other subject, is within the jurisdiction of the school authorities, and whatever anybody's opinion of teaching it in some other manner might be is another matter.

THE COURT: I understand Mr. Moyle to say it is necessary; is there such an averment?

MR. MOYLE: Yes, that is on page 10 of the answer.

THE COURT: Yes, you do say "necessary."

MR MCGURL: And reasonable, we say.

By THE COURT:

Q. I would imagine, Doctor, that what you really mean, in your opinion, it is an appropriate method?

A. Yes.

Q. But not a necessary method, there are other methods?

A. There are other methods.

Q. You say it is an appropriate method, and you have adopted it?

A. Yes, sir.

By MR. MOYLE:

Q. Then you admit loyalty could be taught without the flag salute, is that right?

A. Yes, sir. I will not admit, though, that we do not have the right to ask——

Q. I understand.

THE COURT: That is a legal question.

MR. HENDERSON: That is the whole point; you required it, and that is the case.

By MR. MOYLE:

Q. Outside of the flag salute issue, there are no other acts of disobedience on the part of these children?

A. None at all, very good children.

Q. You do state that the public welfare and safety involving the citizens would be harmed by reason of the fact

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that some of the pupils refuse to salute the flag, even on conscientious grounds, is that right?

A. Yes, sir.

Q. Isn't it a fact, Doctor, that there would be harm to the public welfare and safety by applying that regulation to one who conscientiously objects to it?

A. I cannot admit a conscientious objection.

Q. Just for the sake of argument, you would admit it would be possible, wouldn't you?

A. No, I think there should not be any conscientious objection.

Q. But if there were, Doctor, if one should conscientiously object and he was forced to stifle his conscience and commit this act which he believes morally wrong, wouldn't that be detrimental to the public welfare and safety?

A. May I ask a question?

Q. No, I would like to have you answer my question.

A. As I see it, there is no justification for the objection; therefore, I can't answer your question.

Mr. Moyle: I ask that answer be stricken out, it is not responsive. I would like to have an answer.

The Court: He says he cannot answer the question.

Mr. Moyle: All right, that's all.

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PLAINTIFFS' EVIDENCE IN REBUTTAL.

In rebuttal, the plaintiffs produced Charles R. Hessler who was sworn, but, after objection based on plaintiffs' offer of proof, the witness was withdrawn without testifying.

Erma Metzger was then called by the plaintiffs and duly sworn, but she too was withdrawn without testifying after objection had been raised based on plaintiffs' offer of proof.

DEFENDANTS' EVIDENCE IN SURREBUTTAL.

In surrebuttal, the defendants recalled Dr. Charles Edward Roudabush, who testified regarding the school books used in the public schools of Minersville. Defendants' evidence in surrebuttal is as follows:

> Mr. Henderson: We have some of the public school books here, and I want to see if any of them play any part. It might be helpful.
>
> There are about three paragraphs in the books that were used at the time in this school, and these books, I understand, are used generally throughout the United States, and I would like to put on the record about three paragraphs.
>
> The Court: Put everything on the record that may be material.
>
> Mr. Henderson: I think this might be helpful to show what the youngsters are taught.
>
> Mr. Moyle: I don't see how that would be helpful at all. They may be taught it in the school where they are now, for all I know. The only issue is the salute to the flag.
>
> Mr. Henderson: In Civics it shows specifically that every citizen should know how and when to salute the

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American Flag, and when to give the pledge. That is what they teach them in Civics. "The Stars and Stripes Forever" are at the top of a page in "Behave Yourself," one of the books they have in the public schools.

THE COURT: You may put on the record what you wish.

MR. HENDERSON: I just want to read, your Honor, from the books. I can put Doctor Roudabush on the stand so this can be part of his testimony, and we will assume he is there, and these books are the ones used in the school.

DOCTOR ROUDABUSH: I will certify to that. Two of them are in the grades the children were in when they left school.

CHARLES EDWARD ROUDABUSH, recalled.

DIRECT EXAMINATION.

By MR. HENDERSON:

Q. As far as "Behave Yourself" is concerned, it was a book in use at that time?

A. Yes, sir.

Q. And they were taught as follows, on page 149, at the top of which are "The Stars and Stripes Forever," being a picture of the American Flag with a young man with his hat off in his right hand and pressing it against his heart:

> "Respect and reverence for the American Flag are expected from every decent citizen. It is the symbol of the masses, and any disrespect is a reflection upon the society in which you live. The artificial rules of etiquette that have grown up, and have come to be recognized as the basis for proper recognition of it, all have their foundation in the fact that it is a symbol, that it represents something. It isn't a piece of cloth; it is the Pilgrims at Plymouth Rock, the signers of the Declaration of Independence, the fighters on the frontier, the sol-

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diers, sailors, statesmen, the rich and poor; all who have made the United States. And it is not the past alone, or the present. It is the future, whatever the future is to be. The Flag stands for all that we have been, all that we are, all that we are to be."

This book was written by Allen and Briggs. It is the property of the Minersville Public Schools at Minersville.

THE COURT: That really is supporting the plaintiffs' case.

MR. HENDERSON: We have no objection whatever it does.

THE COURT: I mean it is an acknowledgment the Flag is a symbol which they are asked to worship.

MR. HENDERSON: In "Civics Through Problems," by Edmonson, Dondinea, and Little, which is the property of the Minersville School District, reading from page 37, it says:

"In the pledge to the Flag our duty as citizens is defined. In this pledge we swear allegiance to our country. The duties of allegiance requires that the citizen be willing to defend his country in time of war and try to promote its interests at all times. In turn our country is obliged to defend the life, liberty, and property of a citizen at home and abroad. Every citizen should know how and when to salute the American Flag and be able to give the pledge. The pledge was originally written by Francis Bellamy. The first form of the pledge was changed and it is now given in the following way:

I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

THE COURT: Very well.

MR. HENDERSON: On page 351 of "Easy Road to Reading," in the 6th Grade, which is used in the Public

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Schools of Minersville, by Lyons and Carnahan, we read the following:

"The Law of Loyalty.
The good American is loyal.
If our America is to become ever greater and better, her citizens must be loyal, devotedly faithful, in every relation in life."

And the second one:

"I will be loyal to my school. In loyalty I will obey and help other pupils to obey those rules which further the good of all."

Those are part of the teachings in the particular school to which they have been going

If your Honor please, I do not know just how you want this record. We would be very glad to furnish your Honor with a request for findings of fact and findings of law, if that is the way in which you would like it.

THE COURT: I think that is the way to do it. I think you will want the testimony transcribed, which will be done shortly, and within a certain period after that I would say counsel for the plaintiffs should have his requests and his brief ready, let us say within fifteen days after the testimony is transcribed, and serve copies on you, and then within fifteen days thereafter you prepare and file yours.

MR. HENDERSON: Yes, sir.

THE COURT: And the plaintiffs have leave after that to file a reply brief, if they wish to do so.

MR. HENDERSON: If your Honor please, at this time I would like to renew my motion to dismiss on the jurisdictional grounds which are set forth at the beginning of the trial and which are set forth in the five different motions the stenographer will copy, plus the amount is not sufficient that is involved.

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THE COURT: I will take that under consideration.

MR. MOYLE: The understanding, then, is the plaintiffs will file requests for findings and a brief fifteen days after the testimony is available?

THE COURT: And serve a copy on Mr. Henderson, and Mr. Henderson will prepare his requests and brief and serve a copy on you, and you will advise the Court if you want to file a reply brief. I think you ought to get that in five days. You will have fifteen days, fifteen days, and five days.

MR. HENDERSON: That is satisfactory to us.

It was further agreed by counsel that wherever the name of Dr. A. E. Valibus appears to have been misspelled in the answer of the defendants, it will be deemed to have been correctly spelled.

At the suggestion of the Court, a suggestion was subsequently filed by the attorneys for the defendants that George H. Beatty, one of the defendants, died on January 30, 1938.

We agree that the foregoing contains a true, complete and properly prepared statement under Equity Rule 75 of the evidence adduced at the hearing of the above-numbered and entitled cause.

H. M. MCCAUGHEY,
Attorney for Plaintiffs.
JOHN B. MCGURL,
RAWLE & HENDERSON,
By JOSEPH W. HENDERSON,
Attorneys for Defendants.

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REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed June 18, 1938.)

The issues in this action having come on for trial before the Court on the fifteenth day of February, 1938, the complainants request that the Court enter the folowing as findings of fact and conclusion of law established in said matter.

FINDINGS OF FACT.

1. That the plaintiff Walter Gobitis is a citizen of the United States of America and of the Commonwealth of Pennsylvania, and is a resident of the Borough of Minersville in said Commonwealth of Pennsylvania.

Affirmed. M.

2. That plaintiffs Lillian Gobitis, age thirteen years, and William Gobitis, age twelve years, are children of the said Walter Gobitis and are residents of the Minersville School District of Minersville, Pennsylvania, and have resided there continuously for many years.

Affirmed. M.

3. That the Minersville School District is a public school district embracing the Borough of Minersville, Schuylkill County, Pennsylvania; that the defendants Dr. A. E. Valebus, Claude L. Price, Dr. T. J. McGurl, George Beatty, Thomas B. Evans, William Zapf and David I. Jones were at the time of the institution of this action the duly elected, qualified and acting Board of Education of such school district, and constitute a body politic and corporate in law, and have the management and control of the Minersville public schools; that David I. Jones is no longer a member of said Board of Education and has been succeeded by Dr. E. W. Keith subsequent to the filing of complainants' bill in equity; that the defendant Charles E.

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Roudabush is the superintendent of the Minersville public schools and acts as such under the direction, supervision and order of said Board of Education; that all of the defendants are residents of Minersville, Pennsylvania, and citizens of the Commonwealth of Pennsylvania and of the United States.

Affirmed. M.

4. That the aforesaid Minersville public schools were and are free public schools and are under the supervision and jurisdiction of the said Board of Education.

Affirmed. M.

5. That heretofore, to wit, on the sixth day of November, A. D. 1935, at a regular meeting of the said Board of Education of the Minersville public schools there was adopted and entered on the minutes of such meeting a school regulation in words and figures as follows, to wit:

> "That the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of said schools be required to salute the flag of our country as a part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly."

Affirmed. M.

6. That the minor plaintiffs Lillian Gobitis and William Gobitis were placed in the Minersville public school by their father Walter Gobitis at the beginning of the scholastic year 1935-1936 and attended said school until the sixth day of November, 1935.

Affirmed. M.

7. That plaintiffs are members of an unincorporated association of Christian people designated as Jehovah's Witnesses; that each and every one of Jehovah's Witnesses has entered into an agreement or covenant with Jehovah

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God, wherein they have consecrated themselves to do His will and to obey His commandments; they accept the Bible as the Word of God, and conscientiously believe that a failure to obey the precepts and commandments laid down therein will in due time result in their eternal destruction. Plaintiffs and all of Jehovah's Witnesses sincerely and honestly believe that the act of saluting a flag contravenes the law of Almighty God in this, to wit:

(a) To salute a flag would be a violation of the Divine commandment stated in verses 4 and 5 of the twentieth chapter of Exodus of the Bible, which reads as follows, to wit:

> "Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them, nor serve them . . . ",

in that said salute signifies that the flag is an exalted emblem or image of the government and as such entitled to the respect, honor, devotion, obeisance and reverence of the saluter.

(b) To salute a flag means in effect that the person saluting the flag ascribes salvation and protection to the thing or power which the flag stands for and represents, and that since the flag and the government which it symbolizes are of the world and not of Jehovah God, it is wrong to salute the flag, and to do so denies the supremacy of Almighty God, and contravenes His express command as set forth in Holy Writ.

Affirmed as to plaintiffs. M.

8. Plaintiff Walter Gobitis has at all times endeavored to instruct and inform his said children in the truths set forth in God's Word, the Bible, desiring to educate them

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and bring them up as devout and sincere Christian men and women, all as it was his right, privilege and duty so to do; that said children have been so instructed from an early age and are now and have been at all times material hereto sincere believers in the Bible teachings and have faithfully endeavored to obey the commandments of Almighty God as set forth therein.

Affirmed. M.

9. Plaintiffs are American citizens and honor and respect their country and state, and willingly obey its laws, but that they nevertheless believe that their first and highest duty is to their God and His commandments and laws, and that true Christians have no alternative except to obey the Divine commandments and to follow their Christian convictions.

Affirmed. M.

10. That the said Lillian Gobitis and William Gobitis did not and were conscientiously unable to salute the flag because their religious beliefs and manner of worship forbade such salute, and the giving of such salute was in contravention of and in conflict with the commands of Almighty God, as they sincerely believed.

Affirmed. M.

11. That at the meeting of the Board of Education of the Minersville public schools held on November 6, 1935, as aforesaid, and immediately after the passage of the regulation set forth in foregoing paragraph "5." hereof, the defendant Charles E. Roudabush, acting under the direction and authority of said Board of Education aforesaid, publicly announced, "I hereby expel from the Minersville Schools Lillian Gobitis, William Gobitis and Edmund Wasliewski for this act of insubordination, to wit, failure to salute the flag in our school exercises."

Affirmed. M.

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12. That the sole reason for the said expulsion and their subsequent inability to attend classes at the said school was the refusal by the said Lillian and William Gobitis to salute the flag as required by the regulation of the Board of Education hereinbefore referred to.

Affirmed. M.

13. That since the sixth day of November, A. D. 1935, the said Lillian Gobitis and William Gobitis, as a result of said order of expulsion, have been unable to attend and have not attended their respective classes in the aforesaid Minersville public schools.

Affirmed. M.

14. That the value of the right for which plaintiffs seek protection, to wit, the right of the minor plaintiffs to obtain an education in the public schools of the Commonwealth of Pennsylvania and in the schools maintained by the Minersville School District is a valuable personal and property right to said plaintiffs, and the denial to them of such right is causing them damage in excess of the sum or value of three thousand ($3000) dollars, exclusive of interest and costs.

Affirmed as to plaintiff Walter Gobitis only. M.

CONCLUSIONS OF LAW.

1. That this Court has jurisdiction of said cause, because it is a suit of a civil nature in equity wherein the controversy exceeds, exclusive of interest and costs, the sum or value of three thousand ($3000) dollars, and arises under the Fourteenth Amendment to the Constitution of the United States.

Affirmed. M.

2. That the regulation of the Board of Education of the Minersville public schools entered on the sixth day of November, 1935, and hereinbefore referred to, is unconsti-

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tutional, null and void, as applied to the plaintiffs Lillian Gobitis and William Gobitis, under the due process clause of the Fourteenth Amendment to the Constitution of the United States, for the following reasons, to wit:

(a) It unreasonably restricts the freedom of religious belief and worship and the free exercise thereof, of said plaintiffs.

(b) It unreasonably restricts the freedom of speech of said children by subjecting them to the penalties of dismissal from school and of juvenile delinquency, solely because they are conscientiously unwilling and unable to salute the flag.

(c) It discriminates against children in the public schools by requiring them to salute the flag whereas it does not make such a requirement of the rest of the population, and thereby denies the said Lillian Gobitis and William Gobitis the equal protection of the laws guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

Refused as drawn. M.

3. That the aforesaid regulation is unconstitutional, null and void as applied to the plaintiff Walter Gobitis under the due process clause of the Fourteenth Amendment to the Constitution of the United States, for the following reasons, to wit:

(a) It unreasonably restricts the liberty of Walter Gobitis in his choice and direction that his said children be educated at free public schools.

(b) It unreasonably restricts the liberty of said Walter Gobitis by subjecting him to penalties of prosecution and punishment under the compulsory school attendance laws of the Commonwealth of Pennsylvania, not for his own conduct, but for the conduct of his children in failing to salute the flag.

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(c) It unreasonably restricts the liberty of said Walter Gobitis freely to impart to his said children Bible teachings and a manner of worship according to the dictates of his own conscience.

(d) It denies the said Walter Gobitis of the property right to have his children, the said Lillian Gobitis and William Gobitis, educated in the free public schools of the City of Minersville, without charge.

Refused as drawn. M.

4. That the acts and conduct of defendants in excluding the minor plaintiffs from the public schools of Minersville cannot be justified under the police power of the state in that the failure and refusal of said minor plaintiffs to salute the national flag in accordance with the provisions of said regulation could not and did not in any way prejudice or imperil the public safety, health or morals or the property or the personal rights of their fellow citizens.

Affirmed. M.

5. That the plaintiffs have no adequate remedy at law to prevent the injury and damage as aforesaid.

Affirmed. M.

6. That the plaintiffs are entitled to judgment for the relief demanded in the bill in equity.

Affirmed. M.

I Therefore Direct that judgment be entered as follows, to wit:

1. That the regulation of the Board of Education of the Minersville public schools set out in paragraph "5." of page 2 hereof, as applied to the plaintiffs, be decreed to be null and void as violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

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2. That the said defendants, and each of them, and all persons acting under their authority and direction be enjoined and restrained from doing the following acts:

(a) From continuing in force the expulsion order expelling said minor plaintiffs from school and prohibiting their attendance at said schools.

(b) From requiring and ordering said minor plaintiffs to salute the flag during the course of the patriotic exercises conducted at said schools, or at any other time while in attendance at said schools.

(c) From in anywise hindering or molesting or interfering with the right of said minor plaintiffs to enjoy full religious freedom in the manner dictated by conscience of their own.

Let judgment be entered accordingly.

Dated April , 1938.

....

Judge.

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DEFENDANTS' REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed April 5, 1938.)

The learned trial Judge in the above-entitled case is respectfully requested by the defendants to make the following findings of fact and conclusions of law:

FINDINGS OF FACT.

1. The plaintiff Walter Gobitis is a citizen of the United States of America and of the Commonwealth of Pennsylvania, and is a resident of the Borough of Minersville in said Commonwealth of Pennsylvania.

Affirmed. M.

2. The plaintiff Lillian Gobitis was born November 2, 1923, and the plaintiff William Gobitis was born September 17, 1925. Each of said plaintiffs are children of the aforesaid Walter Gobitis, citizens of the United States of America, and of the Commonwealth of Pennsylvania, and are residents of the Minersville School District of Minersville and have resided there continuously for many years.

Affirmed. M.

3. The Minersville School District is a public school district embracing the Borough of Minersville, Schuylkill County, Pennsylvania; that the defendants Dr. A. E. Valebus, Claude L. Price, Dr. T. J. McGurl, George Beatty, Thomas B. Evans, William Zapf and David I. Jones were at the time of the institution of this action the duly elected, qualified and acting Board of Education of such school district, and constitute a body politic and corporate in law, and have the management and control of the Minersville public schools; David I. Jones is no longer a member of said Board of Education and has been succeeded by Dr. E. W. Keith subsequent to the filing of complainants' bill in equity; George H. Beatty is no longer a member of said

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Board of Education, having died testate on January 30, 1938; the defendant Charles E. Roudabush is the superintendent of the Minersville public schools and acts as such under the direction, supervision and order of said Board of Education; that all of the defendants now living are residents of Minersville, Pennsylvania, and citizens of the Commonwealth of Pennsylvania and of the United States.

Affirmed. M.

4. The aforesaid Minersville public schools were and are free public schools and are under the supervision and jurisdiction of the said Board of Education.

Affirmed. M.

5. On the sixth day of November, A. D. 1935, at a regular meeting of said Board of Education of the Minersville public schools there was adopted and entered on the minutes of such meeting a school regulation in words and figures as follows, to wit:

> "That the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of said schools be required to salute the flag of our country as a part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly."

Affirmed. M.

6. Said regulation provided the reasonable method of teaching "civics, including loyalty to the State and Federal Government" and its adoption was within the authority of the defendant Board of Education.

Refused as drawn. M.

7. Subsequent to the adoption of said regulation and pursuant to the requirements contained therein, it has been and still is the custom and practice of the teachers and pupils of the Minersville public schools at the opening of school to rise, place their right hands on their respective

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breasts and to speak the following words: "I pledge allegiance to the flag of the United States of America, and the Republic for which it stands; one nation indivisible, with liberty and justice for all." The teachers and pupils, while the aforesaid words are being spoken, extend their respective right hands so as to salute the flag.

Affirmed. M.

8. The minor plaintiffs Lillian Gobitis and William Gobitis were placed in the Minersville public school by their father Walter Gobitis at the beginning of the scholastic year 1935-1936 and attended said school until the sixth day of November, 1935.

Affirmed. M.

9. The plaintiffs are members of an unincorporated association of Christian people designated as Jehovah's Witnesses; each of the plaintiffs as a member of said group has covenanted with Jehovah God to obey the commandments of God and to preach the gospel of the kingdom as contained in the Bible; the Bible constitutes the creed of each of the plaintiffs.

Affirmed. M.

10. The act of saluting the national flag is not a violation of any of the commandments of God as set forth in the Bible; it is not an act of idolatry or worship of an image in place of God, and has no reference to nor does it affect or concern one's religious beliefs or one's manner of religious worship.

Refused as drawn. M.

11. The act of saluting the national flag is no more than an acknowledgment of the temporal sovereignty of our country and has nothing to do with religion. It is not a religious rite but merely a part of a patriotic ceremony.

Refused as drawn. M.

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12. The act of saluting the national flag does not go beyond that which is reasonably due any government.

Refused as drawn. M.

13. The act of saluting the national flag is merely an awakening in the minds of youth of a civic consciousness and of loyalty to government.

Refused as drawn. M.

14. Lillian Gobitis and William Gobitis failed to salute the national flag at daily exercise of Minersville public school.

Affirmed. M.

15. At the meeting of the Board of Education of the Minersville public schools held on November 6, 1935, as aforesaid, and immediately after the passage of said regulation the defendant Charles E. Roudabush, acting under the direction and authority of said Board of Education aforesaid, publicly announced, "I hereby expel from the Minersville schools Lillian Gobitis, William Gobitis and Edmund Wasliewski for this act of insubordination, to wit, failure to salute the flag in our school exercises."

Affirmed. M.

16. Since November 6, 1935, Lillian Gobitis and William Gobitis have not attended their respective classes in the aforesaid Minersville public school.

Affirmed. M.

17. From the last week of December, 1935, to the end of May, 1937 (except for holidays and vacation periods), Lillian Gobitis attended classes in Jones Kingdom School at Andreas, Pennsylvania.

Affirmed. M.

18. From September, 1937, to the date of hearing, to wit, February 15, 1938 (except for holidays and vacations),

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Lillian Gobitis attended classes in Pottsville Business College.

Affirmed. M.

19. From the last week of December, 1935, to the day of hearing, to wit, February 15, 1938 (except for holidays and vacations), William Gobitis has attended class in the Jones Kingdom School at Andreas, Pennsylvania, being now in the seventh grade.

Affirmed. M.

20. The Jones Kingdom School at Andreas, Pennsylvania, does not provide education beyond the eighth grade.

Affirmed. M.

21. Neither Walter Gobitis nor his children Lillian Gobitis or William Gobitis have made any attempt to be admitted to classes at any of the four parochial grade schools in Minersville or the parochial high school in Pottsville, Pennsylvania, which is only four miles distant from Minersville.

Affirmed. M.

22. The parochial schools in Minersville and vicinity permit persons of other religious beliefs to attend their institution, many of such persons attending by mere subscription of whatever they are able to pay and many of such persons attending at no cost whatsoever.

Refused. M.

23. Walter Gobitis has not already expended and in all probability will not expend until Lillian Gobitis attains the age of eighteen years the sum of $3000 on account of educating said Lillian Gobitis since her expulsion from the Minersville public schools.

Affirmed. M.

24. Walter Gobitis has not already expended and in all probability will not expend until William Gobitis attains the

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age of eighteen years the sum of $3000 on account of educating said William Gobitis since his expulsion from the Minersville public schools.

Affirmed. M.

25. Walter Gobitis has not already expended and in all probability will not expend until William Gobitis and Lillian Gobitis respectively attain the age of eighteen years the sum of $3000 on account of educating the said William Gobitis and Lillian Gobitis since their expulsion from the Minersville public schools.

Refused. M.

26. The amount in controversy does not exceed the sum of $3000 exclusive of interest and costs.

27. The failure or refusal of Lillian Gobitis and of William Gobitis or of any pupil or group of pupils to salute the national flag was and would be disrespectful to the government of which the flag is a symbol and tends and will tend to promote disrespect for that government and its laws with the result that the public welfare and safety and well-being of the citizens of the United States will be ultimately harmed and seriously affected thereby.

Refused. M.

CONCLUSIONS OF LAW.

1. This Court has no jurisdiction of this suit under subsection 1 of section 24 of the Judicial Code (28 U. S. C. A. sec. 41 (1)) because the matter in controversy does not exceed the sum or value of $3000, exclusive of interest and cost.

Refused. M.

2. This Court has no jurisdiction of this suit under subsection 1 of section 24 of the Judicial Code (28 U. S. C. A. sec. 41 (1)) because the matter in controversy does not arise under the Constitution or laws of the United States.

Refused. M.

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3. This Court has no jurisdiction of this suit under subsection 14 of section 24 under the Judicial Code (28 U. S. C. A. sec. 41 (1)) because the plaintiffs have not been deprived of any right, privilege or immunity secured to them by the Constitution of the United States or of any right secured by any law of the United States.

Affirmed. M.

4. The plaintiffs have failed to establish cause of action entitling them to the relief sought in their bill of complaint.

Refused. M.

5. The Board of Education of Minersville School District had the authority to adopt reasonable regulations regarding the conduct and studies of pupils in its school district and to expel pupils, such as the minor plaintiffs, for refusal to obey such regulations.

Affirmed. M.

6. The resolution requiring pupils to salute the national flag as a part of the daily exercises of the school is reasonable.

Refused as drawn. M.

7. The enforcement of said regulation would not violate any right, privilege or immunity secured to the plaintiffs under the Constitution of the United States.

Affirmed. M.

8. The enforcement of said regulation would not violate any right, privilege or immunity secured to the plaintiffs under the Constitution of the Commonwealth of Pennsylvania.

Refused. M.

9. The attendance at public schools in the Commonwealth of Pennsylvania is a privilege or advantage which is to be enjoyed by its citizens subject to reasonable conditions and restrictions imposed by the legislature through the

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local boards of education, and in this case through the Board of Education of Minersville School District. It is not a right entitling the plaintiffs to the relief sought in their bill of complaint.

Refused. M.

10. Plaintiffs' bill of complaint should be dismissed with reasonable costs and charges to be borne by plaintiffs.

Refused. M.

Respectfully submitted,

John B. McGurl,
Rawle & Henderson,
Joseph W. Henderson,
George M. Brodhead, Jr.,
Attorneys for Defendants.

OPINION

Sur Pleadings and Proofs.

(Filed June 18, 1938.)

June 18, 1938.

Maris, *J.*

This suit in equity was brought to enjoin the individual defendants from continuing to prohibit the attendance of the minor plaintiffs at the Minersville Public Schools because of their refusal to salute the national flag as required by the defendants. From the evidence I make the following

Special Findings of Fact.

Plaintiff Walter Gobitis is a citizen of the United States and of the Commonwealth of Pennsylvania and is a resident of the Borough of Minersville, Schuylkill County, Pennsylvania. Plaintiffs Lillian Gobitis (hereinafter called Lillian) and William Gobitis (hereinafter called William), are his children. Lillian was born November 2, 1923 and is now

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fifteen years of age. William was born September 17, 1925 and is now thirteen years of age. Both of them are citizens of the United States and of the Commonwealth of Pennsylvania and reside with their parents in the Borough of Minersville where they have lived for many years.

The Minersville School District is a public school district of the Commonwealth of Pennsylvania embracing the territory of the Borough of Minersville. The individual defendants David I. Jones, Dr. E. A. Valibus, Claude L. Price, Dr. T. J. McGurl, George Beatty, Thomas B. Evans and William Zapf were at the time this suit was brought the duly elected and acting members of the Board of Education (hereinafter called the Board) of the Minersville School District, having the management and control of the Minersville Public Schools. David I. Jones is no longer a member of the Board, having been succeeded by Dr. E. W. Keith. George Beatty is no longer a member of the Board having died January 30, 1938. Defendant Charles E. Roudabush is the superintendent of the Minersville Public Schools appointed by and acting under the direction and supervision of the Board. All of the surviving defendants are residents of the Borough of Minersville and citizens of the Commonwealth of Pennsylvania and of the United States.

The Minersville Public Schools were and are free public schools under the supervision and jurisdiction of the Board. William and Lillian were placed in the Minersville Public School by their father, Walter Gobitis, at the beginning of the school year 1935-1936 and attended the school until November 6, 1935.

On November 6, 1935 at a regular meeting of the Board the following school regulation was adopted:

> "That the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of said schools be required to salute the flag of our country as a part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly."

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Lillian and William having failed to salute the national flag at the daily exercises of the Minersville Public School, defendant Charles E. Roudabush on November 6, 1935 at the direction of the Board and immediately after the adoption of the regulation above quoted, publicly announced: "I hereby expel from the Minersville Schools Lillian Gobitis, William Gobitis and Edmund Wasliewski for this act of insubordination, to wit, failure to salute the flag in our school exercises." Since that date Lillian and William have not been permitted to attend the Minersville Public School.

Lillian and William and their father, Walter Gobitis, are members of an association of Christian people calling themselves Jehovah's Witnesses. Each of the plaintiffs as a member of that association has covenanted with Jehovah God to do His will and to obey His commandments. They accept the Bible as the word of God and conscientiously believe that a failure to obey the precepts and commandments laid down therein will in due time result in their eternal destruction. Each of the three plaintiffs sincerely and honestly believes that the act of saluting a flag contravenes the law of God because (a) it is a violation of the Divine commandment stated in verses 3, 4 and 5 of the twentieth chapter of the Biblical book of Exodus that "Thou shalt have no other gods before me. Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; Thou shalt not bow down thyself to them, nor serve them . . ." in that such a salute signifies that the flag is an exalted emblem or image of the Government and as such entitled to the respect, honor, devotion, obeisance and reverence of the salutor, and (b) it means in effect that the person saluting the flag ascribes salvation and protection to the thing or power which the flag stands for and represents, and that, since the flag and the Government which it symbolizes are of the world and not of Jehovah God, it is wrong to salute the flag and to do so denies the supremacy of Almighty God, and contravenes his express command as set forth in Holy Writ.

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The refusal of Lillian and William to salute the flag in the Minersville Public School was based solely upon their sincerely held religious convictions that the act was forbidden by the express command of God as set forth in the Bible. Both they and their father, Walter Gobitis, are loyal American citizens who honor and respect their state and country and who are willing and ready to obey all its laws which do not conflict with what they sincerely believe to be the higher commandments of God. Their refusal to salute the flag was not intended by them to be disrespectful to the Government and it did not promote disrespect for the Government and its laws nor endanger the public safety, health or morals or the property or personal rights of their fellow citizens.

The enforcement of defendants' regulation requiring the flag salute by children who are sincerely opposed to it upon conscientious religious grounds is not a reasonable method of teaching civics, including loyalty to the State and Federal Government, but tends to have the contrary effect upon such children.

From the last week of December, 1935 to the end of May, 1937 (except for holidays and vacation periods) Lillian attended the Jones Kingdom School at Andreas, Pennsylvania, and from September, 1937 to the date of hearing, February 15, 1938 (except for holidays and vacation), she attended the Pottsville Business College. From the last week of December, 1935 to the date of hearing, February 15, 1938 (except for holidays and vacation periods), William attended the said Jones Kingdom School. Both the Jones Kingdom School and the Pottsville Business College are private schools whose patrons are required to pay for the tuition of the children attending them.

Up to the present time Walter Gobitis has expended for the education of Lillian since November 6, 1935 a sum in excess of $600 and he will be required to expend for her education in the future during the period she is required by the Pennsylvania School Code to remain in school a sum not

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less than $600, or $1,200 in all. Up to the present time Walter Gobitis has expended for the education of William since November 6, 1935 a sum in excess of $800 and he will be required to expend for his education in the future during the period he is required by the Pennsylvania School Code to remain in school a sum not less than $1,200, or $2,000 in all.

Discussion.

This suit has been brought to restrain the enforcement against the minor defendants of a school regulation requiring a daily salute to the flag. It is based upon the ground that the enforcement of this regulation as a condition of the exercise of their right to attend the public schools, infringed the liberty of conscience guaranteed them by the Fourteenth Amendment to the Federal Constitution.

The important legal questions which the case raises were fully discussed in our opinion denying the defendants' motion to dismiss the bill. 21 F. Supp. 581. We there held that the liberty guaranteed by the Fourteenth Amendment includes liberty to entertain any religious belief and to do or refrain from doing any act on conscientious grounds, which does not prejudice the safety, health, morals, property or personal rights of the people. We further held that the minor plaintiffs have a right to attend the public schools and that to require them, as a condition of the exercise of that right, to participate in a ceremony which runs counter to religious convictions sincerely held by them, would violate the Pennsylvania Constitution and infringe the liberty guaranteed them by the Fourteenth Amendment, unless it should appear that the public safety, health or morals or the property or personal rights of their fellow citizens would be prejudiced by their refusal to participate.

The facts as I have found them sustain the allegations of the bill. No one who heard the testimony of the plaintiffs and observed their demeanor upon the witness stand could have failed to be impressed with the earnestness and sincerity of their convictions. While the salute to our na-

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tional flag has no religious significance to me and while I find it difficult to understand the plaintiffs' point of view, I am nevertheless entirely satisfied that they sincerely believe that the act does have a deep religious meaning and is an act of worship which they can conscientiously render to God alone. Under these circumstances it is not for this court to say that since the act has no religious significance to us it can have no such significance to them. As we said in our former opinion (21 F. Supp. 584), under our Constitutional principles "If an individual sincerely bases his acts or refusals to act on religious grounds they must be accepted as such and may only be interfered with if it becomes necessary to do so in connection with the exercise of the police power, that is, if it appears that the public safety, health or morals or property or personal rights will be prejudiced by them. To permit public officers to determine whether the views of individuals sincerely held and their acts sincerely undertaken on religious grounds are in fact based on convictions religious in character would be to sound the death knell of religious liberty."

I think it is also clear from the evidence that the refusal of these two earnest Christian children to salute the flag cannot even remotely prejudice or imperil the safety, health, morals, property or personal rights of their fellows. While I cannot agree with them I nevertheless cannot but admit that they exhibit sincerity of conviction and devotion to principle in the face of opposition of a piece with that which brought our pioneer ancestors across the sea to seek liberty of conscience in a new land. Upon such a foundation of religious freedom our Commonwealth and Nation were built. We need only glance at the current world scene to realize that the preservation of individual liberty is more important today than ever it was in the past. The safety of our nation largely depends upon the extent to which we foster in each individual citizen that sturdy independence of thought and action which is essential in a democracy. The loyalty of our people is to be judged not so much by their

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words as by the part they play in the body politic. Our country's safety surely does not depend upon the totalitarian idea of forcing all citizens into one common mold of thinking and acting or requiring them to render a lip service of loyalty in a manner which conflicts with their sincere religious convictions. Such a doctrine seems to me utterly alien to the genius and spirit of our nation and destructive of that personal liberty of which our flag itself is the symbol.

It follows that the regulation in question, however, valid and reasonable it may be when applied to others, cannot constitutionally be applied to the plaintiffs as a condition of the right of Lillian and William to attend the public schools and of their father to have them do so.

A question of jurisdiction remains to be considered. In our former opinion we held that the case is one arising under the Constitution of the United States of which this court has jurisdiction under subdivision (1) of Section 24 of the Judicial Code if the matter in controversy exceeds the sum or value of $3,000. The bill contained a clear averment that the jurisdictional amount was involved. This, however, was contraverted by the answer. The amount involved is to be measured by the value of the right to be protected. In this case the right involved is the right to attend the public schools and its value may be measured by the cost of obtaining an equivalent education at private institutions. I have found that cost in the case of Lillian to be $1,200 and in the case of William to be $2,000.

The defendants urge that the rights of Lillian and William are separate rights, the value of which must be separately considered for jurisdictional purposes, and since neither reaches $3,000 the jurisdictional amount is not involved and the bill must be dismissed. The defendants, however, overlook the fact that the obligation to provide for the education of these two children rests upon their father, the plaintiff Walter Gobitis, who is a proper party to the suit, since his right to have his children educated in the public school is also affected. Furthermore he is re-

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quired by Section 1414 of the Pennsylvania School Code as amended (24 P. S. Pa. § 1421), to send his children to school, and under Section 1423 (24 P. S. Pa. § 1430) is guilty of a misdemeanor if he fails to comply with the provisions of the act regarding compulsory school attendance. The amount involved in the suit, so far as he is concerned is, therefore, $1,200 plus $2,000. These amounts he may aggregate for the purpose of determining jurisdiction. Kimel v. Missouri State Life Ins. Co, 71 F. (2d) 921. This court, therefore, has jurisdiction of the bill as to him and consequently as to the minor plaintiffs also. Grosjean v. American Press Co., 297 U. S. 233.

I accordingly reach the following

Conclusions of Law.

This court has jurisdiction of the suit.

The regulation adopted by the defendants on November 6, 1935, as applied to the minor plaintiffs as a condition of their right to attend the Minersville Public Schools, deprives the plaintiffs of their liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The plaintiffs are entitled to an injunction against the defendants restraining them from continuing in force the order expelling the minor plaintiffs from the Minersville Public School and prohibiting their attendance at said school and from requiring the minor plaintiffs to salute the national flag as a condition of their right to attend the said school.

A decree may be entered in accordance with this opinion.

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DECREE.

(Filed July 11, 1938.)

This cause coming on to be heard before the Honorable Albert Branson Maris, holding the United States District Court for the Eastern District of Pennsylvania, upon the pleadings and proof on file, and all stipulations and arguments of counsel thereon.

From the consideration of all of which thereof it is on this eleventh day of July, A. D. 1938

Adjudged, Ordered and Decreed:

1. That the matter in dispute in this cause, exclusive of interest and costs, exceeds the sum or value of three thousand ($3000) dollars.

2. That the regulation of the Board of Education of the Minersville Public Schools adopted on the sixth day of November, A. D., 1935, which said regulation is in words and figures as follows, to wit:

> "That the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of said schools be required to salute the flag of our country as a part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly."

as applied to the minor complainants as a condition of their right to attend the Minersville Public Schools is null and void in that it deprives them of liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

3. That the defendants, Minersville School District: Board of Education of Minersville School District, consisting of David I. Jones, Dr. E. A. Valibus, Claude L. Price, Dr. T. J. McGurl, George Beatty, Thomas B. Evans and William Zapf, and Charles E. Roudabush, Superintendent

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of Minersville Public Schools, their agents, servants, officers and attorneys, and each of them be, and they hereby are perpetually enjoined and restrained from

(a) continuing in force the order expelling the said minor complainants from the Minersville Public Schools and from prohibiting their attendance at said schools;

(b) requiring said minor complainants to salute the national flag as a condition of their right to attend said schools.

4. That the defendants, Minersville School District: Board of Education of Minersville School District, consisting of David I. Jones, Dr. E A. Valibus, Claude L. Price, Dr. T. J. McGurl, George Beatty, Thomas B. Evans and William Zapf, and Charles E. Roudabush, Suerintendent of Minersville Public Schools, pay all the costs of this cause, for which execution will issue.

Dated and entered this eleventh day of July, A D. 1938.

MARIS, *J.*

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STIPULATION.

(Filed August 9, 1938.)

And now, to wit, this ninth day of August, 1938, it is stipulated and agreed by and between Harry M. McCaughey, Esq., attorney for plaintiffs, and John B. McGurl, Esq., and Rawle & Henderson, Esqs., attorneys for defendants, that the above-entitled proceedings in equity be discontinued as to George Beatty, one of the defendants in the above-entitled case.

H. M. McCaughey,
Attorney for Plaintiffs.
John B. McGurl,
Rawle & Henderson,
By Joseph W. Henderson,
Attorneys for Defendants.

Approved:

Maris, *J.*

PRÆCIPE TO MARK CASE DISCONTINUED AS TO GEORGE BEATTY, ONE OF THE DEFENDANTS.

(Filed August 9, 1938.)

To the Clerk:

Kindly mark the above-entitled proceedings in equity discontinued as to George Beatty, one of the defendants in the above-entitled case, in accordance with the stipulation approved by the Court and filed of record.

H. M. McCaughey,
Attorney for Plaintiffs.
John B. McGurl,
Rawle & Henderson,
By Joseph W. Henderson,
Attorneys for Defendants.

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PETITION FOR APPEAL.

(Filed August 9, 1938.)

And now, to wit, this ninth day of August, A. D. 1938, Minersville School District, Board of Education of Minersville School District, David I. Jones, Dr. A. E. Valibus, Claude L. Price, Dr. T. J. McGurl, Thomas B. Evans and William Zapf and Charles E. Roudabush, superintendent of Minersville public schools, considering themselves aggrieved by the decree made and entered hereon on the eleventh day of July, A. D. 1938, in the above-entitled cause, do hereby appeal from said decree and the provisions thereof to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignments of error which are filed simultaneously herewith, and they pray that this appeal and review may be allowed, and that a transcript of the record, papers and proceedings upon which such order was made, and duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

And your petitioners desire that said appeal shall operate as a supersedeas, and therefore pray that an order be made fixing the amount of security which your petitioners shall give and furnish upon such an appeal, and that, upon giving bond in an amount to be fixed by this Court, the said appeal may operate as a supersedeas and may suspend during the pendency of said appeal the effect of any injunction.

John B. McGurl,
Rawle & Henderson,
By Joseph W. Henderson,
Attorneys for Defendants.

August 9, 1938.

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ORDER ALLOWING APPEAL.

(Filed August 9, 1938.)

And now, to wit, this ninth day of August, A. D. 1938, it is ordered that an appeal be allowed as prayed for; and it is further ordered that said appeal shall operate as a supersedeas of the decree made and entered in the above-entitled cause and shall suspend and stay all further proceedings in this court, including any injunction until the termination of said appeal by the United States Circuit Court of Appeals for the Third Circuit upon bond being filed in the amount of $250.

By THE COURT,

MARIS,
J.

ASSIGNMENTS OF ERROR.

(Filed August 9, 1938.)

And now come Minersville School District, Board of Education of Minersville School District, David I. Jones, Dr. A. E. Valibus, Claude L. Price, Dr. T. J. McGurl, Thomas B. Evans and William Zapf and Charles E. Roudabush, superintendent of Minersville public schools, petitioners, and file the following assignments of error on appeal from the decree of this Court, dated July 11, 1938:

1 The learned Court erred in denying defendants' motion to dismiss, to wit:

> "Now come Minersville School District: Board of Education of Minersville School District, consisting of David I. Jones, Dr. E. A. Valibus, Claude L. Price, Dr. T. J. McGurl, George Beatty, Thomas B. Evans and William Zapf, and Charles E. Roudabush, Superintendent of Minersville Public Schools, defendants, by

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their attorneys John G. McGurl, Esquire, and Rawle & Henderson, Esquires, and move the Court to dismiss the bill of complaint filed in the above entitled case upon grounds and reasons therefor as follows:

1. The matters set forth in plaintiffs' bill of complaint do not involve a dispute or controversy within the jurisdiction of this Court.

2. The plaintiffs failed to allege any facts which specifically or inferentially substantiate plaintiffs' allegation that the matter complained of is causing them damage in excess of the sum or value of $3000.00 exclusive of interest and costs.

3. Under the facts set forth in plaintiffs' bill of complaint, the plaintiffs' suit does not involve a controversy arising under the Constitution of the United States.

4. Under the facts set forth in plaintiffs' bill of complaint, the plaintiffs have not been deprived of any right, privilege or immunity secured by the Constitution of the United States.

5. The bill of complaint fails to set forth a good cause of action or to entitle the plaintiffs to the relief prayed for.

6. The alleged rights for which the plaintiffs seek protection are not such rights as entitle them to the relief sought.

7. The bill of complaint fails to show that the plaintiffs have sustained or in the future are likely to sustain any loss, damage or injury for which the defendants are liable either at law or in equity.

8. Under the Constitution of the United States and under the Constitution and laws of the State of Pennsylvania the defendants have full power and authority

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to adopt the regulation complained of and to enforce its provisions as set forth in the bill of complaint.

Therefore the defendants and each of them respectively move the Court to dismiss the bill of complaint with their reasonable costs and charges on their behalf most wrongfully sustained."

. . . . . .

"MARIS, *J*.

. . . . . .

The motion to dismiss the bill is denied."

2. The learned Court erred in denying defendants' motion to dismiss, which motion was made at the commencement of the hearing in the above case, to wit:

"MR. HENDERSON: May it please the Court, this matter was first brought before you on a bill in equity filed by the complainants, and then a motion to dismiss filed by the school board, the Minersville School District. Your Honor has ruled upon that and is familiar with the matter.

Since that time we have filed an answer. I now, therefore, wish to file a further motion to dismiss the Bill of Complaint, and if Your Honor desires, I want to set forth the same motion that I did with reference to the motion to dismiss before we filed an answer, and for the purpose of the record it may appear, and I can just ask the Stenographer to copy it.

THE COURT: Very well.

MR. HENDERSON: Exactly the same motion that we filed before, a motion to dismiss.

THE COURT: You may submit it to the Stenographer.

MR. HENDERSON: From 2 to 6 inclusive, which are exactly the same ones that are in the record already.

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'Motion to Dismiss Bill of Complaint.

Now come Minersville School District: Board of Education of Minersville School District, consisting of David I. Jones, Dr. E. A. Valibus, Claude L. Price, Dr. T. J. McGurl, George Beatty, Thomas B. Evans and William Zapf, and Charles E. Roudabush, Superintendent of Minersville Public Schools, defendants, by their attorneys John B. McGurl, Esquire, and Rawle & Henderson, Esquires, and move the Court to dismiss the bill of complaint filed in the above entitled case upon grounds and reasons therefor as follows:

1. . . .

2. The plaintiffs failed to allege any facts which specifically or inferentially substantiate plaintiffs' allegation that the matter complained of is causing them damage in excess of the sum or value of $3000.00 exclusive of interest and costs.

3. Under the facts set forth in plaintiffs' bill of complaint, the plaintiffs' suit does not involve a controversy arising under the Constitution of the United States.

4. Under the facts set forth in plaintiffs' bill of complaint, the plaintiffs have not been deprived of any right, privilege or immunity secured by the Constitution of the United States.

5. The bill of complaint fails to set forth a good cause of action or to entitle the plaintiffs to the relief prayed for.

6. The alleged rights for which the plaintiffs seek protection are not such rights as entitle them to the relief sought.'

Mr. Henderson: Therefore, if Your Honor please, we object to the taking of any testimony in this case upon the ground set forth in these motions.

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THE COURT: For the reasons set forth in the opinion of the Court heretofore filed, the motion to dismiss is overruled, with an exception to the defendants."

3. The learned Court erred in permitting the plaintiff, Walter Gobitis, to testify what it cost him to run his car per mile, to wit:

"Q. Do you know what it costs you a mile to run your car?

A. Yes, sir.

MR. HENDERSON: Now, if Your Honor please, I object to this, I think it is purely conjectural. There is nothing definite upon which to base it. He even says during part of this time in the winter he never even made any trips, there were some weeks he didn't even go at all. He doesn't pick up and go every time he wants to see his children; if he does, I don't think it can be put on the school district.

MR. MOYLE: It isn't being put on the school district.

MR. HENDERSON: It is a basis for the damage, which arrives at the same conclusion.

THE COURT: I will overrule the objection.

MR. HENDERSON: Will Your Honor grant me an exception?

THE COURT: Exception to the defendants."

4. The learned Court erred in admitting into evidence Plaintiffs' Exhibit "E," "F" and "G," regarding expenses at Pottsville Business College, to wit:

"MR. HENDERSON: Have you offered these bills in evidence?

MR. MOYLE: I will.

MR. HENDERSON: I am going to object to them.

THE COURT: On what ground?

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MR. HENDERSON: Upon the ground they sent the daughter to business school, and that there are other schools available in that community. There is no evidence they have tried to send the child to any other school, and I don't think the expense of sending her to this business college is a proper item.

THE COURT: I don't understand that. They were expelled from the public schools.

MR. HENDERSON: Only one, but there are plenty of schools in that adjacent country around there.

THE COURT: They were private schools as to them; in other words, if they were sent to some other school they would have to pay tuition.

MR. HENDERSON: But they wouldn't have to pay this.

THE COURT: Objection overruled, exception for the defendant."

5. The learned Court erred in overruling defendants' motion that bill be dismissed on the ground that they had not established the required jurisdictional amount, to wit:

"MR. HENDERSON: That's all. If your Honor please, at this time I assume that my friends have nothing further to show on the matter of damage, and the jurisdictional question in order to get into this Court, and I move that the bill be dismissed on the ground that they have not shown the jurisdictional amount as required.

THE COURT: I don't know whether they have or not.

MR. HENDERSON: I have computed it, and I find it comes quite far short.

THE COURT: Well, I will overrule the motion for the present.

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Mr. Henderson: Will your Honor grant me an exception?

The Court: Yes, exception.

Mr. Henderson: At this stage?

The Court: Yes."

6. The learned Court erred in overruling defendants' objection to the offer of proof regarding testimony of Frederick William Franz, to wit:

"Mr. Henderson: If your Honor please, may I ask for an offer of proof in connection with this witness?

Mr. Moyle: May it please the Court, through this witness I hope to prove, or offer to prove that he is one of Jehovah's Witnesses, that he has been one of Jehovah's Witnesses for many years and is thoroughly acquainted with the principles and teachings of Jehovah's Witnesses, especially concerning the salute to the flag, and concerning consecration to the Lord, and their obligation to obey His law, and such matters. Those matters are alleged in our bill and are denied by the defense.

Mr. Henderson: If your Honor please, I object to it as immaterial. It is the belief of the Gobitas' and not this gentlemen.

The Court: Yes, they are members of the group, they have expressed their views. I don't know just what your position is, if your view is they don't hold these beliefs, that may be one thing. It may be immaterial. If, however, you concede that the views expressed by the witnesses are the religious beliefs——

Mr. Henderson: There was some noise, I didn't hear.

The Court: I say if the defendants concede that the views which the plaintiffs have expressed on the stand are the religious beliefs that they hold, then I should say this is immaterial.

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Mr. Henderson: If your Honor please, of course, I am not in a position to concede anything in that connection. I think it is their belief, and it is not for me to state what their belief is, that is a question of fact. This has nothing to do with it.

Mr. Moyle: It would be only explanatory, I suppose.

The Court: Will you make your offer a little more fully, Mr. Moyle? Just what is it you are proposing to prove?

Mr. Moyle: We expect to show definitely through this witness that the law of God does prohibit a salute to the flag, that Jehovah's Witnesses as a group of the Christian Church are definitely bound by that law and must obey it, that refusal to so obey it would result in eternal destruction, and that is a belief which Jehovah's Witnesses hold and sincerely maintain. I think we alleged that quite clearly in our bill. It is corroborative of the testimony offered by the complainants.

Mr. Henderson: If your Honor please, I object to the offer.

The Court: It may go to the question of the sincerity of the religious beliefs which these people alleged that they hold. I will permit the testimony.

Mr. Henderson: And grant me an exception?

The Court: Exception."

7. The learned Court erred in overruling defendants' motion to strike out the testimony of Frederick William Franz, to wit:

"Mr. Henderson: If your Honor please, I now wish to renew my motion to strike out the testimony of this witness as immaterial in connection with this case. It is based, of course, upon opinion, and it has no par-

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ticular bearing, so far as I can see it, in the case. The plaintiffs are the Gobitas'; if there is any religious belief that is involved, it is their religious belief. They belong to Jehovah's Witnesses; we do not know that they believe any of these things that this gentleman is speaking about. We only know what they testified to on the stand, themselves.

THE COURT: Of course, this Court is not concerned with the validity of the religious beliefs held by these persons; it is only concerned, if at all, with the sincerity of them, and whether they are held by the individuals as religious beliefs. It seems to me this testimony may have some bearing on that question; therefore, I will overrule your motion and grant you an exception."

8. The learned Court erred in making the following finding of fact, to wit:

> "They" (the plaintiffs) ". . . conscientiously believe that a failure to obey the precepts and Commandments laid down therein" (referring to the Bible) "will in due time result in their eternal destruction."

9. The learned Court erred in making the following finding of fact, to wit:

> "Both they and their father, Walter Gobitis, are loyal American citizens who honor and respect their state and country and who are willing and ready to obey all its laws which do not conflict with what they sincerely believe to be the higher commandments of God. Their refusal to salute the flag was not intended by them to be disrespectful to the Government and it did not promote disrespect for the Government and its laws nor endanger the public safety, health or morals or the property or personal rights of their fellow citizens"

and in refusing the defendants' twenty-seventh request for finding of fact, to wit:

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> "27. The failure or refusal of Lillian Gobitis and of William Gobitis or of any pupil or group of pupils to salute the national flag was and would be disrespectful to the government of which the flag is a symbol and tends and will tend to promote disrespect for that government and its laws with the result that the public welfare and safety and well being of the citizens of the United States will be ultimately harmed and seriously affected thereby."

10. The learned Court erred in making the following finding of fact, to wit:

> "The enforcement of defendants' regulation requiring the flag salute by children who are sincerely opposed to it upon conscientious religious grounds is not a reasonable method of teaching civics, including loyalty to the State and Federal Government, but tends to have the contrary effect upon such children."

and in refusing the defendants' sixth request for finding of fact, to wit:

> "6. Said regulation provided the reasonable method of teaching 'civics, including loyalty to the State and Federal Government' and its adoption was within the authority of the defendant Board of Education."

and in refusing the defendants' fifth and sixth requests for conclusions of law, to wit:

> "5. The Board of Education of Minersville School District had the authority to adopt reasonable regulations regarding the conduct and studies of pupils in its school district and to expel pupils, such as the minor plaintiffs, for refusal to obey such regulations.
>
> 6. The resolution requiring pupils to salute the national flag as a part of the daily exercises of the school is reasonable."

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11. The learned Court erred in making the following finding of fact, to wit:

> "Up to the present time Walter Gobitis has expended for the education of Lillian since November 6, 1935 a sum in excess of $600 and he will be required to expend for her education in the future during the period she is required by the Pennsylvania School Code to remain in school a sum not less than $600 or $1,200 in all. Up to the present time Walter Gobitis has expended for the education of William since November 6, 1935, a sum in excess of $800 and he will be required to expend for his education in the future during the period he is required by the Pennsylvania School Code to remain in school a sum not less than $1,200, about $2,000 in all."

and in refusing defendants' twenty-fifth request for finding of fact, to wit:

> "25. Walter Gobitis has not already expended and in all probability will not expend until William Gobitis and Lillian Gobitis respectively attain the age of 18 years the sum of $3000.00 on account of educating the said William Gobitis and Lillian Gobitis since their expulsion from the Minersville Public Schools."

12. The learned Court erred in holding in its opinion sur motion to dismiss that the plaintiffs had stated a good cause of action and in holding in its opinion sur bill, answer and proofs that the facts in this case are still governed by its opinion sur motion to dismiss, to wit:

> "The important legal questions which the case raises were fully discussed in our opinion, denying the defendants' motion to dismiss the bill. (21 F. Sup. 581)."

13. The learned Court erred in holding as follows:

> "I think it is also clear from the evidence that the refusal of these two earnest Christian children to salute

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the flag cannot even remotely prejudice or imperil the safety, health, morals, property or personal rights of their fellows."

14. The learned Court erred in holding as follows:

> "It follows that the regulation in question, however, valid and reasonable it may be when applied to others, cannot constitutionally be applied to the plaintiffs as a condition of the right of Lillian and William to attend the public schools and of their father to have them do so."

15. The learned Court erred in holding as follows:

> "Under these circumstances it is not for this court to say that since the act has no religious significance to us it can have no such significance to them."

and in refusing defendants' requests for findings of fact Nos. 10 to 13, inclusive, to wit:

> "10. The act of saluting the national flag is not a violation of any of the commandments of God as set forth in the Bible; it is not an act of idolatry or worship of an image in place of God, and has no reference to nor does it affect or concern one's religious beliefs or one's manner of religious worship.
>
> 11. The act of saluting the national flag is no more than an acknowledgment of the temporal sovereignty of our country and has nothing to do with religion. It is not a religious rite but merely a part of a patriotic ceremony.
>
> 12. The act of saluting the national flag does not go beyond that which is reasonably due any government.
>
> 13. The act of saluting the national flag is merely an awakening in the minds of youth of a civic consciousness and of loyalty to government."

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16. The Court erred in holding as follows:

> "The amount involved in the suit, so far as he is concerned is, therefore, $1,200 plus $2,000. These amounts he" (the father—plaintiff) "may aggregate for the purpose of determining jurisdiction."

and in refusing defendants' twenty-sixth request for finding of fact, to wit:

> "26. The amount in controversy does not exceed the sum of $3000.00 exclusive of interest and costs."

17. The learned Court erred in refusing the defendants' seventh request for finding of fact, to wit:

> "7. Subsequent to the adoption of said regulation and pursuant to the requirements contained therein, it has been and still is the custom and practice of the teachers and pupils of the Minersville Public Schools at the opening of school to rise, place their right hands on their respective breasts and to speak the following words: 'I pledge allegiance to the flag of the United States of America, and the Republic for which it stands; one nation indivisible, with liberty and justice for all'. The teachers and pupils, while the aforesaid words are being spoken, extend their respective right hands so as to salute the flag."

18. The learned Court erred in refusing the defendants' twenty-first request for finding of fact, to wit:

> "21. Neither Walter Gobitis nor his children Lillian Gobitis or William Gobitis have made any attempt to be admitted to classes at any of the four parochial grade schools in Minersville or the parochial high school in Pottsville, Pennsylvania, which is only four miles distant from Minersville."

19. The learned Court erred in refusing the defendants' twenty-second request for finding of fact, to wit:

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"22. The parochial schools in Minersville and vicinity permit persons of other religious beliefs to attend their institution, many of such persons attending by mere subscription of whatever they are able to pay and many of such persons attending at no cost whatsoever."

20. The learned Court erred in making the following conclusion of law, to wit:

"This Court has jurisdiction of the suit."

and in refusing defendants' first request for conclusion of law, to wit:

"1. This Court has no jurisdiction of this suit under subsection 1 of section 24 of the Judicial Code (28 U. S. C. A. sec. 41 (1)) because the matter in controversy does not exceed the sum or value of $3000.00, exclusive of interest and cost."

21. The learned Court erred in making the following conclusion of law, to wit:

"This Court has jurisdiction of the suit."

and in refusing defendants' second request for conclusion of law, to wit:

"2. This Court has no jurisdiction of this suit under subsection 1 of section 24 of the Judicial Code (28 U. S. C. A. sec. 41 (1)) because the matter in controversy does not arise under the Constitution or laws of the United States."

22. The learned Court erred in making the following conclusion of law, to wit:

"This Court has jurisdiction of the suit."

and in refusing defendants' third request for conclusion of law, to wit:

"3. This Court has no jurisdiction of this suit under subsection 14 of section 24 under the Judicial

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> Code (28 U. S. C. A. sec. 41 (14)) because the plaintiffs have not been deprived of any right, privilege or immunity secured to them by the Constitution of the United States or of any right secured by any law of the United States."

23. The learned Court erred in making the following conclusion of law, to wit:

> "The regulation adopted by the defendants on November 6, 1935, as applied to the minor plaintiffs as a condition of their right to attend the Minersville Public Schools, deprives the plaintiffs of their liberty without due process of Law in violation of the Fourteenth Amendment to the Constitution of the United States."

and in refusing the defendants' seventh and eighth requests for conclusions of law, to wit:

> "7. The enforcement of said regulation would not violate any right, privilege or immunity secured to the plaintiffs under the Constitution of the United States.
>
> 8. The enforcement of said regulation would not violate any right, privilege or immunity secured to the plaintiffs under the Constitution of the Commonwealth of Pennsylvania."

24. The learned Court erred in making the following conclusion of law, to wit:

> "The plaintiffs are entitled to an injunction against the defendants restraining them from continuing in force the order expelling the minor plaintiffs from the Minersville Public School and prohibiting their attendance at said school and from requiring the minor plaintiffs to salute the national flag as a condition of their right to attend the said school."

and in refusing the defendants' fourth and ninth requests for conclusions of law

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"4. The plaintiffs have failed to establish cause of action entitling them to the relief sought in their Bill of Complaint.

9. The attendance at public schools in the Commonwealth of Pennsylvania is a privilege or advantage which is to be enjoyed by its citizens subject to reasonable conditions and restrictions imposed by the legislature through the local boards of education, and in this case through the Board of Education of Minersville School District. It is not a right entitling the plaintiffs to the relief sought in their Bill of Complaint."

25. The learned Court erred in entering final decree, to wit:

"This cause coming on to be heard before the HONORABLE ALBERT BRANSON MARIS, holding the United States District Court for the Eastern District of Pennsylvania, upon the pleadings and proof on file, and all stipulations and arguments of counsel thereon.

From the consideration of all of which thereof it is on this 11th day of July, A. D. 1938

ADJUDGED, ORDERED and DECREED:

1. That the matter in dispute in this cause, exclusive of interest and costs, exceeds the sum or value of Three Thousand ($3,000.00) Dollars.

2. That the regulation of the Board of Education of the Minersville Public Schools adopted on the 6th day of November, A. D. 1935, which said regulation is in words and figures as follows, to wit:

'That the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of said schools be required to salute the flag of our country as a part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly.'

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as applied to the minor complainants as a condition of their right to attend the Minersville Public Schools is null and void in that it deprives them of liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

3. That the defendants Minersville School District, Board of Education of Minersville School District, consisting of David I. Jones, Dr. E. A. Valibus, Claude L Price, Dr. T. J. McGurl, George Beatty, Thomas B. Evans and Wiliam Zapf, and Charles E. Roudabush, Superintendent of Minersville Public Schools, their agents, servants, officers and attorneys, and each of them be, and they hereby are perpetually enjoined and restrained from

(a) continuing in force the order expelling the said minor complainants from the Minersville public schools and from prohibiting their attendance at said schools;

(b) requiring said minor complainants to salute the national flag as a condition of their right to attend said schools.

4. That the defendants Minersville School District, Board of Education of Minersville School District, consisting of David I. Jones, Dr. E. A. Valibus, Claude L. Price, Dr. T. J. McGurl, George Beatty, Thomas B. Evans and William Zapf, and Charles E. Roudabush, superintendent of Minersville public schools, pay all the costs of this cause, for which execution will issue.

Dated and entered this 11th day of July, A. D. 1938.

By THE COURT

MARIS, *J.*"

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Wherefore your petitioners pray that said decree may be reversed and plaintiffs' bill of complaint dismissed with reasonable costs and charges on petitioners' behalf most wrongfully sustained, and for such other and further relief as may seem just and proper.

John B. McGurl,
Rawle & Henderson,
By Joseph W. Henderson,
Attorneys for Petitioners and Appellants.

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CITATION.

UNITED STATES OF AMERICA, *ss.:*

THE PRESIDENT OF THE UNITED STATES,

To Walter Gobitis, Individually and Lillian Gobitis, and William Gobitis, Minors by Walter Gobitis, Their Next Friend,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States, Eastern District of Pennsylvania, wherein Minersville School District, Board of Education of Minersville School District, David I. Jones, Dr. A. E. Valibus, Claude L. Price, Dr. T. J. McGurl, Thomas B. Evans and William Zapf and Charles E. Roudabush, superintendent of Minersville public schools, are appellants, and you are appellee to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ALBERT B. MARIS, United States Circuit Judge, this tenth day of August, in the year of our Lord one thousand nine hundred and thirty-eight.

(Sgd.) ALBERT B. MARIS,
Circuit Judge.

August 11, 1938.

Service accepted.

(Sgd.) H. M. McCAUGHEY,
Attorney for Plaintiff-Appellees.

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PRÆCIPE FOR TRANSCRIPT OF RECORD.

(Filed August 15, 1937.)

To the Clerk:

In making up the record on appeal of the above case, you will include the following papers and no others:

Docket entries.

Bill of complaint.

Motion to dismiss.

Opinion of Court sur motion to dismiss.

Answer of defendants.

Stipulation regarding statement of evidence.

Statement of evidence under Equity Rule 75.

Order approving statement of evidence.

Plaintiffs' requests for findings of fact and conclusions of law.

Defendants' requests for findings of fact and conclusions of law.

Suggestion of death of George H. Beatty, one of the defendants.

Opinion of Court sur hearing on bill, answer and proofs.

Final decree filed July 11, 1938.

Stipulation regarding discontinuance of case against George Beatty.

Præcipe to mark case discontinued as to George Beatty.

Petition for appeal.

Order allowing appeal.

Assignments of error.

Citation.

Præcipe sur transcript of record.

Clerk's certificate.

(Sgd.) John B. McGurl,
Rawle & Henderson,
By Thomas F. Mount,
Attorneys for Appellants.

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CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*

I, GEORGE BRODBECK, Clerk of the United States District Court in and for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and full copy of so much of the pleas and proceedings; in the case of Walter Gobitis, individually, and Lillian Gobitis and William Gobitis, minors, by Walter Gobitis, their next friend v. Minersville School District, Board of Education of Minersville School District, consisting of David I. Jones, Dr. E. A. Valibus, Claude L. Price, Dr. T. J. McGurl, Thomas B. Evans, and William Zapf, and Charles E. Roudabush, Superintendent of Minersville Public Schools, No. 9727 March Term 1937; as per præcipe filed, a copy of which is hereby attached, the transcript of record in the above-entitled cause is to include now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Philadelphia, this twenty-second day of August, A. D. 1938.

(Seal)

GEORGE BRODBECK,
Clerk.

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ORDER ASSIGNING HON. HARRY E. KALODNER FOR ARGUMENT.

(Filed November 9, 1938.)

In the United States Circuit Court of Appeals,
For the Third Circuit.

No. 6862. October Term, 1938.

Minersville School District, Board of Education, et al.,

Defendants-Appellants,

v.

Walter Gobitis, Ind. and Lillian Gobitis, and Wm. Gobitis, Minors by Walter Gobitis, Their Next Friend,

Plaintiffs-Appellees.

Appeal From the District Court of the United States,
For the Eastern District of Pennsylvania.

And now, to wit: this ninth day of November, A. D., 1938, it is ordered that Hon. Harry E. Kalodner, District Judge, for the Eastern District of Pennsylvania, is hereby assigned to sit in above case in order to make a full court.

J. Warren Davis,
Circuit Judge.

(Endorsements: Order Assigning Hon. Harry E. Kalodner for Argument Received and Filed November 9, 1938, Wm. P. Rowland, Clerk.)

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REFERENCE TO ARGUMENT.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 6862. October Term, 1938.

Minersville School District, Board of Education of Minersville School District, Consisting of David I. Jones, Dr. E. A. Valibus, Claude L. Price, Dr. T. J. McGurl, Thomas B. Evans and William Zapf, and Charles E. Roudabush, Superintendent of Minersville Public Schools,

Defendants-Appellants,

v.

Walter Gobitis, Individually, and Lillian Gobitis and William Gobitis, Minors, by Walter Gobitis, Their Next Friend,

Plaintiffs-Appellees.

And afterwards, to wit, on the ninth day of November, 1938, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable John Biggs, Jr., Honorable William Clark, Circuit Judges, and Honorable Harry E. Kalodner, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the tenth day of November, 1938, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 6862. October Term, 1938.

MINERSVILLE SCHOOL DISTRICT, BOARD OF EDUCATION OF MINERSVILLE SCHOOL DISTRICT, CONSISTING OF DAVID I. JONES, DR. E. A. VALIBUS, CLAUDE L. PRICE, DR. T. J. McGURL, THOMAS B. EVANS AND WILLIAM ZAPF, AND CHARLES E. ROUDABUSH, SUPERINTENDENT OF MINERSVILLE PUBLIC SCHOOLS,

Defendants-Appellants,

v.

WALTER GOBITIS, INDIVIDUALLY, AND LILLIAN GOBITIS AND WILLIAM GOBITIS, MINORS, BY WALTER GOBITIS, THEIR NEXT FRIEND,

Plaintiff-Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

OPINION.

(Filed November 10, 1939.)

Before BIGGS and CLARK, *Circuit Judges,* and KALODNER, *District Judge.*

CLARK, *Circuit Judge.*

Eighteen big states [1] have seen fit to exert their power over a small number of little children [2] ("and forbid them

[1] Total population according to the latest census circa 38,000,000.

[2] According to the latest casualty lists circa 120.

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not''). The method of exercise has sometimes been by their representatives in solemn conclave assembled and sometimes, as here, by an administrative agency (School Board). The matter of exercise is in that field where, above all, or so we had supposed, power must yield to principle. In other words, the area of action is within the aura of conscience.

The appellant School Board is entrusted by statute of Pennsylvania with the delicate, but surely not difficult, task of instructing the public school children under its control in ''civics including loyalty to the State and National Government'', 24 Purdon's Pa. Stat. Ann., sec. 1551. To that end, as we assume it thought, the following regulation was promulgated on November 6, 1935:

> ''That the Superintendent of the Minersville Public Schools be required to demand that all teachers and pupils of said schools be required to salute the flag of our country as a part of the daily exercises. That refusal to salute the flag shall be regarded as an act of insubordination and shall be dealt with accordingly''.
>
> Record, p. 6

The appellees, a little girl of 13 and a little boy of 12, refused to salute the flag of ''their country'' on the appropriate occasion. They stood in respectful silence while the other children submitted to the ''requirement'' and were ''dealt with accordingly'' by being expelled.

The reason for their refusal raises the constitutional issue of this appeal. They and their parents are members of a group (we avoid for the present more definite characterization) known as Russellites, or more colloquially, Earnest Bible Students,[3] and Jehovah's Witnesses. The

[3] ''. . I consider them quacks . . . I dissolve the 'Earnest Bible Students' in Germany; their property I dedicate to the people's welfare; I will have all their literature confiscated.''

Pronouncement of A. Hitler, April 4, 1935.

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defendant School Board admits that this group "sincerely and honestly believe that the act of saluting a flag contravenes the law of God" in that it constitutes a bowing down to a graven image.

The so-called flag salute statute or regulation first appeared in Kansas in 1907. The idea, without benefit of sanctions, seems to have originated with an employee of the magazine, The Youth's Companion. It was first put in practice at the National Public School celebration on October 21, 1892, pamphlet, The Youth's Companion Flag Pledge. As with its related predecessor the teacher's oath (Nevada, 1866) the voluntary character of the ceremonial act soon disappeared into law and litigation, pamphlet, Oaths of Loyalty for Teachers, published by American Federation of Teachers, Chicago, Illinois. There is some current indication of a reversal in the trend of public opinion at least. Those who attended the training camps of World War No. 1 will remember our staff of life, the manuals of Colonel Moss. That distinguished officer, now retired, has also written extensively on the American flag. In his latest book, we find him taking a secular position remarkably like that of the plaintiff-appellees. He says:

> "Another form that false patriotism frequently takes is so-called 'Flag-worship'—blind and excessive adulation of the Flag as an emblem or image,—super-punctiliousness and meticulosity in displaying and saluting the Flag—without intelligent and sincere understanding and appreciation of the ideals and institutions it symbolizes. This, of course, is but a form of idolatry—a sort of 'glorified idolatry', so to speak. When patriotism assumes this form it is nonsensical and makes the 'patriot' ridiculous".
>
> Chap. 14, Patriotism of the Flag, Moss, The Flag of the United States, Its History and Symbolism, pp. 85-86.

So also, Mr. Laurens M. Hamilton, a direct descendant of Alexander Hamilton, president of the New York Chapter

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of the Sons of the American Revolution (an organization never criticized for its lack of patriotism) told the Daughters of the American Revolution at the forty-second annual meeting of the Washington Heights Chapter:

> "Laws cannot take the place of feeling. We must beware of legislation such as that forcing people to salute the flag. We cannot make people salute, we cannot force them to or command them to. What we can do is to make them want to salute it".
>
> The New York World Telegram, April 14, 1939

This change in social sentiment appears to have reached the consciousness of only one legislator. In Massachusetts this year Mr. Curtis introduced an amendment to the original act which expressly permits the excusing from the flag salute of pupils whose "parent or guardian has scruples, which he regards as religious, against such salute", Senate No. 449, March, 1939 (Mass.). In New Jersey, on the other hand, the opposite is true. The original act was "strengthened" to make a crime of "influencing a pupil against the salute to the flag by instruction printed or otherwise", P. L. N. J. 1939, c. 65, sec. 1.

These little children ("suffer them") are asking us to afford them the protection of the First Amendment (Bill of Rights [4]) to the Constitution and to permit them the

[4] The actual amendment is the Fourteenth, the action complained of being by a state. The Supreme Court has, however, reversed its original holding, Barron v. Baltimore, 7 Peters 242 (1833), that the privileges of the Bill of Rights are not included within the term "due process", Gitlow v. New York, 268 U. S. 652, Whitney v. California, 274 U. S. 357, Burns v. U. S., 274 U. S. 328, Stromberg v. California, 283 U. S. 359, Near v. Minnesota, 283 U. S. 659, Grosjean v. American Press Co., 297 U. S. 233; Shattuck, The True Meaning of the Term "Liberty" In Those Clauses in the Federal and State Constitutions Which Protect "Life, Liberty and Property", 4 Harvard Law Review, 365; Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harvard Law Review 431; Bill of Rights

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"free exercise" of their "religion". That supplication raises, as we see it, two questions. First, do they bring themselves within the meaning of the word "religion" as used in the Constitution; and second, is there any limitation on the adjective "free" in the constitutional phrase "free exercise"?

Appellant suggests that religion is an objective rather than a subjective matter. He goes on to argue that no one could conceivably appraise non-flag saluting in theological terms. In other words, he applies some sort of average reasonable man standard. We agree that the test is not without subjective limitations. The individual cannot claim any and all beliefs religious. Maybe he should be able to, but the fact is that the Constitution uses a certain word of art and does not employ the wider term "belief". A perfect illustration of this distinction is found in the cases of certain conscientious objectors under the Selective Draft Act of 1917, as amended, 40 Stat. 76, 534, 885, 955 (50 U. S. C. A. p. 165). As is known, most of those who objected to service in war offered religious scruples as an excuse. There were, however, a certain number whose claim for exemption was based simply on disbelief in war as an instrument of human policy. Their claims were disallowed and all of them were sentenced to long terms. See Case, Conscientious Objectors, 4 Ency. of Social Sciences p. 210; Second Report of the Provost Marshal General to the Secretary of War on the Operation of the Selective Service System, pp. 58-59; Third Assistant Secretary of War, Statement as to Treatment of Conscientious Objectors in the Army, September 28, 1918, Secretary of War, Statement as to Treatment of Conscientious Objectors in the Army, June 18, 1919.

As in most phases of the subject, there is not complete agreement on a definition of religion, Hopkins, The History

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and Fourteenth Amendment, 31 Columbia Law Review 468, Constitutional Law; Liberty of Assembly Under the Fourteenth Amendment, 25 California Law Review 496, The Hague Injunction Proceedings, 48 Yale Law Journal 257.

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of Religions; Houf, What Religion Is and Does; Menzies, History of Religion, rev. ed.; Dewey, A Common Faith. Some interesting cases might (and may) arise under the broader conception, as for instance anything within the comprehensive term sacred, see Crawley, who gives the study of religion the wide scope of a comparative hierology. (The Tree of Life, p. 209.) Our courts have promulgated what has been referred to as a "minimum definition". Compare the language of a distinguished writer on the subject with that of Mr. Justice Field speaking for the Supreme Court of the United States.

The religious philosopher says:

> "Religion is squaring human life with superhuman life . . . What is common to all religions is belief in a superhuman power and an adjustment of human activities to the requirements of that power, such adjustment as may enable the individual believer to exist more happily".
>
> Hopkins, The History of Religions, p. 2 [5]

The legal philosopher says:

> "The term religion has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will".
>
> Davis v. Beason, 133 U. S. 333, 342

By the same token the definition excludes any theory of sensible choice. If the requirement is present, the doctrinal views of the average man or the average official are wholly irrelevant. Professor Zollman speaks as follows:

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[5] See also:

"... a propitiation or conciliation of powers superior to man which are believed to direct and control the course of nature and of human life".

Frazer, The Golden Bough, 3rd ed. i. 222

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" 'Were the administration of the great variety of religious charities with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration'. The law therefore does not presume 'to settle differences of creeds and confessions, or to say that any point of doctrine is too absurd to be believed' ".

Religious Liberty in the Law, Part 2, 17 Michigan Law Review 456, 460-461

This last sentence is from an early (1836) Pennsylvania case, Schriber v. Rapp, 5 Watts 351, 363; 30 Am. Dec. 327; See also, 3 Scott on Trusts sec. 371.4.

The group to which the plaintiff-appellees belong comes plainly within the "most minimum" definition. It is the very thoroughness of their belief in the supernatural that has gotten them into trouble. Indeed, they qualify even under the more limited "well-recognized" of the Selective Service Act, 50 U. S. C. A. p. 165. Professor Elmer T. Clark lists them in his book, The Small Sects In America, and describes them as follows:

"The most vehement and spectacular, and also the most vigorous propagandists, of all the Adventists are the followers of the late 'Pastor' Charles Taze Russell, now known as the International Bible Students' Association, and sometimes called 'Jehovah's Witnesses'. The group is not a denomination, has no churches or ministry, and is not listed by the census; it is, indeed, bitter in its denunciation of all churches, Catholic and Protestant alike. The movement was created and controlled by Russell, who was an uneducated

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> haberdasher of Allegheny, Pennsylvania, and at his death the mantle fell on the one Judge J. F. Rutherford. . . .
>
> "Russell's exegesis differs from anything else that ever was on land or sea! He observes no canons of criticism and arrives at none of the conclusions reached by other students".
>
> Clark, The Small Sects in America, pp. 58-59

See also, Drake, Who Are Jehovah's Witnesses, 53 Christian Century, April 15, 1936, p. 567. One might note that the sect does not appear to practice the tolerance that it now asks for these young members of its flock. Incidentally, Professor Clark and the publication Religious Bodies, 1926, Vol. 2, Bureau of the Census, United States Department of Commerce, indicate how far from the average religious man's concept the beliefs of most of these so-called small sects depart.[6]

The noun religion is specific and has therefore what might be called historical and institutional limitations. The adjective free is general and its limitations, if any, must therefore be constitutional and politically scientific. And that is just what they are. We, this court, and finally the United States Supreme Court, Committee for Industrial Organization v. Hague, 25 F. Supp. 127, 101 F. (2d) 774, U. S. , June 5, 1939, had recent occasion to consider the word in relation to speech and assembly. Many of the

[6] Religious Bodies, 1926, Vol. 2: Seventh Day Adventist, p. 25; Apostolic Overcoming Holy Church of God, p. 58; Two-Seed-in-the-Spirit Predestinarian Baptists, p. 219; Dunkers, p. 226; Progressive Dunkers, p. 243; River Brethren, p. 286; United Zion's Children, p. 295; Christadelphians, p. 306; Christian Scientists, p. 354; Nazarenes, p. 392; Amana Society, p. 439; Shakers, p. 443; Anglicans, p. 452; Burning Bush, p. 569; Pillar of Fire, p. 584; Mormons (Latter Day Saints), p. 665; Mennonite Bodies, p. 842; Schwenkfelders, p. 1309.

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considerations there validated apply here and we need not repeat them. There are others that have even greater cogency. They can be summed up thus. A man may die for the right to express his opinion. He has died or suffered worse than death for the right to worship according to his conscience. That is implicit in the definitions of religion we have cited, in the long history of the struggle for religious liberty before the law, and in the utterances of our statesmen. That history and those sayings are undoubtedly taught in this very school at Minersville and are so well-known anyway that we shall only encumber this opinion with a few references and quotations.

The leading authority under the common law of England is, of course, Paterson. He devotes the second division of his work, Liberty of the Press, Speech and Public Worship, to an excellent account of the protracted struggle for toleration in Great Britain, Division of the Law Relating to the Security of Public Worship. Its successful continuation on the American continent is outlined in Crooker, The Winning of Religious Liberty, and the operation of the resultant constitutional mechanism which now governs and safeguards our manifold religious pursuits is carefully chronicled by Professor Zollman in his article, Religious Liberty in the Law, above cited. Three wise men of American public life have put into these words the concepts to which that mechanism is geared.[7]

> "Religion is a subject on which I have ever been most scrupulously reserved. I have considered it as a matter between every man and his Maker, in which no other, and far less the public, had a right to intermeddle".
>
> Thomas Jefferson, Letter to Richard Rush in 1813

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[7] These fellow countrymen of ours are only echoing the earlier words of the great 17th Century figures, the statesman and author, Sir William Temple (1628-1699), the philosopher, John Locke (1632-1704), and the 18th Cen-

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"The love of religious liberty is a stronger sentiment than an attachment to civil or political freedom. That freedom which the conscience demands, and which men feel bound by their hopes of salvation to contend for, can hardly fail to be attained. Conscience in the cause of religion, and the worship of the Deity, prepares the mind to act and suffer beyond almost all other causes. History instructs us that this love of religious liberty, a compound sentiment in the breast of men, made up of the dearest sense of right and the highest conviction of duty, is able to look the sternest despotism in the face".

Daniel Webster, Speech in commemoration of the First Settlement of New England, Plymouth, 1820

". . . The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon

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tury Cabinet member, Lord William Wyndham Grenville (1759-1834), all of whom embody the same glorious, as we think, conception in the following passages:

"Now, the way to our future happiness has been perpetually disputed throughout the world; and must be left at last to the impressions made upon every man's belief and conscience, either by natural or supernatural means; which impression men may disguise or dissemble, but no man can resist. For belief is no more in man's power than his stature or his features; and he that tells me I must change my opinion for his, because it is the truer and the better—without other arguments that have to me the force of conviction—may as well tell me I must change my gray eyes for others like his that are black, because these are lovelier or more in esteem. . . . Sufficient and conceited men who talk much of right reason and mean always their own, and make their private imagination the measure of general truth".

Temple, The Right of Private Judgment in Religion, p. 79

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the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part one of legislative policy in avoiding unnecessary clashes with the dictates of conscience. There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power''.

Mr. Chief Justice Hughes dissenting in U. S. v. MacIntosh, 283 U. S. 605, 634

As applied to speech and assembly, we observed and in fact held that free is not absolute and, with pundit Lipp-

''All the life and power of religion consists in the inward persuasion of the mind; and it is impossible for the understanding to be compelled to the belief of anything by the force of the magistrate's power. . . . Every man has the care of his own eternal happiness, the attainment whereof can neither be facilitated by another man's industry, nor the loss of it turn to another man's prejudice, nor the hope of it be forced from him by any external violence''.

Locke, Letters on Toleration, p. 111

''It is the inveterate habit of intolerance to impute to the followers of every rival sect opinions which they disclaim, and to deduce from these tenets conclusions which they utterly deny. Justice and charity on the contrary, give to others the same liberty which we claim for ourselves—the liberty to form our opinions by the light of our own reason, to adopt, to investigate, to interpret for ourselves the tenets which we embrace, and to be credited in our exposition of them until our own practice shall have proved its insincerity''.

Lord Grenville, 22 Parl. Deb. 668

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mann, wondered if anything is, 124 Atlantic Monthly, p. 616. We continue that wonder because here also an even greater urgency for freedom falls before reality. That reality lies in the need for society and so in the needs of society. It is rather interesting to note that in this case the proponents of religious freedom (the greater) are quite willing to concede this; whereas the proponents of free speech (the lesser) were quite unwilling to do so in the Hague case. There may be a distinction in the tendency of religious beliefs to go beyond the contemplations of Confucius into the practices of Brigham Young. This tendency piles up the precedents we discuss later. One might wonder, however, if the practice of rioting is not sometimes as bad as the practice of polygamy.

At any rate the concession that the maxim, "salus populi suprema lex" embraces the dictates of conscience was early made and by that great champion of religious liberty, Roger Williams of Rhode Island. Likening the populace to a ship's company, he said:

> "Liberty of conscience turns upon these two hinges: 1, that no one be forced to attend the ship's prayers or prevented from attending prayers of his own; 2, that if either refuse to obey the laws and orders of the vessel concerning its preservation and the common peace, or mutiny, or maintain that there should be no superior, that the commander in such case shall judge, resist, compel and punish such transgressor according to his deserts and merits".
>
> Roger Williams, Rhode Island Historical Society 4, p. 241

The law today is as he admitted it must be. Professor Freund, the definitive authority on the subject of "police power" (jurist's argot for salus populi), sums it up:

> "The constitutional guaranty of religious liberty covers above all the two cardinal points of worship and doctrine, the two forms in which the uncontrollable facts of faith and opinion find their principal outward

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expression; it includes secondarily also customs, practices and ceremonies, which even where they do not form directly a part of worship, are prescribed by religion. That this liberty does not altogether supersede the operation of the police power is recognized by the constitutional proviso found in many states that it shall not excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state, a proviso which may be implied where it is not expressed. . . . In the United States legislation punishing polygamy was upheld, though the Mormons conscientiously believed that their religion sanctioned and commended the practice. The Supreme Court emphasized the distinction between opinion and precept on the one hand, and practices affecting the social order on the other. Quoting with approval Jefferson's words 'that it is time enough for the rightful purposes of civil government to interfere when principals break out into overt acts against peace and good order' It held that Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order''.

Freund, Police Power, p. 497

and another distinguished writer gives his approval:

''Under the modern idea therefore, of intellectual and religious freedom, but at the same time of the paramount authority of the law, we generally and no doubt should generally, place a limit at the overt act and make its legality depend not on its motive but on its direct effect on the public weal. But the maxims 'sic utere tuum ut alieno non laedas', and 'salus populi suprema est lex' are as applicable in religious matters as in secular; and the state is and ever should be jealous of its public policy''.

Bruce, Religious Liberty in the United States, 74 Central Law Journal, 279, 285

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We have then to balance the two intangibles salus and religio and determine to which arm of the scale the weight of our decision must be added. In doing so, under our system of case law, we are entitled, or rather constrained, to examine the precedents, Cardozo, The Nature Of The Judicial Process. All of these that are cited in either brief and many more besides are collected in four standard sources, 11 Am. Jur. pp. 1100-1104; Constitutional Law, West System Digest, key no. 84; U. S. C. A., Constitution, Part 2, pp. 453-456; Association of American Law Schools Selected Essays on Constitutional Law, Vol. 2, pp. 1108-1175. Having examined these decided cases, we, again under our system, must search for a ratio decidendi, and then include or exclude our own particular set of facts.

As indicated by their decisions, our courts consider that the peace and good order of the community must prevail over conscience, (a) wherever its mental or physical health is affected, (b) wherever a violation of its sense of reverence makes a breach of the peace reasonably foreseeable, and (c) wherever the "defense of the realm" is imperiled. So in the broad category of physical and mental health, we have cases which defer the dictates of individual scruple to the exclusion of obscene literature from the mails, Knowles v. U. S., 170 Fed. 409 the use of obscene language, Delk v. Commonwealth, 166 Ky. 39, 178 S. W. 1129; the vaccination, Vonnegut v. Baum, 206 Ind. 172, and physical examination of school children, Streich v. Board of Education, 34 S. D. 169; the physical examination of prospective brides and grooms, Peterson v. Widule, 151 Wis. 641; the medical qualification of physicians (faith healing etc.), Fealy v. Birmingham, 73 So. 296 (Ala.); Post v. U. S., 135 Fed. 1022; People v. Pierson, 176 N. Y. 201; State v. Verbon, 8 Pac. (2) 1083; State v. Miller, 229 N. W. 569; the limitation of the amount of sacramental wine consumable under the Prohibition Act, Shapiro v. Lyle, 30 F. (2d) 971; the elimination of drug addiction, State v. Big Sheep, 243 Pac. (Mont.); the regulation of the exhumation of dead bodies, In re Wong Yung Quy,

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2 Fed. 624, 632; the preservation of quiet, State v. White, 64 N. H. 48 (Salvation Army); City of Louisianna Bottome, 300 S. W. 316; the suppression of mail frauds, New v. U. S., 245 Fed. 710, and kindred schemes, McMasters v. State, 21 Okla. Crim. Rep. 318 (Spiritualism—exorcisement of evil spirits); State v Neitzel, 69 Wash. 567 (astrology).

Reverence is manifestly something deeper than law. The mere creation by fiat of a particular moral standard would not mean that its violation might reasonably be expected to arouse the passions productive of peace breaches. There are, however, certain "ethics" whether furnished with legal sanctions or not, that do plumb those reaches of our emotions So in a monogamous civilization polygamy shocks and is forbidden, Reynolds v. U. S., 98 U. S. 145, 163; Davis v. Beason, 133 U. S. 333, 342; Church of Jesus Christ of the Latter Day Saints v. U. S., 136 U. S 1, 49, and see also, Warren, The Supreme Court in United States History p. 419 In a deistic civilization blasphemy shocks and is forbidden, State v. Mockus, 120 Me. 84, 113 A 39; State v. Chandler, 2 Del (2 Har.) 553; Commonwealth v. Kneeland, 37 Mass. 206; People v. Ruggles, 8 Johns. 290 (N. Y.); Updegrath v. Commonwealth, 11 S. & R. 394 (Pa.). In a Christian civilization disrespect for the Sabbath shocks and is forbidden, State v. Blair, 288 Pac 729; Elliott v. State, 242 Pac. 340; Shover v. State, 10 Ark 259, 263; State v. Bott, 31 La. Ann. 663, 665; Lindenmueller v People, 33 Bar. 548, 560; State v. Barnes, 22 N. D. 18, 132 N. W. 215; Sparhawk v. Union Pacific Ry. Co., 54 Pa. 401, 406. It might be noted that the cases on these last seem to take an unduly sectarian position and further that the observance of Sunday is now generally placed on the basis of health, State v. Petit, 177 U. S. 164; Zollman, Religious Liberty in the Law, 17 Michigan Law Review 355, 373.

So far we have been talking more about salus in the sense of welfare among the citizens of a community. Clearly that presupposes a country and therefore presupposes until the millennium at least, its defense. Because, however, of

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what might be termed thinking wishful for that very millennium, we find the conflict of conscience over "bearing arms" one of the saddest in this rather sad field. Professor Lecky, in his famous History of European Morals, traces the beginnings of this struggle. (Vol. 2, p. 149.) Public opinion, at least in the common law democracies, has taken cognizance of this conflict between scruple and safety, 5-6 Geo. V, ch. 104, secs. 2 (1) and (3); Statutes of Canada, 7-8 Geo. V, ch. 19, sec. 11 (1) f. From the inception of the Republic, religious objectors have been expressly or impliedly exempt from military service. Annals of Congress, Thirteenth Congress, Third Session, Vol. 3, pp. 774, 775; Selective Draft Act, above cited; 32 U. S. C. A. sec. 3, and see U. S. v. Macintosh, 263 U. S. 605, 627, et seq.; Macintosh v. U. S., 42 F. (2d) 845; 26 Illinois Law Review 375; 30 Michigan Law Review 133; 11 Boston University Law Review 532; 80 University of Pennsylvania Law Review 275. These salutary laws made the constitutional issue of rare occurrence. Whenever it is presented, the decision, as it must, has been in favor of self-preservation, U. S. v. Macintosh, above cited, and see U. S. v. Schwimmer, 279 U. S. 644; Hamilton v. The Regents, etc., 293 U. S. 245.

We have not included in our classification of authorities those bearing on the issue of the case at bar. They are numerous, see Appendix 1, but they stand or fall by our own rightness as finally determined. We may say hardly a kind word about any of them appears in the legal periodicals, see Appendix 2. Further, there are no binding precedents among them, see Appendix 3.

We have set forth the cases. What does an analysis show to be their ratio decidendi? Does compulsory flag saluting come within it? In making our analysis we must keep constantly in mind what we have on those scales which must come down on one side or the other. A framework of government presupposes its own welfare and our particular framework prescribes religious liberty. Under certain

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circumstances the two may be mutually exclusive. The necessity for any choice betwen conscience and country is tragic. It must be made. Salus is a material conception. The injury is to the body and not the soul of the body politic. This eliminates the gentler aspects of love of country. A compulsory voting law, Merriam and Gosnell, Non-Voting, Its Causes and Methods of Control (1924), might well yield to scruples. On the other hand the state's existence has material foundations other than the martial one. Conscience could scarcely be added to the reasons for tax avoidance. But until wars and rumors of wars cease to trouble, bearing arms must be the means of safety and as such means it must depend on the collective, however determined (cf. war referendum proposals), and not the individual ("my country right or wrong") will.

All but two classes of the cases are in negative form. In most of them, the religious objector is prohibited from propitiating the Deity in a certain way; he is not forced to commit a sacrilege. For instance, the Mormon is not damned for monogamy, the astrologist or spiritualist for personally consulting the stars or the spirits, or the Salvationists for using the soft pedal. The character of the field of health, of arms, and of the case at bar requires compulsion rather than prohibition. In the last named, the inoculation is against a spiritual indifference or disloyalty to country instead of a physical disease.

Cicero inversely describes the disease in his famous definition of patriotism. To that definition, we most humbly subscribe:

> "Cari sunt parentes, cari liberi, propinqui; familiares; sed omnes omnium caritates patria una complexa est; pro qua quis bonus dubitet mortem oppetere si ei sit profuturus?"
>
> Cicero, De Officiis, 1, 17

A modern writer on ethics classifies this same abstraction under the head of Benevolence in his discussion of Intui-

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tionism, Sidgwick, The Methods of Ethics, p. 251. But is the disease so dangerous that it comes within the "clear and present" of the surely analogous free speech cases, Schenck v. U. S., 249 U. S. 47; Frohwerk v. U. S., 249 U. S. 204; Debs v. U. S 249 U. S. 211; Abrams v. U. S., 250 U. S. 616; Schaefer v. U. S., 251 U. S. 466; Pierce v. U. S., 252 U. S. 239; O'Connel v. U. S., 253 U. S. 142; Gilbert v. Minnesota, 254 U. S. 325; Whitney v. California, 274 U. S. 357; Stromberg v. California, 283 U. S. 359; Herndon v. Lowry, 301 U. S 242. Love of country in its relation to the armed forces thereof may have either a positive or a negative effect It may prevent treachery and it may promote courage. There are plainly many more certain, if less pleasant, methods of providing against that extreme of disloyalty which is treachery. So, also there are many equally certain, if less noble, methods of inciting to the martial zeal which is bravery on the field of battle. If all armies had to be volunteer, it might be otherwise As it is, considerations of prestige in both its positive (promotions, decorations, etc.) and negative (fear of ridicule etc.) facets operate and make the disease only para at most. After all, even mercenary troops used to win wars; a fortiori, is the remoteness of the sock-knitting and nursing abilities of grown-up girls. See U. S. v. Bland, 283 U. S. 636; U. S. v. Schwimmer, above cited. We conclude that patriotism is an added advantage rather than an essential whose absence is dangerous in the clear and present sense.

An even more "clear, cogent and convincing," as the books say, argument follows from the type of vaccine used. That it must be reasonably effective is both a sensible and recognized canon of police power, Jacobson v. Mass., 197 U. S. 11. The punishment of polygamy, drum beating, blasphemy, and faith healing is indispensable to accomplish their prohibition So, too, the prevention of epidemics requires vaccination. Is the same thing true of compulsory flag saluting? We can concede the general connection between the emblem and the virtue. In the words of a learned Japanese patriot:

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". . . Any nation which makes light of the flag must necessarily sink. Disrespect to the flag evinces a state policy pliable and submissive".

M. Matsunami, The National Flag of Japan, p. 6

Does the conception embrace the next step? The abstract problem postulated concerns the effectiveness of teaching love (of country) by force emanating from the would-be beloved (an administrative instrumentality of that country). We do not doubt that children can and have been forced to learn Latin or eat spinach and so eventually to love them. But this pedogogical victory has more often than not been won at the price of resentment towards the disciplinarian. In our particular circumstance, then, that resentment clashes with and cancels the very affection sought to be instilled. In recognition of this logical absurdity, we find students of educational psychology against overemphasis of the flag salute. They say:

"An objective appraisal of formulas frequently proposed reveals that many are concerned not with patriotism but with traditional or popular means of expressing it. One becomes loyal by swearing his allegiance or saluting the flag, singing the national anthem or celebrating a national holiday, venerating the makers of the organic law or worshipping those who now interpret it. . . .

"If American schools are to develop a creative citizenship, they must do more than train the next generation in matters which should be routine and voluntary. These means of expressing patriotism upon which some leaders would place emphasis are employed in dictatorships as well as in democracies. Loyalty in our republic must have its origin in concepts which are an integral part of the national philosophy itself".

Campbell, In Quest of Patriotism, The Nation's Schools, September, 1938, p. 42

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> ". . . The noble sentiment of patriotism is worn threadbare not only in our movie houses but also in many schools. There are schools all over the United States in which the pupils have to go through the ceremony of pledging allegiance to the flag every school day. It would be hard to devise a means more effective for dulling patriotic sentiment than that. This routine repetition makes the flag-saluting ceremony perfunctory and so devoid of feeling; and once this feeling has been lost it is hard to recapture it for the 'high moments' of life.
>
> "Furthermore, needless compulsory routine tends to set up in some minds an antagonistic attitude. This becomes associated with the ceremony itself and because it is automatic in response the person concerned can not later easily dissociate the two, even though he is intellectually convinced that the two need not go together".
>
> W. C. Ruediger, The George Washington University, 49 Schools and Society, February 25, 1939, p. 249

Some sensing of which may have led the school superintendent of Minersville to admit in his testimony that flag saluting, although an appropriate one, is not the only method of teaching loyalty (R. p. 98). The salute, therefore, unlike the other exercises of the police power, negative and positive, which we have mentioned, is of at least doubtful efficacy and, as applied to appellees, plainly lacking in necessity. See Appendix 4.

A fourth and last distinction exists in the age of the target. In all but the medical cases the victims are adults. It is elementary to recognize disability of infants with respect to their contracts, torts, and to some extent crimes, 31 C. J. pp. 1058-1112. The cardinal ethical principle of this legal phenomenon is implicit in the very statutes by

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virtue of which the appellant performs its function. It is told:

> ". . . No cruel experiment on any living creature shall be permitted in any public school of this Commonwealth".
>
> 24 Purdon's Pa. Stat. Ann. sec. 1554

Here, nevertheless, that disability is not only not recognized, but is exploited. Children are faced with the alternative of conforming to their parents' view of religion or foregoing the privilege of education. That is true, of course, in the medical cases. There again, however, we are saved by the logic of the clear and present danger test. Little children with smallpox are as infectious as their elders.

To summarize our analysis: compulsory flag saluting is designed to better secure the state by inculcating in its youthful citizens a love of country that will incline their hearts and minds to its more willing defense. That particular compulsion happens to be abhorrent to the particular love of God of the little girl and boy now seeking our protection. One conception or the other must yield. Which is required by our Constitution? We think the material and not the spiritual.

Compulsion rather than protection should be sparingly exercised. Harm usually comes from doing rather than leaving undone, and refraining is generally not sacrilege. We do not find the essential relationship between infant patriotism and the martial spirit. That essence we have borrowed from the settled law of another and cognate part of this same provision of the Bill of Rights. Departure from a recently evolved ritualistic norm of patriotism is not clear and present assurance of future cowardice or treachery. And that is especially so, where compulsory adherence to that norm is neither logically consistent with, nor pedagogically indispensible to, the dissemination of

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loyalty. Equally important, we think, is the School Board's mistake in the domain where they are not supposed to make mistakes. They misunderstand and therefore misapply a fundamental of education. Children, as well as "birds and animals", 24 Purdon's Pa. Stat. Ann. sec. 1551, are entitled to the benefits of humane treatment.

We conclude with two examples from the history of the "small sects" of Pennsylvania's early days. The state was colonized and founded by William Penn. He came to the new country because his refusal to subordinate religious scruples to educational coercion led to his expulsion from Oxford University in the old. Document by John Aubrey (now in the Bodleian Library).

George Washington, the almost universal character of whose wisdom always freshly surprises, a century later wrote a letter to the descendants of those whom William Penn brought with him. In it General Washington said:

> "Government being, among other purposes, instituted to protect the persons and consciences of men from oppression it certainly is the duty of rulers, not only to abstain from it themselves, but according to their stations to prevent it in others.
>
> "I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit".
>
> Writings of George Washington (Sparks Ed. Vol. 12, pp. 168-169), Letter to the Religious Society Called Quakers, October, 1789

The appellant School Board has failed to "treat the conscientious scruples" of all children with that "great delicacy and tenderness". We agree with the father of our

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country that they should and we concur with the learned District Court in saying that they must.

The decree of the District Court is affirmed.

A true Copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

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APPENDIX.

1. Appellants' position is ostensibly sustained by Hering v. State Board of Education, 189 Atl. 629 (N. J.), affirmed per curiam, 194 Atl. 177, appeal dismissed, 303 U. S. 624; Nicholls v. Mayor and School Committee of Lynn, 7 N. E. (2) 577 (Mass.); Leoles v. Landers, 192 S. E. 218 (Ga.), appeal dismissed, 302 U. S. 656; Gabrielli v. Knickerbocker, 74 Pac. (2) 290 (Cal.), reversed, 82 Pac. (2) 391, appeal dismissed and certiorari denied, 83 L. Ed. 765; Johnson v. Town of Deerfield, 25 F. Supp. 918 (Mass.), affirmed 83 L. Ed. 765; People v. Sandstrom, 279 N. Y. 523, and see Shinn v. Barrow, 121 S. W. (2) 450 (Tex.).

We exclude from our citation the many adjudications dealing with compulsory bible reading in public schools. These, though factually related to our circumstance, are in irreconcilable conflict with one another and seem in the last analysis to turn upon a nice construction of state constitutional provisions regarding primarily the establishment rather than the free exercise of religion. See 34 Michigan Law Review 1237; 28 Michigan Law Review 431; 16 Virginia Law Review 509.

2. Judicial condonation of the flag salute in our circumstances has been condemned in 51 Harvard Law Review 1418; 23 Minnesota Law Review 247; 27 Georgetown Law Journal 231; 18 Oregon Law Review 127; 23 Iowa Law Review 424; 2 University of Pittsburgh Law Review 206; 5 University of Pittsburgh Law Review 86; 86 University of Pennsylvania Law Review 431; 12 Temple Law Quarterly 513; 23 Cornell Law Quarterly 582; and see, Gardner and Post, The Constitutional Questions Raised by the Flag Salute and Teachers' Oath Acts in Massachusetts, 16 Boston University Law Review 802; Clark, The Limits of Free Expression, 73 United States Law Review, 392, 399. Compare 36 Michigan Law Review 465; 6 Kansas City Law

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Review 217. Many of these law notes give unstinted and, as we think, deserving praise to the opinions of the learned court below, Gobitis v. Minersville School District, 21 F. Supp. 581; 24 F. Supp. 271.

3. Four cases bear the per curiam imprimatur of the Supreme Court. Three of these, however, Hering v. State Board of Education, Leoles v. Landers, and Johnson v. Town of Deerfield, above cited, deal with a circumstance entirely distinct from the case at bar. In each of them, both the state legislature declared, and the highest state court affirmed, a policy of flag saluting. By reason of this legislative and judicial determination, the connection between an omission to salute the flag and the commission of an injury to the public weal, becomes legally and factually closer, Gitlow v. New York, 268 U. S. 652, and see, Brown, Due Process of Law, Police Power and the Supreme Court, 40 Harvard Law Review 943. But here there is no such declaration or affirmance of policy. The legislature of Pennsylvania has gone no further than to prescribe the teaching of civics. The fourth case, Gabrielli v. Knickerbocker, above cited, involves as here, a regulation, but one which had been sustained by the highest court of California. However, the Supreme Court dismissed the appeal therefrom merely for want of jurisdiction under 28 U. S. C. A. sec. 344 (1) and denied certiorari under 28 U. S. C. A. sec. 344 (3). By the same token the jurisdictional issue has now been settled in favor of exercise, Hague v. Committee for Industrial Organization, U. S. , June 5, 1939, above cited.

Hamilton v. The Regents (the land grant college case), 293 U. S. 245, often cited, is, we think, distinguishable. There a religious objector was expelled from a state university on his refusal to participate in military instruction (originally commanded by the Congress). The decision turned inter alia upon the fact that since the state did not draft students to attend the university it did not coerce the objector in the exercise of his religion, cf. The Civil

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Rights Cases, 109 U. S. 148. Here, of course, there is such coercion. The statutes call for compulsory attendance, 24 Purdon's Pa. Stat. Ann. sec. 1421, and the functioning of truant officers who have full police power to arrest without warrant any child who fails to attend or is incorrigible, insubordinate, or disorderly, 24 Purdon's Pa. Stat. Ann. sec. 1471. Thus if the offending child is too poor to purchase private education it may well end in reform school, 11 Purdon's Pa. Stat. Ann. sec. 243 (4) (c), sec. 250 (d), cf. Clark, The Limits of Free Expression, 73 United States Law Review, 392, 399, et seq., and its parents in jail, 24 Purdon's Pa. Stat. Ann. sec. 1430, and see 2 University of Pittsburgh Law Review 206, above cited. Furthermore, under constitutions worded as in Pennsylvania, 1 Vale's Pennsylvania Digest, p. 421, a child's right to primary (school) as distinguished from secondary (college) education is capable of enforcement at law. State v. Wilson, 297 S. W. 419, Bishop v. Hous, 35 S. W. 246, Newman v. Schlach, 50 Pac. (2) 36, Valentine v. Independent School District, 183 N. W. 434, People ex rel. Cisco v. School Board, 161 N. Y. 598.

4. The record before us sheds but little light upon the problems in educational psychology here discussed. Nor do the briefs direct us to any authorities on the subject. Compare Mueller v. Oregon, 208 U. S. 412. To decide questions of reasonableness in the absence of undisputed factual proof or knowledge is of course open to criticism. As has been aptly observed:

> ". . . these underlying questions of fact, which condition the constitutionality of the legislation, are at times questions on which the layman feels justified in forming his own opinion and in declining to yield it to that of the judge, at least when the judge bases his determination, not on evidence produced in the case before him, but on his general information,—the same foundation upon which the layman builds his conclu-

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> sion. As an example, the layman may be quite ready to defer to the opinion of the court when the decision requires a definition of the legal significance of the phrase '*ex post facto law;*' but when the court decides that a law limiting the hours that people may work in bakeshops has no substantial relation to the promotion of the public health, he is inclined to doubt the finality of this finding, since he knows of no particular reason for supposing that the judges are better able to decide such a question than other intelligent persons, unless their determination is based upon evidence produced, before them in the usual way carefully weighed and considered''.
>
> Bikle, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 Harvard Law Review 6, 7

See also, The Consideration of Facts in ''Due Process'' Cases, 30 Columbia Law Review 360 (comment). We feel, however, that this criticism cannot reach the instant case. The matter here can hardly be reduced to statistics. It is rather one of logical conjecture and comparison with the pattern of decided cases, based, furthermore, upon the learned trial judge's special finding of the fact of unreasonableness.

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ORDER AFFIRMING DECREE.

(Filed November 10, 1939.)

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE THIRD CIRCUIT.

No. 6862. October Term, 1938.

Minersville School District, Board of Education of Minersville School District, etc.,
Defendants-Appellants,

v.

Walter Gobitis, Individually, and Lillian Gobitis and William Gobitis, Minors, by Walter Gobitis, Their Next Friend,
Plaintiffs-Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia,
November 10, 1939.

WILLIAM CLARK,
Circuit Judge.

(Endorsements: Order Affirming Decree. Received and Filed November 10, 1939, Wm. P. Rowland, Clerk.)

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CLERK'S CERTIFICATE.

United States of America,
Eastern District of Pennsylvania, } *Sct.*
Third Judicial Circuit,

I, William P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and Proceedings in this Court in the case of Minersville School District, Board of Education of Minersville School District, etc., Defendants-Appellants, v. Walter Gobitis, Individually, and Lillian Gobitis and William Gobitis, Minors, by Walter Gobitis, Their Next Friend, Plaintiffs-Appellees, No. 6862, on file, and now remaining among the records of the said court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this twenty-first day of November, in the year of our Lord one thousand nine hundred and thirty-nine and of the Independence of the United States the one hundred and sixty-fourth.

(Seal)

Wm. P. Rowland,
Clerk of the United States Circuit Court of Appeals, Third Circuit.

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SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 4, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(6926)

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