Michigan Law Review

Volume 36 | Issue 8

1938

SCHOOLS - PRIVATE PAROCHIAL SCHOOLS - TRANSPORTATION OF PUPILS - USE OF PUBLIC FUNDS

Dan K. Cook
University of Michigan Law School

SCHOOLS — PRIVATE PAROCHIAL SCHOOLS — TRANSPORTATION OF PUPILS — USE OF PUBLIC FUNDS — A New York statute [1] provided for the public transportation of school children to public and private schools. Plaintiff instituted a taxpayer's action to enjoin defendant board of education from furnishing transportation, in compliance with the statute, to children attending a parochial school. Plaintiff contended the statute was unconstitutional by reason of a provision of the New York constitution which forbade public aid or maintenance of denominational schools.[2] *Held*, that the statute was valid, and plaintiff's prayer was denied. *Judd v. Board of Education*, 164 Misc. 889, 300 N. Y. S. 1037 (1937), affd. (App. Div. 1938) 3 N. Y. S. (2d) 394.

[1] 16 N. Y. Consol. Laws Ann. (McKinney, 1928), § 206 (18).

[2] N.Y. Const., art. 9, § 4, provides: "Neither the State, nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."

A great majority of the state constitutions contain provisions, analogous to the one in the principal case, which in one form or another prohibit the granting of public aid, funds, or taxes to private sectarian schools.[3] It is not entirely clear, under all circumstances, as to just what constitutes the granting of a benefit to a private school, so as to fall within the various constitutional prohibitions.[4] However, it can be generally asserted, without qualification, that a direct appropriation of public funds to, or a direct levying of a tax for, a private school, will be invalid.[5] Similarly, any arrangement whereby a private school receives a share of the public school funds, such share being proportioned upon the number of pupils attending the private school, is generally invalid,[6] and any contract or arrangement whereby the public school authorities rent a portion of a private school as a public school, the substantial administration of the public school being vested in the private school authorities, is invalid.[7] And the above is true, even though the public schools do not possess adequate facilities for all children of school age.[8] On the other hand, a contract whereby the public school authorities rent a portion of a private school and retain administrative control over the rented portion of the private school, is entirely valid; [9] the theory is that the rented portion, by reason of the public control, is essentially a public school, even though maintained on private school property. While the above principles concerning the granting of benefits to private schools in the way of financial appropriations are clear, the decisions are somewhat divergent on the question whether a state may confer benefits, of a more indirect nature than financial assistance, to private schools. Thus, in the few cases on the subject there has been a clear split of authority whether public funds may be expended for the furnishing of free school texts [10] to students of parochial schools, in the face of constitutional

[3] Examples of these provisions are: Ark. Const., art. 14, § 2; Cal. Const., art. 4, § 30; Colo. Const., art. 5, § 34; Fla. Const., art. 12, § 13; Ill. Const., art. 8, § 3; Ky Const., § 189; La. Const., art. 12, § 13.

[4] Early cases on this general subject are collected in: Ann. Cas. 1917C 917 at 922; 15 L. R. A. 825 (1892); 14 L. R. A. 418 (1892).

[5] In re Opinion of the Justices, 214 Mass. 599, 102 N. E. 464 (1913); Cook County v. Industrial School for Girls, 125 Ill. 540, 18 N. E. 183 (1888); Hall's Free School Trustees v. Horne, 80 Va. 470 (1885); State v. Hallock, 16 Nev. 373 (1882); Trustees of Brooke Academy v. George, 14 W. Va. 411 (1878); State v. Graham, 25 La. Ann. 440 (1873); Halbert v. Sparks, 72 Ky. 259 (1872); People v. Allen, 42 N. Y. 404 (1870); Jenkins v. Andover, 103 Mass. 94 (1869).

[6] Williams v. Board of Trustees, 173 Ky. 708, 191 S. W. 507 (1917); Underwood v. Wood, 93 Ky. 177, 19 S. W. 405 (1892); Synod of Dakota v. State, 2 S. D. 366, 50 N. W. 632 (1891); Otken v. Lamkin, 56 Miss. 758 (1879). But see, Page v. Academy, 63 N. H. 216 (1884).

[7] State v. Taylor, 122 Neb. 454, 240 N. W. 573 (1932); Knowlton v. Baumhover, 182 Iowa 691, 166 N. W. 202 (1918); Williams v. Board of Trustees, 173 Ky. 708, 191 S. W. 507 (1917).

[8] State v. Taylor, 122 Neb. 454, 240 N. W. 573 (1932); Knowlton v. Baumhover, 182 Iowa 691, 166 N. W. 202 (1918); Underwood v. Wood, 93 Ky. 177, 19 S. W. 405 (1892).

[9] Crain v. Walker, 222 Ky. 828, 2 S. W. (2d) 654 (1928).

[10] On the general validity of statutes providing for the furnishing of free textbooks, cases are collected in: 17 A. L. R. 299 (1922); 67 A. L. R. 1196 (1930).

provisions denying the rendition of public aid to private schools.[11] A few other cases have upheld the validity of contracts or privileges, obtained by public authority, which have benefited indirectly, along with the public schools, private schools and their pupils.[12] Only one case was found which was analogous to the principal case, and it inferred in its dictum that the furnishing of free transportation out of public funds, to students of private schools, would be contrary to state constitutional provisions.[13] However, it is submitted that, in view of the fact that the benefits in the instant case accrued most directly to the students, and only very indirectly to the private school, the instant case was correctly decided.[14]

Dan K. Cook

[11] Two Louisiana cases have sustained a statute providing for the furnishing of free texts to students of parochial 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), affd. 281 U. S. 370, 50 S. Ct. 335 (1930). A New York decision has declared a similar statute unconstitutional: Smith v. Donahue, 202 App. Div. 656, 195 N. Y. S. 715 (1922). The Louisiana decisions take the view that the furnishing of the text-books is a benefit to the students, and not to the parochial schools, whereas the opposing New York decision states that the furnishing of the books, "if not directly in aid of the parochial schools, it certainly is an indirect aid. The scholars do not use text-books and ordinary school supplies apart from their studies in the school. They want them for the sole purpose of their work there." Smith v. Donahue, 202 App. Div. 656 at 661, 195 N. Y. S. 715 (1922).

[12] St. Patrick's Church Society v. Heermans, 68 Misc. 487, 124 N. Y. S. 705 (1910) (a contract binding a lessee of the waterworks of a village to furnish water free of cost to all schoolhouses, including parochial schoolhouses, in the village); Oklahoma Ry. v. St. Joseph's Parochial School, 33 Okla. 755, 127 P. 1087 (1912) (a provision of a franchise to a street railway providing for reduced fares to all children "in actual attendance on the public schools" of the city was held to include children attending the parochial schools in the city). But note, Commonwealth v. Interstate Consolidated Street Ry., 187 Mass. 436, 73 N. E. 530 (1905), affd. 207 U. S. 79, 28 S. Ct. 26 (1907), where a similar provision in a street railway franchise seemed impliedly to extend only to pupils attending the public school.

[13] State v. Milquet, 180 Wis. 109, 192 N. W. 392 (1923). The decision went off primarily on an interpretation of the statutory authority granted to the school district. However, the court stated (180 Wis. at 115), "The whole scope and purpose of the statute is to comply with the provisions of the constitutional mandate and that requires that free, non-sectarian instruction be provided for all persons of school age. The board is not authorized to expend public funds for any other purpose. The contract made by the district board whereby it attempted to provide transportation of pupils to a private school was an act beyond its authority and therefore invalid. . . . A contention that a contract of the kind involved in this case is valid wholly ignores the underlying fundamental purpose of our educational system as set forth in the constitution."

[14] On the other hand, it is at best quite difficult to explain the holding in the principal case, in view of the previous New York decision of Smith v. Donahue, 202 App. Div. 656, 195 N. Y. S. 715 (1922), where it was stated that a statute furnishing free text-books to parochial students would be unconstitutional.