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STATUTES CITED

NEW JERSEY COURT OF ERRORS AND APPEALS

ARCH R. EVERSON,
Prosecutor-Respondent,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, ET AL.,
Respondents-Appellants

ON APPEAL FROM THE NEW JERSEY COURT OF ERRORS AND APPEALS

STATEMENT OF JURISDICTION

The jurisdiction of the United States Supreme Court rests upon the statutory provision contained in United States Code Annotated, Title 28, Section 344, Paragraph (a), which provides:

> "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 upon a writ of error."

The appellant relies on the 14th Amendment to the Constitution of the United States as a basis for the jurisdiction of the United States Supreme Court.

The date of the judgment of the New Jersey Court of Errors and Appeals sought to be reviewed is November 8, 1945.

Petition for re-argument was denied on November 29, 1945.

The application for the allowance of an appeal was presented to the Chancellor and Presiding Judge of the New Jersey Court of Errors and Appeals on February 5, 1946, and was duly allowed on that date. The application and allowance were, therefore, timely.

Statement of the Case

The judgment referred to above upheld the constitutionality of the resolution of the Appellee Board of Education and the Act of the Legislature of the State of New Jersey, hereinafter quoted, which resolution and statute had been duly attacked in the pleadings as being an infringement of the 14th Amendment of the Constitution of the United States and of appellant's rights thereunder. (State of case, N. J. Court of Errors and Appeals, page 15.)

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, which resolution provided:

> "The Transportation Commtt. 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."

The statute in question is Chapter 191, Laws of 1941 of the State of New Jersey entitled "An Act relating to educa-

tion, 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.* (Italics ours.)
>
> "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 1942) 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.

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.

All of the said schools are Roman Catholic Parochial Schools in the City of Trenton, and religion is taught as part of the curricula in each of said schools. A priest of the Catholic Church is the Superintendent of said schools.

In the New Jersey Supreme Court appellant contended that the resolution and statute violated certain provisions of the State Constitution and the 14th Amendment of the Constitution of the United States.

The New Jersey Supreme Court held (132 N. J. L. 98, 39 A. 2d 75) that the resolution and statute violated certain provisions of the Constitution of New Jersey and entered judgment for this appellant setting aside the resolution.

The New Jersey Court of Errors and Appeals (133 N. J. L. 350, 44 A. 2d 333) 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 authorize 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.

Thus, there is presented a suit wherein is drawn in question the validity of a statute of the State of New Jersey and

validity of a resolution of the Appellee Board of Education on the ground of their being repugnant to the Constitution of the United States in which the decision of the highest court of that state was in favor of the validity of the statute and resolution.

Wherefore, it is submitted that the United States Supreme Court has jurisdiction to review the judgment appealed from.

Points and Authorities

1

Appeal is the remedy for review of a decision of a State Court of last resort in favor of the validity of a state law, where the state law is alleged to infringe the Federal Constitution.

Western Turf Ass'n vs. *Greenberg,* 204 U. S. 359, 27 Sup. Ct. 384, 51 L. Ed. 520;

Great Northern Ry. Co. vs. *State of Minnesota,* 278 U. S. 503;

Nashville and St. L. Ry. vs. *White,* 278 U. S. 456.

2

The validity of a statute which can only be fulfilled by resort to taxation depends on the power of the state to levy the tax for the purpose for which the tax fund is to be used.

Parkersburg v. *Brown,* 106 U. S. 487, 501:

> "Taxation to pay the bonds in question (bonds were issued by City to finance a private enterprise) is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person."

Cole v. *LaGrange,* 113 U. S. 1, 6:

> "The general grant of legislative power in the Constitution of a State (Missouri) 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."

3

The action of a state in leving taxes for a private, as distinguished from a public purpose, raises a constitutional question under the 14th Amendment to the Constitution of the United States.

Fall Brook Irrigation District v. *Bradley,* 164 U. S. 112, 158:

> "In the Fourteenth Amendment the provision regarding the taking of private property is omitted, and the prohibition against the State is confined to its depriving any person of life, liberty, or property, without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law, if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the State instead of the Federal government."

4

That statutes authorizing aid to private schools by taxation authorize a levy of taxes for a private, as distinguished

from a public purpose, is a principle established and approved by the decisions of the United States Supreme Court.

Savings and Loan Asso. v. *Topeka,* 20 Wall. 655:

> "We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. * * *
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> * * * * * * *
>
> "The same court had previously decided, in the case of *Jenkins* v. *Anderson* (Andover, 103 Mass. 94, 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 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.
>
> "The cases are clearly in point, and they assert a principle which meets our cordial approval."

The principles decided in that case have never been denied in the United States Supreme 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; *Fall Brook Irrigation District* v. *Bradley,* 164 U. S. 112; *Green* v. *Frazier,* 253 U. S. 233.

5

The furnishing of transportation by the state to children attending private or sectarian schools is essentially, and as a practical matter, an aid to such schools.

Judd v. *Board of Education,* 278 N. Y. 200, 15 N. E. 2d 576:

> "Free transportation induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. * * * It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid."

State ex rel. Traub v. *Brown,* 36 Delaware 181, 172 A. 835, writ of error dismissed, 197 A. 478:

> "We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools. It helps build up, strengthen and make successful the schools as organizations."

Gurney v. *Ferguson,* 190 Okl. 254, 122 P. 2d 1002, *certiorari* denied, 317 U. S. 588, rehearing denied, 317 U. S. 707:

> "It is urged that the present legislative act 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."

Mitchell v. *Consolidated School Dist. No. 201* (Supreme Court of the State of Washington), 135 P. 2d 79:

"We cannot, however, accept the validity of the argument that transportation of pupils to and from school is not beneficial to, and in aid, of the school. Even legislation providing for transportation of pupils to and from public schools is constitutionally defensible only as the exercise of a governmental function furthering the maintenance and development of the common school system. * * *

* * * * * * *

"We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself."

Sherrard v. *Jefferson County Board of Education*, 294 Ky. 469, 171 S. W. 2d 963.

State ex rel. Van Straten v. *Milquet*, 180 Wis. 109, 192 N. W. 392.

The state should not be permitted to do indirectly what it cannot do directly.

The courts of this country have been unanimous in prohibiting a use of public funds to pay, *directly or indirectly*, tuition fees of pupils in private or sectarian schools.

Williams v. *Board of Trustees, Stanton Common School Dist.,* 173 Kentucky 708, 191 S. W. 507, reversing on rehearing, 172 Kentucky 133, 188 S. W. 1058, and discarded.

Otken v. *Lamkin,* 56 Miss. 758.

Synod of Dakota v. *State,* 2 S. D. 366, 50 N. W. 632.

In re Opinion of the Justices, 214 Mass. 599, 102 N. E. 464.

People ex rel. Roman Catholic Orphan Asylum Society in City of Brooklyn v. *Board of Education,* 13 Barb. 400.

If the judgment of the court below is not reversed, it will be 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, by paying to the parents the amount of such costs. The state will be permitted to do indirectly what it cannot do directly.

Judd v. *Board of Education,* 278 N. Y. 200, 15 N. E. 2d 576:

> "Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, *to whomsoever made,* circuitiously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interest and purposes."

If the furnishing of transportation to children attending private and sectarian schools is not to be considered an aid to such private schools but an aid only to the children attending such schools, then the tax levied for such purpose is equally obnoxious to the federal constitution because it constitutes a diversion of public property to private individuals without distinction as to need for charity and

without any special obligation of the state, charitable or otherwise, to such persons.

Savings and Loan Asso. v. *Topeka,* 20 Wall. 655:

> "To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation."

The same principle has been enunciated in state courts, and applied to use of public funds to aid those attending private schools.

State v. *Switzler,* 143 Mo. 287, 45 S. W. 245, 40 L. R. A. 280:

> "The act under consideration endows the scholar, not the university. * * * It is a pure and simple gift of public money by the state to private individuals, for their own private use. * * *
>
> "It is only necessary to add that counsel for the curators do not attempt to maintain this tax on the theory that the young men and women who would obtain these scholarships are paupers, in the meaning of the law. Even without this admission, it is perfectly apparent that the act, by its terms, does not confine this pension to the children of poor persons who may, in a legal sense, be denominated 'paupers'."

8

If the furnishing of transportation to children attending private and sectarian schools is not to be considered an aid to such schools but an aid only to the children attending such schools, then the tax levied for such purpose is equally obnoxious to the federal constitution because it constitutes a taking of private property to aid private individuals for

a purpose which is not effectuated by or through a public agency.

People v. *Westchester County National Bank,* 231 N. Y. 465, 132 N. E. 241, 244:

> "Whether the purpose is a public one, therefore, is no longer the sole test as to the proper use of the state's credit. Such a purpose may not be served in one particular way. However important, however useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of the credit to an individual or a corporation. It will not do to say that the character of the act is to be judged by its main object—that because the purpose is public, the means adopted cannot be called a gift or a loan."

Prior to the judgment of the court below, the same principle was recognized and was applied by the courts of New Jersey to statutes in aid of education.

Wilentz v. *Hendrickson,* 133 N. J. E. 447, 480, affirmed 135 N. J. E. 244:

> "These constitutional amendments were, however, directed at the means of effectuating that public purpose. They were intended to prevent the accomplishment of that purpose by the means of aid to private corporations not constituting public agencies controlled by the state."

In re Voorhees, 123 N. J. E. 142, 147, affirmed 121 N. J. L. 594, affirmed 124 N. J. L. 35:

> "And in *Trustees of Newark Free Public Library* v. *Civil Service Commission,* 83 N. J. Law 196, 83 Atl. Rep. 980; aff'd 86 N. J. Law 307, 90 Atl. Rep. 261, the constitutional validity of the appropriation of public moneys by municipalities to free public libraries is rested on the ground that the libraries in question were public agencies for public education and the appropriations are expenditures by the state or muni-

cipality for such public education *through* such agents." (Italics by court.)

Rutgers College v. *Morgan,* 70 N. J. L. 460, 473, affirmed 71 N. J. L. 663:

> "This provision, as well as that relating to special laws, does not bar instrumentalities for public education *provided by the state and under its control* by general laws where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced; but they were not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for *public* education *under its own supervision.*" (Italics ours.)

A statute authorizing transportation of children to private and sectarian schools is not in aid of an agency or instrumentality of the state for public education provided by the state and under its control and supervision.

9

A statute which does not provide for transportation of pupils generally but only of pupils attending public schools and non-profit private schools constitutes a taking of private property for a private purpose in so far as the transportation of pupils attending non-profit private schools is concerned.

10

A resolution which authorizes transportation of children to Catholic schools, and makes no provision for transportation of children attending sectarian schools other than Catholic schools, segregates the schools and the pupils designated as beneficiaries and constitutes a taking of private property for a private purpose.

11

That a statute respecting an establishment of religion or authorizing the support of any religious tenets by taxation is prohibited by the federal constitution is a principle established and approved by the decisions of the United States Supreme Court.

Reynolds v. *United States,* 98 U. S. 145:

> "Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion and sometimes for the support of particular sects to whose tenets they could not and did not subscribe."

Davis v. *Benson,* 133 U. S. 333:

> "The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of a religion, or forbidding the free exercise thereof, was intended * * * to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect."

12

The Fourteenth Amendment makes applicable to the states and their subdivisions the guaranties of religious liberty contained in the First Amendment.

Murdock v. *Pennsylvania,* 119 U. S. 105, 108:

> "The First Amendment, which the Fourteenth Amendment makes applicable to the States, declares that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *."

A statute or resolution authorizing the use of tax moneys for the purpose of furnishing transportation to children attending sectarian schools is legislation respecting an establishment of religion.

Judd v. *Board of Education,* 278 N. Y. 200, 15 N. E. 2d 581, 582, a case holding such a statute unconstitutional:

> "While a close compact had existed between the Church and State in other governments, the Federal government and each State government from their respective beginnings have followed the new concept whereby the State deprived itself of all control over religion and has refused sectaries any participation in or jurisdiction or control over the civil prerogatives of the State. And so in all civil affairs there has been a complete separation of Church and State jealously guarded and unflinchingly maintained. * * * Any contribution directly or indirectly made in aid of the maintenance and support of any private or sectarian school out of public funds would be a violation of the concept of complete separation of Church and State in civil affairs and of the spirit and mandate of our fundamental law."

Gurney v. *Ferguson,* 190 Okl. 254, 122 P. 2d 1002, certiorari denied, 317 U. S. 588, rehearing denied, 317 U. S. 707, another case in which a state court held such a statute unconstitutional:

> "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. The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution."

Harfst v. *Hoegen* (Missouri Supreme Court), 163 S. W. 2d 609:

> "The constitutional policy of our State has decreed the absolute separation of church and State, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise."

The operation of a church school under the direction of, and teaching the tenets of, a church, is a primary function whereby that church puts its impress upon and holds the children of the church to its faith. The parochial schools are a part of the ministration of the church under whose control they are. The ministry of the church is concerned and connected therewith. Specifically, in this case, religion is taught in the schools and a priest of the church is the superintendent of the schools.

14

A statute or resolution authorizing the use of tax moneys for the purpose of furnishing transportation to children attending sectarian schools is legislation for the support of religious tenets.

Judd v. *Board of Education,* 278 N. Y. 200, 15 N. E. 2d 581.

Gurney v. *Ferguson,* 190 Okl. 254, 122 P. 2d 1002, certiorari denied, 317 U. S. 588, rehearing denied, 317 U. S. 707.

Harfst v. *Hoegen* (Missouri Supreme Court), 163 S. W. 2d 609.

Dakota Synod v. *State*, 2 S. D. 366, 50 N. W. 632.
Williams v. *Stanton Common School District*, 173 Ky. 708, 191 S. W. 507.

The resolution of the Appellee Board of Education is legislation respecting an establishment of religion and for the support of religious tenets in that it contains no provision for the transportation of children to sectarian schools generally, but segregates the schools and the pupils designated as beneficiaries, and makes no provision for transportation of children attending sectarian school other than Catholic schools.

Respectfully submitted,

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