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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

NO. 52.

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,

Appellees

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF FOR APPELLANT

Opinions of the Courts Below and Jurisdiction

This case comes to this Court on appeal from the New Jersey Court of Errors and Appeals.

The jurisdiction of the Court is invoked under Section 344, Paragraph (a), Title 28, United States Code, providing:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being

> repugnant to the Constitution, * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court. * * *"

The question raised in the Court below was as to the validity of a statute of the State, alleged to be violative of certain provisions of the Constitution of the State of New Jersey and the Fourteenth Amendment to the Constitution of the United States and the decision below was in favor of the validity of the statute. (R. 9, 45)

Judgment was rendered by the New Jersey Court of Errors and Appeals on November 8, 1945. (R. 62, 63) Appeal to this Court was allowed by the Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals on February 5, 1946. (R. 65)

The judgment referred to upheld the constitutionality of the resolution of the appellee Board of Education and the Act of the Legislature of the State of New Jersey, which resolution and statute had been duly attacked in the pleadings as being an infringement of the Fourteenth Amendment of the Constitution of the United States and of appellant's rights thereunder. (R. 45, 46, 9)

The opinion of the New Jersey Supreme Court is reported in 132 N. J. L. 98 and the opinion of the New Jersey Court of Errors and Appeals is reported in 133 N. J. L. 350. (R. 34, 46)

Statement of the Case

The New Jersey statute in question is Chapter 191, Laws of 1941 of the State of New Jersey entitled "An Act relating to education, and amending Section 18:14-8 of the Revised Statutes," which reads as follows:

> "1. Section 18:14-8, of the Revised Statutes is amended to read as follows:
>
> "18:14-8. Whenever in any district there are children living remote from *any* schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from

school, *including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.*

"When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of children to a school in an adjoining district when such children are transferred to the district by order of the county superintendent of schools, or when any children shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

"2. This act shall take effect July first, one thousand nine hundred and forty-one."

The 1941 amendment (Chapter 191, Laws of 1941) changed the words "the schoolhouse" in the first paragraph of R. S. 18:14-8 to read "any schoolhouse," and the other parts of the statute italicized above were added by said amendment.

Action under the statute was taken by the School Board of Ewing Township by a resolution for the payment of transportation of certain pupils in that township to certain private parochial schools, part of which payment was made when suit was brought and part of which was unpaid, but was required to be paid by the resolution in question. (R. 8)

On application of the appellant, a resident and taxpayer of the Township of Ewing, the New Jersey Supreme Court issued a writ of certiorari to review the legality of a resolution adopted on September 21, 1942, (R. 1) which resolution provided: (R. 8, 13)

> "The Transportation Committ. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

Pursuant to the said resolution the appellee Board of Education agreed to pay for the then current school year the cost of transportation to such Catholic parochial schools approximately $859.80, and on February 15, 1943 authorized the payment of $8,034.95 for transportation, of which $357.74 was paid to the parents of pupils who were transported to such parochial schools. (R. 15, 18, 19, 35)

All of the said schools are Roman Catholic Parochial Schools in the City of Trenton, and religion is taught as part of the curriculum in each and every one of said schools. A priest of the Catholic Church is the Superintendent of said schools. (R. 23)

In the New Jersey Supreme Court appellant contended that the resolution and statute violated certain provisions of the State Constitution and the Fourteenth Amendment to the Constitution of the United States. (R. 9)

The New Jersey Supreme Court held (132 N. J. L. 98) that the resolution and statute violated certain provisions of the Constitution of New Jersey and entered judgment for this appellant setting aside the resolution. (R. 34-37)

The New Jersey Court of Errors and Appeals (133 N. J. L. 350) pointed out in its opinion that the record before it showed that the reasons advanced in the New Jersey Supreme Court and in the New Jersey Court of Errors and Appeals "in support of the judgment under review are that the statute, upon which the resolution is based, is infirm and inoperative because it contravenes several constitutional inhibitions, namely, Article I, paragraphs 3, 4, 19 and 20; Article IV, Section 7, paragraph 6, of the Constitution of this State, N. J. S. A.; and the Fourteenth Amendment to the Constitution of the United States," but held "that the legislature may appropriate general state funds or au-

thorize the use of local funds for the transportation of pupils to any school," and entered judgment reversing the judgment of the New Jersey Supreme Court. (R. 45-51)

Specification of Errors

1. The New Jersey Court of Errors and Appeals erred in reversing the judgment of the New Jersey Supreme Court setting aside the resolution of the Appellee Board of Education on the ground that said resolution authorizes an unconstitutional gift of public funds in aid of sectarian schools.

2. Said Court erred in refusing to sustain the holding of the New Jersey Supreme Court that Chapter 191, Laws of 1941 of the State of New Jersey, pursuant to which said resolution was adopted, is unconstitutional in that it authorizes the use of public funds for transportation of children to private and sectarian schools.

3. Said Court erred in refusing to hold that said resolution and statute violate the provisions of the Fourteenth Amendment to the Constitution of the United States in that they authorize aid to private and sectarian schools by taxation thus constituting a taking of private property for a private purpose.

4. Said Court erred in refusing to hold that said resolution and statute, even if not considered to be an aid to private or sectarian schools but an aid only to the children attending such schools, violate the Fourteenth Amendment to the Constitution of the United States in that it constitutes a taking of private property to aid private individuals.

5. Said Court erred in refusing to hold that said resolution and statute violate the Fourteenth Amendment to the Constitution of the United States in that they are legislation respecting the establishment of religion.

6. Said Court erred in refusing to hold that said resolution and statute violate the Fourteenth Amendment to the Constitution of the United States in that they constitute legislation authorizing the support of religious tenets by taxation.

7. Said Court erred in holding that Chapter 191, P. L. 1941 of New Jersey is a valid enactment and not in contravention of the 14th Amendment of the Constitution of the United States. (R. 64, 65)

ARGUMENT

Taxes Levied by a State must be for a Public Purpose and Aid, Direct or Indirect, to Private Sectarian Schools is for a Private, as Distinguished from a Public, Purpose.

The power of the state to tax, or to authorize taxation, under the Federal Constitution, is limited by the uses to which the proceeds may be devoted and one of the fundamental limitations is that the use must be a public one.

In *Cole* v. *LaGrange* 113 U. S. 1, 6, it is said:

> "The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities or towns to contract, for private objects, debts which must be paid by taxes * * * These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject."

The view that public funds may not be used to give financial support or aid to private institutions of learning, not a part of the public school system, originated in the early decisions of this Court. In *Loan Association* v. *Topeka,* 20 Wall. 655, a leading case on the subject, it is said: (p. 664)

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. * * *

"But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the inn-keeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town. * * * In the case of *Lowell* v. *The City of Boston,* in the Supreme Judicial Court of Massachusetts * * *. The Court, in an able and exhaustive opinion, decided that the law was unconstitutional, as giving a right to tax for other than a public purpose.

"The same court had previously decided, in the case of *Jenkins* v. *Anderson* (Andover), 103 Mass 74, that a statute authorizing the town authorities to aid by taxation a school established by the will of a citizen, and governed by trustees selected by the will, was void because the school was not under the control of the town officers, and was not, therefore, a public purpose for which taxes could be levied on the inhabitants.

"The same principle precisely was decided by the State Court of Wisconsin in the case of *Curtis* v. *Whipple,* 24 Wis. 350. In that case a special statute which authorized the town to aid the Jefferson Liberal Institute was declared void because, though a school of learning, it was a private enterprise not under the control of the town authorities. In the subsequent case of *Whiting* v. *Fond du Lac,* already cited, the principle is fully considered and reaffirmed.

"These cases are clearly in point, and they assert a principle which meets our cordial approval."

In *Curtis* v. *Whipple,* 24 Wis. 350, one of the cases cited and approved, the Court was considering an act of the legislature authorizing the town of Jefferson to raise by tax $5,000, to aid in the erection of buildings for the "Jefferson Liberal Institute," in the town, in case the majority of the votes cast upon the question at a special town meeting should be in favor of the tax. The question was decided in the affirmative and Whipple, as town treasurer, proceeded to collect the tax. Curtis resisted the collection.

The court in holding the tax void said:

> "The counsel for the plaintiff correctly state the effect of the act of incorporation * * * when they say that the 'Jefferson Liberal Institute,' for the benefit of which the taxes in question were attempted to be assessed and collected, is essentially a private educational institution, controlled exclusively by the stockholders, through a board of trustees. The town of Jefferson is not a stockholder, and has no voice in its management. The taxpayers in the town, as such, are not stockholders, and have no privileges in the institute that are not common to all the people of this or any other state. The trustees may exclude any or all of the citizens of the town from the institution. * * * It strikes us, 'at the first blush,' that this is not the levy and collection of money for public purposes, as clearly as if the institute were not an incorporated body, but a mere association of private individuals resolved upon the establishment of a like institution. If it were such an institution, or a grammar or classical school, or a seminary built up and established by individual enterprise, as by persons engaged in the profession of teaching, or by others, and owned and controlled by those contributing toward it, and the emoluments belonging to them, we apprehend that no one would contend that the people of Jefferson might be taxed for the purpose of donating the money to it. The fact that it is an institution incorporated by act of the legislature does not change its character in this respect. * * * It can no more be supported by taxation than if it were unincorporated, or a private school or seminary of the kind above supposed. Nor will the location of the institu-

> tion at Jefferson, and the incidental benefits which may thereby arise to the people of the town, sustain the tax. That is not the kind of public benefit and interest which will authorize a resort to the power of taxation."

Jenkins v. *Andover,* 103 Mass. 74 (another of the state cases cited and approved) was a suit to restrain the officers of the town of Andover from proceeding to raise money to aid in rebuilding Punchard Free School, a school founded by charitable bequest which vested the order and superintendence of it in trustees, who, though a majority of them were to be chosen by the inhabitants of the town, yet were limited to the members of certain religious societies.

The court discussed the nature of public schools, saying:

> "Schools which towns are required to maintain, or authorized to maintain, though not required to do so, as a part of our system of common education and which are open and free to all the children and youth of the towns in which they are situated, who are of proper age or qualifications to attend them, or which adjoining towns may unite to support as a part of the same system; * * *
>
> "This class of school does not include private schools which are supported and managed by individuals; nor colleges or academies organized and maintained under special charters for promoting the higher branches of learning, and not specially intended for, nor limited to, the inhabitants of a particular locality. * * *
>
> "But the school is not 'under the order and superintendence of the authorities of the town.' The will requires that it shall be under the direction of eight trustees; three of them to be clergymen of three of the religious societies in the town, and the other five, though chosen by the inhabitants in town meeting, to be members of those societies. All the other inhabitants of the town are ineligible to the office of trustee; and the authorities of the town, as such, have no control over the school. * * *
>
> "* * * If a school can possibly exist which is not under the control of the town authorities, and yet can be called a common or public school within the meaning of the eighteenth article (state constitution) this is

> such a school. The fact that it is not under the control of the town authorities is its objectionable feature, and constitutes the reason why moneys raised by taxation or appropriated by the Commonwealth for the support of common schools cannot be applied to its support."

In *Lowell* v. *Boston,* 111 Mass. 454, 460 (also cited and approved in *Loan Asso.* v. *Topeka, supra*) Justice Wells reviewed the general principles in cogent language, which "can hardly be surpassed for accuracy and clearness" (211 Mass. 624):

> "The power to levy taxes is founded on the right, duty, and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public, or to the state, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.
>
> "The principle of this distinction is fundamental."

The principles laid down in the case of *Loan Association* v. *Topeka* have never been denied in this Court, but on the contrary they have frequently been cited with approval. *Parkersburg* v. *Brown,* 106 U. S. 487; *Cole* v. *LaGrange,*

113 U. S. 1; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112; *Green* v. *Frazier,* 253 U. S. 233; *Thompson* v. *Consolidated Gas Co.* 300 U. S. 55, 80.

This view that the Fourteenth Amendment was violated by use of public funds for private schools was not denied but on the contrary was affirmed in the case of *Cochran* v. *Board of Education,* 281 U. S. 370, where it was recognized that the question under the Fourteenth Amendment of the Constitution of the United States was raised by an Act of the Legislature of Louisiana alleged to authorize aid to private schools in that State, but the decision held that the particular actions there involved did not constitute such aid.

It is also recognized in this Court that though the Fourteenth Amendment deals only with the taking of liberty or property without due process of law, yet the principles enunciated in the First Amendment,—including the prohibition against any law respecting an establishment of religion or forbidding the free exercise thereof—constitute a chart by which due process of law may be measured, and that a violation of the First Amendment to the Constitution is a violation also of the Fourteenth Amendment. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108; *Cantwell* v. *Connecticut,* 310 U. S. 296; see also *Board of Education* v. *Barnette,* 319 U. S. 624, 637, 639.[1]

With these preliminary questions disposed of by the decisions of this Court, we may come to the precise question in this case: May the state, consistently with the First and

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[1] In the case of *Board of Education* v. *Barnette,* it is said (at page 639)

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard."

Fourteenth Amendments, use funds raised by taxation, to furnish free transportation to pupils attending private parochial schools, not a part of the public school system of the state, and not under control of the state, but under control of a religious organization?

The right of the state to do so is generally put on one of three grounds:

1. That the furnishing of transportation is merely incidental to the broad policy of fostering education by the state, which is clearly a public purpose.

2. That the state in furnishing transportation to the pupils attending private schools is not aiding such schools but is merely aiding the children in securing education; and

3. That furnishing such free transportation is merely carrying out the authority of the state in having compulsory attendance of pupils at school, either public or private.

In presenting this argument the first thought to be considered is that it is not the extent of the "breach in the ark of our covenant"[2] that determines the validity of the statute questioned but whether there is really any breach at all.

It is clear that if we are to observe constitutional limitations we are called upon in every case to draw the line somewhere and if the particular instance falls over that line it is not to be ruled valid because it is just a little over the line. Where then is the line to be drawn in the particular field here discussed?

At the outset there occurs at once the question—was not the point settled and the question foreclosed by the decision in the *Cochran case?* (281 U. S. 370) We submit that an analysis of that case will show very clearly that this Court did not foreclose the questions here discussed.

The lower court had held:

1. That the school books furnished to the children were not sectarian books for use in religious schools but were

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[2] *Bailey* v. *Drexel Furniture Co.* 259 U. S. 20.

in fact the public school books adopted and used in the public schools.

2. That the books were merely loaned to the pupils and were not given to them.

The analogy to furnishing public school text books to public libraries established and under control of the state and open to all the people with the right of any one to borrow the books for such length of time as the regulations permit—is inescapable. And so it was that Chief Justice Hughes in the *Cochran case, supra,* said, after reciting the limitations imposed upon the free school book statute by the Louisiana Supreme Court: "Viewing the statute as having *the effect thus attributed to it,* we cannot doubt that the taxing power of the State is asserted for a public purpose."

If the question is solely whether a state may purchase public school text books, retaining title to and control over them, and merely loaning them to the public (as public libraries do) making the books available to all alike, regardless of their religious creeds, there can be no doubt of the power of the state under the Fourteenth Amendment or the First Amendment to do so.

But the matter of furnishing financial aid either to the parochial schools or to the parents of the children attending such parochial schools, over which the state has no control and which are not a part of a free service open to all the people of the state or all the children of the state, presents a very different question.*

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* It was apparently treated as a different question in the several state decisions (rendered since the decision in the *Cochran case*) holding invalid the furnishing of free transportation to private or parochial schools. *State ex rel Traub* v. *Brown,* 36 Del. 181 (1934); *Gurney* v. *Ferguson,* 190 Okla. 254 (1941); *Mitchell* v. *Consolidated School District,* 135 Pac. 2d 79 (1943); *Sherrard* v. *Jefferson County Board of Education,* 294 Ky. 469 (1943).

Such furnishing of free transportation is more nearly analogous to the use of public funds to pay directly or indirectly tuition fees of pupils in private or sectarian schools, which the state courts have

The question here presented is succinctly stated by Justice Case (now Chief Justice) in the dissenting opinion in the decision of the New Jersey Court of Errors and Appeals: (R. 51, 52, 53)

> "The issue is the constitutionality of reimbursement by the Board of Education of the Township of Ewing, from public moneys, to parents, resident in the township, for the bus fares paid by their children on public buses between the township and the City of Trenton, in which city the children attended certain Roman Catholic parochial schools. The religion of the church was taught in each of the schools as a part of the curriculum. A priest of the church was the superintendent of the schools. The resolution under review made no provision for transportation to private or sectarian schools other than Catholic schools and therefore did not make provision for children generally. Further, it made no change in the method of transportation and so added nothing to protection against traffic hazards. The transportation had been and continued to be by public buses running on their usual schedules. The township public schools extend through the eighth grade. Public school children beyond those elementary grades are transported either to Trenton or Pennington. Some of the parochial school children transported to Trenton were in the elementary grades and some in the high school grades. Consequently the parochial school children in the elementary grades were transported to the City of Trenton although the public school children in those grades were received and taught in the schools within the school district. * * *
>
> "A major question is whether the furnishing of transportation to private or parochial schools out of public money is in aid or support of such schools and whether constitutional provisions which prohibit such aid or support are violated by statutory authority for transportation. The argument that such disbursements are not in aid of the schools is based upon what is

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held invalid. *Williams* v. *Stanton Common School District,* 173 Ky. 708; *Synod of Dakota* v. *State,* 2 S. D. 366; *In re Opinion of the Justices,* 214 Mass. 599; *People, ex rel.* v. *Board of Education,* 13 Barb. 400.

> known as the 'child-benefit' theory which presents as a distinction that the charges are for the benefit of the children rather than of the schools. * * *
>
> "The 'child-benefit' argument is made here. Among its weaknesses, as a means of avoiding constitutional inhibitions, are its vagueness and the impossibility of satisfactorily distinguishing one item of expense from another in the long process of child education. * * *
>
> "Every step in the educational process is, presumably, for the benefit of the child and, therefore, theoretically, for the benefit of the state. Consequently, if the argument is sound, it is within the discretion of the legislature, free of constitutional restraint, to provide for practically the entire cost of education in private and parochial as well as in public schools."

In all the cases where the principles of the First Amendment were involved, the question whether the restriction, regulation or aid was violative of constitutional limitations, was a narrow one, that is, the encroachment was slight and insignificant compared to the claimed general purpose of the law. In practically every case it might be said that the challenged law was for the general purpose of promoting education and helping the children of the state to secure it.

If the law here in question is sanctioned as not violating the Fourteenth Amendment or the First Amendment, because it has as its main purpose the promotion of education in the state and only incidentally and in a negligible way affects an establishment of religion or takes the property of the citizen for private purposes, then, with this as a precedent, what is to prevent the state from paying directly to the religious schools out of the public school funds or out of any funds raised by taxation sufficient money to secure the transportation of the students who desire to attend such schools? It might well be said that this would be a more convenient way to meet the situation and it could be said that it is for the state to decide the most convenient way to carry out its power. The payment to the children,

or to the parents, of bus fares to parochial schools, requires reports possibly from hundreds of individual children or parents, likewise proof and applications and numerous receipts and hundreds of exceedingly small disbursements. The whole matter could be handled by having the schools certify as to the number of children attending and in need of transportation and paying the money direct to the schools. It would follow logically from this that if the facilities of the private parochial schools were inadequate for reasons other than transportation, such schools might be helped financially, thus supposedly promoting education in the state and only incidentally affecting or relating to an establishment of religion.

In a recent decision (*Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55) this Court, in an opinion in which all the members of the Court joined, in passing upon the power of a state legislature under constitutional limitations of the Federal Constitution, reaffirmed the doctrine of *Loan Association* v. *Topeka, supra,* that the taking of the property of A and giving it to B is contrary to the fundamental principles of our form of government, even though the taking was related to or purportedly incidental to, a great public purpose—in that case the conservation of natural resources.

This Court also explained that the doctrine equally applied though the taking was not in the form of a regulation, but was of money raised by general taxation and given to private individuals or organizations.*

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* In *Thompson* v. *Consolidated Gas Co. supra,* at p. 79, Mr. Justice Brandeis, speaking for a unanimous court, said: "Our law reports present no more glaring instance of the taking of one man's property and giving it to another."

"In *Missouri Pacific Ry. Co.* v. *Nebraska,* 164 U. S. 403; *Missouri Pacific Ry. Co.* v. *Nebraska,* 217 U. S. 196; *Great Northern Ry. Co.* v. *Minnesota,* 238 U. S. 340; *Great Northern Ry. Co.* v. *Cahill,* 253 U. S. 71; *Delaware L. & W. R. Co.* v. *Morristown,* 276 U. S. 182; and *Chicago St. P., M. & O. Ry. Co.* v. *Holmberg,* 282 U. S. 162, expenditures directed to be made for the benefit of a private person

In the case at bar, we have the simple fact that public funds, raised by taxation, were, under authority and direction of the State Legislature, handed over directly to A, B, C and D, private persons not in need, or requiring public charity, in amounts of cash required to pay the fare on means of transportation to private institutions, over which the public or the state had no control and in relation to which it could not exercise any control directly or indirectly, by the accepted doctrine of separation of church and state, except such as is inherent in sovereignty itself—the Police Power—to guard against or prevent epidemics, disease, fires, immorality, etc.

No fine distinctions as to reasonable classification of the subjects of state legislation; no argument as to minors being the wards of the state in the exercise of the police powers of the state; no extolling of the duty of the state to offer its own means of education to all the citizens; no theorizing as to subsidizing individuals to induce them to obey the laws as to compulsory obligations to their children—can gloss over this simple fact.

It never has been, and never can be, under our written constitution as it now stands, lawful or for the "public welfare" to take the property of A and give it to B. This Court has consistently so held from *Loan Association* v. *Topeka* to *Thompson* v. *Consolidated Gas Co.* and beyond.

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were held invalid, although the party ordered to pay was a common carrier. In *Loan Association* v. *Topeka,* 20 Wall, 655, and *Cole* v. *LaGrange,* 113 U. S. 1, the payments ordered for the benefit of a private person were declared invalid, although the money was to be raised by general taxation. In *Myles Salt Co.* v. *Board of Commissioners,* 239 U. S. 478, the exaction was held unlawful, though imposed under the guise of an assessment for alleged betterments. Compare *Georgia Railway & Electric Co.* v. *Decatur,* 295 U. S. 165. And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. See *Hairston* v. *Danville & Western Ry. Co.,* 208 U. S. 598, 605, 606; *Rindge Co.* v. *County of Los Angeles,* 262 U. S. 700, 705. Compare *Cincinnati* v. *Vester,* 281 U. S. 439, 446, 449."

However desirable the law may seem to some, and however slight the infringement on our fundamental principles may be, the fact remains that this is a "glaring instance of the taking of one man's property and giving it to another."

And it is more important that this breach be closed when it occurs in the realm of separation of church and state and when it is, even though the degree be small, "respecting an establishment of religion."

In one of the very latest of the state cases on this subject, (*Gurney* v. *Ferguson,* 190 Okla. 254, 122 P. 2d 1002, which came to this Court on certiorari, which was denied in 317 U. S. 588 and 317 U. S. 707) the Supreme Court of Oklahoma said:

> "It is urged that the present legislative act (providing transportation to schools) does not result in the use of public funds for the benefit or support of this sectarian institution or school 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. * * * It is true this use of public money and property aids the child. We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has no authority to maintain a sectarian school. Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such, Yet the same argument is equally applicable to those expenditures as to the present one.
>
> "If the cost of the school bus and the maintenance and operation thereof was not in aid of the public schools, then expenditures therefor out of the school funds would be unauthorized and illegal. Yet, we assume it is now acquiesced in by all that such expenditures are properly in aid of the public schools and are authorized and legal expenditures. If the maintenance

> and operation of the bus and the transportation of pupils is in aid of the public schools, then it would seem necessarily to follow that when pupils of a parochial school are transported that such service would likewise be in aid of that school.
>
> "In that connection we must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regulation and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete control might well be the expected development. * * *"

That *financial aid* to sectarian schools from public funds may well lead to efforts at *control* of such sectarian schools is not without examples in experience. (See *Harfst* v. *Hoegan,* 163 S. W. 2d, 609). Both are contrary to our conception of the absolute separation of church and state and to the principles enunciated in the Fourteenth Amendment as well as those in the First Amendment.

The Payment out of Public Monies, Raised by Taxation for the Support of Free Public Schools, to Parents of Pupils of their Expenses of Sending their Children to Private Religious Schools, Constitutes a Division of School Funds Between a Public Use and a Private and Religious Use Contrary to Fundamental Principles of the Federal Constitution.

The limits to which states may go in taking private property, though of somewhat wide range, are definitely confined by the Federal Constitution and the cases decided under it, to such taking as is for a *public use* only. While a public use, itself, embraces an increasing variety of things, because, doubtless, of our complex mode of living, yet the principles upon which a public use is determined have been unvaried throughout the cases. The requirements of a public use as deduced from these cases, are: the use must be

available to the public and there must be a capability of public use; the public must have or reserve some control over the use; some benefit must flow directly to the public from this use; the "promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object." (*Lowell* v. *Boston,* 111 Mass. 454, 461).

It may be difficult, in every case, to draw the line between what is, and what is not, a public use; but a line must be drawn somewhere or the limitations on the taxing power are meaningless and futile. But though hard to draw, there are some things that plainly and beyond doubt fall on one side or the other of the line. Among the uses which clearly fall on the private side, are those in which the public has neither control, as such, nor common and general access to or benefit from. Here is where this Court has drawn the line in *Loan Association* v. *Topeka, supra,* as plainly and unequivocally marked out. And here is the crux of this case.

Since that interpretation of the Constitution, there have been no changes of condition that make this interpretation inapplicable to the kind of case here presented. Private schools and religious schools have not changed their nature; public schools have tremendously grown and expanded and any supposed need to commit the education of the youth to private enterprises uncontrolled by the state because of the inability of the state to perform its functions, has diminished rather than increased. Therefore any thought that the Constitution is broad enough to meet the changing conditions of society has no application here. The principles announced in *Loan Association* v. *Topeka, supra,* are as sound and applicable, under present day conditions, as they were a hundred years ago. And this is recognized by this Court in the most recent decisions on the subject. (See *Thompson* v. *Consolidated Gas Co.,* 300 U. S. 55).

Without discussing the theories as to how far the state may go in entering businesses heretofore conducted by pri-

vate enterprise, or how far the state may go in aiding enterprises conducted by private individuals, but over which the state reserves and exercises control, at least to the extent of securing common and equal access and benefit on terms prescribed by the state—theories which are not before the Court in this proceeding—we present here the single question, whether a state having a common school system, controlled by the state, to which all children have access on terms prescribed by the state and to which all taxpayers have equal and common benefit, and supported by taxation upon all the citizens by a levy of general taxes, may divert any of the funds so raised, to the aid, support, or maintenance, in any form, by payments direct or to the users or patrons, of admittedly private enterprises offering common schooling of the grade offered by the public schools, where the entire control, at least to the extent of selecting those who may receive the benefit and have the access and prescribing the curriculum and the religious tenets to be observed, rests wholly in private hands and in a religious and sectarian organization, individual, association or corporation. To ask the question is to answer it, if taxation, under the Federal Constitution, in all the states, must be confined to a "public use," as that expression is and always has been understood since the adoption of the Constitution, and if the absolute separation of church and state, fundamental in our form of government, is to be maintained.

In dividing the school fund between the public schools, over which the public has control, and the parochial schools, over which the public does not have control, it is plainly not important—so far as the constitutional question is concerned—whether the division is effected by payments direct to the parochial schools or by payments to the pupils attending such private schools, or to the parents of such pupils.

If so dividing the public funds for the support of public schools is to be sanctioned, it will set "a precedent that must, if followed, destroy the very existence of common

schools." (*Underwood* v. *Wood,* 93 Ky. 177, 15 L. R. A. 825).

If dividing the school fund is improper, it does not become valid because it tends to promote or is in aid of some other policy of the state. (*Board of Education* v. *Barnette,* 319 U. S. 624; *Meyer* v. *Nebraska,* 262 U. S. 390) The same argument as to aid to other state policies, could be made for establishing outright and maintaining completely the parochial schools. But there is general agreement that this may not be done under our form of government.

"Observance of the limitations of the Constitution will not weaken government in the field appropriate for its exercise" * * * Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction." (*Board of Education* v. *Barnette, supra*)

As the freedoms of the First Amendment are to be imported into the Fourteenth, the Constitution of the United States requires that religious liberty shall be the rule in the states; but there is not to be implied from this that the Constitution either requires or permits the exercise of or choice in the exercise of religious liberty to be subsidized by the state. Such implication would impair the outstanding characteristic of religious liberty—the separation of church and state.

And yet that is precisely the nature of the payments here made. The payments out of public funds are not because the parents are in need of charity; nor is it contended that the parents cannot give full sway to their religious beliefs or send their children to religious schools unless this money is paid to them; nor is it suggested that the recipients are in any way discriminated against and that this subsidy is some recompense for that discrimination. The money is paid solely and only because the parents voluntarily elect to send their children to parochial schools instead of to the public schools. The election is theirs, not the state's, and is in no way imposed or induced by the state. There is

logically no limit to the election, though it embrace all the children in the district and make the public schools idle and useless. Nor is there any limit, in principle, to the method by which the subsidy is to be effected by depletion of the public school funds for the use of those who happen to have objections on religious grounds to the public schools, or prefer, from mere whim, the private or parochial school to the public school supported by taxation of all the citizens and for which alone the taxes were levied and the school fund accumulated.

As to the Contention that such a Statute is in Aid of Enforcement of Compulsory Attendance Laws.

The argument that paying parents to send their children to private schools facilitates enforcement of "compulsory education laws" is no justification for violation of specific constitutional limitations.

The constitutional limitations, so far as they apply to the states, are restrictions on the states as to specific matters and acts.

They are not operative in those states only which do not have certain other valid laws to be enforced and inoperative in those states which do have such other laws.

The separation of church and state and the restrictions on the use of public funds are fundamental and vital principles. They are not to be encroached upon to further the convenience of the state in enforcing its legitimate prohibitions or mandates.

The cogent reasoning of the Supreme Court of Iowa, in *Knowlton* v. *Baumhover,* (1918), 182 Iowa 691, 166 N. W. 202, 5 A. L. R. 841, is apt and pertinent here. That court says:

> "If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—

Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used directly or indirectly for religious instruction, and above all that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief.

"* * * We can and do hold in high respect the convictions of those who believe it desirable that secular and religious instruction should go hand in hand, and that the school which combines mental and spiritual training is best adapted to the proper development of character in the young. The loyalty to their professed principles which leads such persons to found and maintain schools of this class at their private expense, while at the same time bearing their equal burden of taxation for the support of public schools, is worthy of admiration and convincing proof of their sincerity. But it is doubtless true that this double burden (double only because voluntarily assumed) sometimes renders those who bear it susceptible to the misleading argument that because they thus carry an extra load for conscience's sake, there is something wrong in the policy which forbids them to make the public school a means for accomplishing the end for which the parochial school is designed. * * *But, as we have before intimated, the right of a controversy of this kind is not to be decided by a count of the number of adherents on either side. The law and one are a majority, and must be allowed to prevail. The spirit which would make the state sponsor for any form of religion or worship, and the religion, whether Protestant or Catholic, which would *make use of any of the powers or functions of the state to promote its own growth or influence,* are un-American; they are not native to the soil; they are inconsistent with the equality of right and privilege and the freedom of conscience which are essential to the existence of a true democracy." (Italics supplied)

There are many instances where the payment of money to some individuals might well prevent or lessen evasions of the law or aid in the enforcement of the law. But it can never be in the public interest to take one private individual's property and hand it over to another private individual.

In the interests of conservation of natural resources the state may limit and prorate the production of oil or gas; but that does not mean that the state may require A to purchase oil or gas from B, or B to sell to A. (*Thompson* v. *Consolidated Gas Co., supra*)

A city may pass ordinances against littering the streets, but it cannot forbid the distribution of religious pamphlets because such distribution may tend to hamper the enforcement of such ordinances. (*Schneider* v. *State,* 308 U. S. 147, 161) But how absurd to say that, as a corollary to this, the city must not only permit such distribution but may compel the inhabitants of the city, through taxation, to pay the fare of those doing the distributing!

The state may, in the interest of the effectiveness of compulsory education in some school, public or private, require the teaching of English in all schools, but it may not deprive teachers of other languages of their right to exercise a lawful calling or deprive parents of their right to have their children receive such instruction, if they choose. (*Meyer* v. *Nebraska* 262 U. S. 390) But the exercise of the choice is obviously to be at their own expense; there is not implied in such right, that the state may compel the public, through taxation, to secure, or contribute to securing, such teaching of other languages.

The theory of compulsory education laws is that it is the duty of parents to educate their children, and the state, in furtherance of its own interests, may compel the performance of this duty. There is a corresponding duty of the state to furnish facilities of free schools to all so that the obligation of the parents may be fulfilled without undue burdens and without discrimination because of financial conditions. The underlying thought back of such legislation is the furnishing of facilities of every kind for the *public school* free to all, and to which all may have access without expense. The sending of children to private schools, whether religious or nonsectarian, is an excuse for not utilizing the public facilities afforded by the state—an excuse which must be accepted, otherwise there would be an

interference with religious freedom and the pursuit of the lawful calling of teaching in private schools. (*Pierce* v. *Society of Sisters,* 268 U. S. 510) The exemption thus afforded is because the parents are ready, willing and able to send their children to private schools and to the particular school of their own choice.

The public schools do not trench upon the tenets of any religion. Indeed they cannot do so under our constitution. There is no reason why children should not attend the public school nor any reason why they should not be compelled so to attend except their freedom of choice in the matter of religion which extends to schools in connection with religion. But to say that the parents may not only be excused from sending their children to the public schools but shall be paid for exercising this choice is extending religious liberty beyond anything heretofore suggested and runs counter to the mandate of the separation of church and state, inherent in the First Amendment providing that there shall be no law respecting an establishment of religion and to the mandate inherent in the Fourteenth Amendment that the funds raised by taxation shall be devoted wholly to a public use and not to a private use.

There is no challenge here of the validity or propriety of Compulsory Education Laws, where there are adequate facilities for public education furnished by the state and proper exceptions and exemptions. What is challenged is the right of the state to subsidize those who claim the exemption or exception, by paying out of public funds part or all of their expenses in exercising such free choice, particularly where the choice is on religious grounds and the payment is solely because of their claimed religious beliefs.

Subject only to the right of the state to protect itself—by proper exercise of the Police Power—the freedom of the individual consistent with like freedom of other individuals in the body politic means "non-action" by the state in the particular instance where the freedom is secured; it does not mean that the rest of the public, in the discretion of the legislature or a local board, may be compelled, through

taxation, to pay money to the citizen, in any way or to any extent, to exercise his freedom. "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Board of Education* v. *Barnette, supra,* at p. 638.

Providing for such compulsory payment is not "separation of church and state" meant by the First Amendment; it is not the "due process" meant by the Fourteenth Amendment; on the contrary it is violative of both amendments.

Respectfully submitted,

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