INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 911

ARCH R. EVERSON,
Prosecutor, Appellee,

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 OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellees' Statement as to Jurisdiction and Motion to Dismiss or Affirm

The Appellees, believing that the matters set forth below will demonstrate the lack of substance in the questions raised by this appeal, file this, their statement in opposition to appellant's statement as to jurisdiction. Appellees include herein their motion to dismiss the appeal or in the alternative to affirm the judgment of the New Jersey Court

of Errors and Appeals on the grounds that the questions raised on behalf of Appellant are so insubstantial as not to need further argument, and indeed that the Statement of Jurisdiction filed by Appellant shows them so to be.

While the cause is one which otherwise would be reviewable by the Supreme Court on direct appeal from the New Jersey Court of Errors and Appeals, Appellees assert that the insubstantial character of the grounds stated by Appellant are so apparent on the face of the record as to warrant the court in summarily disposing of the appeal at this stage of proceeding. Appellees also show that the judgment of the New Jersey Court of Errors and Appeals must in any event be affirmed upon the findings of the said court.

The matters here relied upon by Appellees are more particularly stated below:

Facts

The evidence in the case shows, and all that it shows, is that Arch Everson, the Appellant, testifies that he owns his home in the Township of Ewing and pays taxes on that property to the Township of Ewing. Charles Garfield Latham, the District Clerk, testifies that the resolution in question reads as follows:

"The Transportation Committee recommended the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier as in recent years. On motion of Mr. Ralph Ryan and Mr. M. French, the same was adopted."

He further testified as follows:

Q. "Mr. Latham, after the adoption of this resolution, were certain applications received from parents of children who desired to send their children from the Township to certain Parochial schools in the City of Trenton?"

A. "Yes, I say yes to that. The applications were made, and they were carried on renewal each year."

He further testified:

Q. "Was there any transportation of pupils from Ewing Township to schools other than the Parochial schools involved?"

A. "Trenton High Schools, both Junior and Senior."

Father Endebrock testified that he was Superintendent of the Parochial schools throughout the Diocese of Trenton, which includes the City of Trenton, and that religion is taught as part of curricula therein, and that these schools are not conducted in whole or in part for profit, and that the only money taken in is what is paid by the parents or the parish for the maintenance of the school, but that they all operate at a loss.

Argument

Under the guise of stating many points in antagonism to the statute and resolution challenged, Appellant in reality only poses one fundamental objection and that is that the furnishing of transportation to pupils, residing at a distance from private and sectarian schools at the public expense, constituted an unconstitutional gift of public funds, or an unconstitutional use thereof, so as to constitute a taking of private property for a private purpose, in that it was an aid to either the sectarian schools or an aid to the children attending the same, in violation of the Fourteenth Amendment to the Constitution of the United States. It is also assigned for error that the resolution and statute violate the Fourteenth Amendment in that they constitute legislation authorizing the support of religious tenets by taxation.

There is no substantial ground for any of these contentions which constitute all those contained in the Assignment of Errors, and argued in The Statement of Jurisdiction.

The whole bases of Appellant's said contention are completely disposed of in principle by the decision of the United States Supreme Court in *Cochran* v. *Board of Education,* 281 U. S. 370.

The opinion of Chief Justice Hughes, speaking for a unanimous United States Supreme Court, in that case which was one involving the use of money raised by taxation to purchase school books free of cost to all school children of the State, including those attending sectarian schools, notwithstanding constitutional provisions at least as stringent as those in New Jersey, is conclusive, and hence we quote, in order to make this Brief self-contained and its continuity unbroken in this particular, a large portion of the short opinion:

"The contention of the appellant under the Fourteenth Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. *Loan Association* v. *Topeka,* 20 Wall. 655. The purpose is said to be to aid private, religious, sectarian and other schools not embraced in the public educational system of the State by furnishing textbooks free to the children attending such private schools. The operation and effect of the legislation in question were described by the Supreme Court of the State as follows (168 La., p. 1020):

" 'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their

benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. * * * What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction.'

"The Court also stated, although the point is not of importance in relation to the Federal question, that it was 'only the use of books that is granted to the children, or, in other words, the books are lent to them.'

"Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

It is said in *Green* v. *Frazier,* 253 U. S. 233, cited by Appellant in his Statement of Jurisdiction:

"The taxing power of the States is primarily vested in their legislatures, deriving their authority from the people. When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have entrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority of the State undertakes to exert the taxing power, and the question of validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

"What is a public purpose has given rise to no little judicial consideration. Courts, as a rule, have attempted no judicial definition of a 'public' as distinguished from a 'private' purpose, but have left each case to be determined by its own peculiar circumstances. Gray, Limitations of Taxing Power, Section 176, 'Necessity alone is not the test by which the limits of State authority in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people.' Cooley, Justice, in *People* v. *Salem,* 20 Michigan, 452. Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government. *Chicago, Burlington & Quincy R. R. Co.*

v. *McGuire,* 219 U. S. 549, 569; *German Alliance Insurance Co.* v. *Lewis,* 233 U. S. 389.

"With the wisdom of such legislation, and the soundness of the economic policy involved, we are not concerned. Whether it will result in ultimate good or harm it is not within our province to inquire."

Appellant under Point 3 of his "Statement of Jurisdiction" lays the main stress of his entire statement on certain cases which he thinks support his contention that the instant case runs afoul of the principle that "The action of a state in levying taxes for a private, as distinguished from a public, purpose, raises a constitutional question under the Fourteenth Amendment to the Constitution of the United States." Of course, there can be no quarrel with the prinicple, but it has no inimical application whatever to the instant case, nor does any one of the cases cited establish that it has; while the case of *Cochran* v. *Louisiana State Board of Education, supra,* demonstrates that it has not. In *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112, the first case cited by Appellant under "Point 3," it is said "What is a public use, for which private property may be taken by due process of law, depends upon the particular facts and circumstances connected with the particular subject matter." The limitations of the application of the Fourteenth Amendment to State legislation are cogently stated on pp. 155 and 157, *inter alia,* of the opinion in the *Fallbrook* case; and *Davidson* v. *New Orleans,* 96 U. S. 97, 104, is cited with approval for a principle, pp. 157 bottom and 158 top, which militates strongly against Appellant's contention, as is *Mobile County v. Kimball,* 102 U. S. 691, 704.

In *Cole* v. *LaGrange,* 113 U. S. 8, the admitted facts were that the LaGrange Iron and Steel Company, to which the

bonds were issued, was "A private manufacturing company, formed and established for the purpose of carrying on and operating a rolling mill," and "Was strictly a private enterprise, formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character."

The *Topeka* case was that of a private company for private gain, with nothing whatever of a public character, engaged in the manufacture of iron bridges. The *Parkersburg* case was one of a loan of the City's bonds for the purpose of aiding this private, profit-making company "in the erection of a foundry and machine works."

The cases of *Jenkins* v. *Anderson,* 103 Mass. 94, which simply involved the question of the violation of a state constitution and lack of power, and *Curtis* v. *Whipple,* 24 Wis. 350, both cited with approval in *Savings and Loan Association* v. *Topeka,* 20 Wall. 655, are not in the least in point. *Cole* v. *LaGrange* and *Parkersburg* v. *Brown* are completely differentiated and shown to be inapplicable to the instant controversy by the case of *Green* v. *Frazier,* 253 U. S. 233, cited by Appellant in connection with the above cases in its Statement of Jurisdiction herein, wherein it is said (p. 242), "This is not a case of undertaking to aid private institutions by public taxation as was the fact in *Citizens Savings and Loan Association* v. *Topeka,* 20 Wall. 655, 665." It is sufficient to say that *Parkersburg* v. *Brown, Cole* v. *LaGrange,* and *Savings and Loan Association* v. *Topeka,* all *supra,* were all cases condemning the issuance of bonds to directly assist merchants or manufacturers in their private businesses, carried on for profit.

The instant case is one to use the language of Mr. Chief Justice Hughes in *Cochran* v. *Board of Education, supra,* "Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State

is exerted for a public purpose. The legislation does not segregate private schools, or their pupils as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly, its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

Next under points 3 *et seq.* of the Statement of Jurisdiction is cited a collection of cases, all decided in State Courts, which hold that furnishing free transportation to pupils attending sectarian or private schools is done to aid the schools. Only one of these cases, *Gurney* v. *Ferguson,* 190 Okla. 254, 122 P. 2d, 1002, was taken to the Supreme Court of the United States. This case appears in 317 U. S. 588 in the following memorandum:

"No. 128.—*Gurney et al.* v. *Ferguson et al.* Appeal from the Supreme Court of Oklahoma. October 12, 1942. Per Curiam: The appeal is dismissed for want of jurisdiction. Sec. 237(a), Judicial Code, as amended, 28 U. S. C. Sec. 344 (a). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by Sec. 237(c) of the Judicial Code as amended, 28 U. S. C. Sec. 344(c), certiorari is denied. Messrs. W. P. Wilson, M. A. Ned Looney, and T. Austin Cavin for appellants. Reported below: 190 Okla. 254, 122 P. 2d 1002."

Rehearing Denied, 317 U. S. 707.

Having in mind the general rules of construction of statutes in respect to their constitutionality that "The presumption in favor of constitutionality is especially strong in the case of statutes enacted to promote a public purpose, such as, for example, statutes relating to taxation. 16 CJS, Sec. 99, P. 275; *Green* v. *Frazier,* 253 U. S. 233; *U. S.* v. *Butler,* 296 U. S. 561, 297 U. S. 1.

"In considering the constitutionality of a statute enacted in exercise of the power to levy taxes for the general welfare, it is strongly presumed that the tax is being levied for a public purpose, and that the legislature's determination of what constitutes a public purpose is correct." 16 CJS Sec. 100, P. 285; *John A. Gebelein, Inc.* v. *Milbourne,* 12 F. Supp. 105; *Scott* v. *Frazier,* 253 U. S. 233, 243. "Any question as to whether an appropriation of public revenues is for a public purpose must be resolved in favor of the validity of the statute." *Payne* v. *Jones,* 199 N. W. 472; *Board of Revenue* v. *Puckett,* 149 So. 850.

"Where the public benefit is direct, incidental advantage to individuals or a class does not defeat a tax." *John A. Gebelein, Inc.* v. *Milbourne,* 12 F. Supp. 105; *Scott* v. *Frazier,* 253 U. S. 233, 243; *Thomas* v. *Gay,* 169 U. S. 264, 280.

"Where the court used the following language:

"It is no objection to a tax that the party required to pay it derives no benefit from the particular burthen; e.g., a tax for school purposes levied upon a manufacturing corporation. But, in truth, benefits always flow from the appropriation of public moneys to such purposes, which corporations in common with natural persons receive in the additional security to their property and profits. *Amesbury Nail Factory Co.* v. *Weed,* 17 Mass. 53."

See the same point stated in *Carley & Hamilton* v. *Snook,* 281 U. S. 71. See also, *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 268.

"Appellant objects that the tax violates the Fourteenth Amendment in that it is levied as a charge for the use of the highways which Appellant does not use. But the levy is a tax, not a toll or charge for the use of the highways, see *Corley & Hamilton* v. *Snook,* 281 U. S. 66, and the consti-

tutional power to levy taxes does not depend upon the enjoyment by the taxpayer of any special benefit from the use of the funds raised by taxation."

It is clear in the light of these rules that the Supreme Court of the United States, in denying the Writ of Certiorari, and in dismissing the appeal in the case of *Gurney* v. *Ferguson, supra,* was simply asserting that no substantial Federal question had been properly presented under the Fourteenth Amendment, and applying the well-settled doctrine that the challenged statute was passed in the exercise of the Police Power, and that that power extends to regulations relating to education, *Interstate Cons. Street R. Co.* v. *Massachusetts,* 207 U. S. 79, and that debatable questions as to reasonableness are not for the courts but for the legislature, *Sproles* v. *Binford,* 286 U. S. 374, and that what constitutes a public purpose might well be decided by one State in one way and by another State in another, and that this question has been variously decided in the different States of the union, and the Supreme Court of the United States has implicitly in one and expressly in another sustained the contrary conceptions of public purpose embodied in such decisions. I refer, of course, to the case of *Gurney* v. *Ferguson, supra,* and *Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370. In other words the Courts of some States might condemn legislation treating free transportation of pupils and furnishing free textbooks to them as being primarily an aid to the schools, and other States might equally legitimately treat such transportation and furnishing of textbooks as primarily for the benefit of the State and the promotion of the education of its citizens. The reasonableness and non-arbitrary character of the challenged legislation will be made crystal clear by the following tabulation of its general legislative acceptance and utilization.

As part of contemporaneous history, it should be pointed out that many states (other than those in which litigation has arisen) have statutes which extend free transportation and/or textbook privileges to "Private" school pupils, and find no constitutional objection to such statutes. Moreover, the Attorneys General of several such states have rendered opinions upholding the constitutional validity of such statutes.

To round out the picture, it is well to point out that in addition to the states in which litigation has arisen, as a result of the extension of free transportation and/or free textbook privileges to pupils attending "Private" schools, there are many states in which similar legislation has been enacted and is being carried out without objection to its constitutional validity, notwithstanding that the constitutional provisions of these states are similar to those of New Jersey, which have been invoked by the plaintiff in the present case. In addition to the states hereinafter listed, there may be other states having like legislation. In the limited time at our disposal, we have not been able to complete the research necessary to determine whether there are other such states.

We next list the states (other than those in which litigation has arisen) which extend free textbook privileges to pupils of private schools. They are in alphabetical order:

1. Kansas (Sch. Laws 1939, Sec. 72-4107-a);
2. New Mexico (Laws 1933, Ch. 112, Sec. 5);
3. Oregon (Laws 1941, Ch. 485, Sec. 1);
4. West Virginia (Sch. Laws 1939, Ch. 18, Art. 5, Sec. 21-b).

Similarly, the following states, listed in alphabetical order, extend free transportation privileges to pupils of private schools:

1. Illinois (Rev. Stats. 1935, Ch. 122, Par. 128);
2. Indiana (Sch. Laws 1935, Ch. II, Sec. 2);

3. Iowa (1935 Code, Sec. 4179);
4. Kansas (Sch. Laws 1939, Sec. 968);
5. Kentucky (Com. Sch. Laws 1940, Secs. 4339-4420);
6. Massachusetts (Gen. Sch. Law, Ch. 40, Sec. 5);
7. Michigan (Comp. Laws 1939, Secs. 7379, 7439, as amended);
8. Missouri (Sess. Acts 1939, No. 448, Secs. 1, 2);
9. New Hampshire (Pub. Ed. Laws 1937, Ch. 117, Sec. 7(a));
10. New Jersey (Pub. Laws 1941, Ch. 191);
11. Oregon (Laws 1939, Ch. 352);
12. Rhode Island (Gen. Laws 1938, Ch. 178, Sec. 31).

In West Virginia and Wisconsin, the law provides for the free transportation of "all children of school age" (Sch. Law W. Va. 1939, Ch. 18, Art. 5, Sec. 13; Pub. Ed. Laws of Wisc., Secs. 34, 40).

In Iowa, Illinois, and Massachusetts, the constitutionality of legislation extending free transportation privileges to pupils attending "Private" schools has been passed upon by the Attorneys General of said respective states, and the constitutionality of the legislation has been upheld in the face of constitutional objections similar to those made in instant case. The opinion of the Attorney General of Iowa is dated July 14, 1936. The opinion of the Attorney General of Illinois was rendered in 1936 (see Opinions of Attorneys General 1936, p. 415). There are two opinions by the Attorney General of Massachusetts, dated February 17, 1936, and December 23, 1936, respectively.

In the cases cited therefor in Appellants brief the courts have held that similar legislation was unconstitutional on the theory that it made a "gift" or "grant" of public property or otherwise lent "support" to a "sectarian" or other private school. In short, in the cases there cited, the courts held that the private schools and not their pupils were the beneficiaries of the legislation.

In the following cases, the pupils (and not the schools) were held to be the beneficiaries of the legislation; accordingly, the decisions in these cases were in favor of the constitutionality of legislation which provided for the free use of textbooks by or the free transportation of pupils of private schools.

Borden v. *Louisiana State Board of Education,* 168 La. 1005, 123 So. 655 (1929);

Cochran v. *Louisiana State Board of Education,* 168 La. 1030, 123 So. 664 (1929);

Cochran v. *Louisiana State Board of Education,* 281 U. S. 370, 74 L. Ed. 913 (1930);

Board of Education v. *Wheat,* 174 Md. 314, 199 Atl. 628 (1938);

Adams v. *County Commissioners,* 26 Atl. (2d) 137 (1942);

Chance v. *Mississippi Textbook R. & P. Board,* 190 Miss. 453, 200 So. 706 (1941).

In the light of this aggregation of statutes, opinions of Attorneys General and decisions of the Courts supporting it must be concluded that when the Legislature of New Jersey enacted the challenged statute, it was acting in an entirely reasonable and non-arbitrary manner, and that such action was immune against assault. Its action, both as to power and classification, finds complete vindication in the following cases decided by the United States Supreme Court.

International Harvester Co. v. *Missouri,* 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525. In that case attention is called to the distinction between legislative power and the wisdom of its exercise in these words:

" 'It is to be remembered that the question presented is of the power of the Legislature—not the policy of the

exercise of the power. To be able to find fault, therefore, with such policy, is not to establish the invalidity of the law based upon it.'

"So in *Chicago, Burlington & Quincy Railway Co.* v. *McGuire,* 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, it is said:

" 'The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

" 'The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the Legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the Legislature may be guided by experience. *Patsone* v. *Pennsylvania,* 232 U. S. 138-144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may "proceed cautiously, step by step," and "if an evil is specially experienced in a particular branch of business," it is not necessary that the prohibition "should be couched in all-embracing terms." *Carroll* v. *Greenwich Ins. Co.,* 199 U. S. 401-411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keo-*

kee Consol. Coke Co. v. *Taylor,* 234 U. S. 224-227.' *Miller* v. *Wilson,* 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915 F, 829.

"One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. A distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Company,* 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912 C, 160. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917 A, 421, Ann. Cas. 1917 B, 455. These are general principles which control judicial inquiry into the question of legislative power, and they have been applied in the cases which have been cited and those mentioned in the opinions in those cases and in numerous other cases in a great variety of circumstances."

That the children in private schools and in sectarian schools should not be discriminated against is well stated in *Pierce* v. *Society of Sisters,* 268 U. S. 510. "The Oregon Compulsory Education Act * * * with certain exemptions, requires every parent * * * of a child between the ages of eight and sixteen years to send him to the public school in the district where he resides * * *". This was held by a unanimous U. S. Supreme Court to be an unreasonable interference with the liberty of parents to direct the upbringing of the children, and in that respect violative of the Fourteenth Amendment.

That Court, speaking through Mr. Justice McReynolds, said, at pp. 534, 535:

"The inevitable practical result of enforcing the Act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the State of Oregon. These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

"Under the doctrine of *Meyer* v. *Nebraska,* 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations."

It is important here to state the activities of the state in compulsory education and with respect to children generally. I refer of course to New Jersey.

Beginning in the early part of the last century, our citizens began to consider the subject of the education of their

children not only as eminently deserving their own attention, but as entitled to the fostering care of the State, and while in the course of years since then the Legislature has never undertaken to assert a monopoly of the education of the children, it has in accordance with the command of the constitutional provision (Article IV, Section 7, par. 6) and otherwise, by appropriate statutes, undertaken to protect and advance the interest of the children of the State generally, not only by providing free public schools but also by promoting the educational advancement of children generally. The most outstanding legislation dealing with the education of children generally is that contained in the so-called Compulsory Education Act (R. S. 18:14-14). In substance, this statute, so far as here pertinent, provides that every parent, guardian, or other person having custody and control of a child between the ages of seven and sixteen years shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments, or to receive equivalent instruction elsewhere than at a school, unless such child is above the age of fourteen years and has completed the work of the eighth grade in the public school or equivalent work in a private school, or is above the age of fifteen years and has completed the work of the sixth grade, or has completed an approved educational program in lieu thereof and has been granted an age and schooling certificate and is regularly and lawfully employed in some useful occupation or service. (A discussion of this statute will be found in *Stephens* v. *Bangart,* a case in the Domestic Court of Essex County and reported in 15 N. J. Misc. R. 80, 189 All. Rep. 131). Further State interest in the children attending private schools is manifested in the following instances:

R. S. 18:19-1, prohibiting the infliction of corporal punishment upon a pupil attending such school.

R. S. 18:19-8, prescribing that regular courses of instruction in the Constitution of the United States shall be given in private schools.

R. S. 18:19-4 to 6, dealing with fire prevention.

R. S. 18:19-7, defining "private schools."

R. S. 18:3-18, requiring that annual report be made by the private schools to the Commissioner of Education.

R. S. 18:20-8, requiring that the private school, as a condition precedent to conferring or participating in the conferring of degrees upon any person, submit to conditions prescribed by the State Board of Education.

R. S. 18:14-34, dealing with truancy and juvenile delinquency.

R. S. 18:14-35, 36, 37, 38, 39, 40, providing for returning by attendance officer of truants to parents or school, compelling attendance of children at school; visiting penalties upon parent, etc., for failure to comply with the law; providing for procedure against parent as a disorderly person, and authorizing the issuance of a warrant by the Court against parent and child, etc. The fees of attendance officers are paid by money raised by taxes.

Hence, even if transportation of children was paid for out of the school fund, it was in no sense "free state aid" or a "donation to a sectarian school."

It referred solely to transportation of children to and from school. But the School Law makes attendance compulsory and provides for the payment out of the fund of an "attendance or truant officer" whose duty it is to compel attendance of truants and deliver them to the school, at the State's expense. This, of course, is a prime example of the legitimate exercise of the "police power," which extends to the regulation of education.

The matter of attendance at school is under the State's supervision and control. By law it compels and enforces

attendance at both public and private schools, it supervises and compels such attendance through attendance or truant officers, at public expense, and the matter of transporting children is entirely under its control and may be continued or terminated at its own free will.

The State cannot make a donation to a private school directly or indirectly? This is bosh! It would permit exemption from taxation to a private school, and if a valid statement, then it would prohibit the service of an attendance or truant officer; or a school doctor, all of which our statutes provide for.

The cases, other than *Gurney* v. *Ferguson,* which has already been discussed herein, cited by Appellant under point 5 of his Statement of Jurisdiction are *Judd* v. *Board of Education,* 278 N. Y. 200, 15 N. E. 2d 576; *State ex rel. Traut* v. *Brown,* 36 Delaware 181, 172 A. 835; *Mitchell* v. *Consolidated School Dist. No. 201,* 135 P. 2d 79; *Sherrard* v. *Jefferson County Board of Education,* 294 Ky. 469, 171 SW. (2d) 963; and *State ex rel. Van Straten* v. *Milquest,* 180 Wis. 190, 192 N. W. 392, all fall under the class of cases where the State courts, in the light of the State Constitutional provisions, held the free transportation of pupils to be in aid of the school. None of them went to the U. S. Supreme Court. In not a single one of them was the 14th Amendment to the Federal Constitution relied upon in the decisions. They were all cases decided on the ground of violation of the provisions of the State Constitutions. In *Judd* v. *The Board of Education* the Court split, 4 Judges voting for the aid to the school theory and 3, including the Chief Justice, voting against it. The opinion of Crane, C. J., dissenting, stated that "having made attendance upon instruction compulsory and having approved of attendance at certain schools other than public schools" [as has been done in New Jersey] "the Legislature determined that the

inhabitants of the district should have the power, under certain conditions, to provide for the transportation to and from the schoolhouse in the district or the school which they legally attend."

After the decision of the court in *Judd* v. *Board of Education,* supra, and in the same year, i.e., 1938, a constitutional convention proposed, and the people of New York adopted, an amendment to the New York Constitution, by which the legislature was expressly authorized "to provide for the transportation of school pupils to and from any school or institution of learning." After the adoption of the constitutional amendment, appropriate legislation was enacted and under it New York provides free transportation to pupils attending private schools. Thus, the people of New York overruled the Court of Appeals of their State and exhibited a liberality of view that was sadly lacking in the majority opinion in the *Judd* case. The course of this amendment and these statutes will be found in Appendix No. 1 attached hereto.

APPENDIX NO. 1

RESUME OF LEGISLATION PERTAINING TO TRANSPORTATION OF SCHOOL CHILDREN IN THE STATE OF NEW YORK

1. First bill introduced in 1935. Passed Legislature and vetoed by Governor Lehman on May 11, 1935.

2. Substantially same Legislation introduced in 1936. Signed by the Governor on May 13, 1936.

3. Constitutionality tested November 1937. Upheld by the Supreme Court, Second Department. Affirmed by Appellate Division, Second Department.

4. The two lower courts were reversed, and Legislation declared unconstitutional by Court of Appeals, four to three decision on May 24, 1938.

5. Constitutional Convention in fall of 1938, Renumbered Article 9, Section 4, to Article 11, Section 4, and added: "* * * but the Legislature may provide for the transportation of children to and from any school or institution of learning." Approved by vote of people on November 8, 1938. This removed the objections of the Court of Appeals to constitutionality of that provision.

6. Chapter 465 of the laws of 1939 added Subdivision 18 of Section 206 and Section 503 of the Education Law. Signed by the Governor and became law on May 16, 1939, and gave force and effect to the constitutional change.

If, therefore, the Statute offended against the 14th Amendment to the Federal Constitution, so does the Amendment to the New York Constitution.

The decision in State *v.* Traut and Brown, *supra,* was that merely of the Superior Court, consisting of two Judges, and not of the Supreme Court of the State. Mitchell *v.* Consolidated School Dist. No. 201 was a 5 to 4 decision, and the reasoning of the dissenting Judges is most cogent. The

other two cases cited were not, as has been said, cases involving the Fourteenth Amendment to the Federal Constitution. There is no question involved in the instant case of doing by indirection what is prohibited from being done directly, or of danger, if the present case is unreversed, of putting it 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. Such a contention is ridiculous. The State Constitution and its Courts are still the guardians of the Police power of the State, and of the sanctity of its Constitutional restraints, and this Court will not attribute to the State Courts an unwillingness to perform their full duty in furnishing such protection. This Court has decided in the case of Cochran *v.* Louisiana, *supra,* that furnishing free textbooks to private schools is not in violation of the Fourteenth Amendment to the Federal Constitution or directly advancive of Sectarian schools. Many other courts and legislatures as shown above, are of the same opinion, and the cases hereinbefore cited completely explode any such contention.

Points #7 and #8 are utterly without substance. The school books in the *Cochran* case were furnished free to the pupils, but Chief Justice Hughes disposed of this contention by saying "Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matter of exclusively private concern. Its interest is education; broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded." The same doctrine was stated in Board of Education of Baltimore *v.* Wheat, *supra,* where it was said 'School attendance is compulsory, and attendance at a private or parochial school is a compliance with the law." What has already been said applies to points #9, #10, #11, #12, #13, and #14. The same points were posited in the *Cochran* case and they were definitely overruled by the Supreme Court of the United States; and concluding this part of the discussion, I can-

not do better than quote an excerpt from the opinion of Honorable Smith Troy, Attorney-General of the State of Washington, submitted to the Prosecuting Attorney of Yakima County, Washington, on August 6, 1941, with respect to the constitutionality of the Washington transportation statute, as applied to private school. Among other things, the Attorney-General said:

"When the legislature, in the exercise of its sovereign police power, declares that the health and safety of children attending all schools is to be promoted by avoiding and minimizing accidents and traffic hazards through public transportation, and that private and parochial school children are to be benefited (sic) in this regard as well as public school children, it is difficult to perceive how such transportation will unconstitutionally advance religious worship and distruction or how the public facilities employed in this promition (sic) of child welfare will be applied to the support of religious establishments. Children of this county have ever attended and still attend sectarian schools where they have ever received and still receive spiritual as well as secular instruction. Their religious training will be neither increased nor furthered because they come on public wheels rather than on private shoe leather. The constitutional provision is aimed against direct, concrete support of denominational schools—in the matter of public transportation it is no more concerned with incidental and intangible aid to parochial schools than is a subsequent provision, prohibiting the giving of public money or property in aid of a private individual, concerned with similar benefits which casually and indirectly accrue to the public school child's parent whose pocketbook is relieved of some expense for wear and tear on boots. Upon this score we distinguish as not in point of the New York decisions (Smith *v.* Donahue, 202 App.. Div. 656; Judd *v.* Board of Education, 15 N. E. (2d) 580), which are grounded on a former express constitutional prohibition against direct and indirect aid, and the Delaware ruling (State ex rel. Traub *v.* Brown, 172 A. 835), which is inaptly based on the Donahue case, *supra.* Controlling, we believe, is the argument of

the Louisiana court (Borden *v.* State Board of Education, 123 So. 655) as follows:

"'* * * One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public schools. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries * * *'

It is next contended in Point #15 that 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 pupils designated as beneficiaries, and makes no provision for transportation of children attending sectarian school other than Catholic Schools."

This argument is very tenuous. In the early part of this Statement, I set forth evidence bearing upon the adoption of this Resolution with a copy of the Resolution itself. It is there made clear that all pupils of private schools who desired transportation made individual application therefor and none were denied. The resolution was a mere order for payment or re-imbursement to such as made application therefore and were entitled to it.

A School District Board is in no sense a legislative body and does not legislate, N. J. S. A. 18:7-57 et seq. Its function is in no sense legislative and its action in adopting the challenged resolution bore not the slightest resemblance to a legislative act.

As the terms are commonly used in charters, there is a distinction between an ordinance and a resolution. The

corporation cannot accomplish by an order or resolution that which, under its charter, can be done only by an ordinance. Whether the particular thing should be done by ordinance or resolution depends upon the proper construction of the charter and the forms observed in doing an act. A resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed, and is distinctively a legislative act. It may be stated broadly that matters upon which the municipal corporation desires *to legislate* must be put in form of an ordinance, while all acts that *are done* in a ministerial capacity and for a temporary purpose may be put in the form of resolutions. This is the rule in New Jersey. Stemmel *v.* Madison Borough 82 N. J. L. 62; 66; Hunt *v.* Lamberville, 45 N. J. L. 279; State *v.* Bayonne, 35 N. J. L. 335. Ordinance is the equivalent of legislative action, but resolution is not.

The Resolution is not shown to have adversely affected a single pupil or parent in the Township of Ewing and the statute which authorized its passage applies, under appropriate and legal classification to *all* pupils attending *private, non-profit schools.* It is trite law that, "it is not sufficient that the statute is unconstitutional as to other persons or classes of persons (Burgois, Inc. *v.* Chapman, 301 U. S. 183; Pierce *v.* Society of the Sisters of the Holy Name of Jesus and Mary, 268 U. S. 510). It must affirmatively appear that the person attacking the statute comes within the class of persons affected by it. Heald *v.* District of Columbia, 259 U. S. 114. Here it does not appear that a single person, let alone the Appellant, was affected by the resolution which merely applied the statute to all persons to whom it could be applicable within the Township, non constat that there was a single person in that Township who could or did attempt to take advantage of it. See also City of Allegan, Mich. *v.* Consumers Power Co., 71 F. 2d 477, certiorari denied, Consumers Power Co. *v.* City of Allegan, 293 U. S. 586; Peak *v.* Court of Internal Revenue, C. C. A. 80 F 2d, 761, certiorari denied, 298 U. S. 666, to the effect that "no taxpayer may question the constitutionality of a statute

who is not directly affected to his injury or prejudice by its allegedly unconstitutional feature." In the case in hand there was not the slightest evidence to show that the money spent for the challenged transportation was raised by local or indeed by any taxation whatever which could or did affect the Appellant.

As bearing upon the argument that any indirect or collateral benefit is obnoxious to the Fourteenth Amendment, I would point out that the rule which reason and inveterate practice alike have sanctioned is well stated in Dunn *v.* Chicago Industrial School, 280 Ill. 613, 117 N. E. 735, in deciding a case in the light of Constitutional provisions much more specific and restrictive than ours. "Not only have the people, by the Constitution and by their representatives in the General Assembly, recognized and provided for the enjoyment of religious liberty, but the court has not adopted any rule antagonistic thereto." In Nichols *v.* School Directors, 93 Ill. 61, 34 Am. Rep. 160, the Court said:

> "Religion and religious worship are not so placed under the ban of the Constitution that they may not be allowed to become the recipient of any incidental benefit whatever from the public bodies or authorities of the state."

The list of things conceivable as legal incidental benefits to churches, private and parochial schools, monasteries and nunneries, is extremely long and many of them are enumerated in my brief. In the Dunn case, supra, it was paying a sectarian institution for the care of wards of the State. The prime example, of course, is exemption from taxation, which New Jersey grants religious and secular institutions, whether public or private, and classifies by limiting it to those not conducted for profit, (R. S. 54:4-3.6) thus adopting the precise classification challenged by Appellant in the instant case. There is a vast difference between the constitutional provision that "Congress shall make no law respecting an establishment of religion and a complaint that the law affects a religious establishment." Bradfield *v.* Roberts, 175 U. S. 291. Our Constitution,

Article 1, Paragraph 4, provides "There shall be no establishment of one religious sect, in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right, merely on account of his religious principles." There surely is no evidence of any attempt to the establishment of one religious sect, in preference to another, in the instant case. The challenged act, Chapter 191, Laws of 1941, makes no reference to any religious sect whatever. It expressly refers to 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." Here, it will be observed, all school children in public schools and in private schools not operated for profit are treated exactly alike. No effort is made for the establishment of one religious sect, in preference to another, but, on the contrary, a clear intention to treat all school children, who come within the class designated in the Act, exactly alike. Furthermore, it clearly appears that Prosecutor-Appellee's complaint is not that the establishment of a religious sect is attempted by the Act, but that it results in incidentally benefiting a religious establishment.

Wherefore, Appellees respectfully submit this statement showing that the questions upon which the decision of this cause depends are so insubstantial as not to need further argument, and appellees respectfully move the court to dismiss this appeal, or in the alternative, to affirm the judgment of the New Jersey Court of Errors and Appeals entered below.

Respectfully Submitted,

WILLIAM ABBOTTS,
Counsel for Appellees.

WILLIAM H. SPEER,
Of Counsel.