this point is BRYANT v. BROWN, 151 Miss. 398, 118 So. 184, 60 A.L.R. 1325 (1928). The court upheld a commitment of a minor to the industrial school but in doing so announced the general rule with reference to the taking of children from their parents, as follows (p. 1331 A. L. R.) :

"As long as parents properly exercise their duty, under their natural rights, to rear, educate, and control their children, their right to do so may not be interfered with solely because some other person or some other institution might be deemed better suited for that purpose. The children of the poor cannot be taken from them, and awarded to the rich or to some rich and powerful institution, merely because such person or such institution might, in the judgment of the court, do a better part by the child than the natural parents. But where the parents fail to perform their natural duty to so rear and educate

the child as to make it a useful, intelligent, and moral being, but permit it to go unrestrained and to become vicious in its habits and practices, and a menace to the rest of society, the state as *parens patriae* of all children, may assert its power and apply the curative, so as to prevent injury to the child and to society by the negligent and wrongful conduct of the parents in failing to exercise the proper control and restraint over the child in its tendencies."

Anderson, J., dissenting to the decision (p.

1341, A.L.R.) states:

"What has become of one of the fundamental principles of our government, that the people who are the least governed are the best governed? When the state undertakes to do too much for the people, the result is they do too little for themselves - they rely on the state. By the statute here involved the state enters the precinct of the home, and says to the parents of the child, "Although you are doing the best you can to rear your child properly, you are making a failure of it, and the state is going to undertake the job." If the state can go that far, why not go a step further, and say by law that only those who are fit according to a moral, intellectual, and property standard fixed by the state, shall marry and bring children into the world?

"The companionship and services of their children are a valuable property right given their parents both by the laws of nature and by the laws of the state. Like any other property right, it cannot be arbitrarily taken away from them by the state. To take such a

property right away, the state must show the parents have done something to forfeit it. Otherwise they would be deprived of their right in violation of the due process provisions of the federal and state Constitutions."

The doctrine of *parens patriae* is not one giving juvenile courts unlimited powers. Neither do the states have unlimited powers under this doctrine. Section 55-10-35, Utah Code Anno., 1953, far exceeds the scope of the doctrine if it confers on the juvenile courts the indiscretionate power which it seems to confer by its words. If the court can imply the discretionate restriction into the section, then certainly the Juvenile Court of Washington County, Utah exceeded the bounds of discretion given it under the doctrine of *parens patriae* in invoking this power under the facts of the case at bar.

Point 4. Section 55-10-6, Utah Code Annotated, 1953, under which the Juvenile Court in 1. of its Conclusions of Law finds the children "neglected children" is unconstitutional, in that it is vague and uncertain.

Section 55-10-6, Utah Code Annotated, 1953 is,
as follows:

"...The words 'neglected child' include:

"A child who is abandoned by his parent, guardian or custodian.

"A child who lacks proper parental care by reason of fault or habits of the parent, guardian or custodian.

"A child whose parent, guardian or custodian neglects or refuses to provide proper or necessary subsistence, education, medical or surgical care or other care necessary for his health, morals or well-being.

"A child whose parent, guardian or custodian neglects or refuses to provide the special care made necessary by his mental condition.

"A child who is found in a disreputable place or who associates with vagrant, vicious or immoral persons.

"A child who engages in an occupation or is in a situation dangerous to life or limb or injurious to the health or morals of himself or others."

What is the meaning of the words "a child whose parent...neglects or refuses to provide proper or necessary...other care necessary for his health, morals or well-being"? Finding of Fact 17, 18 and 19 and Conclusions of Law 1 and 2 taken in conjunction with Finding of Fact 16,

to wit, "that there was no evidence that any of the children were destitute and without proper sustenance, clothing or medical care," indicate that the court either contradicted Finding of Fact 16 in Finding of Fact 18 where it said the parents "failed and neglected to provide for said children the proper maintenance, care, training and education contemplated and required by both law and morals", or it has placed its deprivation of custody solely on the grounds that these parents are raising these children in an immoral environment or in such a way as to make the children grow up to be immoral.

What is the standard of immorality used by the court? From the conditions set by the Decree and Judgment and the oath prescribed by the court it might well appear that the judgment of immorality comes from the fact that it appears that these children are so situated that they are exposed to the religious philosophy which their parents

believe to be the Word of God. Such a religious philosophy has been held by the Federal District Court for the District of Utah not to be immoral. That philosophy is found in Section 132 of DOCTRINE and COVENANTS of the Church of Jesus Christ of Latter Day Saints, all the material in which book is looked upon by over 1,000,000 people throughout the world, the majority being in the United States, as being the Word of God. Certainly the court is not saying that any part of the Word of God is immoral. The rest of the Philosophy, in view especially of the emphasis placed upon it in the questions propounded to the witnesses at the hearing with reference to it, may be said to be found in Truth Magazine. The editorial from that magazine quoted by Judge Symes in the case of UNITED STATES v. BARLOW, 56 F. Supp. 795, (1944), is quoted in this argument under Point 1, supra. It was looked upon by that court as typical of what might be found on the subject in

that publication.

The Barlow case on the question of morals here involved is important enough to deserve a detailed presentation.

In that case the court was dealing with an indictment under the mailing laws which charged that "TRUTH" magazine was "obscene, lewd, or lascivious" and "of an indecent character". This was felt to be a necessary incident of certain editorials in that publication which "simply advocated the restoration of 'celestial or plural marriage', stating that the Lord has revealed the principle thereof." The court, Judge Symes sitting, quoted the editorial set out hereinabove and said on page 796:

"A careful reading of the editorial discloses no obscene or filthy word of expression of lewd suggestion is used or contained therein. It is restrained and nothing more than an argument in favor of a practice that for many years was a tenet of the Mormon Church, until abolished as a condition of Utah to Statehood. I cannot see how any word or sentence in these

editorials submitted to the court can be denominated as lascivious, or of a nature to excite erotic feelings or thoughts in the mind of the ordinary reader, or as tending to deprave public morals, or lead to impure purposes or practices."

On page 797 the court said,

"A reading of the publication here involved forces us to the same conclusion. As stated, it is nothing more than advocacy of a certain practice that was once part of the religion of the Mormon Church, and which this group of defendants still advocates. There is nothing in it that comes within the language of the Swearingen case, or which tends to corrupt and debauch the minds and morals of those in whose hands it might fall.

"The court takes judicial notice that the Mormon Church for many years advocated polygamy, and in doing so used the mails to disseminate its literature, advocating 'celestial or plural marriages'. Such a use of the mails has continued for many years without molestation, and has never before been questioned. In the interpretation of a doubtful and ambiguous statute - a uniform administrative practice by the authorities in respect thereto over a considerable period of time carries weight with the court, especially where, as here, thousands of good citizens sincerely and honestly believe in it as part of their religion.

"It was quite natural that when the Congress forbade plural marriages and the church

agreed to submit to those laws many of the followers of the Mormon faith felt they could not conscientiously and sincerely change their beliefs in the face of what they considered the direct command of God to the contrary.

"In conclusion, it might be said that the natural reaction to reading a publication setting forth that polygamy is essential to salvation is one of repugnance and does not tend to increase sexual desire or impure thoughts. We also bear in mind that one cannot pick up a national magazine, or go to the theatre or movie without being confronted with illustrations and advertisements that tend more to incite sexual desire than do any of the publications in this magazine that have been called to our attention. In fact sex excitement is a selling point of innumerable publications and advertisements that pass without comment or prosecution."

It is to be emphasized that the court said on page 797 "There is nothing in it that comes within the language of the Swearingen case, or which tends to corrupt and debauch the minds and morals of those in whose hands it might fall."

Judge Symes apparently did not feel that this religious philosophy was immoral or that it would corrupt the mind and morals of anyone, but the Juvenile Judge of Washington County, Utah appar-

ently felt otherwise. A third person might have yet another opinion, and so a fourth, and so on ad infinitum. A hundred different people are quite likely to have a hundred different conceptions of what is moral and what is immoral.

The section of the statute in question gives no statutory definition of the term involved. In so failing, it might well be held to have left the question of what is proper or necessary moral care completely up to the juvenile judge. This would seem to be an improper delegation of legislative power. If it is not improper delegation then the court should look to the cases for guidance. Although it may not be binding authority on the Utah courts, the opinion of the Federal District Judge, District of Utah, in a matter in which the issue was involved would surely be looked upon as most highly persuasive authority, especially so in view of the fact that the Supreme Court of the United States dismissed, without opinion, an appeal by

The United States from the Barlow decision of the Federal District Court, District of Utah, at 323 U.S. 805, 65 S.Ct. 25, L. Ed. 642.

In the case of *MUSSER v. UTAH* in the United States Supreme Court, set out hereinabove in the argument under Point 1 the opinion of Mr. Justice Jackson on the use of the term "injurious to public morals" in the statute involved indicates the Justice's distrust of such broad wording without limitation or definition.

In the rehearing of this case in the Supreme Court of Utah in *STATE v. MUSSER*, - Utah - , 223 P. (2d) 193 (1950), the court held the statute "void for vagueness and uncertainty under the Fourteenth Amendment to the Federal Constitution." Mr. Justice Wade in the opinion of the court at page 194 reasoned as follows:

"The argument before this court has developed no reason why we should believe that the legislature intended, in using this language, that it should be limited to a meaning less broad than the words therein used

would indicate in their ordinary sense. No language in this or any other statute of this state or other law thereof or any historical fact or surrounding circumstance connected with the enactment of this statute has been pointed to as indicating that the legislature intended any limitation thereon other than that expressed on the face of the words used. We are therefore unable to place a construction on these words which limits their meaning beyond the general meaning. The conviction of the defendants thereunder cannot be upheld."

The same indictment given the words in that case should be applied to the words called into question herein in Section 55-10-6, Utah Code Annotated, 1953. The words "necessary for his health, morals or well-being" are certainly susceptible to a multiplicity of interpretations limited only by the number of people called upon to interpret them.

Point 5. The Findings of Fact 14, 17, 18, and 19 are not supported by the evidence, and said Findings of Fact being essential to the Conclusions of Law entered by the court, said Conclusions of Law are, therefore, not based upon

the evidence before the court, and the Judgment and Decree based upon said Findings of Fact and Conclusions of Law is, therefore, erroneous.

Finding of Fact 14 is as follows:

"That said parents, Leonard and Vera Johnson Black, have at no time counseled or advised any of their children to abide by the laws of Utah regarding polygamy, but on the contrary by their (the Parents') own conduct and example in living polygamy and by associating themselves with a religious group whose members practice and advocate polygamy have encouraged their children to become polygamists when they become of marriageable age."

This finding of fact seems to be at variance with the testimony produced at the hearing.

Mr. Black testified, on page 38 of the transcript of testimony, under questioning by the court as follows:

"Question - Did you encourage your daughters to make the marriages they did?

Answer - No, sir."

On page 43 under questioning by Mr. Nelson, as follows:

"Question - Have you generally and has your wife, tried to teach your children the necessity of obedience to the law?

Answer - Yes. We have been strict on obeying the laws, stealing and so forth."

On pages 44 and 45 in answer to a question by the court to this effect: "...I am very interested in knowing whether it would be your intention to encourage your children to comply with the laws of Utah regarding plural marriage and unlawful cohabitation or if you are going to leave it up to the children when they become of the age of consent as you say. What is it your intention to do?", Mr. Black answered, "I can tell them the results and facts, not to be law-breakers."

The mother of the children under direct questioning by Mr. Nelson on page 61 answered the question, "What do you expect to teach your children Mrs. Black?", as follows: "I expect to teach them to be upright, good citizens as far as my knowledge goes."

And further on page 61 of the transcript:

"Question - Well, then I will put it this way. If you feel that the law does not adhere to your concept of what it should be, that you are free to breach that law and to teach your children to do so?

Answer - I don't teach my children to do any such thing."

On page 65 of the transcript the mother answered a question of Mr. Nelson, as follows:

"I believe in teaching the principle of the thing, but I am not saying I would teach them to practice it."

Mr. Nelson's line of questioning on pages 69 and 70 and the mother's answers to his questions clearly indicate that she has not counseled and advised her children to enter into a plural relationship. In fact, her answers indicates that she feels the children are all too young to discuss the subject with them.

On page 77 of the transcript the mother replied to the following question by the court:

"And how will you counsel them?", as follows: "I could counsel them to obey the laws of the land, if they felt it was their duty to go otherwise why that was their life."

On page 81 Orson Black was questioned by the court, as follows: "Has the subject of plural marriage ever been discussed between you and either of your parents, Orson?" Orson replied: "No, Sir."

There is ample testimony throughout the record of this hearing showing that these parents have actively encouraged their children to obey all the laws. That seems to be good parental advice. It is not customary for parents to go down the line of the statutes and affirmatively counsel their children to obey each one. The children of these parents are not going to be advised by these parents to go out and break the law. There is ample testimony to this effect. That they might be taught the principle of celestial or plural marriage, would not be a violation of any law on

the part of the teacher. If the teacher after teaching this principle were then to say to his listener "Now, go out and enter into a plural marriage relationship." and the listener then did so in violation of law, the teacher would then also be guilty of violating the law. There is no evidence that this has ever happened on the part of these parents, and certainly it has never happened in the case of the children before the Juvenile Court in this matter.

There is a conclusion in Finding of Fact 14 that the parents' example is going to lead these children into polygamy when they reach marriageable age. The court in that finding refers to the parents' "own conduct and example in living in polygamy." Yet the court in Finding of Fact 6, in effect, found that they were not living in polygamy at the time of the hearing and had not been so living since July 24, 1953. The Findings of Fact do not square on these points. These

parents are not now living in polygamy; yet the court says the example of their living will encourage their children to become polygamists.

Of course, Finding of Fact 14 also finds that these parents "by associating themselves with a religious group whose members practice and advocate polygamy" encourage their children to become polygamists. In other words, the association is what will lead these children to become polygamists. Even a cursory reading of the history of the Church of Jesus Christ of Latter Day Saints prior to 1890 quickly shows that even when that church actively encouraged its members to enter polygamy a very small percentage of that church's membership were in the plural marriage relationship. The association was not sufficient to encourage the great majority of latter day saints in the days prior to 1890. What is the justification for concluding that association is going to do it in this day?

It would seem, of course, that such a conclusion was a necessary adjunct to there being any logic in the Findings of Fact 17, 18, and 19 that these children are being raised in an immoral environment, that their parents have neglected to provide them with proper moral training and that, therefore, the court is justified in taking the custody of these children from their parents. However necessary the conclusion may be for the sake of logic, it is certainly not a finding of fact supportable by the testimony taken at this hearing or by reference to any history of the situation, which point of history is a matter of very common knowledge in Utah and of which the court could be presumed to be aware.

Finding of Fact 17 is "That the home of Leonard Black and Vera Johnson Black at Short Creek, Utah, is an immoral environment for the rearing of said children." Such a finding is not in accord with the testimony presented at

the hearing.

Mr. Lauritzen in his testimony at page 97 of the transcript stated as to the people at Short Creek:

"I would say that I have never known, and I have been around a great deal, a more industrious people, a more honest a more reliable people in every way I can think of where I would judge a character for integrity and decency I would say these people in Short Creek average higher than any people I know.

And on page 97 as to the character of Leonard Black:

"I would say that he is as moral a character as I know, that is in the way of decency and clean-mindedness."

And on page 97 with reference to the mother of these children:

"I must say that I know very little about Vera or her home life and anything in regard to her life at all, but I would say my impression of Vera is that she is a very clean, fine woman and that she would be devoted to her children."

And on page 105 with reference as to whether the people of Short Creek were a happy people:

"I have never seen a happier bunch of people, unless it was in Harlem or down South where they turned themselves loose and sang and danced. I have often remarked to my wife that those children, those families seemed to be, from my outside standpoint, seemed to be the most happy people I have ever seen. Their lives are more wholesome and purposeful than any I have seen."

This line of testimony was not controverted.

A mother who is devoted to her children does not raise them in an immoral environment. From the testimony adduced Short Creek has a very moral environment rather than contrary.

Finding of Fact 18 seems to state itself in the words of the statute, but it does not state something which can be supported in the record before the court. The record indicates that these are very well-trained and well-behaved children. If they are not being given the proper training from the standpoint of morals, they must be immoral children. Certainly a finding of fact to that effect could not be supported. If these children are not being properly trained,

they should show tendencies toward delinquency, one would think. Who would be in a better position to observe this than their school teacher?

Mrs. Lauritzen on page 112 of the transcript of testimony was asked by Mr. Knowlton, "Do these children show any tendencies toward delinquency?" She answered, "No, they are very well-behaved children."

Mrs. Lauritzen's testimony as to whether in her opinion these children should be taken away from their parents and from Short Creek appears on page 114 of the transcript of testimony, as follows:

"I think that little children need security and love, and that security seems to come from the love they feel in the home, and it would be my opinion that they would surely lose security and gather a great deal of complexes if they were taken from their homes. I think the exuberance and happiness they have when they get to school shows that there is love in the home. It seems other complexes would arise if they were taken from the home, they wouldn't have this love and affection."

This line of testimony was not controverted.

What it indicates is that this school teacher-mother,

in an excellent position to observe these children, felt their environment was sound, their training and education quite adequate, and that they should be left where they were. The court did not agree, however, with this uncontroverted testimony.

Finding of Fact 19 follows if Findings 14, 17, and 18 are proper. These findings are improper and are not supported by the evidence and testimony taken at the hearing.

Conclusions of Law must be based upon the Findings of Fact. Where the Findings of Fact necessary to support the Conclusions of Law are in and of themselves unsupported by evidence and testimony, such Conclusions of Law are erroneous, and the Decree and Judgment of the court entered upon such Findings of Facts and Conclusions of Law will be reversed for error by the Supreme Court of the state on appeal, as this court should do in this case.

CONCLUSION

We, therefore, submit that the Decree and Judgment of the Court below is unconstitutional and void as contrary to provisions of the Constitution of Utah and the Constitution of the United States of America, that the Court erred in his Findings of Fact and Conclusions of Law, and that this Court should reverse the Decree and Judgment of the Court below.

Respectfully submitted,

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