

July 2016

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Recommended Citation

(1962) "Recent Decisions: Textbooks for Parochial Schools," *The Catholic Lawyer*. Vol. 8 : No. 1 , Article 10.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol8/iss1/10>

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Textbooks for Parochial Schools

The Supreme Court of Oregon, in the recent case of *Dickman v. School Dist. No. 62C*,¹ was called upon to decide the constitutionality of a statute which stated that:

[E]ach district school board shall . . . provide textbooks, prescribed or authorized by law, for the free and equal use of all pupils residing in its district and enrolled in and actually attending standard elementary schools. . . .²

In accord with this statute public funds were expended to provide textbooks for students in both public and parochial schools. A taxpayer sought to enjoin a school board "from supplying textbooks without charge for the use of pupils enrolled in . . . a parochial school. . . ."³ The Court held that this expenditure was for-

¹ — Ore. —, 366 P.2d 532 (1961).

² ORE. REV. STAT. § 337.150(1) (1957).

³ *Dickman v. School Dist. No. 62C*, — Ore. —, 336 P.2d 533, 534-35 (1961).

bidden by the Oregon constitution, which provides: "No money shall be drawn from the Treasury for the benefit of any religious [*sic*], or theological institution. . . ."⁴

The *Dickman* decision illustrates the conflict which often arises when legislation aimed at benefiting education indirectly confers a benefit upon sectarian institutions. In the past, courts have upheld such legislation by relying on either the "remuneration" or the "child benefit" theory.

According to the "remuneration"⁵ the-

⁴ ORE. CONST. art. I, § 5.

⁵ *St. Hedwig's Industrial School for Girls v. Cook County*, 289 Ill. 432, —, 124 N.E. 629, 631 (1919); *Murrow Indian Orphans Home v. Childers*, 197 Okla. 249, —, 171 P.2d 600, 601-03 (1946); *State ex rel. Atwood v. Johnson*, 170 Wis. 251, —, 176 N.W. 224, 228 (1920). The *Murrow* case distinguished the cases based on a remuneration theory from those involving the use of public money to provide transportation for pupils to parochial schools on the ground that in the latter cases the state received no value for its money. *But see Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002 (1941).

ory, religious institutions may properly be reimbursed for the performance of non-religious services, such as the care and feeding of orphans, for which the state would in any event be responsible. However, some courts have rejected this theory and have stated that the religious institution benefits from payments made for services as well as from outright donations, and that the one benefit is no more constitutional than the other.⁶ This theory was summarily rejected by the Court in the instant case.⁷

The "child benefit" theory is usually relied upon by the courts which uphold the use of state funds to supply textbooks or transportation for students in parochial schools. According to this theory, the funds are used for the benefit of the child and, therefore, do not constitute aid to the institution which he attends.⁸ It has been said that this theory answers the objections historically raised in opposition to providing books and transportation for parochial school students: (1) that the funds are used for a private rather than a public purpose,⁹ and (2) that they constitute state support of religion. These objections would seem to be rebutted by the fact that the funds expended for transportation¹⁰

⁶ *Cook County v. Chicago Indus. School for Girls*, 125 Ill. 540, —, 18 N.E. 183, 191 (1888); *Synod of Dakota v. State*, 2 S.D. 366, —, 50 N.W. 632, 635 (1891). See Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 337 (1950).

⁷ *Dickman v. School Dist. No. 62C*, *supra* note 3, at —, 366 P.2d at 542-43.

⁸ See *Borden v. Board of Educ.*, 168 La. 1005, —, 123 So. 655, 660-61 (1929).

⁹ The requirement that the state may only levy taxes to raise money for a public, as opposed to a private, purpose was established by the Supreme Court in *Loan Association v. Topeka*, 87 U.S. 655 (1874).

¹⁰ *Nichols v. Henry*, 191 S.W.2d 930, 934-35 (Ky. 1945).

and schoolbooks¹¹ are spent for the public purpose of educating children in general. Further, since the funds are specifically appropriated for the children's benefit the aid runs directly to them, as opposed to the religious institutions which they attend.¹²

Those who have rejected the "child benefit" theory have reasoned that schools cannot function without books and pupils; when the state undertakes to provide both books and transportation for students in sectarian institutions it is materially aiding the schools.¹³ The net effect of such action is to "build up, strengthen and make successful the schools as organizations."¹⁴ It has also been argued that where the state provides a service, such as education, and makes it equally available to all its citizens, money spent to duplicate this service is spent for a private, not a public, purpose.¹⁵

The problem presented by the use of state funds to provide services for students in parochial schools has been considered

¹¹ *Borden v. Board of Educ.*, *supra* note 8, at —, 123 So. at 660-61.

¹² *Ibid.* Cf. *Bowker v. Baker*, 73 Cal. App. 2d 653, —, 167 P.2d 256, 262-63 (1946); *Chance v. Mississippi State Textbook Bd.*, 190 Miss. 453, —, 200 So. 706, 713 (1941).

¹³ *Judd v. Board of Educ.*, 278 N.Y. 200, 211-15, 15 N.E.2d 576, 582-83 (1938). This case held unconstitutional a law providing public funds for the transportation of pupils to private and parochial schools. At the present time, however, art. XI, § 4 of the state constitution specifically authorizes such expenditures. See also *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002 (1941); *Mitchell v. Consolidated School Dist.*, 17 Wash. 2d 61, 135 P.2d 79 (1943). In *Gurney* the court pointed out that school funds may only be used for school purposes and thus no support is legal except that which aids the school. Therefore, a fortiori, school bus service for parochial school students must similarly aid the sectarian institution.

¹⁴ *State ex rel. Traub v. Brown*, 36 Del. 181, —, 172 Atl. 835, 837 (1934).

¹⁵ *Board of Educ. v. Wheat*, 174 Md. 314, —, 199 Atl. 628, 638 (1938) (dissenting opinion).

by the United States Supreme Court. In *Cochran v. Board of Educ.*¹⁶ the Court held that a Louisiana statute which provided textbooks for students in both public and private institutions did not violate the fourteenth amendment's prohibition against taxation for a private purpose. The Court found that the state received a benefit when it supplied free school books to children. Similarly, in *Everson v. Board of Educ.*¹⁷ the Court upheld the use of state funds to reimburse parents for the cost of transporting their children to both parochial and public schools. Both these decisions apparently adopted the "child benefit" theory, which the instant case rejected.

In the *Dickman* case the Court based its decision on a section of the Oregon constitution which prohibited the use of state funds for the benefit of religious institutions.¹⁸ The Court said that this section proclaimed separation of church and state to be the public policy of Oregon.¹⁹ The question was whether the distribution of textbooks for the use of parochial school students was a violation of this policy.²⁰

The Court first considered the contention that the expenditure constituted aid to the students rather than to the schools. It rejected this argument on two grounds: first, since all funds spent on education ultimately inure to the benefit of the child,

¹⁶ 281 U.S. 370 (1930).

¹⁷ 330 U.S. 1 (1947).

¹⁸ *Dickman v. School Dist. No. 62C*, — Ore. —, —, 366 P.2d 533, 542 (1961). The Court stated that since the statute in question violated art. I, § 5 of the Oregon constitution there was no need to consider whether it violated the first (aid to a religious institution) or the fourteenth amendment (imposing a tax for a "non-public" purpose) of the federal constitution. Nor did the Court find it necessary to consider whether it violated art. VIII, § 2 of the Oregon constitution.

¹⁹ *Id.* at —, 366 P.2d at 537.

²⁰ *Id.* at —, 366 P.2d at 538.

this theory would justify the use of public funds to pay *all* the costs of parochial education;²¹ secondly, since school funds may only be used for school purposes, no support is legal except that which aids a school.²² Therefore, any expenditure for textbooks supplied for the use of parochial students must necessarily aid the parochial school.

Having concluded that these expenditures were in fact aid to the parochial school, the Court went on to consider the question from the viewpoint of separation of church and state. It conceded that such separation does not prevent the state from extending to religious institutions certain benefits, such as fire and police protection, which are also conferred on other members of the community.²³ "The proscription is against aid to religious *functions*."²⁴ Thus, in light of the fact that Catholic schools "permeate the entire educational process with the precepts of the Catholic religion,"²⁵ the Court concluded:

[W]here the aid is to pupils and schools the benefit is identified with the function of education and if the educational institution is religious, the benefit accrues to religious institutions in their function as religious institutions.²⁶

Having disposed of the principal theory upon which the legislation before it might have been sustained, the Court went on to dispose of several other possible defenses. It indicated that even if the supplying of textbooks could be considered legislation for the general welfare, the Oregon constitution precluded the legislature from pro-

²¹ *Id.* at —, 366 P.2d at 539-40.

²² *Id.* at —, 366 P.2d at 540.

²³ *Id.* at —, 366 P.2d at 542-43.

²⁴ *Ibid.*

²⁵ *Id.* at —, 366 P.2d at 536.

²⁶ *Id.* at —, 366 P.2d at 543-44.

moting the general welfare in this manner.²⁷ In the same vein, it held that the supplying of textbooks is not an acceptable way of facilitating the enforcement of the compulsory school attendance laws.²⁸ With regard to the "remuneration" theory, the Court dismissed as "specious" the idea that the state was paying for services rendered.²⁹

It is to be noted that the Court in the instant case recognized that much of its reasoning was at variance with that contained in the Supreme Court's decision in *Everson v. Board of Educ.*³⁰ The state was allowed to pay for transportation to parochial schools because it was done to promote the health and safety of children in the *Everson* case. However, the *Dickman* opinion endeavored to distinguish *Everson* on the ground that supplying textbooks was clearly an expenditure for education rather than for the general welfare.³¹ Further, it indicated that in any event it would not have followed *Everson* had the case not been distinguishable.³²

The dissenting opinion in the instant case took an entirely different approach from the majority. It did not concern itself with whether the state's funds ultimately benefited the school, and, if so, whether the benefit accrued to it in its religious

function. Rather, it made legislative intent the test of constitutionality: Applying this test it found that in the present case the legislative intent was to improve the quality of education by supervising the quality of the books used in the schools and that there was no intent to aid religious schools. Thus, it concluded that the statute was constitutional.³³

Both the majority and the dissenting opinions in this case broke new ground with the tests of constitutionality which they proposed. The dissenting opinion's "legislative intent" test is probably more liberal than any of those applied in the past. The majority's test, which forbids any state action which ultimately benefits a religious institution in its religious character appears to be more conservative than either the "child benefit" or the "remuneration" theory. It remains to be seen whether either will find favor with the courts of the other states or with the Supreme Court, should it be called upon to reconsider its opinion in the *Everson* case. If other courts see fit to adopt the majority's test the probable result will be the closing off of the trickle of public money now being diverted to students in private schools. On the other hand, if they choose to follow the path suggested by the dissent, the result may be a new era in which public money will be used to provide better educational opportunities for *all* children, without a requirement that they attend state operated schools.

²⁷ *Id.* at —, 366 P.2d at 541.

²⁸ *Id.* at —, 366 P.2d at 542.

²⁹ *Id.* at —, 366 P.2d at 542-43.

³⁰ 330 U.S. 1 (1947).

³¹ *Dickman v. School Dist. No. 62C*, — Ore. —, —, 366 P.2d 533, 540-41 (1961).

³² *Id.* at —, 366 P.2d at 540-41, 545.

³³ *Id.* at —, 366 P.2d at 545-47.