Opinion No. 71

Schools—Free Text Books—Taxation—Constitutional Law.

HELD: A law requiring the furnishing of free text books to the pupils of all schools, public or private, is valid since it does not violate either

Sec. 8, Art. XI, or Sec. 35, Art. V of the Constitution of Montana, nor is taxation for that purpose a taking of private property for a private use.

February 9, 1933.

You have requested my opinion as to the constitutionality of a bill proposed, requiring the furnishing of free text books to the pupils of all schools, public or private. This question involves an interpretation of Section 8 Article XI of the Montana Constitution, which provides, inter alia, that no school district shall ever make directly or indirectly any appropriation, or "pay from any public fund or moneys whatever * * * for any sectarian purpose, or to aid in the support of any school, academy, seminary * * * controlled in whole or in part by any church, sect, or denomination whatever."

Section 35, Article V of the Constitution of Montana provides: "No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institutions or association."

We have been able to find only three cases touching this question. This question was considered in the case of Borden v. Louisiana State Board of Education, 168 La. 1005, 123 Southern 655, wherein it was held that a similar law did not offend against such constitutional provisions. A quotation from such decision shows that the constitutional provisions in the Louisiana Constitution are very similar to those in the Montana Constitution.

"Section 8 of Article 4 prohibits, among other things, the taking of money from the public treasury, directly or indirectly, in aid of any priest, preacher, minister or teacher of religion as such, or for private, charitable, or benevolent purposes to any person or community excepting certain institutions conducted under state authority. Section 4 of Article 1 relates to the right to worship God according to the dictates of one's own conscience, and prohibits the passage of laws establishing religion, or the free exercise thereof, or the granting of preferences to, or making discriminations against any church, sect, or religious creed. Section 13 of Article 12 prohibits the using of public funds for the support of any private or sectarian school. Section 12 of Article 4 prohibits among other things, the lending, pledging, or granting the funds, credit, property, or things of value of the state or of any political corporation thereof to or for any person or persons, association, or corporation, public or private." (Borden v. Louisiana State Board of Education, 123 Southern, page 660).

The case of Cochran v. Louisiana State Board of Education, 281 U. S. 370, another case which was a companion case to the above Louisiana case, was taken to the Supreme Court of the United States to test out whether or not such a lending of text books was a public purpose, it being contended that taxation for that purpose was the taking of private property for private uses. This may have been prompted by the dissenting opinion in the Borden case. The Supreme Court of the United States very definitely settled the proposition that it was a public purpose when it said:

"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 quoted with approval the following from the Louisiana case:

"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, sectarian or nonsectarian, 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 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."

Chief Justice Hughes wrote the opinion and the court unanimously agreed.

The only contrary case is that of Smith v. Donohue, 195 N. Y. Supp. 715. This case, however, is not strong authority for the reason that the discussion concerning constitutionality is purely obiter dicta. The court specifically held that the statute in question did not purport to furnish any free text books to children in private schools. Therefore, its remarks on the subject of constitutionality, under the settled rules of judicial construction, are to be accorded little weight. A further fact in considering the weight of opinion is that the court was not a court of last resort in New York state upon the question of law.

Both the Louisiana case and the case in the Supreme Court of the United States point out that it is only the use of the books granted to the children and not that there is any gift. Reasoning from analogy it might be said that if the state cannot lend text books to students in private schools, by a parity of reasoning it could not create or maintain a library, the historical library, for instance, and permit students of private intsitutions to borrow the books for use in their studies.

Taking the only three cases in which the matter has been directly involved, it is the undoubted weight of authority that such an act is constitutional.