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RECENT DECISIONS

CHURCH AND STATE — EXCUSING OF PUBLIC SCHOOL PUPILS FOR RELIGIOUS INSTRUCTION.—*People ex rel. Latimer et al. v. Board of Education of City of Chicago,* 394 Ill. 228, 68 N. E. (2d) 305 (1946).—The separation of Church and State, according to the precepts of the American form of constitutional government, imposes no duty on the public school system to erect a barrier of hostility and antagonism against religion or the churches. Accordingly, a regulation of the Board of Education excusing the weekly absences of pupils for the purpose of receiving religious instruction does not, it was held in this case, do violence to the compulsory attendance law and is a reasonable rule for the practical administration of the public schools.

Petitioners sued for a writ of mandamus, seeking to compel the Board of Education to revoke the authority it previously gave to the superintendent of schools to excuse public school children at the request of their parents for one hour each week before the end of the regular school period, for the purpose of attending religious educational classes at places outside of the school activities or property. The petitioners also sought to compel the Board to make and enforce rules prohibiting the excusing of pupils from the public schools to attend classes for instruction in religion, or in aid of any church or sectarian purpose.

The interest alleged by the petitioners in bringing this suit was that they, as citizens and residents of the city of Chicago, were particularly interested in the enforcement of laws relating to civil rights and liberties. They stated that they had frequently engaged in activities opposing union of Church and State in the public schools.

It was alleged that pursuant to the 1929 regulation the respondent through its superintendent, teachers and other assistants, had for sixteen years released pupils from school during regular school sessions for one hour per week on condition that they attend a class in religious instruction and thereafter return to their public school classrooms.

The petitioners asserted that at the present time 22,500 pupils out of 249,614 children attending elementary public schools were excused for one hour per week, usually the last hour of the school day on Wednesday. The petitioners further alleged that the superintendent and principals were required to issue directions concerning the dismissal of pupils for the purpose outlined and the superintendent used postage, stenographic service, stationery, telephones and office space for such service; that the principals of the schools engaged in conferences with the teachers of religion and with the agents of the churches concerning the details of the plan; that such services constituted duties performed in the course of their employment for which they were paid from the public school fund.

It was the contention of the petitioners that the action of the respondent pursuant to the regulation violated the American principle of separation of Church and State. Particularly, they said it was a violation of the First and Fourteenth Amendments to the Constitution.

It was also alleged that such action violated sections of the Illinois constitution which required the General Assembly to provide a thorough and efficient system of free schools and that no public corporation should make any appropriation or pay from any public fund whatever anything in aid of any church or sectarian purpose.

In further support of their contention petitioners relied on other provisions of the Illinois constitution, which state in part: ". . . nor shall any preference be given by law to any religious denomination or mode of worship."

The petition disclosed that a large number of the pupils were receiving Catholic religious instruction at 137 parochial schools and a smaller number of pupils were receiving instruction in Protestant religions at 57 different Protestant church buildings.

The Supreme Court of Illinois upheld the position of the Board of Education, stating that the petitioners did not show any violation of the Federal and State constitutions, or of the statutes of the State of Illinois, nor did they show any violation of such clear legal rights in themselves or neglect of such clear legal duty on the part of the respondent Board, as would be essential for the issuance of a writ of mandamus.

The court, in the opinion written by Justice Fulton, conceded that the Board of Education should not help sustain or support any school controlled by a church or sectarian denomination or aid any church or sectarian purpose. It was not to follow from this principle, however, that a school board should be hostile or antagonistic to religion or churches, nor should the board interfere with the free exercise and enjoyment of religious freedom.

The preamble to the constitution adopted in Illinois in 1870 recognizes the reliance of the people upon a Deity, and while the decisions of the federal and state courts approve the doctrine of the separation of Church and State, it is nowhere stated that there is any conflict between religion and the State, nor any discrimination of any kind against religion as such. In view of the basic religious philosophy of our government, it would be incongruous, in this case, to exhibit a spirit of hostility and antagonism toward religion as the petitioners would have this court do.

The court cited *Reichwald v. Catholic Bishop of Chicago,* 258 Ill. 44, 10 N. E. 266 (1913), which held, "The Constitution does not absolutely prohibit the exercise of religion, but, on the contrary, provides that the free exercise and enjoyment of religious profession and worship, without discrimination, shall be forever guaranteed. . . . No one can be obliged to attend or contribute; *but no one has a right to insist that the services shall not be held.* The man of no religion has a right to act in accordance with his lack of religion, but no right to insist that others shall have no religion." (Italics ours)

Petitioners cited with favor *People ex rel. Ring v. Board of Education,* 245 Ill. 334, 92 N. E. 251 (1910) in which case the teachers employed by the schools during school hours and in the schoolroom read to the pupils portions of the King James version of the Bible; sacred hymns were sung in concert by the pupils; the Lord's prayer was recited in unison. There, as here, the petitioners filed a writ of mandamus to require the defendant in error to discontinue these exercises in the public schools. The court held that such exercises constituted acts of worship; that the pupils were all required to participate; that the versions used were of a distinctly denominational tinge and a different interpretation from that taught by other religious faiths. The King James version was, in fact, a sectarian text to which Catholic, Jewish and some Protestant parents objected. Thus it was held a violation of the constitutional prohibition against the use of school funds in aid of a sectarian purpose.

The court in the instant case pointed out that the present petitioners made no charge that the action of the Board here was discriminatory or that any particular denomination or religious faith was favored, or that any part of the religious instruction was held in the schoolroom on school property.

Persuasive authority for the holding is the New York case of *People ex rel. Lewis v. Graves,* 245 N. Y. 195, 156 N. E. 663 (1927), which had occasion to review a very similar mandamus case in which it held that the school authorities might release pupils during school hours for the purpose of attending religious

education classes in their own churches without violating constitutional provisions very similar to those of Illinois.

In the New York case, as here, the petitioners alleged the use of public money to aid the church schools because of the time the public school teachers used in arranging, registering and checking excuses. There, too, it was held that this was in no way, a constitutional violation. Both courts agree that the regulation permitting class absences for the purpose of receiving religious instruction does not do violence to the compulsory attendance law but rather is a reasonable rule for the practical administration of the public schools.

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SLOT MACHINES AND GAMING DEVICES AS PROPERTY AND TAXABLES.—*In re Weisenberg's Estate* .....Ohio....., 70 N. E. (2d) 269 (1946).—This was an action brought by the executor in the Probate Court of Cuyahoga County for the recovery of certain gaming devices confiscated by the chief of police, which were alleged to be part of the decedent's estate. The decedent, during his life and at the time of his death, possessed and maintained ownership over 66 mechanical slot machines and 27 mechanical golf track amusement devices. Following the decedent's death and prior to the appointment of the executor, the coroner of Cuyahoga County, while duly carrying out the duties of his office and making an investigation of the decedent's death, discovered the slot machines and the mechanical golf devices on the premises and immediately reported their location to the police department with recommendations that they be seized. At the time the property was seized by the police department it was not in use nor was it displayed for gambling.

The Probate Court rendered a judgment for the executor and ordered the chief of police to return the property in question to the executor of the estate. The chief of police appealed and the Court of Appeals reversed the judgment and issued final judgment in favor of the chief of police. The executor raised a motion for a certification of the record by the Supreme Court, and the motion was granted, and this court affirmed the judgment of the Probate Court.

On appeal, the question was this; what factors determine whether property of this nature will remain part of the decedent's estate or be subject to confiscation by the law authorities? Incidental to the question at hand but not lacking in importance, is whether such property is taxable property.

The language of the code applicable to the question is contained in Section 13066, General Code: "Whoever keeps or exhibits for gain or to win or gain money or other property, a gambling table, or faro bank, or keno bank, or a gambling device or machine, or keeps or exhibits a billard table for the purpose of gambling or allows it to be so used, shall be fined not less than fifty dollars nor more than five hundred dollars and imprisoned not less than ten days nor more than ninety days, and shall give security in the sum of five hundred dollars for his good behavior for one year."

It is well settled in the state of Ohio that property of this type may not be used for gaming or exhibited for public gambling, but the provisions set out in Section 13066 of the General Code do not necessarily preclude the possibility of lawful possession. It is the contention of the executor that, because such property at the time of the decedent's death or during his life was not in the decedent's possession for unlawful gambling, and was not displayed for the gambling whim of the public, it was *in custodia legis* and that upon his death it vested along with

all other property in the executor, as decided by the Probate Court. The chief of police based his claim on the theory that the devices are *prima facie* illegal regardless of whether they are operated for gain or merely in storage on the decedent's premises, and maintained that they were unlawful property subject to seizure and confiscation.

If what the chief of police set forth in his claim were the law in the state of Ohio, there would seem to be no property in devices of this type notwithstanding their absence from illegal display or disposition. In this event it would be quite possible for confiscation to take place while devices of this nature were under construction or under consignment to an agent, and certainly the authorities of the law would be justified in seizing any gambling equipment in the possession of an innocent purchaser if these claims were valid. But the court upheld the executor's contention that the devices were not illegal and subject to seizure merely because of their nature, the true test being that of disposition and use. Therefore the machines might be manufactured and stored in the state of Ohio, if only for sale or resale within a jurisdiction where they are not outlawed by statute.

In support of its decision the court cited, 24 American Jurisprudence 437, Section 57, "A slot machine — is not *per se* a gambling device, since it may be used or played upon for an innocent purpose, and the courts cannot, therefore, take judicial notice that every slot machine is a gambling device."

Throughout this country there seems to be a conflict on this issue. In the final analysis it is the language of the statute that determines whether or not mere possession of certain gambling devices will be contrary to law and whether or not evidence must be shown as to the purpose of their display or disposition.

The court, in a brief opinion, recalled the precedent set forth in previous decisions with respect to taxation and held that such gambling devices, even when possessed illegally, were to be considered by the tax commission as taxables. "Slot machines, placed by owner in private clubs, kept in repair by his servicemen, opened by them from time to time to remove money therefrom and divide it with clubs, transferred from one locality to another, returned to owner for repairs, and listed on his federal tax return, were 'tangible things being the subject of ownership' within statute defining personal property subject to taxation." Ellery v. Evatt, Tax Com'r., 140 Ohio St. 249, 42 N. E. (2d) 979 (1942).

It would seem to follow that if the law of taxation will offer no protection to individuals who are holding in possession property of an illegal nature, that the internal revenue law would show the same tendency toward those who receive gains from transactions that are branded illegal. In the case of *United States v. Sullivan*, 274 U. S. 259, 71 L. Ed. 1037, 47 S. Ct. 607 (1927), it was held that income derived from transactions in violation of the law were subject to income tax. Illegal gains were held to include income from such illegal transactions as card playing, race track bookmaking, traffic in liquor, unlawful insurance policies, lotteries, graft, embezzlement, fraud, misapplied money of a client by an attorney, protection payments, and ransom money.

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