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The Effect of Desegregation on Public School Bonds in the Southern States

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THE EFFECT OF DESEGREGATION ON PUBLIC SCHOOL BONDS IN THE SOUTHERN STATES

In the wake of *Brown v. Board of Education*[1] six recent cases arising in four states[2] have involved a constitutional challenge to the validity of an issue of public bonds to finance segregated schools. In each case it was contended that bonds authorized and approved according to statute could not be validated or the proceeds used for a purpose now unconstitutional. Confronting this apparently meritorious contention was the impelling practical consideration of furthering public education in the already lagging South. Legal answers, embodying this equitable consideration, ranged from a plea to jurisdiction,[3] to interpretation of a statute or bond,[4] to a rationale that while unconstitutional, segregated school facilities are not illegal until integration has had local legal recognition.[5] The outstanding similarities in these cases were the attitude of the courts and the result; the courts were unanimous in sustaining the validity of the issue and in rejecting the contention of unconstitutionality. Striking, however, is the fact that no two states refused to invalidate the bonds on the same ground, and that no general technique received approval in more than two courts. If for no other reason, this kaleidoscopic divergence of solution would be of sufficient legal interest to deserve comment.

A perhaps more compelling reason for a legal examination of these cases is that, unlike many legal problems, substantial implications dollar-wise are involved. The private investor does not want to "buy a lawsuit"; he does not want to purchase a bond with a constitutional cloud, even if reasonably certain of the bond's soundness. Reluctance on the part of private investors and syndicates to bid on public school bonds is being unhappily recognized wherever bonds

1. 347 U.S. 483 (1954) and 349 U.S. 294 (1955). The *Brown* case arising in Kansas was heard with the companion cases of *Gebhart v. Belton* from Delaware, *Briggs v. Elliott* from South Carolina and *Davis v. County School Board of Prince Edward County* from Virginia. Together with Bolling v. Sharpe, 347 U.S. 497 (1954) and 349 U.S. 294 (1955), declaring segregation contrary to the fifth amendment in the District of Columbia, these cases are popularly referred to as *The School Segregation Cases.*

2. These cases, discussed more fully *infra,* are:
Florida: Florida v. Special Tax School Dist. No. 1 of Dade County, 86 So. 2d 419 (Fla. 1956); Board of Public Instruction of Manatee County v. Florida, 75 So. 2d 832 (Fla. 1954);
North Carolina: Doby v. Brown, 232 F.2d 504 (4th Cir. 1956), *affirming* 135 F. Supp. 584 (M.D.N.C. 1955); Constantian v. Anson County, 244 N.C. 221, 93 S.E.2d 163 (1956);
Oklahoma: Matlock v. Board of County Comm'rs of Wagoner County, 281 P.2d 169 (Okla. 1955);
Virginia: County School Bd. of Hanover County v. Shelton, 198 Va. 226, 93 S.E.2d 469 (1956).

3. Doby v. Brown, *supra* note 2.

4. Constantian v. Anson County and Matlock v. Board of County Comm'rs, *supra* note 2.

5. Board of Public Instruction of Manatee County v. Florida and Florida v. Special Tax School Dist. No. 1 of Dade County, *supra* note 2.

are issued for segregated schools; the few bids that are received, and some issues have found no bidders at all, are often unreasonably higher than bonds of similar grade issued at the same time for other purposes or for financing the school systems of northern states. Only speculation suggests what part each of three elements—"tight money," which is "tighter" in the southern states than elsewhere, the investor's reluctance to lend money for financing segregated schools on moral grounds or integrated schools for fear of citizen retaliation, and his fear of litigation—have had in the creation of abnormally high interest rates for Southern school bonds.[6] But at any rate fear of legal attack seems to be an element which, however large or small, has added to the woe of the Southern states.

Contention of Assailants of Bonds

Contentions essentially similar were urged by all parties assailing the validity of the bonds. First and fundamentally, the bonds were authorized for financing segregated schools only. Bonds issued prior to *Brown v. Board of Education* must have been so issued, for state constitutions and statutes declared that school systems must be segregated; bonds issued for another purpose, namely, to finance non-segregated schools, would have been invalid *ab initio*. Bonds issued subsequent thereto were so done in contemplation of, and for the sole purpose of, continued segregation of school facilities. Whichever the case, either the scope of authorization for which the bonds were approved was exceeded, or, if not, then the authorization itself was unconstitutional under the fourteenth amendment. In either event, claimed the contestants, the bonds were invalid.

The state courts hearing this contention faced two determinative questions. First, were the bonds authorized for financing segregated schools only? And, second, if the bonds were so authorized, is the expenditure of funds for financing schools which must be segregated constitutional under the fourteenth amendment? Three of the cases met issue on the first question, holding for three different reasons that the bonds were not authorized solely for segregated schools, and, therefore, the bonds were valid.[7] Nonetheless in two Florida cases the court seems to have conceded that the only authorized purpose for which the bonds were issued was for financing segregated schools and met squarely the question of unconstitutionality.[8] The *School*

6. Much discussion of these factors has appeared in financial publications under various topics relating to school financing, bond markets, credit policies of the government and integration of public schools in general. See, *e.g.*, "Integration Mixup Snarls New School Financing," Wall Street Journal, Jan. 29, 1957 p. 1.

7. These are the *Constantian, Matlock* and *Shelton* cases, discussed *infra*, notes 10 through 21 and related text.

8. These are the *Manatee County* and *Dade County* cases, discussed *infra*, notes 27 through 39 and related text.

Segregation Cases[9] had determined that compulsory segregation was *unconstitutional* but it had not ruled that the maintaining of segregated schools was *illegal.* The Florida Supreme Court faced the seemingly insoluble dilemma, whether to declare school bonds forever valid for a purpose which, while unconstitutional, was nonetheless not illegal.

Disposition on Non-Constitutional Grounds

While four of the six cases were decided on non-constitutional grounds, no two courts employed quite the same technique. Apparent in all of the decisions, however, is the attitude of the courts favoring the validity of the bond issue on any ground whatever.

A. *Construction of School Code: Matlock v. Board of County Comm'rs*[10] was decided on an interpretation of the Oklahoma School Code. Taxpayers had brought a class action to enjoin the issuance of bonds voted for the construction and repair of separate schools, asserting the bonds' unconstitutionality. Since the School Code provided for the maintenance of separate schools under a system of segregation, which was declared unconstitutional by *Brown v. Board of Education,* it was argued that the bonds were invalid because authorized for an unconstitutional purpose. A lower court judgment declaring the bonds invalid was reversed by the Oklahoma Supreme Court. Provisions governing the acquisition and maintenance of school property, the court held, were untouched by the doctrine of the *School Segregation Cases* which outlawed statutes requiring separate schools for white and colored students. The court reasoned that authorization of the bond issue was determined by specific statutes governing it, and not by the School Code in general; hence, although other parts of the School Code are unconstitutional, provisions for the acquisition, repair and maintenance of school property were not invalidated by the Supreme Court's decision. "[I]t was not the intention of the United States Supreme Court to . . . cripple the normal functioning of the school systems of the states affected during the period of changing from segregated to non-segregated schools."[11] Commenting also that the Oklahoma School Code, if ambiguous, is to be construed liberally to the extent that public education may be advanced, the court declared the bonds valid.[12]

B. *Severability of Unconstitutional Provisions: Constantian v.*

9. As noted above, this is the popular name for the cases decided under the style of *Brown v. Board of Education, supra* note 1.

10. 281 P.2d 169 (Okla. 1955), 1 RACE REL. L. REP. 136, 35 NEB. L. REV. 133 (1956).

11. 281 P.2d at 171.

12. "[I]t is our duty . . . to construe the Oklahoma School Code so that public education may be advanced in this state." *Ibid.*

Anson County,[13] arising in North Carolina, involved a suit to restrain the issuance of previously approved school bonds on the ground that the bonds were authorized in contemplation of constitutional and statutory provisions requiring racially segregated schools and therefore could not be utilized for non-segregated schools. The North Carolina Supreme Court held that the provisions of the state constitution and statutes providing for setting up and operating a system of public schools were severable from the invalid provisions requiring mandatory separation of races; thus the bonds could be legally issued notwithstanding the invalidity of those provisions. While recognizing that unconstitutional provisions of the code constitute part of the contract of indebtedness, the opinion seems to say that these provisions may be severed without invalidating the entire contract.

The approach of the North Carolina court is possibly distinguishable from that of the *Matlock* case which refused to recognize that the unconstitutional portions of the code were part of the original contract of issue; this case indicates that they were, but holds that they can be severed in the interest of construing the statute for the improvement of educational facilities. The bond issue is in essence contractual, and an illegal provision may be stricken from a contract if it does not constitute an essential feature of the agreement.[14] The problem inherent in the solution of severability, not encountered in the other approaches, is that if this contract of indebtedness is non-separable, the requirement of segregation may be so material that the entire bond is vitiated.[15] This of course is purely a question for interpretation by state courts following state law.

C. *Purpose for Which Authorized by Voters:* In the Virginia case of *County School Bd. of Hanover County v. Shelton*[16] the plaintiff, as a taxpayer, sought to enjoin the School Board from spending the proceeds of a school bond issue. Alleging that the school bonds were authorized by an election prior to the *School Segregation Cases*, in which the electors authorized the bonds only for use in racially segregated schools, he contended that the proceeds of the issue could not be utilized for schools which might not be segregated. The plaintiff contended therefore, that the purpose for which the proceeds would be spent was different from the purpose for which authorized by the voters, namely, "to promote segregated public schools and for that purpose only."[17] The trial court granted the injunction[18]

13. 244 N.C. 221, 93 S.E.2d 163 (1956), 1 RACE REL. L. REP. 658.
14. See 12 AM. JUR., *Contracts* § 220 (1938).
15. *E.g.*, Allard v. Madison Township Bd. of Education, 101 Ohio St. 469, 129 N.E. 718 (1920) (joining an unauthorized purpose with one that is authorized invalidates the entire bond issue because the voters should have an opportunity to vote on each provision separately; otherwise it is impossible to determine if the vote approved the legitimate purpose).
16. 198 Va. 226, 93 S.E.2d 469 (1956), 1 RACE REL. L. REP. 666.
17. 93 S.E.2d at 470.

and appeal was taken to the Virginia Supreme Court of Appeals. This court reversed, holding that the proceeds could be used for the purpose for which voted, namely, "for the construction of school improvements . . . for white and negro school children."[19] The reason for incurring the indebtedness was to remedy the "desperate need of school improvements," not to authorize continued segregated facilities; hence the doctrine of the *School Segregation Cases* "has no place in the determination of the question before us."[20]

It should be noted that the contention of this plaintiff involved only the assertion for disposition in a state court whether the voters in fact authorized the bond issue solely for segregated schools. It is axiomatic that the will of the electorate should govern, provided it can be ascertained.[21] However, it is difficult to determine the subjective intent of voters authorizing the issue, and even more difficult for a litigant to establish where it contravenes the strong policy consideration of promoting public education. This case is distinguishable from the *Matlock* and *Constantian* cases, in which the purpose of authorization was determined by the terms of the statute and bond; the decision in this case was based upon a failure of the assailant to establish that the will of the electorate supported his contention.

D. *No Federal Jurisdiction: In Doby v. Brown*[22] plaintiffs sought federal court assistance under the Civil Rights Act[23] to enjoin a state condemnation proceeding against their land. They alleged that the statute authorizing the issuance of school bonds for school construction was enacted prior to the decision of the United States Supreme Court in the *School Segregation Cases* and in contemplation of state laws requiring segregation in public schools, and that the proceeds thereof could not legally be used for schools which might not be segregated. The court of appeals affirmed a dismissal, holding that no federal question was involved, and that, even if there were, the federal court should not assume jurisdiction where the issue involved interpretation of a state statute which could be determined in the pending condemna-

18. The opinion of the lower court is noted with favor in 41 VA. L. REV. 1159 (1955).
19. 93 S.E.2d at 471.
20. *Id.* at 472.
21. See, *e.g.*, Kinder v. School Dist. No. 126, 68 Wash. 410, 123 Pac. 610 (1912).
22. 232 F.2d 504 (4th Cir. 1956), *affirming* 135 F. Supp. 584 (M.D.N.C. 1955), 1 RACE REL. L. REP. 662, 664 (1956).
23. The salient provision under which perhaps a preponderance of segregation litigation is brought is 28 U.S.C.A. § 1343 (1950). This section reads:
"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
". . . .
"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

tion proceeding. The approach of the court is similar in legal analysis to the *Matlock* and *Constantian* cases and typical of other southern courts in its dauntless attitude that school finance should not be entangled in the social struggle over desegregation.[24] Regardless of the court's predisposition,[25] the decision reached appears manifestly correct. The scope of authorization of a school bond is purely a state question; no other question was necessary to the disposition of the case. The question whether one would be deprived of equal protection of the laws by the use of proceeds for segregated schools subsequent to the cessation of segregation is not clear, but the lower court seems to indicate that no redress would be available under the Civil Rights Act.[26] However, even if federal assistance then was available to enjoin the use of proceeds for this unconstitutional purpose, it is more likely that desegregation would be effectuated in another way, as by contempt proceedings against intervenors.

Disposition on Constitutional Ground

The leading case involving the legality of an issue of school bonds subsequent to the *Brown* decision is *Board of Public Instruction of Manatee County v. Florida*,[27] which was followed in a similar case in Dade County.[28] In the *Manatee County* case objection was made to the validation of a bond issue for financing segregated school facilities on the ground that the recent *School Segregation Cases* declared segregated education unconstitutional, and that expenditure of funds for this purpose likewise was unconstitutional. The Florida court declared the bond issue valid and conclusive upon the rights of the citizens, though at the same time conceding that its action technically contravened the equal protection clause of the fourteenth amendment. The United States Supreme Court had declared that compulsory segregation in public school facilities violated the Federal Constitution; but, argued the Florida court, segregation, while unconstitutional, is not illegal in this state. Hence, in view of the need for better school

24. "Federal judges are ill-prepared to sit in judgment in every school squabble." 135 F. Supp. at 586.

25. The history of the instant case gives further reason to believe that the court was predisposed to dismiss it. The plaintiffs had already been before the Supreme Court of North Carolina seeking to block condemnation of their land on other grounds. Brown v. Doby, 242 N.C. 462, 87 S.E.2d 921 (1955). And prior to this time the plaintiffs had unsuccessfully attempted in the state court to restrain the defendants from proceeding with the condemnation suit. The present action might have seemed a final effort to unearth a technicality for the benefit of particular plaintiffs yet at the expense of the effective operation of the school system. For this reason as well as the policy favoring public education, the federal courts may have been predisposed to dismiss it on any of the several grounds available.

26. See Doby v. Brown, 135 F. Supp. 584, 585 (1955).

27. 75 So. 2d 832 (Fla. 1954), 1 RACE REL. L. REP. 124 (1956), approved in 8 ALA. L. REV. 127 (1955), criticized in 1 HOWARD L. REV. 286 (1955).

28. Florida v. Special Tax Dist. No. 1 of Dade County, 86 So. 2d 419 (Fla. 1956), 1 RACE REL. L. REP. 527.

facilities the unconstitutional but not unlawful bond issue may stand.

A concurring justice adopted the approach seen thereafter in the *Matlock* case from Oklahoma.[29] The purpose for which the bond issue is to be validated is constitutional, for "surely a building in which the races are mixed will be constructed no differently than one to be occupied by the white or by the colored."[30]

A strong dissenting opinion, agreeing with the majority on little more than that the fourteenth amendment was never legitimately adopted and that *Brown v. Board of Education* was incorrectly decided,[31] would declare the bond issue invalid. The Supreme Court has "*now* announced," in the *Brown* case, that segregation is a denial of the equal protection of the laws. "The proposed bond issue [for segregated schools] . . . is in direct conflict with the United States Constitution, as *now* construed by the Supreme Court of the United States in the Brown case. Therefore the purpose for which the money is to be expended is illegal. The purpose being illegal, it follows that the bonds are illegal."[32]

The implication of this position is not only that the bond issue is invalid, but that the entire school system is unlawful. The state alone has the right to create schools. Florida in creating its schools explicitly authorized only segregated schools. Segregated schools are now unconstitutional, and it follows that, the sole end result being unconstitutional, the bonds enhance an invalid purpose and are themselves invalid. The only alternative, concluded the dissent, is that the electorate must act to provide for integrated schools if they are to exist; the court cannot legislate them.[33]

The confusion that would have resulted from an adoption of this position is manifest; a question of the constitutionality of the entire school system is considerably more serious than the illegality of a single bond issue. Faced with the necessity for preserving public schools, the court chose to adopt the somewhat tenuous rationale that the bond issue, while unconstitutional, is not at this time illegal.[34] This decision, though criticized, was perhaps correct on its disposition of the constitutional point; for, had the court held otherwise, the

29. See notes 10 through 12 *supra* and related text.

30. 75 So. 2d at 840.

31. The majority's statement, "In law . . . the Brown decision was a great mistake," and comments regarding the adoption of the fourteenth amendment under "Reconstruction" display the same caustic attitude evident in the dissent, which said, "Notwithstanding the fact that we may know, which we do, that the Fourteenth Amendment . . . was never adopted in the manner required by that fundamental document, . . . we are bound by" the *Brown* decision. 75 So. 2d at 838, 839 (majority), and 844 (dissent).

32. *Id.* at 848, 849.

33. "Under our constitutional system of government, only the electorate can make this decision." *Id.* at 849.

34. "Any reasonable pattern for desegregation that may be imposed will require a long time and the record discloses a pressing necessity for improved school facilities." *Id.* at 839-40.

policy of letting the states solve their own segregation problems would have been circumvented. It is suggested that the brief concurring opinion, dodging this constitutional dilemma, would have been a better path to the decision the court undoubtedly considered necessary.

The approach of the majority, though limited in utility to matters arising before state tribunals, has been seen in later cases. In *Steiner v. Simmons*,[35] arising after the first but before the second *Brown* opinion, the Delaware Supreme Court, conceding that segregation by race is unconstitutional, refused a Negro's petition for admission to a public high school explaining that the United States Supreme Court has not decreed "desegregation *at the present time*."[36] The court said, "The Supreme Court of the United States has determined a right to exist, but has not determined the remedy. Until that remedy shall be fixed, the right is not a present enforceable one. States having segregation laws are not required, *at the present moment*, to desegregate their schools."[37] Since the second *Brown* decision, the absence of a contention of unconstitutionality in school bond case where there has been no order ending segregation possibly reflects confidence in the position of the majority in the *Manatee County* case.

Finally it may be asked, will school bonds authorized exclusively for segregated facilities remain valid after desegregation has been decreed, in which case the bonds will be not only unconstitutional but also illegal? In Florida, site of the *Manatee County* case, the answer is in the affirmative; the validity of the bond issue was litigated in a validation proceeding, which by operation of the doctrine of res judicata precludes any later suit on the issue of the bond's validity.[38] On the other hand, if no validation proceeding has barred subsequent attack, the answer may be in the negative, that the bonds will be invalid when desegregation is ordered. Clearly the same equities militating for support of the school system would be present, but now segregation is not only unconstitutional but also illegal. The dissenting justice in the *Manatee County* case said, "There is no need to postpone the evil day."[39] In a state whose bonds are unprotected by a validation judgment, this evil day could become a reality, to the infelicity of the school district, the bondholder and the private citizen.

Recommendation: Bond Validation Legislation

It is suggested that Southern states wishing to circumvent future litigation challenging the validity of school bonds, constitutionally or

35. 111 A.2d 574 (Del. 1955). See also Hawkins v. Board of Control, 83 So. 2d 20 (Fla. 1955), *rev'd* 350 U.S. 413 (1956). *Cf.*, Davis v. Prince Edward County School Bd., 25 U.S.L. Week 2333 (E.D. Va. 1957).
36. 111 A.2d at 578.
37. *Id.* at 579.
38. For more detailed discussion see text and notes 40 through 50 *infra*.
39. 75 So. 2d at 848.

otherwise, and to preclude the possibility of an "evil day," should adopt bond validation legislation. Though of course an unconstitutional state practice cannot be legalized by any sort of state legislation, the validation proceedings can protect the buyer from a later judgment declaring the bonds void and the seller from the undesirable situation of being unable to spend the funds received by the sale of bonds. There is competent authority to the effect that validation proceedings, assaulted on many and varied grounds as violating both general and specific provisions of constitutions, will generally withstand such attacks.[40]

Several states already have legislation providing judicial proceedings for approval of public debentures prior to their issuance or sale. Notable among Southern states with these statutes are Florida,[41] Georgia,[42] Kansas,[43] Kentucky,[44] Mississippi[45] and Oklahoma.[46]

These statutes generally provide that the proceeding for the validation of bonds is an adversary action in a court of competent jurisdiction in which the plaintiff is the issuing county, municipality, or taxing district, and the defendants are the state or state representatives, and all taxpayers or citizens of the district or state.[47] This action is in the nature of an *in rem* proceeding, or perhaps more correctly, in the nature of a declaratory judgment in a class action.[48] Its primary purpose is, of course, to immunize the bond issue against any subsequent charge of invalidity.[49] This is accomplished by joining

40. 43 AM. JUR., *Public Securities and Obligations* § 312 (1942). For discussion of this principle, see Rohde v. Newport, 246 Ky. 476, 55 S.W.2d 368 (1932); Annots., 87 A.L.R. 706 (1933), 102 A.L.R. 90 (1936). The leading Supreme Court case recognizing the constitutionality of a validation statute is Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123 (1927) (a validation statute satisfies due process of law requirements and presents a case or controversy for judicial determination).

41. FLA. STAT. ANN. c. 75 (Supp. 1956). The forerunner of this statute is said to have been modeled after the Georgia statute. Thompson v. Town of Frostproof, 89 Fla. 92, 103 So. 118 (1925).

42. GA. CODE ANN. § 87-301 to -310 (Supp. 1955).

43. A modified form of a validation statute in the Kansas City Charter provided for a declaration of the validity of an ordinance establishing taxing or assessment districts and declaring liens on land benefited by public improvements. It is construed in the well-known case of Fidelity Nat'l Bank & Trust Co. v. Swope, 274 U.S. 123 (1927).

44. KY. REV. STAT. §§ 66.210, 66.310 (1955).

45. MISS. CODE ANN. §§ 4314-18 (1943).

46. OKLA. STAT., tit. 70, §§ 15-1 to 15-15 (Supp. 1955). See Matlock v. Board of County Comm'rs, 281 P.2d 169 (Okla. 1955).

47. See BORCHARD, DECLARATORY JUDGMENTS 146-47 (2d ed. 1941).

48. 43 AM. JUR., *Public Securities & Obligations* § 311 (1942) states that this action is "in the nature of a proceeding in rem." It seems sounder to refer to this action as a declaratory judgment binding members of a large class, to circumvent confusion with real property aspects. Borchard calls it "a pure action for a declaratory judgment." BORCHARD, DECLARATORY JUDGMENTS 147 (2d ed. 1941).

49. Since public school bonds are excluded from coverage by the Uniform Negotiable Instruments Law, 5 UNIFORM LAWS ANNOT. § 65 (1943), the common-law rule of *caveat emptor* applies. Under this common-law rule, the Supreme Court in Otis v. Cullum, 92 U.S. 447 (1875), held that the vendor of municipal bonds which were issued under an unconstitutional statute was

all parties who might have an interest in the bond issue and pursuing the action to final judgment, the effect of which is to bar any person who was a party or who might later be similarly situated from raising any issue that might have been raised in the validation proceeding. All questions of law and fact that might subsequently be raised affecting the bonds' validity are put in repose and subsequent relitigation is precluded by application of the doctrine of res judicata.[50] This settles once and for all that the bonds are valid obligations which may be used for authorized purposes, and protects the school system from spurious attacks which might be brought by litigants in favor of or opposing segregation.

Bond validation legislation might find acceptance in the Southern states for another reason; it confines jurisdiction to challenge the bond's validity to the state court. A state cannot by statute limit jurisdiction over a matter to the state courts; but a state may take advantage of a federal rule of procedure to arrive at the same end.

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not liable to his vendee for breach of implied warranty. The risk that a bond will be declared illegal and thereby cause the holder to suffer loss, by being unable to recover from his vendor, has led to the statutes which expressly provide for judicial determination of the validity of the bond prior to issue. See 1 HOWARD L. REV. 286, 287-88 (1955).

The Florida bond validation statute provides, for example, that "such decree shall be forever conclusive as to all matters adjudicated against the petitioner and all parties affected thereby, including all property owners, taxpayers and citizens . . . and all others having or claiming any right, title or interest in property to be affected by the issuance of said bonds . . . ." FLA. STAT. ANN. § 75.09(1) (Supp. 1956).

Cases bear out the intention of the statute. See Florida v. Citrus County, 116 Fla. 676, 157 So. 4 (1934); Street v. Town of Ripley, 173 Miss. 225, 161 So. 855 (1935). See also Annot., 10 A.L.R.2d 782 (1950).

50. An argument based on the doctrine of the *Sunnen* case, creating an exception in tax cases to the rule of res judicata, in which a prior litigated issue may be reopened on collateral attack on the ground of a change in the tax law since the original suit might be urged. Commissioner v. Sunnen, 333 U.S. 591 (1948), 61 HARV. L. REV. 1463.

However this exception to the doctrine of res judicata does not seem likely to expand into non-tax cases. Three points might be brought out to substantiate this statement: (1) the *Sunnen* exception applies to situations where res judicata would bind the parties by "collateral estoppel," rather than when the action is precluded by the doctrine of "bar"; (2) apparently, the exception might be limited to the correction of minor changes where equity would strongly urge it, and would not allow relitigation of the pivotal issues; (3) courts have not pushed the exception with a spirit of acceptance which might extend it to other fields.

Also it might be argued that the petitioner's right is a federal one and that the validation judgment is not res judicata in a federal court action involving the same right. See, *e.g.*, Trailmobile Co. v. Whirls, 154 F.2d 866 (6th Cir. 1946), *rev'd on other grounds*, 331 U.S. 40 (1947); Kan v. Tsang, 74 F. Supp. 508 (N.D. Calif. 1947), *rev'd on other grounds*, 173 F.2d 204 (9th Cir.), *cert. denied*, 337 U.S. 939 (1949). In both cases a veteran's right to have pre-war seniority in his old job under the Selective Service Act was enforced in a federal court despite a contrary state declaratory judgment that no right existed. Once more this argument should not be greatly feared as applicable to state bonds.

A state's refusal to recognize a federal statutory right, as in these cases, should be distinguished from state recognition that a class of federal rights exists but none exists in a particular plaintiff. See also Annot., 10 A.L.R.2d 782 (1950).

Federal practice denies the federal district court removal jurisdiction over a cause of action arising in a state court which presents a federal question by way of defense rather than in the complaint.[51] And, because the assailant of the bond is joined as defendant, the only way he can raise his federal question is by way of defense. He cannot seek federal court relief as a plaintiff before the bonds are validated because there is no justiciable issue; he cannot attack the judgment of the validation suit thereafter because of the doctrine of res judicata.

Whether a federal question is involved that may be brought in the federal court may be an important consideration from a tactical standpoint. Southern courts are often frank in condemning the *Brown* decision, and may be more reluctant to effectuate its policies than the federal courts. Of course, the state court cannot deprive a party of a right under the federal Constitution, and a writ of certiorari may be had from the state's highest court to the United States Supreme Court; however, the Supreme Court will deny review if the state court based its decision on an adequate and independent state ground, even though its decision on the federal question may have been wrong.[52] Such grounds may become easier to find when the state court strives

51. Section 1331 of Title 28 of the United States Code gives federal district courts jurisdiction to hear "all civil actions . . . [which] arise under the Constitution, laws or treaties of the United States." This jurisdictional grant, known as "federal question jurisdiction" has been so severely limited that now it is much narrower than the parallel scope of appellate jurisdiction exercised by the Supreme Court over state decisions. Stated generally, the rule today is that the plaintiff is complete master in determining federal question jurisdiction in the federal district courts. The court may look only to the plaintiff's complaint to ascertain whether jurisdiction exists. The plaintiff may neither allege an anticipated defense involving a federal question to get into federal court, Metcalf v. Watertown, 128 U.S. 586 (1888), nor may the defendant remove the action under section 1441 on the ground of a federal question raised by defense, Tennessee v. Union and Planters' Bank, 152 U.S. 454 (1894). "[T]he plaintiff's original cause of action, [must arise] . . . under the Constitution;" otherwise, the federal court may not take jurisdiction although the only issue involved is a federal issue. Louisville & N.R.R. v. Mottley, 211 U.S. 149, 152 (1908).

Furthermore a plaintiff under the Declaratory Judgments Act who would otherwise be a defendant cannot be heard by the federal court upon a federal question if the federal question would not have been raised by the opposing party in his original bill had he brought the suit. Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950). The federal court will not consider whether a substantive federal question is involved, but will consider whether the party ordinarily plaintiff would have raised it as an essential allegation of his complaint.

For an excellent discussion of this matter, see Trautman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 VAND. L. REV. 445, 454-68 (1954). See also HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 758-77 (1953).

52. Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1875) set out the self-imposed Supreme Court policy, now solidified into a rather absolute rule, that the Court will not hear a case on appellate review if the case is found to have, in addition to a federal question, a state question which is independent and adequate to settle the matter, despite error on the state court's determination of the federal question. This distinction between Supreme Court appellate jurisdiction and district court original jurisdiction, *supra* note 51, should be noted. For a discussion of this self-imposed restraint, see HART & WECHSLER, *op. cit. supra* note 51, at 421-35.

to maintain a state policy. On the other hand, a segregation question arising in a case originating in the federal system, in addition to perhaps a more dispassionate hearing, is less likely to be blocked on its way to the Supreme Court where many state judges had rather it not go.

Conclusion

Drawing a thread of orderliness from the foregoing discussion, we can now collect our observations and observe the dissipation of the legal miasma. Attack might be made, it is feared, on bonds authorized and issued pursuant to statutory requirements on the ground that proceeds are to be used or are not to be used for segregated schools. This attack will be totally ineffectual unless it can be clearly shown that the authorization encompassed use only in segregated schools. The best ground for standing against the attack is here. North Carolina, Oklahoma, and Virginia dismissed the case at this point, establishing a precedent for the courts of other states to do likewise. This is a state question, and the state courts have indicated that they will go far in support of a policy promoting the school system. If, however, it is conceded that the bonds are authorized for segregated facilities exclusively, the issue is nonetheless not open to attack unless the end of segregation has been decreed. Then, if the bonds are used to finance integrated schools, the authorization is exceeded and the bonds invalid; or if proceeds are used to continue segregated schools despite a federal court order to cease segregation, this use may contravene the rights of private persons under the fourteenth amendment. As a practical matter, the federal court would more likely use contempt proceedings to enforce desegregation rather than lay seige to school finances. However, the cloud remains and the bond could be declared invalid. The safest method of removing this cloud appears to be through a proceeding which will judicially establish the bonds' validity.

Concededly, the recommendation of a validation proceeding is not made with so great an emphasis upon the legal protection it affords as upon the restoration of the investor's confidence that there is no cloud on the bonds' validity. Indeed the endeavor of this Note is the dissipation of legal uncertainties lambent upon the investor's sensibilities rather than a contribution to the great body of legal knowledge. It is hoped that the resolution of these uncertainties will result in more favorable bids and consequently less hardship on the already beleaguered Southern school system.

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