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WITNESSES FOR PROSECUTOR.

Arch R. Everson,
Direct 19

Charles Garfield Latham,
Direct 20
Cross 26

John Joseph Endebrock,
Direct 32
Cross 33

Writ of Certiorari.

(Filed August 19, 1943.)

New Jersey Supreme Court

NEW JERSEY, TO WIT: THE STATE OF NEW JERSEY, TO THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER—GREETING:

10

We being willing, for certain reasons, to be certified of a certain action of the Board of Education of the Township of Ewing, in the County of Mercer, in agreeing to pay the cost of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Parochial School, St. Francis School, and Trenton Catholic Boys High School, at a cost of approximately $859.80 for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainder thereof, do command you that you certify and send under your seal, to our Justices of our Supreme Court of Judicature, at Trenton, on the nineteenth day of August, 1943, all the proceedings, records, and papers dealing with said action of said Board of Education, together with all things touching and concerning the same, as fully and completely as they remain before you, together with this, our writ, that we may cause to be done thereupon what of right and justice and according to the laws of the State of New Jersey ought to be done.

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30

WITNESS, THOMAS J. BROGAN, Chief Justice of our Supreme Court, at Trenton, this 5th day of August, 1943.

JAMES J. GAVIN,
Clerk.

40

POWELL & PARKER,
Attorneys for Prosecutor.

Allocatur.

The within writ is allowed. Let it be sealed. Either side may take depositions on two days' notice to the other.

Charles W. Parker,
Justice of the Supreme Court.

10

July 31, 1943.

Acknowledgment of Service.

Service of the within writ and allocatur is hereby acknowledged, this thirteenth day of August, 1943.

20

William Abbotts,
Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

30

40

(Endorsement on Writ.)

NEW JERSEY SUPREME COURT.

Arch R. Everson,
Prosecutor, 10
vs.

The Board of Education of the Township of Ewing, in the County of Mercer and State of New Jersey; Florence S. Higgs, Julia Hoy, Anna Kendall, Anna Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter, James F. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, 20 August F. Jacobs, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan,
Respondents.

On Certiorari

WRIT OF CERTIORARI

ALLOCATUR. 30

POWELL & PARKER,
117 Main Street,
Mt. Holly, N. J.
Attorneys for Prosecutor.

40

Notice to Take Depositions.

(Filed August 20, 1943.)

NEW JERSEY SUPREME COURT.

ARCH R. EVERSON, Prosecutor, *vs.* THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*, Respondents.	**On Certiorari. Notice.**

10

To the Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy, Anna Kendall, Anna Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter, James J. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

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30

PLEASE TAKE NOTICE, that the prosecutor in the above entitled cause will pursuant to an order of the Court heretofore made in the above stated cause, take the depositions and introduce the exhibits on his part, before William N. Cooper, Esquire, a Supreme Court Commissioner, at his office, 1 West State Street, Trenton, New Jersey, at ten o'clock in the forenoon, on Monday, August 23, 1943.

Respectfully yours,

40

POWELL & PARKER,
Attorneys for Prosecutor.

Acknowledgment of Service.

Service of the within notice is hereby acknowledged, this 13th day of August, 1943.

William Abbotts,
Attorney for the Board of Education
10 of the Township of Ewing, in the
County of Mercer.

Affidavit of Service.

(Filed August 20, 1943.)

NEW JERSEY SUPREME COURT.

20

Arch R. Everson,
Prosecutor,
vs.
The Board of Education of the Township of Ewing, in the County of Mercer, *et al.*,
Respondents.

On Certiorari.
Affidavit.

30

State of New Jersey,
County of Mercer. } ss.:

John W. Kira, of full age, being duly sworn according to law, upon his oath deposes and says that:

1. I am a Deputy Sheriff of the County of Mercer in the State of New Jersey.

40

Affidavit of Service.

2. On Thursday, August 12, 1943, I personally served Florence S. Higgs with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to her at 53 Bank Street, Trenton, New Jersey, and explaining the contents thereof to her.

10

3. On the same day, I personally served Julia Hoy (whose correct name is Grace Hoy) with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 1582 Pennington Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

4. On the same day, I served Anna Kopezynski (whose correct name is Josephine Kopezynski) with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her father, Walter Paradowski, at her home, 1830 Pennington Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

20

5. On the same day, I personally served Anna Kendall (whose correct name is Grace Kendall) with a true copy of writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 6 Rutledge Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

30

6. On the same day, I personally served Julia Lydon, with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at Brookfield and N. Olden Avenues, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

40

Affidavit of Service.

7. On August 11, 1943, I personally served Frances Smith with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 345 Beechwood Avenue, Ewing Township, R. D., Trenton, New Jersey, and explaining the contents
10 thereof to her.

8. On the same day, I personally served Anna Williams with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 51 Ellsworth Avenue, Trenton, New Jersey, and explaining the contents thereof to her.

9. On the same day, I personally served Anna
20 Kelly with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her sister, Mrs. Huley at their home, Lower Ferry Road and Stuyvesant Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

10. On August 12, 1943, I personally served Ruth O'Brien with a true copy of the writ of certiorari and notice to take depositions in the above
30 entitled action by handing the same to her at Ewing Township Hall, R. D. Trenton, New Jersey and explaining the contents thereof to her.

11. On August 11, 1943, I served Paul H. Barr with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to his wife, at his home on Carlton Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof
40 to her.

Affidavit of Service.

12. On the same day, I served Mary Harter (whose correct name is Helen Harter) with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her husband, at her home 26 Summit Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him. 10

13. On the same day, I personally served James F. Hughes with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to him at 54 Harrop Place, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

14. On August 12, 1943, I personally served 20 Mary E. Ryan with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 16 Rutledge Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

15. On August 12, 1943, I personally served Catherine Wieger with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her 30 at Allison Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

16. On August 11, 1943, I personally served Bertha Brodowski with a true copy of the writ of certiorari and notice to take depositions in the above entitled action by handing the same to her at 430 Greenway Avenue, Ewing Township, R. D. 40 Trenton, New Jersey, and explaining the contents thereof to her.

New Jersey State Library

Affidavit of Service.

17. On August 12, 1943, I served John P. Sweeney with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home on Sutherland Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents
10 thereof to her.

18. On August 11, 1943, I served August F. Jacobs with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home 30 Iowana Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

20 19. On the same day, I served James H. Williams with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home 314 Beechwood Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

20. On August 16, 1943, I personally served Sarah Hills with a true copy of writ of certiorari and notice to take depositions in the above entitled
30 action, by handing the same to her at 22 Summit Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her.

21. On August 12, 1943, I personally served Victoria Domanski with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to her at 440 Weber Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof
40 to her.

Affidavit of Service.

22. On the same day, I served Robert J. Ryan with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to his wife at his home 1816 Pennington Road, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to her. 10

23. On the same day, I personally served William Ryan with a true copy of writ of certiorari and notice to take depositions in the above entitled action, by handing the same to him at 16 Rutledge Avenue, Ewing Township, R. D. Trenton, New Jersey, and explaining the contents thereof to him.

Annexed hereto, made a part hereof and filed herewith is a true copy of the notice to take depositions referred to hereinabove. 20

John W. Kira.

Sworn to and subscribed before me this twentieth day of August, 1943.

Lena M. Booz,
Notary Public, N. J.

30

40

Notice Annexed to Foregoing Affidavit.

NEW JERSEY SUPREME COURT.

ARCH R. EVERSON, Prosecutor, *vs.* THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*, Respondents.	**On Certiorari. Notice.**

10

To the Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy, Anna Kendall, Anna Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter, James J. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

20

PLEASE TAKE NOTICE, that the prosecutor in the above entitled cause will, pursuant to an order of the Court heretofore made in the above stated cause, take the depositions and introduce the exhibits on his part, before William N. Cooper, Esquire, a Supreme Court Commissioner, at his office, 1 West State Street, Trenton, New Jersey, at ten o'clock in the forenoon, on Monday, August 23, 1943.

30

Respectfully yours,

POWELL & PARKER,
Attorneys for Prosecutor.

40

Return to Writ.

(Filed August 19, 1943.)

NEW JERSEY SUPREME COURT.

ARCH R. EVERSON, Prosecutor, *vs.* THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, Respondents.	On Certiorari. Return to Writ.

10

To the Honorable the Justices of the Supreme Court of Judicature of New Jersey:

20

I, C. G. LATHAM, District Clerk of the Board of Education of the Township of Ewing, in the County of Mercer, in obedience to the command of the writ hereto annexed, directed to the said The Board of Education of the Township of Ewing, in the County of Mercer, do hereby certify and send to you, the said Justices, the proceedings, records, and papers dealing with the certain action of said Board of Education of the Township of Ewing, in the County of Mercer, in agreeing to pay the cost of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Parochial School, St. Francis School, and Trenton Catholic Boys High School, at a cost of $859.80, for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainder thereof.

30

40

Schedule.

In witness whereof, I have hereunto set my hand the seal of the said The Board of Education of the Township of Ewing, in the County of Mercer, this 19th day of August, 1943.

C. G. Latham,
10 District Clerk.

Schedule.

I, C. G. Latham, District Clerk of the Board of Education of the Township of Ewing, in the County of Mercer, do hereby certify that at a regular meeting of The Board of Education of the Township of Ewing, in the County of Mercer,
20 on September 21, 1942, the following action was taken in accordance with the minutes of said meeting:

"The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted."

30 C. G. Latham,
District Clerk.

40

Reasons.

(Filed August 20, 1943.)

NEW JERSEY SUPREME COURT.

ARCH R. EVERSON, Prosecutor, *vs.* THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*, Respondents.	On Certiorari. Reasons.

10

Arch R. Everson, the Prosecutor in the above entitled matter, relies upon the following reasons in his application to have set aside and for nothing holden the action of the Board of Education of the Township of Ewing, in agreeing to pay the costs of transportation of certain pupils from said Township to St. Mary's Cathedral High School, St. Hedwigs Parochial School, St. Francis School, and Trenton Catholic Boys High School at a cost of approximately $859.80 for the school year 1942-1943, and in paying a portion thereof and agreeing to pay the remainder thereof;

20

30

1. Said action of said Board of Education, which was taken pursuant to authority purported to be given by virtue of the provisions of 18:14-8 of the Revised Statutes of New Jersey, as amended by Chapter 191 of the Laws of 1941, is illegal and void and said action and said Chapter 191 of the Laws of 1941 invade the constitutional rights of prosecutor as a taxpayer within the

40

taxing district of the Township of Ewing, and all other taxpayers similarly situated, and said statute is wholly void and unconstitutional for the following reasons:

(a) Said statute violates the provisions of Article 1, Paragraph 3, of the Constitution of New 10 Jersey, in that it permits the raising of money by taxation for the maintenance of a religious ministry.

(b) Said statute violates Article 1, Paragraph 4, of the Constitution of New Jersey, in that it would permit the establishment of one religious sect in preference to another.

(c) Said statute violates the principle of complete separation of church and state enunciated 20 in Article 1, Paragraph 3, and Article 1, Paragraph 4, of the Constitution of New Jersey, in that it purports to authorize the use of public moneys to pay the costs of transportation to private sectarian schools.

(d) Said statute violates Article 1, Paragraph 19, of the Constitution of New Jersey, in that it purports to authorize a gift of public moneys to or in aid of individuals, associations, or corpora- 30 tions.

(e) Said statute violates Article 1, Paragraph 20, of the Constitution of New Jersey, in that it purports to authorize an appropriation of public money to or for the use of societies, associations, or corporations.

(f) Said statute violates Article 4, Section 7, Paragraph 6, of the Constitution of New Jersey, in that it purports to authorize the use of public 40 school funds of the State and the local school dis-

Reasons.

tricts for a purpose other than the maintenance and support of public free schools.

(g) Said statute violates the provisions of the Fourteenth Amendment of the Constitution of the United States.

2. Said action of said Board of Education and said statute are in divers other respects illegal and unconstitutional and should be set aside and for nothing holden.

10

Powell & Parker,
Attorneys for Prosecutor.

20

30

40

Depositions.

NEW JERSEY SUPREME COURT.

STATE OF NEW JERSEY,
ARCH R. EVERSON,
Prosecutor,

10

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING IN THE COUNTY OF MERCER AND STATE OF NEW JERSEY; FLORENCE S. HIGGS, JULIA HOY, ANNA KENDALL, ANNA KOPEZYNSKI, JULIA LYDON, FRANCES SMITH, ANNA WILLIAMS, ANNA KELLY, RUTH O'BRIEN, PAUL H. BARR, MARY HARTER, JAMES F. HUGHES, MARY E. RYAN, CATHERINE WIEGER, BERTHA BRODOWSKI, JOHN P. SWEENEY, AUGUST F. JACOBS, JAMES H. WILLIAMS, SARAH HILLS, VICTORIA DOMANSKI, ROBERT J. RYAN and WILLIAM RYAN,
Respondents.

20

Depositions.

Depositions taken before WILLIAM N. COOPER, ESQ., Supreme Court Commissioner, on the 23d day of August, 1943, at the hour of ten o'clock in the forenoon; said depositions having started at his office, 503 First Mechanics National Bank Building, Trenton, N. J., and because of the number of people appearing was adjourned to the Assembly Room on the fifth floor of said First Mechanics Bank Building.

30

Depositions were taken in pursuance of notice given.

40

Colloquy.

Appearances:

Powell & Parker, Esqs., by Albert McKay, Esq., for Prosecutor.

William Abbotts, Esq., for Board of Education of the Township of Ewing.

10

I, Marion H. Sweetman, hereby certify that the attached transcript is a true and accurate copy of my stenographic notes taken before William N. Cooper, Esq., a Supreme Court Commissioner of the State of New Jersey, at his office 503 First Mechanics Bank Building, Trenton, N. J., on August 23, 1943.

Marion H. Sweetman.

20

It is stipulated that signatures to the depositions are waived, and that the said depositions shall be certified to by the stenographer.

(Marion H. Sweetman, C.S.R., was duly sworn as the stenographer.)

The Commissioner: Will you, please, answer to your names and tell us whether or not you are represented by any counsel?

30

Are there any attorneys here representing anyone?

If the name is not absolutely correct, please let me know whether the name is correct or incorrect.

Florence S. Higgs; not present and not represented by counsel.

Julia Hoy (correct name Grace Hoy); not present and not represented by counsel.

40

Colloquy.

Anna Kendall (correct name Grace Kendall); not present and not represented by counsel.

Anna Kopezynski (correct name Josephine Kopezynski); not present and not represented by counsel.

Julia Lydon; not present and not represented
10 by counsel.

France Smith (correct name Frances Smith); not present and not represented by counsel.

Anna Williams; not present and not represented by counsel.

Anna Kelly; not present and not represented by counsel.

Ruth O'Brien, appearing personally.

Paul H. Barr, appearing personally.

Mary Harter (correct name Helen Harter), ap-
20 pearing personally.

James F. Hughes (correct name James T. Hughes), appearing personally.

Mary E. Ryan; not present and not represented by counsel.

Catherine Wieger, appearing personally.

Bertha Brodowski, not present and not represented by counsel; her husband.

Edmund F. Brodowski, appearing personally.

John P. Sweeney, not present and not repre-
30 sented by counsel.

August F. Jacob (correct name August Jacob) appearing personally.

James H. Williams, not present and not represented by counsel.

Sarah Hills; not present and not represented by counsel.

Victoria Domanski; not present and not represented by counsel.

Robert J. Ryan; not present and not repre-
40 sented by counsel.

William Ryan; not present and not represented by counsel.

Those of you who have appeared are parties defendant in this action. You are not represented by counsel, and I will give you the opportunity to ask any questions that you want to put on the record.

A stipulation has been made by counsel present that the testimony will be taken, the signature of the witness is waived, and the certificate of the stenographer will be issued. 10

Are you all satisfied that that be done?

Arch R. Everson, being duly sworn, deposes and says as follows:

Direct examination by Mr. McKay: 20

Q. What is your address, Mr. Everson? A. 508 Maple Avenue, Ewing Township.

Q. That is Mercer County? A. That is right.

Q. Do you own your home at that address? A. I do.

Q. And you pay taxes on that property to the Township of Ewing? A. That is right.

Mr. McKay: That is all.

Mr. Abbotts: No questions. 30

The Commissioner: Is there anyone present who desires to ask this gentleman any questions on anything that he has testified to?

(No response.)

Mr. McKay: Mr. Commissioner, there was one question I should have asked Mr. Everson that I did not. I wonder if counsel has any objection. 40

Mr. Abbotts: No.

Q. Mr. Everson, are you the prosecutor in this proceeding? A. Yes.

Mr. McKay: That is all.

---

10 CHARLES GARFIELD LATHAM, being duly sworn, deposes and says as follows:

Direct examination by Mr. McKay:

Q. Mr. Latham, are you connected with the Board of Education of the Township of Ewing, in the County of Mercer? A. I am.

Q. What is your position? A. District Clerk.

Q. Will you please, refer to the minutes of the meeting of the Board of Education of the Town-
20 ship of Ewing held on September 21, 1942? A. Yes.

Q. Do you find there a resolution authorizing payment of the cost of transportation of certain pupils from the Township of Ewing to certain private schools in the City of Trenton? A. Do you mean by private schools, parochial schools?

Q. Yes. A. Yes, I find it here.

Q. Will you read that resolution, please? A. (Reading) "The transportation committee recom-
30 mended the transportation of pupils of Ewing to the Trenton and Pennington High Schools and Catholic Schools by way of public carrier as in recent years. On Motion of Mr. Ralph Ryan and Mr. M. French the same was adopted."

Q. Mr. Latham, after the adoption of this resolution, were certain applications received from parents of children who desired to send their children from the Township to certain parochial schools in the City of Trenton? A. Yes. I say yes
40

to that. The applications were made, and they were carried on renewal each year.

Q. Didn't certain pupils thereafter from the Township of Ewing attend certain parochial schools in the City of Trenton? A. They did.

Q. Do you have a record of any payments made to parents to reimburse them for the cost of transportation of pupils from the Township of Ewing to parochial schools in the City of Trenton? A. I do. 10

Q. When were those payments made? A. They were made the first five months and second five months' period. They are made about February, after January's attendance comes in. It is somewhere around the middle of February, or the 15th, when they go out.

Q. Will you, please, refer to your records and tell me whether you have a record of pupils from the Township of Ewing attending St. Hedwig's parochial school in the City of Trenton? A. I do. 20

Q. Will you, please, give us a list of the payments made for transportation of such pupils from Ewing Township to that school, giving the name of the parent, the name of the pupil, and the amount? A. Victoria Domanski, daughter, Dorothy, $19.36; Victoria Domanski, Arthur, $19.36; Victoria Domanski, Robert, $19.36. 30

Q. Those payments were made, were they not, to reimburse Victoria Domanski for the cost of transportation of her three children from the Township to St. Hedwig's parochial school in the City of Trenton? A. Right.

Q. Will you refer to your records, please, and tell me whether you have a record of certain payments made to parents for transportation of their children from the Township to St. Francis parochial school in the City of Trenton? A. I have. 40

Q. Will you, please, give us a list of the payments that were made, giving the name of the parent, the name of the pupil, and the amount that was paid? A. Yes. This name since that has been changed here because the name was Mrs. Karl Harter.

10 Q. Give it. A. Mrs. Karl Harter, Frances, daughter, $17.80. Mrs. Karl Harter, Karl, $17.80.

Q. Those payments were made, were they not, to reimburse Mrs. Karl Harter for cost of transportation for her children from the Township of Ewing to St. Francis parochial school in the City of Trenton? A. That is right.

Q. Will you, please, refer to your records again and tell me whether you have a record of payments made to parents to reimburse them for cost of

20 transportation of their children from the Township to the Catholic Boys' High School in the City of Trenton? A. Yes, I have that record.

Q. Will you, please, give us a list of the payments that were made, giving the name of the parent, the name of the pupil, and the amount that was paid? A. Mrs. E. R. Kendall, son Robert, $17.60.

Mrs. A. Kopeczynski, Alexander, $16.50.

Frances J. Smith, for Frances, $18.26.

30 Mrs. James H. Williams, for James, $9.90.

Q. Will you, please, refer to your records again and tell us whether you find a record of payments having been made to certain parents to reimburse them for costs of transportation of their children from the Township of Ewing to St. Mary's Cathedral High School in the City of Trenton? A. I have it.

Q. Will you, please, give us a list of the payments that were made, giving the name of the

40 parent, the name of the pupil, and the amount that

was paid? A. Bertha K. Brodowski, for daughter Irene, $15.80.

James T. Hughes, for Alice, $18.20.

Mrs. Karl Harter, for Helene, $18.60.

Mrs. Karl Harter, for Hildegarde, $18.60.

August Jacob, for Margaret, $18.40.

Anna Kelly, for Barbara, $17.80. 10

Ruth O'Brien, for Joanne, $17.20.

William J. Ryan, for Mary, $18.00.

Mrs. James H. Williams, for Ann, $9.20.

Catharine Wieger, for Marie, $18.60.

John P. Sweeney, for Eileen Hogan, $5.20.

Paul H. Barr, for Lillye, $18.60.

Robert Ryan, for Kathleen, $17.60.

Q. Mr. Latham, those payments that you just read were made to parents covering transportation for the first half of the school year, commencing September, 1942, were they not? A. That is right. 20

Q. Have any payments been made to parents of children attending parochial schools for transportation covering the last half of the school year commencing September, 1942? A. No.

Q. Have certain pupils from the Township of Ewing been attending Catholic parochial schools in the City of Trenton during the last half of that year? A. Yes. 30

Q. Why haven't they been reimbursed? A. On advice of counsel not to pay the second half.

Q. That advice of counsel was given to the Board of Education after this proceeding was instituted, wasn't it? A. Yes, that is right.

Q. Do you have a record of the pupils from Ewing Township who have been attending parochial schools in the City of Trenton during the last half of the school year, 1942? A. Yes.

Q. Will you refer to your records, please, and tell me the names of the parents of such children, 40

the name of the pupil, and your record of the attendance at St. Hedwig's parochial school for the last half of the school year commencing September, 1942? A. Victoria Domanski, parent, for Dorothy Domanski; I have a record of attendance for February, March and April, and none for May, 10 and June.

Q. When you say "none for May or June," does that mean that you have not received a report from the school as to attendance? A. That is right.

Q. Will you, please, proceed with the list of the names of pupils attending the school for the last half of the school year ending June 30, 1943? A. Victoria Domanski, for Arthur, attendance for February, March, and April, and none for May 20 and June.

Q. When you say "none for May and June," do you mean that you have not received the record from the school? A. That is right.

Q. Will you proceed with the list, please? A. Victoria Domanski, for Robert, attendance for February, March, and April. No report on May and June.

Q. Will you, please, refer to your records and give me a list of the pupils attending St. Francis 30 parochial school from the Township of Ewing during the last half of the school year ending June 30, 1943, giving the name of the parent, the pupil, and your record of the attendance? A. Mrs. Karl Harter, for Francis, a record of February, March, April, May, and June. Mrs. Karl Harter, for Karl, record complete, February, March, April, May, and June.

Q. Do you have a record of certain pupils from the Township of Ewing attending the Catholic 40 Boys' high school in the City of Trenton during

the last half of the school year ending June 30, 1943? A. Yes, I do.

Q. Will you, please, give us a list of those pupils, giving the name of the parent, the name of the pupil, and your record of the attendance at the school? A. Mrs. E. R. Kendall, for Robert, report for February, March, April, and May. No report on June. 10

Mrs. A. Kopszynski, for Alexander, report for February, March, April, and May. None for June.

Q. When you say "none for June," you mean that you have not received a report from the school? A. No report.

Mrs. Frances J. Smith, for Frances, report for February, March, April, and May, but no attendance report for June.

Mrs. James A. Williams, for James, no report at all, boy having left November 21, 1942. 20

Q. Will you, please, refer to your records again and give us a list of the pupils from the Township of Ewing who attended St. Mary's Cathedral high school in the City of Trenton during the last half of the school year ending June 30, 1943, giving the name of the parent, the name of the pupil, and your record of attendance at that school.

Bertha K. Brodowski, for Irene, attendance report for February, March, April, and May. No report on June. 30

James T. Hughes, for Alice, report on February, March, April, and May, but no report for June.

Mrs. Karl Harter, for Helene, report for February, March, April, and May. No report on June.

Mrs. Karl Harter, for Hildegarde, report for February, March, April, and May. No report for June.

August Jacob, for Margaret, report for February, March, April, and May. No report on June. 40

Mrs. Anna Kelly, report for Barbara, report for February, March, April, and May. No June report.

Mrs. Ruth O'Brien, for Joanna (*sic*), report for February, March, April, and May. No report for June.

10 Mrs. Mary E. Ryan, for Mary, report for February, March, April, and May. No report for June.

Mrs. James H. Williams, for James, no report, having moved from Township.

Mrs. Catherine Wieger, for Marie, report for February, March, April, and May. None for June.

John J. Sweeney, for Eileen Hogan, no report, having left school.

Paul H. Barr, for Lillye, report for February, March, April, and May. No report on June.

20 Robert J. Ryan, for Kathleen, report for February, March, April, and May. No report on June.

Q. Mr. Latham, isn't it a fact that payments would have been made to the parents to reimburse them for costs of transportation during the last half of the school year ending June 30, 1943, if Mr. Abbotts had not advised the Board of Education to withhold payment pending this proceeding? A. Do you mean it would have been paid?

Q. Yes. A. Well, I suppose it would. If counsel
30 had not advised against it, it probably would have been paid.

Q. It probably would have been paid if Mr. Abbotts had not advised against it? A. Yes, Mr. Abbotts, after reading these proceedings, advised against payment while these were going on.

Mr. McKay: That is all.

Cross examination by Mr. Abbotts:

40 Q. Mr. Latham, the school law provides for the payment of costs of transportation, provided that

the children involved are transported a certain distance. You know of the existence of that law, don't you? A. Yes.

Q. Was anything done to check up on the distance that it was necessary to be traveled by these children who were going to the parochial schools before they were put in line for payment of that transportation? A. Yes. 10

Q. Who checked the distance? A. I did, the District Clerk.

Q. Did you find that all of the children who were being put in line for payment for their transportation had need to travel the required distance? A. I did.

Q. You have testified to certain payments being made to the parent involved for the transportation of the children, whose names you have given, to the parochial schools. Were those payments actually made by the Board of Education to the parents involved? A. Yes. 20

Q. Were the payments of those sums authorized by the Board of Education? A. Yes.

Q. Can you refer to your minutes and tell us when they were authorized? A. The minutes show on Monday, February 15, 1943, the Board authorized the payment of a transportation bill for the first half of high school and elementary at Trenton, to the amount of $8,034.95. 30

Q. Did that sum of $8,034.95 include the payment to the people whose names you read off and the amounts? A. Yes, it did.

Q. Was there any transportation of pupils from Ewing Township to schools other than the parochial schools involved? A. Trenton High Schools, both junior and senior.

Q. The setup in Ewing Township so far as grades are concerned goes how far? A. The eighth grade. 40

Q. And pupils who want to go to school beyond the eighth grade, what do you do with them? A. They go to the City of Trenton and some to Pennington.

Q. Do you pay the cost of tuition? A. Yes.

Q. During the school year from beginning July 10 1, 1942, and ending June 30, 1943, what tuition did you pay for pupils going to schools other than the parochial schools? A. Do you mean the total sum?

Q. No. The individual amounts? A. $175 and $195.

Q. What do you pay to the City of Trenton? A. Junior schools $175 and senior schools $195.

Q. Those pupils that you send to Pennington, how much do you pay for tuition? A. $128 a year for all grades.

20 Q. Then in addition to the payment for tuition, did you make any payments for transportation to those pupils who were going to the Trenton Senior High and the Trenton Junior High and the Pennington school? A. Yes, we made payments to them.

Q. In accordance with the law? A. That is right.

Q. Do you know how many of the pupils who were transported to the parochial schools were 30 of high school grades? A. Yes, I can tell by my cards here.

Q. Do you know how many were of elementary grades? A. Yes.

Q. Will you tell me how many pupils that were transported to the parochial schools were of elementary grade? A. Five; two to St. Francis and three to St. Hedwig's.

Q. And all of the other pupils who were transported to parochial schools were of high school 40 grade, is that correct? A. Right.

Q. Would it have been necessary under the law to have paid the cost of transportation of the pupils of high school grade if they had gone to the public school as furnished by Ewing Township, namely, to the Trenton Junior and Senior high schools? A. I did not just get that. Do you mean the elementary? 10

Q. No. Would you have paid the transportation to the Trenton Senior and Junior high schools of those pupils who were going to the parochial high schools if they had not gone to parochial schools but had gone to the facilities which you were furnishing, namely, the Trenton high schools? A. Yes.

Q. And if they had not gone to parochial schools but had gone to the public schools, which you were furnishing, namely, the Trenton high schools, 20 you would also have paid their tuition, is that correct? A. That is correct.

Q. As I understand it, you did not pay anything for tuition for these pupils who went to the parochial schools? A. No.

Q. Just to clear up one point. Your records for attendance at the parochial schools is not complete for the second half of the school year beginning July 1, 1942, and ending June 30, 1943; is that correct? A. That is right. 30

Q. I take it that if I had not advised the school board not to make payments you would have had those records complete? A. I would have gone to the school and got them.

Q. And after having them completed would you have presented the report of the cost to the school board for payments? A. Yes.

Q. Mr. Latham, how are the children who are transported to Trenton high school, whether senior or junior, transported? A. By public carrier, bus. 40

Q. In other words, they take the public carrier conveyance, is that right? A. That is right.

Q. How are they reimbursed for that cost of transportation? A. By report of the high school on their monthly attendance, which I check on the back of these cards, and at the end of five months
10 it is added up and they are paid according to what it costs, 22 cents a day or 20.

Q. You mean that the pupil involved pays his or her own transportation on the public carrier, and is— A. And reimbursed after five months.

Q. And reimbursed for the number of days of actual attendance as shown by the report coming from the school? A. That is right.

Q. What is the cost of the transportation per day? A. It varies according to the schools they
20 go to.

Q. What is the reason for the variance? A. Some do not have to take a transfer.

Q. And those who do not have to take a transfer, what is the actual cost? A. Ten cents. 20 cents a day. Ten cents each way. But the Board provides a penny for transfer purposes for those who go to town and have to transfer over to Central high school.

Q. Can you tell us in transporting to what
30 schools is a transfer necessary? A. Well, you see now you are speaking of all schools. The parochial schools—St. Mary's it is 20 cents; but the Boys Catholic high school is 22 cents because they go in the center of town and must take a transfer on Chambers Street or Chestnut I think it is.

Q. And for that transfer they must pay one cent each way? A. They are allowed one cent each way.

Q. Is it upon the same basis, namely, a report
40 of days actually attended at the school that you

have paid the cost of transportation to those who have gone to the parochial schools as listed by you? A. That is right.

Q. The 20 cents a day or 22 cents a day is a round trip? A. That is a round trip.

Q. In other words, the ordinary 1 zone bus fare in Trenton, and including Ewing Township, is 10 cents? A. Yes. 10

Q. And 1 cent for a transfer to another line? A. That is right.

Mr. Abbotts: That is all.

The Commissioner: Does any person present desire to ask this witness any questions?

Father Endebrock: I would like to make a correction in one of his statements. 20

The Commissioner: Just a moment. You cannot correct a witness. You can testify, if you wish. You can only ask the witness a question whether or not his answer is correct.

If you wish to do that you may do it. Just ask the witness the question, please.

Father Endebrock: Speaking of the children of Mrs. Williams attending the Catholic Girls high school you said James rather than Ann. It does not make much difference but it would look rather odd to say James attended a girls' high school. 30

The Witness: There are two Williamses. One goes to the boys' school and that is James.

Father Endebrock: The first time you had it correct and then when you repeated "Mrs. James Williams" you said "James" rather than "Ann." 40

The Witness: That is because the card got in the wrong place.

The Commissioner: Suppose you ask the question.

Mr. McKay: I would prefer to ask that question rather than have Father Endebrook ask it as I am not so sure that he has the right to question the witness.

The Commissioner: Do you have any objection to counsel asking the question?

Father Endebrock: No.

By Mr. McKay:

Q. Mr. Latham, when you testified relative to the attendance of pupils at St. Mary's Cathedral high school you testified that James Williams was one of the pupils; is that correct, or should it have been Ann? A. It should have been Ann.

John Joseph Endebrock, being duly sworn, deposes and says as follows:

Direct examination by Mr. McKay:

Q. Father Endebrock, are you in any way connected with the Catholic parochial schools in the City of Trenton? A. Yes, I am.

Q. What is your position, Father? A. I am Superintendent of the parochial schools throughout the Diocese of Trenton, which includes the City of Trenton.

Q. Are Catholic Boys high school and St. Mary's Cathedral high school, St. Francis school, St. Hedwig's parochial school all Roman Catholic parochial schools in the City of Trenton? A. They are.

Q. Father Endebrock, are you familiar with the curricula in those schools? A. Yes.

Q. Is religion taught as part of the curricula? A. Yes, it is.

Q. In each one of the schools that I mentioned? A. Yes.

Mr. McKay: That is all. 10

Cross examination by Mr. Abbotts:

Q. Father Endebrock, the schools which have been mentioned by counsel, are they conducted in whole or in part for profit? A. No.

Q. Not at all. A. The only money taken in is what is paid by the parents, or the parish for the maintenance of the school, but they all operate at a loss. 20

Mr. Abbotts: That is all.

The Commissioner: Does anyone have any questions that they desire to ask Father Endebrock?

(No response.)

Mr. McKay: I was wondering if any of the defendants had come in since the hearing started.

The Commissioner: Has anyone come in 30 since I read out the names?

(No response.)

The Commissioner: Has anyone here been made a party defendant by order of the court?

This testimony has been taken in pursuance of a notice given. I do not know whether I should give you the opportunity of offering any testimony you have, but if 40

counsel have no objection if anybody has any testimony that you want to offer, unless counsel do object I will give you an opportunity of doing so.

Mr. KcKay: I have no objection, and I think that any defendant here is entitled to 10 put in his or her testimony.

The Commissioner: I think so. Do any of the ladies or gentlemen have any testimony to give which you think has not been covered?

Of course, you understand this is only a preliminary hearing to take testimony to go before the Court. Certain facts have to be presented before the Court and if those facts are as you believe them and you have 20 no contradictory testimony I presume you have nothing to offer.

Make a note I made the offer and no one desires to present any testimony.

Mr. McKay: There is only one thing further I have in mind. I would like to talk with Mr. Abbotts a moment if I may.

(Conference between counsel.)

Mr. McKay: I think that is all, Mr. Com- 30 missioner.

The Commissioner: The taking of the testimony is now adjourned.

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Certificate of Supreme Court Commissioner.

State of New Jersey, } ss.:
County of Mercer. }

I, William N. Cooper, Supreme Court Commissioner, do hereby certify that the foregoing depositions were taken before me on the twenty-third day of August, 1943, at the hour of ten o'clock in the forenoon, in pursuance of the certificate of Marion H. Sweetman hereto attached; that the witnesses were duly sworn to testify to the truth, the whole truth, and nothing but the truth, and did depose to the matters contained in the foregoing depositions; that the said testimony was taken stenographically by the said Marion H. Sweetman in my presence.

William N. Cooper,
Supreme Court Commissioner.

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Notice of Application to Amend Writ.

(Filed September 20, 1943.)

NEW JERSEY SUPREME COURT.

ARCH R. EVERSON,
Prosecutor,

vs.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*,
Respondents.

On Certiorari.

Notice.

To The Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

PLEASE TAKE NOTICE, that on Tuesday, October 5, 1943, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall apply to the New Jersey Supreme Court, at the State House, Annex, in the City of Trenton, New Jersey,

Acknowledgment of Service.

for an order amending the writ of certiorari in the above entitled matter by striking out the names of Julia Hoy, Anna Kendall, Anna Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs, respondents in the above entitled matter, and substituting in place thereof their correct names as follows: Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively.

Respectfullly yours,

Powell & Parker,
Attorneys for Prosecutor.

Acknowledgment of Service.

Service of the within notice is hereby acknowledged this third day of September, 1943.

William Abbotts,
Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

Notice of Argument.

(Filed September 20, 1943.)

NEW JERSEY SUPREME COURT.

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ARCH R. EVERSON,
Prosecutor,
vs.
THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*,
Respondents.

On Certiorari.

Notice of Argument.

20 *To William Abbotts, Esq., Attorney for Respondent, Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter (whose correct name is* 30 *Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:*

PLEASE TAKE NOTICE of argument of the above entitled cause before the New Jersey Supreme Court, to be held at the State House Annex, in the

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Acknowledgment of Service.

City of Trenton, New Jersey, on the 5th day of October, 1943, at ten o'clock in the forenoon, or as soon thereafter as the same can be heard by said Court.

Powell & Parker,
Attorneys for Prosecutor.

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Dated: September 3, 1943.

Acknowledgment of Service.

Service of the within notice of argument is hereby acknowledged this third day of September, 1943.

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William Abbotts,
Attorney for the Board of Education of the Township of Ewing, in the County of Mercer.

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Affidavit.

(Filed September 20, 1943.)

NEW JERSEY SUPREME COURT.

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ARCH R. EVERSON,
Prosecutor,
vs.
THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*,
Respondents.

On Certiorari.
Affidavit.

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STATE OF NEW JERSEY, }
COUNTY OF MERCER. } ss.:

JOHN K. (*sic*) KIRA, of full age, being first duly sworn according to law, upon his oath deposes and says:

1. That on Tuesday, September 7, 1943, I personally served Florence S. Higgs with true copies of notice of argument and notice of application to amend writ of certiorari in the above entitled matter, by handing the same to her at 53 Bank Street, Trenton, New Jersey, and explaining the contents thereof to her.

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2. On the same day, I personally served Anna Kendall (whose correct name is Grace Kendall) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her at 6 Rutledge Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

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Affidavit.

3. On the same day, I served Anna Kopezynski (whose correct name is Josephine Kopezynski) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her father, Walter Pardowski, at her usual place of abode, 1830 Pennington Road, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him. 10

4. On the same day, I served Julia Lydon with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her husband, Michael Lydon, at her usual place of abode, 172 Brookland Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

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5. On the same day, I personally served Frances Smith with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 345 Beechwood Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

6. On the same day, I personally served Anna Williams with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 51 Ellsworth Avenue, Trenton, New Jersey, and explaining the contents thereof to her. 30

7. On the same day, I served Anna Kelly with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her sister, Mary Entwistle, at the usual place of abode of said Anna Kelly, Lower Ferry Road, Ewing Township, Mercer County, 40

New Jersey, and explaining the contents thereof to said Mary Entwistle.

8. On the same day, I personally served Ruth O'Brien with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at the Ewing Township Hall, Pennington Road and Green Lane, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

9. On Wednesday, September 8, 1943, I personally served Paul H. Barr with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to him at Carlton Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

10. On Tuesday, September 7, 1943, I personally served Mary Harter (whose correct name is Helen Harter) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing the same to her at 26 Summit Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

11. On the same day, I served James F. Hughes (whose correct name is James T. Hughes) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, Alice Hughes, at his usual place of abode, 54 Harrop Place, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

12. On the same day, I served Mary E. Ryan with true copies of said notice of argument and

notice of application to amend writ of certiorari, by handing same to her husband, William Ryan, at her usual place of abode, 16 Rutledge Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to him.

13. On the same day, I personally served Catherine Wieger with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at Allison Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her. 10

14. On the same day, I personally served Bertha Brodowski with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 430 Greenway Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her. 20

15. On the same day, I served John P. Sweeney with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, at his usual place of abode, Sutherland Road, Ewing Township, Mercer County, New Jersey, and explaining the content thereof to her. 30

16. On the same day, I served August F. Jacobs (whose correct name is August Jacob) with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, Maria Jacob, at his usual place of abode, 30 Iowana Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her. 40

17. On the same day, I served James H. Williams with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to his wife, Anna Williams, at his usual place of abode, 51 Ellsworth Avenue, Trenton, New Jersey, and explaining the
10 contents thereof to her.

18. On the same day, I personally served Sarah Hills with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 22 Summit Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

19. On the same day, I personally served Vic-
20 toria Domanski with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to her at 440 Weber Avenue, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

20. On the same day, I served Robert J. Ryan with true copies of said notice of argument and notice of application to amend writ of certiorari,
30 by handing same to his wife, Emily Ryan, at his usual place of abode, 1816 Pennington Road, Ewing Township, Mercer County, New Jersey, and explaining the contents thereof to her.

21. On the same day, I personally served William Ryan with true copies of said notice of argument and notice of application to amend writ of certiorari, by handing same to him at 16 Rutledge Avenue, Ewing Township, Mercer County, New
40 Jersey, and explaining the contents thereof to him.

Affidavit.

Annexed hereto and made a part hereof are true copies of the notice of argument and notice of application to amend writ of certiorari referred to herein.

John W. Kira.

Sworn to and subscribed before me this 10th day of September, 1943.

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Lena M. Booz,
Notary Public of New Jersey.

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Notice of Argument Annexed to Foregoing Affidavit.

NEW JERSEY SUPREME COURT.

ARCH R. EVERSON,
Prosecutor,

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vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*,
Respondents.

On Certiorari.

Notice of Argument.

To: William Abbotts, Esq., Attorney for Respondent, Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul H. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

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PLEASE TAKE NOTICE of argument of the above entitled cause before the New Jersey Supreme Court, to be held at the State House Annex, in the City of Trenton, New Jersey, on the 5th day of October, 1943, at ten o'clock in the forenoon, or as

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soon thereafter as the same can be heard by said Court.

POWELL & PARKER,
Attorneys for Prosecutor.

Dated: September 3, 1943.

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Notice Annexed to Foregoing Affidavit.

NEW JERSEY SUPREME COURT.

ARCH R. EVERSON, Prosecutor, *vs.* BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*, Respondents.	On Certiorari. Notice.

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To: The Board of Education of the Township of Ewing, in the County of Mercer, Florence S. Higgs, Julia Hoy (whose correct name is Grace Hoy), Anna Kendall (whose correct name is Grace Kendall), Anna Kopezynski (whose correct name is Josephine Kopezynski), Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul N. Barr, Mary Harter (whose correct name is Helen Harter), James F. Hughes (whose correct name is James T. Hughes), Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August F. Jacobs (whose correct name is August Jacob), James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan and William Ryan:

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PLEASE TAKE NOTICE, that on Tuesday, October 5, 1943, at 10 o'clock in the forenoon, or as soon

Notice Annexed to Foregoing Affidavit.

thereafter as counsel can be heard, we shall apply to the New Jersey Supreme Court, at the State House Annex, in the City of Trenton, New Jersey, for an order amending the writ of certiorari in the above entitled matter by striking out the names of Julia Hoy, Anna Kendall, Anna Kopezynski,
10 Mary Harter, James F. Hughes and August F. Jacobs, respondents in the above entitled matter, and substituting in place thereof their correct names as follows: Grace Hoy, Grace Kendall, Josephine Kopezyński, Helen Harter, James T. Hughes and August Jacob, respectively.

Respectfully yours,

POWELL & PARKER,
Attorneys for Prosecutor.

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Order Amending Writ of Certiorari.

(Filed October 6, 1943)

NEW JERSEY SUPREME COURT.

ARCH R. EVERSON, Prosecutor, *vs.* THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*, Respondents.	On Certiorari. Order Amending Writ of Certiorari.

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This matter being opened to the court by Powell & Parker, Attorneys for the Prosecutor, and it appearing that notice has been duly served upon all the respondents herein of an application to this court for an order amending the writ of certiorari filed herein by striking out the names of the respondents, Julia Hoy, Anna Kendall, Anna Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs and substituting their correct names in place thereof; and it further appearing to the satisfaction of the court that the correct names of said respondents are Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively, and that they have been duly served with true copies of said writ of certiorari; and William Abbotts, Esq., Attorney for the Respondent, Board of Education of the Township of Ewing, having consented to the entry of this order; and no reason appearing to the contrary:

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Order Amending Writ of Certiorari.

It is, on this fifth day of October, 1943, ORDERED that the writ of certiorari in the above entitled matter be and hereby is amended by striking out the names of the Respondents, Julia Hoy, Anna Kendall, Anna Kopezynski, Mary Harter, James F. Hughes and August F. Jacobs, and substituting in place thereof their correct names as follows: Grace Hoy, Grace Kendall, Josephine Kopezynski, Helen Harter, James T. Hughes and August Jacob, respectively. Let this rule be entered.

CHARLES W. PARKER,
Justice of the New Jersey
Supreme Court.

Entered on Motion of:

(Signed) POWELL & PARKER,
Powell & Parker,
Attorneys for Prosecutor.

I hereby consent to the entry of the within order amending writ of certiorari.

(Signed) WILLIAM ABBOTTS,
William Abbotts,
Attorney for the Respondent,
Board of Education of the
Township of Ewing.

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Opinion of Justices Parker and Perskie.

(Filed September 13, 1944.)

NEW JERSEY SUPREME COURT.

No. 233, October Term, 1943.

Arch R. Everson, Prosecutor, *vs.* The Board of Education of the Township of Ewing, *et al.*, Respondents.	On Certiorari. Before Justices Parker, Heher and Perskie. Submitted October 5, 1943. Decided September 13, 1944.

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Resolution of township board of education, appropriating money, part of school fund, for transportation of pupils to and from schools in a neighboring city other than public schools, held unconstitutional and invalid. 20

For the prosecutor, Harold T. Parker (Joseph Beck Tyler, *amicus curiae*).

For the respondents, John Solan and William Abbotts.

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The opinion of the Court was delivered by

Parker, *J.*

The question raised by this writ, and submitted on briefs without oral argument, is as to the legal validity of a resolution adopted by the Board of Education of the Township of Ewing, adjoining the City of Trenton, relating to the transportation to Trenton and return, of school children. It appears that the public school facilities in the town- 40

ship do not extend beyond the eighth grade, and that pupils past that grade have customarily attended public schools in Trenton or Pennington, the township paying for the tuition, and also the cost of transportation advanced by parents or other relatives. Previous to July 1, 1941, all children so transported attended public high schools, and the township Board contracted for their transportation pursuant to R. S. 18:14-8, the first paragraph of which provided that "whenever in any district there are children living remote from the schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school." The original act seems to date from 1903; (acts of second special session, p. 45). But in 1941 (P. L. p. 581) the paragraph above quoted was amended and another paragraph added. In the first paragraph the words "the schoolhouse" are changed to read "any schoolhouse" and after the words "to and from school" the paragraph continues "including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part." The additional paragraph reads: "When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part."

The result, of course, is to provide for free transportation of children at the expense of the home municipality and of the State school fund to

and from any school, other than a public school, which is not operated for profit; and accordingly, the resolution brought up by this writ provides for the transportation of school children of Ewing township, not only to the Trenton and Pennington High Schools, but to certain other designated schools in Trenton not operated for profit, but not connected with the public school system, "by way of public carriers as in recent years." It is stipulated that the township authorities pursuant to the resolution agreed to pay for the then current school year the cost of transportation to such non-public schools approximately $859.80 and actually did pay part thereof.

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We conclude that the resolution under review must be set aside, on the fundamental ground that the amendment of 1941 is in violation of paragraph 6 of Section 7 of Article IV of the Constitution, which reads: "The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund, or any part thereof, for any other purpose, under any pretense whatever. * * *"

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The facts are not in dispute. We are called upon to decide the purely legal question whether or not the township board of education in appropriat-

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ing money for transportation of pupils to and from parochial schools in a neighboring city, *i. e.*, other than public schools, contravened paragraph 6 quoted above.

There are two theories. A majority of the State courts have held such transportation unconstitu-
10 tional. The leading case, supporting that theory, is the New York case of *Judd* v. *Board of Education,* 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789. Typically illustrative of this theory are the following cases: *State ex rel. Traub* v. *Brown* (Delaware) 36 Del. 181, 172 A. 835; *Sherrard* v. *Jefferson County Board of Education* (Kentucky), 294 Ky. 469, 171 S. W. (2d) 968; *Gurney* v. *Ferguson* (Oklahoma), 190 Okl. 254, 122 P. (2d) 1002; *Mitchell* v. *Consolidated School District No. 201*
20 (Washington), 135 P. (2d) 79; and *State ex. rel. Van Straten* v. *Milquet* (Wisconsin), 180 Wis. 109, 192 N. W. 392.

The other theory (Child Benefit Theory) that such transportation is not unconstitutional was adopted by the court of Maryland (*Board of Education of Baltimore County* v. *Wheat,* 174 Md. 314, 199A. 628); by Louisiana (*Borden* v. *Louisiana State Board of Education,* 168 La. 1005, 123 So. 665, 67 A. L. R. 1183 and *Cochran* v. *Louisiana*
30 *State Board of Education,* 168 La. 1030, 123 So. 664); and by Mississippi (*Chance* v. *Mississippi,* 206 So. 706).

We are not required to make a choice between these two theories, as the matter is not one of first impression in this State. In the case of *Rutgers College* v. *Morgan,* 70 N. J. Law, 460, at pages 474-475, it was held by this court, in an opinion by Justice Van Syckel, that the constitutional provision (paragraph 20 of Article I) and the pro-
40 vision relating to special laws "does not bar in-

strumentalities for public education provided by the state and under its control by general laws where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or *sectarian* schools, and should be rigidly enforced; but they were not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for public education under its own supervision.'' The decision was affirmed by the Court of Errors and Appeals in all essential features in 71 Id. 663. The same principle was applied by Vice-Chancellor Buchanan *in re Voorhees,* 123 N. J. Eq. 142, 196 A. 365, affirmed by this court, 121 N. J. L. 594, 3 A. 2d 891, and by the Court of Errors and Appeals, 124 N. J. L. 35, 10 A. 2d. 650.

The resolution under review will be set aside, with costs.

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Dissenting Opinion of Justice Heher.

(Filed September 13, 1944.)

NEW JERSEY SUPREME COURT.

No. 233. OCTOBER TERM, 1943.

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ARCH R. EVERSON,
Prosecutor,
vs.
THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*,
Defendants.

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HEHER, *J.* (dissenting).

I dissent, and vote to dismiss the writ of certiorari.

The statute provides for the transportation of children attending schools other than public schools, not operated for profit, on routes established for the conveyance of public school children. Pamph. L. 1941, p. 581; N. J. S. A. 18:14-8.

30 It is assailed, first as in contravention of paragraphs 19 and 20 of Article I of the State Constitution. Paragraph 19 provides that "No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation;" and paragraph 20 directs that "No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use
40 of any society, association or corporation whatever."

Paragraph 19 is not in terms applicable to school districts. And I cannot accept the view that the mere transportation of pupils to private schools, over a route already established for the conveyance of public school children, constitutes a gift, donation, or appropriation of money by the State or a municipal corporation "for the use" of a "society, association or corporation." 10

Of course, a gift of public funds or property to a private society, association, or corporation would be unconstitutional whether made directly or indirectly. *Wilentz* v. *Hendrickson,* 133 N. J. Eq. 447, affirmed 135 N. J. Eq. 244. But this is not the case here. Such transportation is a service to the children and their parents rather than to the schools, for otherwise the parents would be obliged to provide the conveyance or incur the 20 traffic hazards incident to the journey, for which children are generally so ill-equipped. It is in no real sense a contribution to "the use" or the maintenance of the institutions which the children attend. Here, the school district did not operate the transport. The challenged resolution provides for conveyance "by way of public carriers;" and the parents were reimbursed directly for the fares thus expended. And such provision is in the exercise of what I deem to be an unquestionable 30 public function.

School attendance is compulsory. *R. S. 18:14-14, et seq.* Compulsory education is a prerogative of the state. The state may compel parents to perform the natural duty of education owed to their children, and aid them in so doing, except as restrained by constitutional limitations. But compulsory attendance at a public school, whether the compulsion be direct or indirect, would violate constitutional guaranties. *Pierce* v. *Society of* 40

Sisters of the Holy Names of Jesus and Mary, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070. The statute under review facilitates the attendance at both classes of schools of children remotely situated, and thus contributes substantially to the effectuation of the statutory provisions for compulsory
10 education, and at the same time considers the factor of safety—a reasonable measure to those ends. I am unable to perceive any intrusion upon these or any other constitutional limitations by the mere provision, under such conditions, of transportation to children attending non-public schools not operated for profit. The State recognizes the private school, as perforce it must, as a means of providing the minimum of education decreed by what is conceived to be sound public policy; and I think
20 the Legislature possesses the incidental right of providing transportation to such schools of children residing at a distance, especially where it is confined to routes found necessary for the conveyance of public school children. I cannot find in any of our constitutional prohibitions a purpose to deny such transportation to children of non-profit private schools, seeking the education which satisfies the standard of the compulsory education law. If this transportation provision be viewed
30 apart from the institutions themselves, and considered as an aid to parents in making educational facilities of their choice available to their children with a measure of safety, in the service of an essential public interest, it seems to me that constitutional doubts lose their force. As so viewed, the act is in aid of compulsory education, a primary concern of society. Education is a matter of "supreme importance, which should be diligently promoted." *Meyer* v. *Nebraska,* 262 U. S. 390, 43 S.
40 Ct. 625, 67 L. Ed. 1042.

A like statute has recently received the approval of the Court of Appeals of Maryland. *Board of Education of Baltimore County* v. *Wheat,* 174 Md. 314, 199 Atl. 628. It was there held that "the accommodation of private school children is an incidental use of provision made for an unquestioned public purpose," and therefore the statute did not infringe the prohibition of the Declaration of Rights "against the use of funds for private purposes." Chief Judge Bond declared that whether such use is "private * * * appears to be, finally, a question whether it is in furtherance of a public function in seeing that all children attend some school, and in doing so have protection from traffic hazards." He continued: "Starting with the interest which the State is acknowledged to have in seeing that all children of school age acquire an education by attending some school, and the fact that they are complying with the law in going to such a school as the parochial school involved in this case, their accommodation in the buses appears to the court to be within the proper limits of enforcement of the duty imposed. Compliance having been made dangerous in a much greater degree, removal of the danger to any extent would seem to be within the same public function. * * * This conclusion that the act must be regarded as one within the function of enforcing attendance at school, renders it unnecessary to consider separately the objection that a religious institution is aided. Art. 36, Declaration Rights. The institution must be considered as aided only incidentally, the aid only a by-product of proper legislative action."

There is a conflict in the cases elsewhere that is in some instances more seeming than real. For

example, in the case of *Judd* v. *Board of Education,* 278 N. Y. 200, 15 N. E. (2d) 576, cited in the majority opinion, the constitution contained a sweeping provision against the use, "directly or indirectly," by the State or any subdivision thereof, of public money "in aid or maintenance, other
10 than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious, or in which any denominational tenet or doctrine is taught." The majority classified the statute as bestowing an indirect benefit upon the institutions as such, on the theory that "Free transportation of pupils induces attendance at the school," and "The purpose of transportation is to promote the interests of the private school or re-
20 ligious or sectarian institution that controls and directs it." Chief Judge Crane, for the minority, considered the measure to be a proper complement to the compulsory education statute. He said: "The object of such legislation is apparently to insure the attendance of the children at their respective schools for the requisite period of instruction and, perhaps, to safeguard the health of the children. The statute is not designed to aid or maintain the institutions themselves.
30 Recognizing the right of the children to be sent to such schools, and enjoining upon them the duty of regular attendance, the Legislature gave the authorities power, in a proper case, to assist the children in getting to their school. * * * There is no benefit to the schools except, perhaps, as one may conceive an accidental benefit in the sense that some parents might place their children in religious schools when they anticipate transpor-
40 tation provision, though they might hesitate to do so if the children were compelled to make their

own way. The constitutional provision is not designed to discourage or thwart the school where religious instruction is imparted. 'Denominational religion is merely put in its proper place outside of public aid or support.' "

The doctrine that provision of transportation aids the private non-profit school by inducing attendance of pupils was rejected, as unfounded in fact, by Mr. Justice Robinson and Mr. Justice Mallery in interesting and well reasoned dissents in the case of *Mitchell* v. *Consolidated School District No. 201,* 135 Pac. (2d) 79. It would seem that the statutory provision for the transportation of public school pupils was primarily designed to make such educational facilities available to pupils remotely situated from the seat of instruction, and thus to aid in the performance of the public educational function.

These considerations also dispose of the contention that the statute runs counter to paragraphs 3 and 4 of Article I of the State Constitution.

And I cannot agree that the Act violates Article IV, section 7, paragraph 6, of the Constitution, safeguarding the "fund for the support of free schools."

The attack is upon the statute itself, not the use of public moneys as in contravention of this constitutional provision. The sole point made is that the act infringes the several cited constitutional limitations; and it is said, *arguendo,* that "part of the moneys used by school districts for transportation of pupils to private or sectarian schools can be traced to the school districts directly from the State school fund mentioned in the Constitution." There is no proof whatever that any part of the State school fund was so used

here. The holding of the case of *Rutgers College* v. *Morgan,* 70 N. J. L. 460, affirmed 71 N. J. L. 663, is that this constitutional mandate has relation only to what may be done with the constituted school fund, not what may be done with the general funds of the State. The sole question raised here is the constitutional sufficiency of the statute.

Rule Setting Aside Resolution of the Respondent Board of Education.

(Filed September 14, 1944.)

NEW JERSEY SUPREME COURT.

ARCH R. EVERSON, Prosecutor, *vs.* THE BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*, Respondents.	On Certiorari. Rule Setting Aside Resolution of the Respondent Board of Education.

The Court, having inspected the depositions and the transcript and proceedings of the respondent Board of Education, returned with the writ of certiorari in this cause and the reasons for setting aside the resolution adopted by the respondent Board of Education on September 21, 1942, and having duly considered the argument of counsel herein, it is on this 14th day of September, 1944,

ORDERED that the aforesaid resolution of the respondent Board of Education be set aside, va-

cated and made for nothing holden, with costs to be taxed.

Entered September 14, 1944,
on Motion of:

(Signed) POWELL & PARKER,
Powell & Parker,
Attorneys for Prosecutor.

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Notice of Appeal.

(Filed November 29, 1944.)

NEW JERSEY SUPREME COURT.

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ARCH R. EVERSON, Prosecutor, *vs.* BOARD OF EDUCATION OF THE TOWNSHIP OF EWING IN THE COUNTY OF MERCER, FLORENCE S. HIGGS, GRACE HOY, GRACE KENDALL, JOSEPHINE KOPEZYNSKI, JULIA LYDON, FRANCES SMITH, ANNA WILLIAMS, ANNA KELLY, RUTH O'BRIEN, PAUL N. BARR, HELEN HARTER, JAMES T. HUGHES, MARY E. RYAN, CATHERINE WIEGER, BERTHA BRODOWSKI, JOHN P. SWEENEY, AUGUST JACOB, JAMES H. WILLIAMS, SARAH HILLS, VICTORIA DOMANSKI, ROBERT J. RYAN and WILLIAM RYAN, Respondents.	On Certiorari. Notice of Appeal.

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To Powell & Parker, Esquires, Attorneys for Arch R. Everson, Prosecutor:

Sirs:

PLEASE TAKE NOTICE that the Board of Education of the Township of Ewing, in the County of

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Mercer, Florence S. Higgs, Grace Hoy, Grace Kendall, Josephine Kopezynski, Julia Lydon, Frances Smith, Anna Williams, Anna Kelly, Ruth O'Brien, Paul N. Barr, Helen Harter, James T. Hughes, Mary E. Ryan, Catherine Wieger, Bertha Brodowski, John P. Sweeney, August Jacob, James H. Williams, Sarah Hills, Victoria Domanski, Robert J. Ryan, and William Ryan, respondents in the above-stated proceeding, appeal from the whole of the judgment entered in this cause, to the Court of Errors and Appeals in the last resort in all causes in New Jersey.

Respectfully yours,

William Abbotts,
(William Abbotts)
Attorney for Respondents.

William H. Speer,
(William H. Speer)
Of Counsel

Dated: November 18, 1944.

Sat below:

Parker, *J.*
Perskie, *J.*
Heher, *J.*

Service of the within Notice of Appeal is acknowledged this 18th day of November, 1944.

Powell & Parker,
Attorneys for Arch R. Everson,
Prosecutor.

Grounds of Appeal.

(Filed November 29, 1944)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING IN THE COUNTY OF MERCER, FLORENCE S. HIGGS, GRACE HOY, GRACE KENDALL, JOSEPHINE KOPEZYNSKI, JULIA LYDON, FRANCES SMITH, ANNA WILLIAMS, ANNA KELLY, RUTH O'BRIEN, PAUL N. BARR, HELEN HARTER, JAMES T. HUGHES, MARY E. RYAN, CATHERINE WIEGER, BERTHA BRODOWSKI, JOHN P. SWEENEY, AUGUST JACOB, JAMES H. WILLIAMS, SARAH HILLS, VICTORIA DOMANSKI, ROBERT J. RYAN and WILLIAM RYAN, Respondents-Appellants, *vs.* ARCH R. EVERSON, Prosecutor-Appellee.	**On Appeal from the New Jersey Supreme Court.** **Grounds of Appeal.**

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To: Powell & Parker, Esquires,
Attorneys for Arch R. Everson,
Prosecutor-Appellee.

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Sirs:

PLEASE TAKE NOTICE that the Respondents-Appellants assign the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above-entitled cause:

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Grounds of Appeal.

The Supreme Court erred in giving judgment for Prosecutor-Appellee instead of for the Respondents-Appellants.

Respectfully yours,

William Abbotts,
(William Abbotts)
Attorney for Respondents-Appellants.

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William H. Speer,
(William H. Speer)
Of Counsel.

Service of the within Grounds of Appeal is acknowledged this 18th day of November, 1944.

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Powell & Parker,
Attorneys for Arch R. Everson,
Prosecutor-Appellee.

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Grounds of Appeal.

(Filed January 2, 1945.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ARCH R. EVERSON, Prosecutor-Appellee. *vs.* BOARD OF EDUCATION OF THE TOWNSHIP OF EWING IN THE COUNTY OF MERCER, FLORENCE S. HIGGS, GRACE HOY, GRACE KENDALL, JOSEPHINE KOPEZYNSKI, JULIA LYDON, FRANCES SMITH, ANNA WILLIAMS, ANNA KELLY, RUTH O'BRIEN, PAUL N. BARR, HELEN HARTER, JAMES T. HUGHES, MARY E. RYAN, CATHERINE WIEGER, BERTHA BRODOWSKI, JOHN P. SWEENEY, AUGUST JACOB, JAMES H. WILLIAMS, SARAH HILLS, VICTORIA DOMANSKI, ROBERT J. RYAN and WILLIAM RYAN, Respondents-Appellants,	**On Appeal from the New Jersey Supreme Court.** **Grounds of Appeal.**

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To: Powell & Parker, Esquires,
Attorneys for Arch R. Everson,
Prosecutor-Appellee.

Sirs:

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PLEASE TAKE NOTICE that the Respondents-Appellants assign the following grounds of appeal from the judgment of the New Jersey Supreme Court in the above-entitled cause:

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Grounds of Appeal.

The Supreme Court erred in giving judgment for Prosecutor-Appellee instead of for the Respondents-Appellants.

Respectfully yours,

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WILLIAM ABBOTTS,
(William Abbotts)
Attorney for Respondents-Appellants.

WILLIAM H. SPEER,
(William H. Speer)
Of Counsel.

Due and legal service of the within Grounds of

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Appeal is hereby acknowledged as of November 18, 1944.

POWELL & PARKER,
(Powell & Parker)
Attorneys for Arch R. Everson,
Prosecutor-Appellee.

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Order Amending Title of Grounds of Appeal.

(Filed January 2, 1945.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

ARCH R. EVERSON, Prosecutor-Appellee, *vs.* BOARD OF EDUCATION OF THE TOWNSHIP OF EWING IN THE COUNTY OF MERCER, FLORENCE S. HIGGS, GRACE HOY, GRACE KENDALL, JOSEPHINE KOPEZYNSKI, JULIA LYDON, FRANCES SMITH, ANNA WILLIAMS, ANNA KELLY, RUTH O'BRIEN, PAUL N. BARR, HELEN HARTER, JAMES T. HUGHES, MARY E. RYAN, CATHERINE WIEGER, BERTHA BRODOWSKI, JOHN P. SWEENEY, AUGUST JACOB, JAMES H. WILLIAMS, SARAH HILLS, VICTORIA DOMANSKI, ROBERT J. RYAN and WILLIAM RYAN, Respondents-Appellants.	On Appeal from the New Jersey Supreme Court. Order Amending Title of Grounds of Appeal.

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IT APPEARING to the Court that in the Grounds of Appeal served on November 18, 1944, and filed on November 29, 1944, in this Court, in the above-entitled cause, that in the styling of the title the names of the parties were inadvertently reversed, and it appearing that counsel for the prosecutor-appellee have consented to the making, entry, and filing of this order, and it further appearing that Grounds of Appeal amending and curing said situation, by the transposition of the names of the parties to said appeal so as to bring the same into conformity with Rule 20 of this Court, have been served upon the prosecutor-appellee, and due and

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Order Amending Title of Grounds of Appeal.

legal service thereof has been acknowledged thereon as of November 18, 1944:

It is hereby ordered that said Grounds of Appeal actually served on November 18, 1944, and filed in the Office of the Clerk of this Court on November 29, 1944, be and the same hereby are amended so as to conform to Rule 20 of this Court, and are to be considered as having been in the form and substance set forth in the Grounds of Appeal acknowledged to have been served on prosecutor-appellee "as of November 18, 1944," and said Grounds of Appeal actually served on November 18, 1944, are to be considered as having been entitled at the date of their service and filing, and thence hitherto, as if said title had always been as set forth in the Grounds of Appeal acknowledged to have been served upon prosecutor-appellee "as of November 18, 1944."

We hereby consent to the making, entry, and filing of the above order.

Powell & Parker,
Attorneys for Prosecutor-Appellee.

New Jersey Court of Errors and Appeals

ARCH R. EVERSON, Prosecutor-Appellee, *vs.* BOARD OF EDUCATION OF THE TOWNSHIP OF EWING IN THE COUNTY OF MERCER, *et al.*, Respondents-Appellants.	On Appeal from New Jersey Supreme Court. Sat Below: Parker, Perskie and Heher, *JJ.*

BRIEF OF RESPONDENTS-APPELLANTS

Preliminary Statement of Facts

The object of the Prosecutor-Appellee in instituting this case was to secure an adjudication that the adoption of and certain action taken under a resolution adopted by the Appellant Board on September 21, 1942, purporting to be empowered by the amendment of Chapter 191, P. L. 1941 to R. S. 18:14-8 was illegal in that said amendment is violative of the provisions of the Constitution of New Jersey written down in the Reasons filed by prosecutor herein, which Reasons are printed on pages 13, 14 and 15 of the State of Case.

The resolution in question reads as follows:

> "The Transportation Commtt. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic Schools, by way of public carriers as in recent years. On motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted." (S. C., p. 12, ll. 23 to 30.)

The schools of Ewing Township are set up on the basis of education being provided in the Township Schools up to and including the eighth grade. The Township not having a high school or high school course of study, pupils are furnished a high school course, some in the City of Trenton, and some in Pennington, in accordance with the provisions of R. S. 18:14-6 and 18:14-7, the Board of Education of Ewing Township paying for their tuition the sums of $175.00 for those going to Junior High School in Trenton, $195.00 for those going to Senior High School in Trenton, and $128.00 for those going to the High School in Pennington. (S. C., p. 28.)

In accordance with the provisions of R. S. 18:14-8, the Ewing Township Board of Education, in addition to paying the tuition of the pupils going to Public High Schools in Trenton and Pennington, also paid for their transportation (S. C., p. 28, ll. 20 to 24), by public transportation lines, the parents of the pupils in the first instance paying the cost, being either twenty or twenty-two cents per day, depending upon whether it was necessary to use a transfer or not with the understanding that the parent who signed the card for the child would be reimbursed at that daily rate at the end of each school term of five months on the basis of the actual number of days' attendance of the child at the school. (See testimony of Charles G. Latham, District Clerk, S. C., pp.. 29, 30, 31.)

After the passage of the amendment in question and by resolution of the Board of Education those pupils from Ewing Township who were attending parochial schools at such a distance from their homes as to be within the definition of "remote," as established by the Commissioner of Education, and whose parents made application therefor, were included within the group for whom

arrangements for transportation were made by the Board. Arrangements were made by the Clerk of the Board with the parent for the transportation, the parent to pay the transportation in the first place and reimbursement to be made to the parent in the same way as reimbursement had been made to the parents of pupils from Ewing Township attending high school. (Testimony of Mr. Latham, State of Case.)

On September 21, 1942, the Board passed the resolution in question, applicable to transportation of pupils for the school year beginning July 1, 1942, and ending June 30, 1943.

On February 15, 1943, the Board authorized the payment of the bill for transportation for the first half of the school year of high school and elementary pupils at Trenton, to the amount of $8,034.95, which sum included the payments made to the parents of pupils being transportated to the parochial schools. (S. C., p. 27, l. 26 to l. 34.)

The payment made for the transportation of pupils to the parochial schools was made to the parent of the pupil being transported, the total amount of the payment being $357.74 to sixteen parents for the transportation of twenty pupils. (S. C., pp. 22, 23, 24, 25 and 26.)

No payments of any money were made to the schools.

The private schools to which the pupils were transported are Catholic Boys High School, St. Mary's Cathedral High School, St. Francis School, and St. Hedwig's Parochial School. They are all Roman Catholic Parochial Schools in the City of Trenton. (S. C., p. 32, ll. 37 to 40.) They are not conducted for profit. (S. C., p. 33, ll. 11 to 20.) Religion is taught therein as part of the cur-

ricula. (S. C., p. 33, ll. 7 to 8.) Of the pupils involved, five were elementary school pupils, the rest were high school pupils. (S. C., p. 28, l. 36.)

No payments have been made to parents of pupils attending the parochial schools for reimbursement for transportation during the second half of the school year 1942-1943, under the resolution, because, after the institution of these proceedings, counsel for the Board advised the Board to decline to pay until the legality of the action had been adjudicated. (S. C., p. 26, l. 22, *et seq.*)

No payments were made for tuition for the pupils who went to the parochial schools. (S. C., p. 29, ll 23 to 25.)

ARGUMENT

The Supreme Court erred in giving judgment for Prosecutor-Appellee instead of for Respondents-Appellants.

Statute in Question and Its Construction

Prior to June 9, 1941, R. S. 18:14-8 (as to change, see P. L. 1904, p. 45), so far as here pertinent, read as follows:

> "Whenever in any district there are children living remote from the schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school * * *."

The following is a complete copy of said Section after the change made by the passage of Chapter 191 of the Laws of 1941 (the changes made in 1941 are printed in italics):

"18:14-8. Whenever in any district there are children living remote from *any* schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, *including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.*

"*When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.*"

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of children to a school in an adjoining district when such children are transferred to the district by order of the county superintendent of schools, or when any children shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

"This act shall take effect July first, one thousand nine hundred and forty-one."

In this case the Supreme Court divided sharply and irreconciliably. In their opinion the two Justices constituting the majority of that Court, after making a measurably accurate statement of the facts, said (S. C., p. 52, ll. 38 through 40, and *ib.* p. 53, ll. 1 and 2): "The result, of course, is to provide for free transportation of children at the expense of the home municipality *and of the State school fund* to and from any school, other than a

public school, which is not operated for profit; * * *.'' (Italics ours.)

This is a gross error and a glaring misstatement. The statute itself requires no such construction; indeed, under established rules, if such construction were possible and would render the act unconstitutional and another construction were possible which would render it constitutional, as is the case here, the latter would have to be adopted. Furthermore, there being not a scintilla of proof in this case that any money from the State school fund was expended for the purpose of transportation, an attack upon the constitutionality of the Act on that ground is, under established principles, impermissible. This situation was emphasized in Mr. Justice Heher's very able dissenting opinion in which he says (S. C., p. 61, ll. 40 and 41, and p. 62, ll 1): ''* * * There is no proof whatever that any part of the State school fund was so used here * * *.'' Justice Heher goes further and points out (S. C., p. 61, ll. 34 to 39) ''and it is said *arguendo,* that 'part of the moneys used by school districts for transportation of pupils to private or sectarian schools can be traced to the school districts directly from the State school fund mentioned in the Constitution.' '' It is in answer to this argument that Justice Heher says: ''There is no proof whatever that any part of the State school fund was so used here,'' *supra.*

Justice Heher points out further (S. C., p. 61, ll. 30-33): ''The attack is upon the statute itself, not the *use* of public moneys as in contravention of this Constitutional provision,'' i.e. Article IV, section 7, paragraph 6, of the Constitution, safeguarding the ''fund for the support of free schools.'' (Italics ours.) The case is utterly devoid of any evidence whatsoever to support such

an attack, and yet it is upon this ground that the majority decision expressly concluded that the resolution under review must be set aside, (See S. C., p. 53, ll. 18 through 40, and p. 54, ll. 1-4), notwithstanding there was not even a syllable of evidence to support it and conclusive evidence to the contrary, and Prosecutor in his Brief in the Supreme Court, page 2, expressly stated "and the parents of the pupils were reimbursed *by the Board of Education* for the cost of such transportation." (Italics ours.) It is hence apparent that the statute involved does not require the moneys to be taken from the public school fund, and that they were not so taken or intended so to be taken in the instant case. This consideration alone is sufficient to dispose of this case favorably to the Township. However, all the other points raised by Prosecutor-Appellee are equally baseless and we shall proceed to so demonstrate.

Both the majority and the minority Justices based their opinions upon the sole question of the constitutionality of the statute in question: The majority said (S. C., p. 53, ll. 18-22): "We conclude that the resolution under review must be set aside, on the fundamental ground that the amendment of 1941 is in violation of paragraph 6 of Section 7 of Article IV of the Constitution * * *," and the minority said (S. C., p. 62, ll. 10-11): "The sole question raised here is the constitutional sufficiency of the statute." In considering this question the majority discussed the so-called two theories—the one that such transportation is unconstitutional, which the majority said is the theory held by a majority of the State courts, such as New York, Delaware, Kentucky, Oklahoma, Washington and Wisconsin—and the other theory (Child Benefit Theory), that such transportation is not unconstitutional, adopted by Maryland, Louisiana and Mississippi. After

having mentioned the so-called conflict of theories the majority said (S. C., l. 33 on p. 54 through the balance of p. 54 to end of opinion on p. 55) as follows:

> "We are not required to make a choice between these two theories, as the matter is not one of first impression in this state. In the case of *Rutgers College* vs *Morgan,* 70 N. J. Law, 460, at pp. 474-475, it was held by this court, in an opinion by Justice Van-Syckel, that the constitutional provision (paragraph 20 of Article I) and the provision relating to special laws 'does not bar instrumentalities for public education provided by the state and under its control by general laws where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or *sectarian* schools, and should be rigidly enforced; but they were not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for public education under its own supervision.' The decision was affirmed by the Court of Errors and Appeals in all essential features in 71 Id. 663. The same principle was applied by Vice Chancellor Buchanan *in re Voorhees,* 123 N. J. Eq. 142, 196 A. 365, affirmed by this court, 121 N. J. L. 594, 3 A. 2d 891, and by the Court of Errors and Appeals, 124 N. J. L. 35, 10 A. 2d 650."

The minority opinion discussed thoroughly the above-mentioned two theories and adopted the so-called Child Benefit Theory—which denomination, because of its generality, may be misleading, and we call it so here purely for identificatory purposes. It connotes so much more than merely the benefit to the child and has been so often and so authoritatively held so to do, that we deem it proper to mention the fact here, i.e., it connotes a huge and perhaps principal benefit to the State,

in contributing to the advancement of education, the promotion of literacy, the health and safety of its citizens, that it seems too narrow and insufficient to confine it in such a verbal straightjacket.

The theory of the constitutionality of the Act connotes, in addition to the Child Benefit, the unquestioned and unquestionable benefit to the subject of education, the removal of illiteracy, and the advancement of the further interest which the government indubitably has in the health, intellectual growth, safety, and welfare of the citizen, an interest which it can and does protect and advance by the exercise of the Police Power. The opinion of Chief Justice Hughes, speaking for a unanimous United States Supreme Court, in *Cochran* vs. *Board of Education,* 281 U. S. 370, in a case involving the use of money raised by taxation to purchase school books free of cost to all school children of the State, including those attending sectarian schools, notwithstanding constitutional provisions at least as stringent as those in New Jersey, is conclusive, and hence we quote, in order to make this Brief self-contained and its continuity unbroken in this particular, a large portion of the short opinion:

> "The contention of the appellant under the Fourteenth Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. *Loan Association* vs. *Topeka,* 20 Wall. 655. The purpose is said to be to aid private, religious, sectarian and other schools not embraced in the public educational system of the State by furnishing text books free to the children attending such private schools. The operation and effect of the legislation in question were described by the Supreme Court of the State as follows (168 La., p. 1020):

"'One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. 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, the latter, sectarian or non-sectarian, 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. * * * What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction.'

"The Court also stated, although the point is not of importance in relation to the Federal question, that it was 'only the use of books that is granted to the children, or, in other words, the books are lent to them.'

"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."

This decision was attempted to be belittled and whistled down the wind in Prosecutor-Appellee's Brief in the Supreme Court solely by the jaunty and snippy treatment all of which we write down as follows:

> "In *Cochran* vs. *Louisiana State Board of Education,* 281 U. S. 370, 50 S. Ct. 335, 74 L. Ed. 913 (decided in 1930, and referred to in the *Judd case, supra*) affirming 168 La. 1030, 123 So. 664, the United States Supreme Court, 'viewing the statute as having the effect thus attributed to it' by the Louisiana Supreme Court in the *Borden case, supra,* (its construction, operation and effect being a matter which the state court only could determine), held that, as thus construed, it did not violate the Fourteenth Amendment of the Federal Constitution, as a taking of private property for private use.
>
> "In the *Wheat case (supra),* 199 A. 628, 640, Judge Parke makes the following comment relative to the *Cochran* case, *supra:*
>
> > " 'The decision of the state court on the constitutionality of the Louisiana statute was a matter for the state court alone, and the affirmance was simply to the effect that the statute as construed by the state court was not in violation of the 14th Amendment to the Federal Constitution.' In an annotation in 67 A.L.R. 1196, 1197, it is stated, relative to the *Cochran* case, *supra,* that:
> >
> > " 'The Federal Supreme Court passed only on questions of violation of the Federal Constitution, so that the issue as to whether free text-books may be supplied to children in private or sectarian schools un-

der constitutional provisions of the kind indicated is a matter of interest which cannot be said to be authoritatively settled in other states.' "

Now this treatment of the *Cochran* case is at once unsound and defective. It is not true, as a matter of law, that the "construction, operation and effect is a matter which the state court *only* could determine." (Italics ours.) The exercise of the police power of the State must be exercised in subordination to the provisions of the Fourteenth Amendment to the Constitution of the United States. *Panhandle Eastern Pipe Line Co.* vs. *State Highway Comm.,* 294 U. S. 613; *Buchanan* vs. *Warley,* 245 U. S. 60; L. R. A. 1918C, 210. The Supreme Court has pointed out that the Fourteenth Amendment requires that governmental regulation shall be accomplished by methods consistent with due process (*Nebbia* vs. *New York,* 291 U. S. 502), and that the due process clause *is* a limitation upon an improper exercise of the police power by the States (*Grenada Lumber Co.* vs. *Mississippi,* 217 U. S. 433), in that it prevents an arbitrary or unreasonable exercise of the power (*Nashville, etc.* vs. *Walters,* 294 U. S. 405) through laws or regulations. *Dobbins* vs. *Los Angeles,* 195 U. S. 223; *Maxwell vs. Miami,* 87 Fla. 107, 100 So. 147, 33 A. L. R. 682. The test of a police regulation, when measured by the due process clause of the Constitution, is reasonableness as distinguished from arbitrary or capricious action. *State, etc.* vs. *Clausen,* 65 Wash. 156, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

From the above principles it follows that ~~the~~ the construction, operation, and effect of a police statute or regulation is not one which only the State Court can determine, but one which the Fed-

eral Court may and must determine, in order to arrive at a decision as to whether in its construction, operation, or effect the statute is a mere mask, or its construction a design, or its effect certain, to deprive a person of his life, liberty, or property without due process of law. The United States Supreme Court can and does constantly hold statutes, ordinances, and even the decisions of Courts or other State agencies to be unconstitutional because of efforts under the guise of the police power to deprive a person of his life, liberty, or property, or to deny to him the equal protection of the laws. Any other construction of the Fourteenth Amendment as to due process would render the amendment a lifeless and inoperative enactment. That the Supreme Court must construe the act to determine the appropriateness of the means to the accomplishment of the legitimate purposes falling within the scope of the power, their adaptability to the end sought, is trite law. 11 Am. Jur. p. 1075 §303. Even if the Legislature itself asserts that the statute relates to the public health, welfare, or safety, the Court is not bound thereby, but will itself construe the act, envision its effect, and consider its operation. Ibid. The Legislature has no power, under the guise of pollice regulations, arbitrarily to invade the personal rights and liberty of the individual citizen, to interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations, or to invade property rights. See cases cited 11 Am. Jur. p. 1078, §303.

It follows then that in *Cochran* vs. *Louisiana State Board of Education, supra,* that, as appears upon the very face of Chief Justice Hughes's opinion, that Court had to and did consider the construction placed upon the Act by the Mississippi Supreme Court, construed it and appraised

its operation and effect, and then determined that it was neither *arbitrary* nor *unreasonable.*

The citations (Prosecutor's Brief in the Supreme Court, pp. 18, *et seq.*) from the dissenting opinion of Judge Parke in *Board of Education of Baltimore County* vs. *Wheat,* 199 Atl. 628, and 67 A. L. R. 1196 and 1197, a case which supports completely our contention in the instant case, have no bearing upon the effect of the decision in the United States Supreme Court of the *Cochran* case. Chief Justice Hughes distinctly stated that the statute, as construed (as above set forth), was an example of the exercise of the taxing power for a public purpose, and that "the legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern." This was the Supreme Court of the United States speaking and giving the accolade of reasonableness and non-arbitrariness to the so-called "Child Benefit Theory. Furthermore, the opinion of Parke, *J.*, in the *Wheat* case, *supra,* lends a wealth of support to our contentions in the instant case. He put his decision upon numerous grounds, i.e., the act was a "special" act confined to an improperly classified group of pupils; its purpose was not to safeguard the children from injury. On page 635 Parke says:

> "Thus, it is a reasonable exercise of the police power to require a lessened speed in vehicular traffic within a specified section of a highway in a vicinity of a school; and to station traffic officers to regulate and safeguard children at street and highway crossings near schools. The extension of the application of this principle to the transportation of school children, because of the dangers of pedestrian travel by children upon the public highway, is of doubtful legality, even if it be an effort of the state to protect, without discrimina-

tion, all school children. Should the statute have this purpose in providing for free transportation of all school children, without discrimination in this exercise of the police power, there is great weight to the argument that the children are the real beneficiaries of the statute, and any advantage derived by the schools attended would be incidental and immaterial. 51 Harvard Law Review, 935; compare *Cochran* vs. *Louisiana State Board of Education,* 168 La. 1030, 123 So. 664; Id., 281 U. S. 370, 50 S. Ct. 335, 74 L. Ed. 913; *Meyer* vs. *Nebraska,* 1923, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446; *Pierce* vs. *Society of the Sisters, etc.,* 1925, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468.''

This language is perfectly applicable to our case, and more will be said upon this subject hereinafter.

We reiterate, therefore, that the decision in the *Cochran* case, demonstrating that the construction we contend for in the instant case, is a construction which is not arbitrary nor unreasonable, is for a *public* purpose, i.e., education, the abolition of illiteracy, etc., hence is not a gift nor donation to a private person, or for a private use, and therefore should not be overruled.

A real significance, therefore, of the *Cochran* case and the expression excerpted from the opinion of Judge Parke is, *inter alia,* that they definitively demarcate the line separating the appropriate exercise of the police power in the furnishing of services to elementary school children from the operations of the free public school system. Pupils attending an elementary school (whether public or private) are usually of tender age—five to sixteen years. The state has a particular and unique interest in providing for the *safety* of all these children and for their growth

and development, both physically and mentally. In recognition of this duty, the State, in recent years, and the municipalities under appropriate delegation and exercise of police power, have provided various services promotive of the safety, health and welfare of such children, all of them referable to the police power of the State and its duty to aid its citizens of tender years, to foster their mental and physical development, and, thus, lay the foundations of a sturdy manhood and womanhood. Among such services conspicuously rendered to pupils of parochial and private schools and widely known to citizens of our State to be so rendered and hence judicially noticeable, are the providing of medical and dental services, nursing, eye examinations of such pupils in such schools, etc. Upon the principle that the duty of the State extends to *private* school pupils as well as to *public* schools pupils, as we have said, the State and its various subdivisions and municipalities have extended these services to *private* school pupils as well as to *public* school pupils.

In passing, it may be said that there would be as much logic in forbidding the use of tax-provided streets and sidewalks and safe street crossings and traffic officers at such crossings for the safety of *all* school children, as there would be in forbidding the enjoyment by *private* school children of the services above-mentioned. This is not an argument *in vacuo* for it is common knowledge that the City of Newark furnishes such medical, dental, and nursing services to *private* schools, to many thousands of pupils therein of tender years, through civil service employees who are paid out of City Funds, furnished to the Health Department for those purposes, and without any appropriation therefor from the State school funds. It is also common knowledge that the like services are furnished through municipal appropriations

to thousands of pupils of *private* schools of all denominations in Jersey City. In the interest of brevity we have limited our statement of the number and character of such services being rendered to private schools at public expense in the exercise of the police power and without tapping the Free School Fund, but it is certainly not amiss to say that the Benét and Braille systems are thus provided thereby transforming in the one case useless into useful citizens and in the other furnishing eyes to the blind and increasing manyfold the value to the State of these classes of its inhabitants.

It is within the legislative competency to provide for the transportation of pupils to public and/or private schools, as a "suitable means" to "promote education," "provide for the safety" of the pupils, conserve their "health," for the advancement of morale and efficiency of the citizens of the State, and to provide for the general welfare, unless there is some inhibiting constitutional provision, and there is none.

The matter is not settled in New Jersey as claimed in the majority opinion of the Supreme Court.

The case of *Rutgers College* vs. *Morgan,* 70 N. J. L. 460, which is cited by the majority opinion in the instant case as decisive thereof favorably to Prosecutor-Appellee is, of course, utterly misconceived and misused by the majority, as is pointed out in the minority opinion in the instant case. Mr. Justice Heher there aptly says (S. C., pp. 61 bottom, 62 top): "There is no proof whatever that any part of the State school fund was so used here. The holding of the case of *Rutgers College* vs. *Morgan,* 70 N. J. L. 460, affirmed 71 N. J. L. 663, is that this constitutional mandate has relation only to what may be done with the constituted

school fund, not what may be done with the general funds of the State." This statement of Justice Heher is demonstrated to be true by the Court-written first two paragraphs of the syllabus of the case, which are completely established and confirmed by the opinion itself.

70 N. J. L. 460, paragraph 2 of the syllabus reads:

> "This provision of the constitution is not a limitation of legislative power over the subject of free public education. It prescribes what must be done with the school fund, not what may be done at the public expense out of the general funds of the state. The facilities for free public education are to be provided by the legislature within the exercise of a sound discretion subject only to constitutional restraints, which must be found in expression or clear implication."

Ibid. page 471 reads:

> "There is no constitutional limitation which restrains the state legislature from establishing an agricultural college. It promotes a branch of education beneficial to the state, and support for it can be found in many judicial decisions. *Commonwealth* v. *Hartman,* 17 Pa. St. 118; *Stuart* v. *School District,* 30 Mich. 69; *Higgins* v. *Prater,* 14 S. W. Rep. 910; *Briggs* v. *Johnson County,* 4 Dill. 148.
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> "The injunction in the organic law that free public schools shall be established and maintained for all children between the ages of five and eighteen years does not exclude the legislative power to provide for the education of persons not within that class. The former must be provided for; the latter may be an object of legislative concern."

Ibid. page 473 reads:

> "In *Commonwealth* v. *Hartman, supra,* the Supreme Court upheld a law establishing

> schools for the free education of persons between the ages of five and twenty-one.
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> "Chief Justice Black said that it seems to be believed that the constitution is a limitation on the power of the legislature, and that no law can be valid which looks to any other object than the teaching of the poor, gratis. The error, he said, consisted in supposing the constitution to define the maximum of the legislative power, while in truth it only fixes the minimum. It enjoins them to do thus much, but does not forbid them to do more."

The fact is that *Rutgers College* vs. *Morgan, supra,* is decisive of this case but in favor of the Respondents-Appellants. We shall now demonstrate the truth of this statement:

We contend with the utmost confidence that the paragraph extracted from *Rutgers College* vs. *Morgan,* (70 N. J. L. at p. 473), viz., that the constitutional provision (paragraph 20 of Article I) and the provision relating to special laws, "does not bar instrumentalities for public education provided by the state and under its control by general laws where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or *sectarian* schools, and should be rigidly enforced; but they were not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for public education under its own supervision," is in no way decisive against Respondent-Appellants.

It is first to be observed that this statement was an *obiter dictum,* not necessary for the decision of the then pending case, but that even if it were not so, it had no relevancy to and was not binding upon the Court in the instant case, for in this case no free state aid was given, there was no donation

to private or sectarian schools, and the factual question of transportation of pupils was not involved, considered, or decided. We shall deal with this question more fully after having stated the law with respect to the weight to be given to precedents and the doctrine of *stare decisis*.

Precedents, as has been universally settled, are worth exactly what they weigh in right and reason when applied to the particular circumstances of each individual case (*Red Star Motor Drivers' Asso.* vs. *Detroit,* 244 Mich. 480, 221 N. W. 622), since every judicial opinion must be construed in the light of the facts of the particular case. In other words, a judicial opinion is authority only for what is actually decided. *Rolfe* vs. *Hewitt,* 277 N. Y. 486, 125 N. E. 804, 14 A. L. R. 125.

"The power of the court only extends over and is limited by the particular case before it." *American Book Co.* vs. *Kansas,* 193 U. S. 49.

"The positive authority of a decision is co-extensive only with the facts on which it is made." *Ogden* vs. *Saunders,* 12 Wheat. 213; *Sturges* vs. *Crowninshield,* 4 Wheat. 122.

"General principles announced by courts which are perfectly sound expressions of the law under the facts of a particular case may be wholly inapplicable in another and different case." *Parsons* vs. *District of Columbia,* 170 U. S. 45.

"Expressions in a judicial opinion not necessary to the decision of the case are without binding effect." *Nichols* vs. *St. L. & S. F. R. Co.,* 227 Ala. 592, 90 A. L. R. 842, 151 So. 347.

See, on the general subject, 14 Am. Jur. § 79, pp. 289, *et seq.,* where there is a full citation of cases. The opinion, in other words, is limited by the facts. See also §§ 59, 60 and 61.

The doctrine of *stare decisis* has been declared to have greater or less force according to the nature of the question decided. It has been held that the doctrine of *stare decisis* has no real place in constitutional law where the validity of a statute is under consideration (*Davison* vs. *Chic. & N. W. R. Co.,* 100 Neb. 462, 160 N. W. 877, L. R. A. 1917C 135; *Heisler* vs. *Thomas Colliery Co.,* 274 Pa. 448, 118 Atl. 394, 24 A. L. R. 1215, affirmed in 260 U. S. 245). At least the rule will not prevent a court from reviewing a constitutional question where the facts before it *are slightly different from those in former decisions. Prall* vs. *Burckhartt,* 299 Ill. 19, 132 N. E. 280.

To make a judicial opinion a precedent the point in question must not only have been involved, but it must have been presented and decided. *Louisville, etc., N. R. Co.* vs. *Hutton,* 220 Ky. 277, 295 S. W. 175, 53 A. L. R. 1328.

Applying the above-cited rules of law it is manifest that *Rutgers College* vs. *Morgan, supra,* involved the application of Article 4, section 7, paragraph 6, of the State Constitution, which provided for the creation, custody, and disposition of an "*Educational fund* for the support of free public schools." (Italics ours.) This fund is to be segregated, "securely invested, and remain a perpetual fund." In the case of *Rutgers College* vs. *Morgan,* the holding was: "This [paragraph] * * * is not a *limitation* of legislative power over the subject of free public education. It prescribes *what must be done with the school fund,* not what *may be done at the public expense out of the general* funds of the state." (Italics ours.) 1 Comp. Stat. of New Jersey, lxxv, lxxvi. This was expressly stated in Justice Van Syckel's opinion, p. 470, paragraph 2, pp. 471 bottom, 472 top. It is also stated that "Substantial classes may be selected for education by the state as well as property may be selected by a

proper classification for taxation,'' page 472, and examples of such classification are there given. The classification of pupils into those which attend schools not operated for profit and those which are so operated is a proper classification having a basis clearly related to the object of the legislation, i. e., ''free transportation.''

Now in the *Morgan* case the money involved was to be taken and was taken from the school fund; it was not and was not intended to be taken out of the general funds of the State, and certainly not out of the funds of a municipality. It was not in the remotest degree related to the transportation of infant children to school. It was given *directly* to the college. Inasmuch as the *school fund* is not involved in the instant case, and the matter of *transportation* furnished to the pupils is involved, and the payment is not to the school, the facts in the *Morgan* case are utterly different from the facts in the instant case, and hence that case is not a precedent for the decision of this one. That this is so is clear from the following epitome of the course of that case taken from the decision of Judge Van Syckel, pp. 465, *et seq.*:

The payment for the scholarship ''shall be made only out of the income of the fund for the support of public free schools remaining after appropriations heretofore made payable out of said income are met,'' and the payment was to be by the warrant of the comptroller upon the treasurer of the school fund. And then the Act of 1902 was passed, because the State had failed to make the previous payments, which 1902 Act provided for the appointment of three commissioners by the Governor, and he appointed the Honorable Amzi Dodd, the Honorable Charles J. Baxter, and William H. Corbin. They investigated and reported that they had learned no reason why the money

should not have been paid except some supposed or apprehended inability founded on the suggestion that the provision for payment in the 1890 Act was void because in contravention of the State Constitution. This suggestion they expressly found to be "without substance," and reported that $131,610.00 was due and should be paid. Then in 1903 the Legislature passed the general appropriation bill for $80,000.00, and advised its payment when the Act was declared constitutional. This proceeding for a mandamus followed.

It was contended that the Act of 1890, seeking to appropriate to Rutgers College moneys arising out of the income of the funds for the support of free public schools, violated Article IV, section 7, paragraph 6, of the State Constitution.

The question, or any question, relative to the expenditure of general state or municipal moneys, as distinguished from subtraction from the school fund, was not involved, and remained unconsidered and undecided in the *Morgan* case. The decision cannot be considered as broader than the facts under consideration, and the generality of the language used in the instant case, as quoted therein from the *Morgan* case, is restricted, and cannot be considered otherwise than as so limited, to the abstraction of money from the school fund. That was the fact as to the constitutional provision involved, and that was the fact as to the statute involved. Hence, the expansiveness of the language used in the quoted paragraph from Judge Van Syckel's opinion must be subdued to the precise facts which gave it birth. As so construed it is wholly without authority or precedent significance in the case now under review. The decision was by a Court divided six judges to five.

It will be advantageous at this point to go on and demonstrate the inapplication of the other

case cited in the majority opinion of the Supreme Court. The other case cited was mentioned as follows: "The same principle was applied by Vice-Chancellor Buchanan *in re Voorhees,* 123 N. J. Eq. 142, 196 A. 365, affirmed by this court, 121 N. J. L. 594, 3 A. 2d 891, and by the Court of Errors and Appeals, 124 N. J. L. 35, 10 A. 2d 650."

This case has no application or precedent value to the instant case whatever. Its supposed application arises from Vice-Ordinary Buchanan's citing, on page 147 of 123 N. J. Eq., the case of *Trustees of Rutgers College* vs. *Morgan, supra,* "that this constitutional prohibition was designed to prevent giving 'free state aid and donations to private * * * schools,'—and 'should be rigidly enforced.'" All the vice and limitations which inhered in this *dictum* in the *Morgan* case, as above set forth, naturally inhere in its quotation here, and in addition thereto the issues involved in the *Voorhees* case were utterly different from those involved in this; it arose under the exercise of the power of *taxation* while this case arose under the *police power.* These are two totally different and separate powers as has been often pointed out in our own Courts. See *North Hudson Co. Railway Co.* vs. *Hoboken,* 41 N. J. L. 71, and *Fielders* vs. *North Jersey St. Ry. Co.,* 68 N. J. L. 343. It did not purport to be an exercise of the police power, and hence could not be tested upon that theory. It was simply and solely a matter of tax exemption, a *donation* by the State to a private corporation for unspecified purposes. A précis of the course of the case in our Courts will demonstrate its inapplication. The case did not consider the question whether a statute, passed under the police power, which authorized the payment of the transportation charges for the conveyance of pupils to a private school would be unconstitutional when such payment was made to the parent of such child

to reimburse him for payments made by him therefor. The police power was not involved in any degree in the case. This is clearly demonstrated by the opinion of V.-O. Buchanan in 123 N. J. Eq. 142. This judgment was taken by certiorari to the Supreme Court whose opinion will be found reported in 130 N. J. L. 62, *sub. nom. Voorhees* vs. *Kelly.* The Supreme Court held that the decree of the Prerogative Court *determined* two questions, viz.: (1) the transfer of securities by deed of trust made by Voorhees in his lifetime was made in contemplation of death; and (2) that the fair market value of the property as of the time of death should be included in his estate for inheritance tax purposes. No mention was made in that decision of the *Morgan* case, or of any citation therefrom.

This case was then taken to the Court of Errors and Appeals and was decided *sub. nom. In the Matter of the Transfer Inheritance Taxes in the Estate of Elizabeth Rodman Voorhees, Deceased, et al.*, the *per curiam* opinion of the Court of Errors and Appeals, 10 Atl. (2d) 650, was as follows:

> "The appeal in this case is from an affirmance in the Supreme Court, 121 N. J. L. 594, 3 A. 2d 891, of a decree of Vice Ordinary Buchanan affirming a transfer tax assessment. In re Voorhees' Estate, 123 N. J. Eq. 142, 196 A. 365. After a careful examination of the record and the briefs of counsel, we conclude that the *determinations* of the learned Vice Ordinary *as applied to the facts in this case* are in accordance with the law of this State." (Italics ours.)

That Court did not adopt the opinion or reasons of the V.-O., but merely his *determinations, as applied to the facts in that case.*

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In re Stanford's Estate, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, 45 L. R. A. 788, is an almost perfect counterpart of *In re Voorhees,* and was decided, as the *Voorhees* case was, under the taxation theory, and not under that of the police power. It was there (45 L. R. A. 788) held that "the claim of the state to a portion of a decedent's estate under a statute asserting the right and making the amount due and payable at death cannot be released by the legislature, even prior to the state's receipt of the amount, where the Constitution prohibits the legislature from making any gift to any individual or corporation, and from passing any special law releasing any indebtedness to the state." Judge Van Dyke said (at pp. 790 and 791): " 'An estate is vested when there is an immediate right of present enjoyment, or a present fixed right of future enjoyment.' Kent, Com. 202. The state here, from the death of the decedent, had a present fixed right of future enjoyment to the 5 per cent of his estate. This is property or a thing of value belonging to the state * * *. In substance, if not in form, to turn over the fund in question belonging to the state to the appellants would be to make a gift or donation of the same, and the law regards substance rather than form. We are therefore of the opinion that to give retroactive effect to the law of 1897, would conflict with the provisions of the Constitution prohibiting the legislature from making any gift or donation of any public money or thing of value." These cases are referable to the *power of taxation,* not of the *police power.*

4 *Dillon, Municipal Corporations,* Fifth Ed., § 1408, states: "The *taxing power* is to be distinguished from the *police power* * * * ." the distinction between the two powers is well stated by Depue, *J.,* in *State* vs. *Hoboken,* 33 N. J. L. 280. See also *Carteret Academy* vs. *State Board of Taxes*

and Assessment, 102 N. J. L. 525, and *Corbin Young Men's Christian Ass'n.* vs. *Commonwealth of Kentucky,* 1 A. L. R. 264. (It is not the property owned, but the institution itself which is exempt.)

In *In re Voorhees,* the exemption had ceased to be an exemption, and under Article I, sections 19 and 20, had become a mere gift, because the tax had become a *vested* right, and ceased to be an exemption.

In *State* vs. *Snyder,* 212 Pac. 771, 29 Wyo. 199, it was held that: (1) "A *lawful* exemption from taxation cannot be regarded as a gift or donation by the state in the aid of the individual, contrary to Const. art. 16 § 6 [prohibiting the relinquishment of any indebtedness, liability, or obligation to the state or any municipal corporation];" and (2) "Laws 1921, c. 50, § 1, exempting from taxation the property of veterans of the Spanish-American and World Wars, manifests no intention to act retroactively, but was clearly intended to apply only to future taxation, and therefore does not in any sense relinquish any obligation to the state or any political subdivision thereof."

The Two Theories Mentioned in the Majority Opinion

Six cases from six States are cited in the majority opinion in the instant case in favor of the theory that free transportation to private school pupils is unconstitutional, viz. (S. C., p. 54):

> "* * * The leading case, supporting that theory, is the New York case of *Judd* v. *Board of Education,* 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789. Typically illustrative of this theory are the following cases: *State ex rel. Traub* v. *Brown* (Delaware) 36 Del. 181, 172

A. 835; *Sherrard* v. *Jefferson County Board of Education* (Kentucky), 294 Ky. 469, 171 S. W. (2d) 968; *Gurney* v. *Ferguson* (Oklahoma), 190 Okl. 254, 122 P. (2d) 1002; *Mitchell* v. *Consolidated School District No. 201* (Washington), 135 P. (2d) 79; and *State ex. rel. Van Straten* v. *Milquet* (Wisconsin), 180 Wis. 109, 192 N. W. 392."

while four cases from three States are cited in favor of the so-called "child benefit theory," i. e., that such transportation is not unconstitutional. These are in addition to the *Cochran* case, *supra.*

The majority opinion in the instant case declined to make a choice between these two theories upon the alleged ground, as hereinbefore mentioned, that "the matter is not one of first impression in this State. We desire to state that in reason and on the facts in the instant case, the theory that such free transportation to private school pupils is unconstitutional is against the weight both of reason and authority. As was said in the Supreme Court of the United States, you do not settle such a question by the mere 'counting of heads.' " We further assert, without fear of successful contradiction, that none of the six cases cited in support of that theory is strictly in point, since the constitutional provisions of the State involved were at once different from, more stringent than, and incomparable to our own, as were the facts.

In the cases where money allowances are made directly to the parents or guardians of the pupils but, because these allowances are mere *indirect* or *incidental* benefits to the parents or guardians connected with the accomplishment of a valid *public* purpose, i. e., the "encouragement" of education, etc., the constitutionality of the statutes, which authorize them, has never been challenged, heretofore in New Jersey and we contend are now

unchallengable! Similar statutes are in force in other states, and their validity has uniformly been upheld, notwithstanding that the constitutions of those states contain provisions which prohibit "gifts" or "grants" of public money to individuals. The theory under which the constitutionality of these laws has been upheld is that they were enacted and are operated in the interest of a *public* purpose, i. e., education and, so, the *personal* benefits, which arise from them, are only *incidental* to the *public* purpose.

Elsewhere herein cases and examples will be cited to illustrate the proposition that *incidental* benefits to *individuals* arising from the operation of a school law of a *public* character do not render the law invalid. Other cases of the same character might be cited but we feel that there is no necessity therefor, inasmuch as the principle would seem to be too well established, to admit of dispute.

The reasoning of well-considered cases from other jurisdictions, which involved questions closely related to the question involved in this case, supports the constitutionality of the statute and the resolution, as against the contention that they authorize a "grant" or "gift" of public funds or a "support" or an aid to a "sectarian" or other private school.

In the discussion of Prosecutor-Appellee's first constitutional objection to the statute and the resolution, we pointed out that similar or related questions have arisen in other states and had to do with constitutional and/or statutory provisions, of those states, which have varying degrees of similarity to the constitutional and statutory provisions of New Jersey, which are involved in the instant case.

In the course of the previous discussion, we have pointed out that a diversity of decision has resulted in the cases elsewhere, and that this diversity is due to the varying conclusions of the courts, with respect to whether or not the beneficiaries of certain types of school legislation were private *schools* or the *pupils* who attended them. We have, also, pointed out that, in the cases wherein the majority of the court were of the opinion that the benefit arising from a legislative grant of free textbook or free bus transportation privileges to private school pupils as one inuring to the *pupils* (as distinguished from the *schools* which they attended), the constitutionality of the granting statute has been upheld and that, conversely, in those cases, where a majority of the court have concluded that the benefit conferred by the statute constituted, in legal effect, a "support" of or a "grant" or "gift" to a private *school* (as distinguished from its *pupils*), the constitutionality of the statute has been denied.

We submit that a reading of the decisions in these cases should lead the court to conclude that the more cogent reasoning, as well as the common-sense view, will be found in the decisions which hold that the benefits of the school legislation, under review, inured to the *pupils* and the State and not to the *school,* and, accordingly, that the statutes involved did not violate any of the constitutional provisions of our State or amount to a "grant" or "gift" to a *sectarian* or other *private* school.

Rather than quote extensively from the cases in other jurisdictions, we merely cite them assembling in one class the cases which hold (as we claim, rightly) that the benefit arising from legislation providing for free transportation of *private* school pupils or the free use of textbooks by them

does not constitute a "grant" or "gift" of public property to or a "support" of the *school* which the pupils attend, and in another class assembling the cases which hold to the contrary. We do this because the cases are not many, and we feel that the court will desire to read the decisions and form its own conclusion respecting their correctness. We shall also hereinafter show that a great number of State Legislatures have adopted the Child Benefit Theory.

In the following cases, the *pupils* (and not the *schools*) were held to be the beneficiaries of the legislation; accordingly, the decisions in these cases were in favor of the constitutionality of legislation which provided for the free use of textbooks by or the free transportation of pupils of *private* schools.

Borden v. *Louisiana State Board of Education,* 168 La. 1005, 123 So. 655 (1929);
Cochran v. *Louisiana State Board of Edution,* 168 La. 1030, 123 So. 664 (1929);
Cochran v. *Louisiana State Board of Education,* 281 U. S. 370, 74 L. Ed. 913 (1930);
Board of Education v. *Wheat,* 174 Md. 314, 199 Atl. 628 (1938);
Adams v. *County Commissioners,* 26 Atl. (2d) 137 (1942);
Chance v. *Mississippi Textbook R. & P. Board,* 190 Miss. 453, 200 So. 706 (1941).

In the following cases the courts have held that similar legislation was unconstitutional on the theory that it made a "gift" or "grant" of public property or otherwise lent "support" to a "sectarian" or other private *school.* In short, in the cases next cited, the courts held that the private *schools* and not their *pupils* were the beneficiaries of the legislation.

State v. *Brown,*
36 Del. 181, 172 Atl. 835 (1934) (Writ of Error dismissed 39 Del. 187, 197 Atl. 478);

Gurney v. *Ferguson,*
190 Okla. 254, 122 Pac. (2d) 1002 (1941);

Judd v. *Board of Education,*
278 N. Y. 200, 15 N. E. (2d) 576 (1938);

Mitchell v. *Consolidated School District,*
135 Pac. (2d) 79 (Wash. 1943);

Sherrard v. *Jefferson County Board of Education,* 294 Ky. 469; 171 S. W. (2d) 968;

Von Straten v. *Milquet,* 180 Wis. 109; 92 N. W. 392.

As previously stated, we submit that a reading of the foregoing cases *pro* and *con,* on the question under discussion, or related questions, will convince the reader that the most cogent reasoning, as well as the common-sense view, supports the conclusion that the extension, of free textbook and/or free bus transportation privileges to pupils of *private* schools, constitutes a benefit to the pupils of the schools and their parents, and does not constitute a gift or grant of public property to a "sectarian" or other private *school,* or constitute a "support" of such "sectarian" or private *school.*

As a part of contemporaneous history, it should be pointed out that many states (other than those in which litigation has arisen) have statutes which extend free transportation and/or textbook privileges to PRIVATE *school* PUPILS, *and find no constitutional objection to such statutes. Moreover, the Attorneys General of several such states have rendered opinions upholding the constitutional validity of such statutes.*

To round out the picture, it is well to point out that in addition to the states in which litigation has arisen, as a result of the extension of free transportation and/or free textbook privileges to pupils attending *private* schools, there are many states in which similar legislation has been enacted and is being carried out without objection to its constitutional validity, notwithstanding that the constitutional provisions of these states are similar to those of New Jersey, which have been invoked by the plaintiff in the present case. In addition to the states hereinafter listed, there may be other states having like legislation. In the limited time at our disposal, we have not been able to complete the research necessary to determine whether there are other such states.

We next list the states (other than those in which litigation has arisen) which extend *free textbook privileges* to pupils of *private* schools. They are, in alphabetical order:

1. *Kansas* (Sch. Laws 1939, Sec. 72-4107 a);
2. *New Mexico* (Laws 1933, Ch. 112, Sec. 5);
3. *Oregon* (Laws 1941, Ch. 485, Sec. 1);
4. *West Virginia* (Sch. Laws 1939, Ch. 18, Art. 5, Sec. 21-b).

Similarly, the following states, listed in alphabetical order, extend *free transportation privileges* to pupils of private schools:

1. *Illinois* (Rev. Stats. 1935, Ch. 122, Par. 128);
2. *Indiana* (Sch. Laws 1935, Ch. II, Sec. 2);
3. *Iowa* (1935 Code, Sec. 4179);
4. *Kansas* (Sch. Laws 1939, Sec. 968);
5. *Kentucky* (Com. Sch. Laws 1940, Secs. 4339-4420);

6. *Massachusetts* (Gen. Sch. Law, Ch. 40, Sec. 5);

7. *Michigan* (Comp. Laws 1939, Secs. 7379, 7439, as amended);

8. *Missouri* (Sess. Acts 1939, No. 448, Secs. 1, 2);

9. *New Hampshire* (Pub. Ed. Laws 1937, Ch. 117, Sec. 7 (a));

10. *New Jersey* (Pub. Laws 1941, Ch. 191);

11. *Oregon* (Laws 1939, Ch. 352);

12. *Rhode Island* (Gen. Laws 1938, Ch. 178, Sec. 31).

In West Virginia and Wisconsin, the law provides for the free transportation of ''all children of school age'' (Sch. Law W. Va. 1939, Ch. 18, Art. 5, Sec. 13; Pub. Ed. Laws of Wisc., Secs. 34, 40).

In Iowa, Illinois, and Massachusetts, the constitutionality of legislation extending free transportation privileges to pupils attending *private* schools has been passed upon by the Attorneys General of said respective states, and the constitutionality of the legislation has been upheld in the face of constitutional objections similar to those made in the instant case. The opinion of the Attorney General of Iowa is dated July 14, 1936. The opinion of the Attorney General of Illinois was rendered in 1936 (see Opinions of Attorneys General 1936, p. 415). There are two opinions by the Attorney General of Massachusetts, dated February 17, 1936, and December 23, 1936, respecively. Copies of all the four opinions, mentioned, can be supplied, if desired.

The matters upon which the plaintiff relies to support his argument, that the statute and the

resolution make illegal "gifts" or "grants" of public money or property, or authorize "support" of a "sectarian" or other PRIVATE *school, are without persuasive force.*

The cases from other jurisdictions, upon which the Prosecutor-Appellee relies to support his contention that the statute and the resolution, unconstitutionally grant aid or "support" to a "sectarian" institution or otherwise, offend against the constitutional provisions which prohibit grants of public money or property for PRIVATE *purposes, dealt with constitutional and/or statutory provisions which differ from the pertinent constitutional and statutory provisions of New Jersey and, so, are without persuasive force in the present case. Moreover, the reasoning in said cases is fallacious and is contrary to the reasoning of the other cases, already considered, which had to do with cognate or related questions.*

In the majority opinion in the instant case six cases are cited from other jurisdictions, to support the theory that the statute under review is unconstitutional, because (so he argues) it authorizes a "grant" or "gift" of aid or "support" of a "sectarian" institution. We submit that three of these cases have no force in this case, for the reason that they deal with the constitutional and/or statutory provisions which differ greatly from the constitutional and/or statutory provisions of New Jersey, with which we are concerned, and because the reasoning of the cases is fallacious and contrary to the reasoning of the New Jersey cases which we have already considered and which had to do with cognate or related questions.

The cases from other jurisdictions, upon which the Prosecutor-Appellee relies, dealt with constitutional and/or statutory provisions which differ

greatly from the constitutional and statutory provisions involved in this case and so are without persuasive force in this case.

The cases which the majority cited as being in support of the argument that the statute under review is unconstitutional are six in number. Hereinbefore we have listed all of them. They are:

1. *State* v. *Brown,* 36 Del. 181, 172 Atl. 835 (1934);
2. *Judd* v. *Board of Education,* 278 N. Y. 200, 15 N. E. (2d) 576 (1938);
3. *Gurney* v. *Ferguson,* 190 Okla. 254, 122 Pac. (2d) 1002 (1941);
4. *Mitchell* v. *Consolidated School District,* 135 Pac. (2d) 79 (Wash. 1943);
5. *Sherrard* v. *Jefferson County Board of Education,* 294 Ky. 469, 171 S. W. (2d) 968;
6. *Van Straten* v. *Milquet,* 180 Wis. 109, 192 N. W. 392.

We submit that a reading of the constitutional and statutory provisions involved in the cases mentioned will show that all of them, with the possible exception of *State* v. *Brown,* involved constitutional and/or statutory provisions which differ greatly from the constitutional and statutory provisions involved in the instant case. For this reason, among others, we submit that the cases cited should have no persuasive force in the instant case.

It would seem that the constitutional provision involved in *State* v. *Brown* (see p. 836, Col. 2 top) is different from and more stringent than ours. In that case the Constitutional provision was "no *portion of any* fund now existing, or which

may hereafter be appropriated, or *raised by tax* for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian church or denominational school." However, the decision in the *Brown* case was based upon a New York decision, which (for reasons hereinafter given) is not applicable in this case. Moreover, the Delaware case is a decision of a *superior* court. It is not the decision of an *appellate* court.

The constitutional provisions of New York, which were involved in *Judd* v. *Board of Education,* are far more comprehensive and restrictive than the provisions of the New Jersey Constitution, which the plaintiff claims to be comparable.

Section 4 of Article IX of the New York Constitution (as set forth on p. 580, Col. 2 (4) of the report of the *Judd* case), in the form in which it existed at the time of the decision in the *Judd* case, forbade the state, or any sub-division thereof, to "use its property or credit or any public money * * * directly *or indirectly,* in aid or maintenance * * * of any school or institution of learning wholly or in part under the control or direction of any denomination," etc.

The words "or indirectly," which we have italicized above, point the striking distinction between the New York Constitution and the New Jersey Constitution. As we have previously shown, the cases which have construed the prohibitions of the constitutions have held that the "grants" or "gifts," which are forbidden by our constitutional provisions, are *direct* grants or gifts, in which the *primary* purpose of the statute is to make such a gift, grant, or support, and that "indirect" and/or "incidental" benefits, resulting to a sectarian or other private institution or to an individual from the operation of a statute, whose "primary" purpose is to accomplish a *public* (as

distinguished from a *private*) purpose, do not offend the constitutional validity of the statute. Indeed, in the case of *Rutgers College* vs. *Morgan,* a very distinct and substantial indirect or incidental benefit arose to the College from the establishment there of the agricultural division.

The New York Constitution, on the other hand, prohibits grants or gifts which even "*indirectly*" aid "any school or institution of learning wholly or in part under the control or direction of any religious denomination". It is clear, therefore, that the Constitution of New York, by its prohibition of "indirect" as well as "direct" aid to sectarian institutions, is far more comprehensive and restrictive than the Constitution of New Jersey which only prohibits *direct* aid to or support of such an institution, and recognizes that *indirect* or purely incidental benefits may constitutionally result to such an institution through the operation of legislation having a legitimate *public* purpose as its *primary* object.

(After the decision of the court in *Judd* v. *Board of Education, supra,* and in the same year, i. e., 1938, a constitutional convention proposed, and the people of New York adopted, an amendment to the New York Constitution, by which the legislature was expressly authorized "to provide for the transportation of school pupils to and from *any* school or institution of learning". After the adoption of the constitutional amendment, appropriate legislation was enacted and under it New York provides free transportation to pupils attending *private* schools. Thus, the people of New York overruled the Court of Appeals of their State and exhibited a liberality of view that was sadly lacking in the majority opinion in the *Judd* case. The course of this amendment and these statutes will be found in Appendix No. 1 attached hereto.

What is said above of the constitutional provision of New York, which was involved in the *Judd* case, may be said, also, of the constitutional provision of Oklahoma, which was involved in *Gurney* v. *Ferguson, supra,* The constitutional provision involved in the *Gurney* case (as quoted on p. 1003 (1) of the opinion in that case) provided that "no public money or property shall ever be appropriated, applied, donated or used directly or *indirectly* for the use, benefit or support of any sect, church * * * or sectarian institution as such." Here again the constitutional prohibition was directed at "indirect" aid to a sectarian institution as well as at "direct" aid to such an institution and so was far more restrictive than any provision of the Constitution of New Jersey.

The constitutional provision of Washington, which was invoked and applied in *Mitchell* v. *Consolidated School District, supra,* contains a provision (quoted on p. 81, col. 1 of the opinion) to the effect that "*the* ENTIRE *revenue derived from the common school fund and the state tax for common schools shall be* EXCLUSIVELY *applied to the support of the common schools.*" The bearing of this provision upon the statute under review, in the *Mitchell* case, was considered so important that the court, in its opinion, italicized it just as we have italicized it. We have supplied special emphasis to the words "entire" and "exclusively," used in the Washington Constitution to further point out the importance of these words, in the constitutional provision.

With reference to the statutes involved in the outside cases, the following may be said:

While the text of the Delaware statute involved in *State* v. *Brown, supra,* is not set forth in the opinion, sufficient is stated in the opinion to make

it appear that the statute provided a money appropriation from general funds for transportation of pupils attending *private* schools. It was not limited merely to permitting such students to ride in a public school bus along the route traversed by such bus, which transported *public* school pupils. To this extent the Delaware statute was unlike the New Jersey statute involved in the instant case.

The New York statute involved in the *Judd* case made it mandatory for the school district and the trustees thereof to "provide, if need be, one or more routes so that all children of school age in said district shall equally be afforded transportation facilities" (15 N. E. (2d) 579, Col. 1). Thus, the New York statute made it mandatory upon school districts to provide whatever facilities were necessary for transportation of *private* school pupils. It was not limited, as is the New Jersey statute, to the mere right to ride in the bus with the public school pupils along the route traveled to the public school.

So much, then, for the constitutional and statutory provisions involved in the cases from other jurisdictions, upon which the Prosecutor-Appellee relies, and their difference from the pertinent statutory and constitutional provisions of New Jersey.

The reasoning in the cases from other jurisdictions upon which the Prosecutor-Appellee relies is fallacious, and is opposed to the reasoning upon which the other cases, having to do with cognate or related questions, were decided. For both of these reasons, the cases from other jurisdictions, upon which the Prosecutor-Appellee relies, should not be followed.

As we have previously pointed out the fundamental basis of the decisions from other jurisdic-

tions, upon which the Prosecutor-Appellee relies, is that any legislative grant of privileges to pupils attending private schools is a grant *in aid of the school itself*, rather than of the *pupils*, notwithstanding that the latter are the direct recipients and beneficiaries of the aid. We have already argued (and we repeat) that this argument is fallacious and is opposed to common sense. The dissenting opinions, in all of said cases, point out that the *pupils* and not the *schools* which they attend are the beneficiaries of legislation granting transportation privileges to school children. The *schools* are not aided by such legislation or, if they are aided thereby, the aid to them is *indirect* and, purely, "*incidental*" to the accomplishment of a lawful *public* purpose, to wit, the fostering of education and so does not create any constitutional barrier. This is the reasoning of the dissenting judges in the cases upon which the Prosecutor-Appellee relies—reasoning which, as we have already made to appear, is identical with the reasoning of the dissenting opinion in the instant case.

Concluding this part of the discussion, we cannot do better than quote an excerpt from the opinion of Honorable Smith Troy, Attorney-General of the State of Washington, submitted to the Prosecuting Attorney of Yakima County, Washington, on August 6, 1941, with respect to the constitutionality of the Washington transportation statute, as applied to *private* school. Among other things, the Attorney-General said:

> "When the legislature, in the exercise of its sovereign police power, declares that the health and safety of children attending all schools is to be promoted by avoiding and minimizing accidents and traffic hazards through public transportation, and that private and parochial school children are to be

benefited [sic] in this regard as well as public school children, it is difficult to perceive how such transportation will unconstitutionally advance religious worship and instruction or how the public facilities employed in this promition [sic] of child welfare will be applied to the support of religious establishments. Children of this county have ever attended and still attend sectarian schools where they have ever received and still receive spiritual as well as secular instruction. *Their religious training will be neither increased nor furthered because they come on public wheels rather than on private shoe leather.* The constitutional provision is aimed against direct, concrete support of denominational schools—in the matter of public transportation it is no more concerned with incidental and intangible aid to parochial schools than is a subsequent provision, prohibiting the giving of public money or property in aid of a private individual, concerned with similar benefits which casually and indirectly accrue to the public school child's parent whose pocketbook is relieved of some expense for wear and tear on boots. Upon this score we distinguish as not in point the New York decisions (*Smith* v. *Donahue,* 202 App. Div. 656; *Judd* v. *Board of Education,* 15 N. E. (2d) 580), which are grounded on a former express constitutional prohibition against direct and indirect aid, and the Delaware ruling (*State ex rel. Traub* v. *Brown,* 172 A. 835), which is inaptly based on the *Donahue case,* supra. Controlling, we believe is the argument of the Louisiana court (*Borden* v. *State Board of Education,* 123 So. 655) as follows:

" ' * * * One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public schools. 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, the latter, 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 * * *.'
>
> "This argument was quoted verbatim by Chief Justice Hughes of the United States Supreme Court in holding that taxation for such books is not a taking of private property (the taxpayers') for a private purpose (the schools') in contravention of the Fourteenth Amendment to the Federal Constitution. (*Cochran* v. *Louisiana State Board of Education,* 281 U. S. 370.)"

We submit that the reasoning of the Attorney-General of Washington has far more of logic and common sense to commend it than the majority opinion of the Washington Supreme Court in the *Mitchell* case.

It is convenient here to direct attention to certain judicial references to this statute prior to the 1941 change, which references have a bearing on the issue now before the Court.

In *McKnight* v. *Cassidy,* 113 N. J. L. 565, the opinion written for the Court of Errors and Appeals makes reference to this statute in its earlier form in part as follows:

> "This section it will be noted contemplates two methods of dealing with the serious problem then arising between introduction of the automobile and its promise of soon supplanting the horse driven vehicle. The first was to make rules for the transportation of school

children living remote from the schoolhouse; the second was to make contracts for like transportation * * *."

In *Board of Education, etc.*, v. *Atwood,* 74 N. J. L. 638, affirming 73 N. J. L. 315, the Court held that the failure of a board of education to provide for the transportation of children living remote from the schoolhouse was *not* a failure to provide suitable school facilities and accommodations within Section 120 of the school law. This appears to be a determination that it was a legislative differentiation between the two functions in question in the case.

Activity of the State Respecting Children

Beginning in the early part of the last century, our citizens began to consider the subject of the education of their children not only as eminently deserving their own attention, but as entitled to the fostering care of the State, and while in the course of years since then the Legislature has never undertaken to assert a monopoly of the education of the children, it has in accordance with the command of the constitutional provision (Article IV, Section 7, par. 6) and otherwise, by appropriate statutes, undertaken to protect and advance the interest of the children of the State generally, not only by providing free public schools but also by promoting the educational advancement of children generally. The most outstanding legislation dealing with the education of children generally is that contained in the so-called Compulsory Education Act (R. S. 18:14-14). In substance, this statute, so far as here pertinent, provides that every parent, guardian, or other person having custody and control of a child between the ages of seven and sixteen years

shall cause such child regularly to attend the public schools of the district or a day school in which there is given instruction equivalent to that provided in the public schools for children of similar grades and attainments, or to receive equivalent instruction elsewhere than at a school, unless such child is above the age of fourteen years and has completed the work of the eighth grade in the public school or equivalent work in a private school, or is above the age of fifteen years and has completed the work of the sixth grade, or has completed an approved educational program in lieu thereof and has been granted an age and schooling certificate and is regularly and lawfully employed in some useful occupation or service. (A discussion of this statute will be found in *Stephens* v. *Bangart,* a case in the Domestic Court of Essex County and reported in 15 N. J. Mis. R. 80, 189 All. Rep. 131.) Further State interest in the children attending private schools is manifested in the follwing instances:

R. S. 18:19-1, prohibiting the infliction of corporal punishment upon a pupil attending such school.

R. S. 18:19-8, prescribing that regular courses of instruction in the Constitution of the United States shall be given in private schools.

R. S. 18:19-4 to 6, dealing with fire prevention.

R. S. 18:19-7, defining "private schools."

R. S. 18:3-18, requiring that annual report be made by the private schools to the Commissioner of Education.

R. S. 18:20-8, requiring that the private school, as a condition precedent to conferring or participating in the conferring of degrees upon any person, submit to conditions prescribed by the State Board of Education.

Prosecutor-Appellee's position appears to be as follows: (a) that the expenditure in question is a

constitutionally forbidden diversion of funds belonging to the public school system exclusively; and (b) that the effect of the application of the statute as carried out in the instant case is to aid parochial schools, and thereby to violate the following provisions of our Constitution:

1. Article I, paragraph 3, in the way of permitting the raising of money by taxation for the maintenance of a religious ministry.
2. Article I, paragraph 4, in the way of permitting the establishment of one religious sect in preference to another.
3. Article I, paragraph 3, and Article I, paragraph 4, in the way of violating the principle of complete separation of church and state.
4. Article I, paragraph 19, in the way of authorizing a gift of public money to or in aid of individuals, associations, or corporations.
5. Article I, paragraph 20, in the way of authorizing an appropriation of public money to or for the use of societies, associations, or corporations.
6. Article IV, section 7, paragraph 5, in the way of authorizing the use of public school funds of the state and of the local school districts for a purpose other than the maintenance and support of free public schools.

Respondents-Appellants contend that the statute is not invalid for any of the reasons assigned by the Prosecutor-Appellee. As we have pointed out above, under the Compulsory Attendance Act substantially all the children of the State are required to attend school and those who control such children are made responsible, under a penalty, for seeing that they attend. It cannot be gainsaid that if compliance with this attendance law may, from the Legislature's viewpoint, involve any haz-

ards to the child, the removal or minimizing of such hazards to any extent and in any appropriate way must be considered a proper public function. Now parents may exercise a legitimate preference in the matter of the schools which their offspring attend. Therefore, in compliance with the attendance law, a child may attend a parochial school, and, in the event the school is remote from his home, public policy would seem to entitle the child to free transportation. It follows that if such transportation is furnished to a child, benefit results to the child (and we submit that where benefits of this nature are afforded school children generally it is a benefit to the State) and public funds may accordingly be rightly expended therefor. Then, as was well said by Justice Cooley in *People* v. *Salem,* 20 Mich. 452:

> "Necessity alone is not the test by which the limits of State authority are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful for the continued existence of organized government, and embrace others which may tend to make that government subserve the general wellbeing of society, and advance the present and prospective happiness and prosperity of the people."

Furthermore, it appears that the money so expended is used to promote the safety of a proper class of the inhabitants of the State. The class includes all children attending schools excepting children attending such schools as are operated for profit. The exclusion of the class last referred to does not make the act special in that the Legislature could rightly have concluded that children of financial ability to pay for their schooling were not without further means to transport themselves to and from the schools when necessary, and, we submit, if necessary to save the statute, such a

presumption should be indulged by the Court. No pupil of a school conducted for profit is here complaining of any discrimination and Prosecutor-Appellee may not complain for him.

Prosecutor-Appellee concedes, as he must, that direct benefit moves to any child to whom the service prescribed by this statute is rendered, but the necessities of his position here constrain him to stress what we conceive to be the invalid argument that the free transportation induces attendance at the parochial schools and thus aids such schools in an unconstitutional way. We submit this is a wrong deduction from the facts of the case and that if the children derive a benefit from the transportation, any benefit to the parochial school is only incidental, and particularly is this so where it is not shown and it does not appear that there is any payment of the proceeds of the taxes or other rates to the organization controlling the school, or that any tangible thing is received by it as a result of the action of the Respondents-Appellants in furnishing the transportation in question.

In support of his attack on the amendment, our adversary asks the Court to presume, *as a matter of law,* that transportation of the children of Ewing Township to these parochial schools will increase the enrollment of such schools. Such a presumption must be based upon the conclusion that there are in the Ewing Township School District pupils who are not attending the parochial schools, who would transfer from the public school to such parochial school if they could secure free transportation. We submit that there is no proof of this fact in the record and that the Court may not take judicial notice that such a thing will happen in that the only facts that may be presumed by the Court are those in favor of the constitutionality of the legislative action. Attention is

invited to the lucid discussion of this point by Justice Mallery of the Supreme Court of Washington in the case of *Mitchell* v. *Consolidated School District No. 201*, reported in 135 Pac. (2d) 79, at pp. 86 and 87.

Prosecutor-Appellee contends that the challenged statute does not include all the children in the State, and excludes those who attend schools operated for profit, and contends "that the exclusion of such children, i.e., those attending any private school operated for profit negatives any legislative attempt to aid the children."

Practically every statute is open to hypercritical argumentation, but the instant case is obviously one for a proper classification such as that adopted. If a person can afford to send his child to a school operated for profit, he can afford to pay his fare to and from the school-house. The act provides for all children of tender age actually engaged in the process of *education* in non-profit schools, and whose attachment to that process involves an almost daily exposure to traffic dangers, physical exhaustion, time expenditure, health impairment, etc., all of which would have an inimical effect on the due effectuation of the primary object—education. For those who live at a great distance from the school, and especially in rural districts unprotected by traffic police, in many instances with roads unpaved and often muddy, and in danger of variable weather converting the roads into seas of mud, and with other easily conceivable motives inducing thereto, the classification adopted is at once reasonable and proper. The law in such instances is clear and is well stated in *Stewart* vs. *Brady,* 300 Ill. 425, 133 N. E. 310, at p. 314 (see also 59 C. J., p. 732, §319; *People* vs. *Callicott,* 153 N. E. 688) where the rules of law which support the statute, with a wealth of citations, are laid down as follows:

"The clearly indicated purpose of the Legislature was to protect the public from deceit and prevent fraud in the sale and disposition of stocks, bonds, and other securities within the state. The authority of the Legislature to adopt a statute of this character is found in the police power, for the promotion of the general welfare by the prevention of frauds, and the appellant concedes that the evil attempted to be regulated is a subject upon which the General Assembly has the right properly to legislate. It is a question for legislative determination whether an evil exists, and what means should be adopted to prevent it, and its acts will not be interfered with, unless they are clearly in violation of some constitutional limitation. *People* v. *Stokes,* 281 Ill. 159, 118 N. E. 87; *People* v. *Elerding,* 254 Ill. 579, 98 N. E. 982, 40 L. R. A. (N. S.) 893; *People* v. *McBride, supra* [234 Ill. 146, 84 N. E. 865, 123 Am. St. Rep. 82, 14 Ann. Cas. 994].

"The Legislature may consider degrees of evil and is not bound to pass such a law as will meet every case. *People* v. *Stokes, supra.* Its classification of the objects of legislation is not required to be scientific, logical, or consistent, if it is reasonably adapted to secure the purpose for which it is intended and is not purely arbitrary. Legislative classification does not have to be so broad and comprehensive as to include all the evils which might by possibility be brought within its terms. Classification must be accommodated to the problems of legislation, and must be palpably arbitrary to authorize a judicial review of it. It cannot be disturbed by the courts, unless they can see clearly and there is no fair reason for the law that would not require with equal force its extension to others, whom it leaves untouched. It is competent for a Legislature to determine upon what differences a distinction may be made, for the purpose of statutory classification, between objects otherwise having resemblance, though such power cannot be arbitrarily exercised, and the dis-

tinction must have a reasonable basis. *International Harvester Co.* v. *Missouri,* 234 U. S. 199, 34 Sup. Ct. 859, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525. In that case attention is called to the distinction between legislative power and the wisdom of its exercise in these words:

" 'It is to be remembered that the question presented is of the power of the Legislature—not the policy of the exercise of the power. To be able to find fault, therefore, with such policy, is not to establish the invalidity of the law based upon it.'

"So in *Chicago, Burlington & Quincy Railway Co.* v. *McGuire,* 219 U. S. 549, 31 Sup. Ct. 259, 55 L. Ed. 328, it is said:

" 'The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the Legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.

" 'The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the Legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the Legislature may be guided by experience. *Patsone* v. *Pennsylavnia,* 232 U. S. 138-144. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may "proceed cautiously, step by step," and "if an evil is specially

experienced in a particular branch of business," it is not necessary that the prohibition "should be couched in all-embracing terms." *Carroll* v. *Greenwich Ins. Co.,* 199 U. S. 401-411. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied. *Keokee Consol. Coke Co.* v. *Taylor,* 234 U. S. 224-227.' *Miller* v. *Wilson,* 236 U. S. 373, 35 Sup. Ct. 342, 59 L. Ed. 628, L. R. A. 1915 F, 829.

"One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. A distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912 C, 160. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety. *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 36 Sup. Ct. 370, 60 L. Ed. 679, L. R. A. 1917 A, 421, Ann. Cas. 1917 B, 455. These are general principles which control judicial inquiry into the question of legislative power, and they have been applied in the cases which have been cited and those mentioned in the opinions in those cases and in numerous other cases in a great variety of circumstances."

That the children in private schools and in sectarian schools should not be discriminated against is well stated in *Pierce* vs. *Society of Sisters,* 268 U. S. 510. "The Oregon Compulsory Education Act * * * with certain exemptions, requires every parent * * * of a child between the ages of eight and sixteen years to send him to the public school in the district where he resides * * *." This was

held by a unanimous U. S. Supreme Court to be an unreasonable interference with the liberty of parents to direct the upbringing of the children, and in that respect violative of the Fourteenth Amendment. That Court, speaking through Mr. Justice McReynolds, said, at pp. 534, 535:

> "The inevitable practical result of enforcing the Act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the State of Oregon. These parties are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students or the State. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.
>
> "Under the doctrine of *Meyer* v. *Nebraska*, 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

In the light of the above it may not be amiss to say that it must be borne in mind that the parents of the children in denominational schools pay

taxes as well as do other citizens, and great care should be taken not to discriminate against them. They have a right to send their children to denominational schools, and to deny them this right would interfere with their religious liberty. They cannot be criticized for having those religious views. At the same time, a just regard for their constitutional rights to use denominational schools requires that they and their children shall not be discriminated against except insofar as the legislative act may constitute a clear violation of the constitutional provisions.

Certainly, it would not violate any constitutional provision to provide for public *health* examinations of children in all schools, or for the use of public (police) ambulances to take a child from a denominational school to a hospital, or for the Safety Squad of the police department to transport, in a public vehicle, a child from a denominational school to a place of safety, or to make use of pulmotors or other safety devices for the benefit of such children.

If the State should provide milk for children of school age, or free medical examination, or vaccination, or special police protection at school crossings, no reason can be suggested as to why these safety measures cannot be given to children who attend denominational or other private schools as well as to children who attend public schools.

Yet the furnishing by the public, at its expense, of such safeguards for the health, safety, and well-being of the children, and the advancement of the public welfare, is as much an indirect though remote benefit to the private school as is the transportation of the children.

Chapter 191, P. L. 1941, Does Not Violate Article IV, Section 7, Paragraph 6, of the Constitution

In relying upon the above-cited provision of the Constitution, the Prosecutor-Appellee, in effect, claims that the command of the people therein, that there be maintained a system of public free schools, and the further command, that the State school fund be annually appropriated to the support of public free schools, amount to an inherent want of constitutional authority by the government to exert any powers with the end in view of promoting the well-being of children of the State other than those attending the said public free schools. At the outset of the discussion of this question, it will not be amiss to point out that in *Trustees of Rutgers College* v. *Morgan,* 70 N. J. L. 460, the Court determined that the constitutional provision in question was not to be regarded as a limitation of legislative power over the subject of free public schools, and that this right of the Legislature to go beyond the constitutional **mandate** was again upheld in the case of *In re Newark School Board,* 70 Atl. 881 (not officially reported).

This view of the Prosecutor-Appellee would forbid the exertion of legislative power which undoubtedly exists. The principle is elementary in that the State, having the guardianship of the common good, cannot be indifferent to the education of its citizens, and this is obvious when we consider that its very existence is for the promotion of the general welfare as represented by the intellectual, moral and physical condition of such citizens. Included in this "welfare" is the right and duty of the State to promote within due limits the interest of the children of the State, including, among other things, the safeguarding of the bodily in-

tegrity of such children from preventable accidents.

Assuming, as we submit the Legislature rightly may, that the welfare of school children is the object of this legislation, the right to the equal application of the law requires that the welfare of children attending private schools must be as much a concern of the State as the welfare of children in tax-supported schools. As an application of this theory, the State provides police protection and other public service for the children attending parochial schools to the same extent as it does for the children attending public school. Indeed, this transportation measure has nothing to do with religion, but has much to do with the civil liberty and equal treatment under the law. To proscribe children attending parochial schools from services of this kind and to render such services to children merely because they attend the public free school would be "to deny any person * * * the equal protection of the laws * * *" contrary to the Fourteenth Amendment of the Federal Constitution.

The Court will not interfere with the application of an act of the Legislature unless it is clear beyond reasonable controversy that the provisions of the Constitution will be violated by such application.

In *State* v. *Murzda,* 116 N. J. L. 219, speaking for the Court of Errors and Appeals, Mr. Justice Heher said, at page 223:

> "A constitutional prohibition against the exercise of a particular power is in the nature of an exception; and it is the settled rule of judicial policy in this jurisdiction that a legislative enactment will not be declared void unless its repugnancy to the constitution is so manifest as to leave no room for reasonable doubt. The constitutional limitation

> upon the exercise of legislative power must be clear and imperative. This is a well defined limitation engrafted upon the function assumed by the courts, federal and state, to nullify a statute for unconstitutionality."

See, also, *State Board of Milk Control* v. *Newark Milk Co.,* 118 N. J. Eq. 504.

In *State Tax Commissioner of Utah* v. *Aldrich,* 316 U. S. 174, Mr. Justice Frankfurter in part said:

> "To allow laws to stand is to allow laws to be made by those whose task it is to legislate. The nullification of legislation on constitutional grounds has been recognized from the beginning as a most 'dominating' function, not to be indulged in by this court simply because it has formal power to do so, but only when compelling consideration leaves no other choice."

The Statute Under Review Does Not Violate Paragraphs 19 and 20 of Article I of the Constitution of New Jersey

This paragraph inhibits certain actions by a county, city, borough, town, township, or village. The action challenged in this case is an action of the Board of Education of the Township of Ewing.

This constitutional provision prohibits a donation of land or appropriation of money to or for the use of any society, association, or corporation whatever. As before pointed out, the application made here of the provisions of the statute in question does not appropriate any money to the association controlling the parochial schools, nor is anything of value which the State or its subdivisions own given to such an institution. Our adversary refers to the construction which has been given to this provision in the case of *In re*

Voorhees, 123 N. Y. Eq. 142 (reviewed by *certiorari. sub nomine Union County Trust Co.* v. *Martin,* 121 N. J. L. 594, affirmed 124 N. J. L. 35), and the case following the *Voorhees* case and involving the railroad tax settlement act between *Wilentz, Attorney General, Informant,* v. *Hendrickson, State Treasurer, Defendant,* 133 N. J. Eq. 447. The appropriation here is to the child or its parent and is not "to or for use of any society, association or corporation whatever."

As an examination will show, these cases have no application here as has been hereinbefore demonstrated. The *Voorhees* case involves the right of the Legislature to waive collection of a financial obligation due from a corporation to the State, the right to which had accrued and was fully vested in the State prior to the enactment of the statute purporting to forgive the same. In the railroad settlement casè, the finding was that the act before the Court purported to waive satisfaction of certain presently due interest and to extend the time of payment for certain presently due taxes.

Furthermore, under this provision, the appropriation, if any there were, would not violate the Constitution unless said appropriation were in the nature of a donation or gift.

The language of Article I, paragraph 20, of our amended State Constitution, which is that upon which the majority Justices in the Supreme Court rest their decision (S. C., p. 54, ll. 33 through 40, and p. 55, ll. 1 through 22), is couched in terms of art, well known to those who framed the paragraph and intended to have their appropriate meaning therein. That language is as follows: "20. State or municipal aid to private corporations, etc.—No donation of land or appropriation

of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

The payment of the cost of pupil transportation by the admitted facts in the case was not a payment *"to"* the school; so much is incontestible. The real inquiry then resolves itself into the question: Was it an *appropriation "for the use of"* the school? The inhibition is directed against appropriation of money to or for the use of any society, association, or corporation. By appropriations, we understand the setting apart of public moneys by legislative vote or enactment, to be applied to specific objects of public expenditure. See Rap. & Law, L. Dict., *ad verbum* §6; Century Dict., *ad verbum.* An analogous meaning has been assigned in New Jersey to the word "appropriations," occurring in a will. See *Whitehead, et al.,* vs. *Gibbons, et al.,* 10 N. J. Eq. 230, 235. Now it is to be noted that the condemnation of the above paragraph of the constitution is not set upon all public appropriations to societies, associations, or corporations, for "no money shall be drawn from the treasury but for appropriations made by law" (Constitution of New Jersey, Article IV, section VI, paragraph 2); and we are not lightly to infer that the people intended to forbid all transactions and dealings between the state and any society, association, or corporation. Such a conclusion might be very unnecessary and very inconvenient. The barrier of the constitution is, however, set up against "appropriations of money *to or for use of* any society, association, or corporation." The modifying phrase, *to or for the use of,* is to be regarded, and it bears great significance to the legal mind. For example, in an action of *indebitatus assumpsit,* upon the common counts respect-

ing moneys, the plaintiff declares that the defendant is indebted to him "for so much money by the plaintiff, before that time, paid, laid out, and expended *to and for the use of* the defendant, at his special instance and request." See 2 Chit. Pl. (11th Am. ed.) *37, *87. Obviously, the moneys thus sought to be recovered had not come to the defendant as a just payment for services performed, goods sold and delivered, or otherwise, but they had been paid or expended for the peculiar benefit of the defendant, and at his solicitation, actual or supposed. This element of special, singular, selfish benefit involved in the phrase "to and for the use of," found in the common counts, is also involved in the similar phrase found in the amended Constitution, and it is upon this element that the condemnation of the above-quoted paragraph of the Constitution rests.

Prosecutor-Appellee contends that paragraphs 19 and 20 of Article I of the Constitution prohibit state aid, given directly or *indirectly,* to any individual, association, society, or corporation for any private purpose whatever, and relies upon *In re Voorhees,* 123 N. J. Eq. 142-148, in support thereof. This position is entirely without support in the case cited, is not only not warranted by, but is in direct antagonism to the language of the Constitution itself, and is a glaring exposé of the difference which exists in the language of our Constitution and that of most, if not all, of those States whose decisions are cited in the majority opinion in the instant case. These cited decisions and the constitutional provisions on which they rest are dealt with elsewhere in this Brief. We now proceed to demonstrate and document the matters hereinbefore in this paragraph set forth:

Our Constitution, paragraphs 19 and 20 of Article I, does not either expressly or by implication

prohibit state aid to be given *indirectly*. The language of those two paragraphs is as follows: "19. Municipal aid to private corporations.—No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation. 20. State or Municipal aid to private corporations, etc.—No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

It will be observed that in neither of these constitutional provisions is the word *indirectly* used in reference to the matters in issue in the instant case. In paragraph 19, which Justice Heher in his dissenting opinion (S. C., p. 57, ll. 1 and 2) says "is not in terms applicable to school districts," and which was not the basis of decision in *Rutgers College* vs. *Morgan, supra,* and in *In re Voorhees, supra,* where paragraph 20 of Article I (S. C., p. 54, ll. 34 through 39) was the basis of decision, which are the two cases which the majority in the instant case say cause the latter case not to be one of first impression in this State, the expression "directly or indirectly" is not used as applying to gifts of money or property, or loans of money or credit, to or in aid of any individual, association, or corporation, but it *is expressly* employed in the last clause "or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation." This is a most illuminating and compulsive employment and application of language and distinctions present to the minds of the framers of the Constitution. In the first class of cases the employment of the phrase "directly or indirectly"

was consciously and deliberately avoided, and was consciously and deliberately employed as to the class embracing suretyship, or ownership of stocks or bonds. In paragraph 20, immediately following, the phrase is not used at all. Under settled rules of construction, the significance of such omission to use the phrase as to one class, including that in the instant case, and to use it as to another class alien to that in the instant case, is conclusive evidence it was not intended to apply to the former class.

That Prosecutor-Appellee's contention as to the case of *In re Voorhees* is equally baseless is clear. His error arises from his misconception of the first syllabus of that case: "By article I, section 20, of the constitution of this state, the legislature is prohibited from making any gift of public lands or funds to any private corporation, either directly or indirectly." The law is clear that where the headnote of a decision of a state court is not given special force by statute or rule of court, the opinion is to be looked to for the original and authentic grounds of decision. *Burbank* vs. *Ernst,* 232 U. S. 162; 15 C.J. §380, p. 971, title "Courts," sub-title "Syllabi." Looking into the opinion of the Vice-Ordinary, in *In re Voorhees,* we find the basis for the syllabus, as confined to and limited by the facts in issue in that case as they must be, to be "that there is no distinction between direct pecuniary aid and indirect aid by release from a pecuniary burden; and that there is no distinction between a release of an obligation for license fees and a release of an obligation for taxes." The language used in paragraph 1 of the syllabus is found on page 147, and shows it to have been subdued to and limited by the peculiar facts of that case, which are utterly different from those involved in the instant case, and hence not an authoritative decision with respect thereto as is

elsewhere herein shown. In that case payment was made to the school directly; in this no payment was made. There the money was expendable by the school for any school purpose, sectarian or otherwise; in this the school had no possession of or control over the money. There it could be used for any school purpose whatsoever; here its use was limited to transportation of the pupils; there the gift was *direct*.

And it may be further asked: "What, in a legal sense, in these times, is an *indirect* benefit?" Practically every act performed by the State or its municipalities is in a remote sense an indirect benefit to some person, association, or corporation. Innumerable instances will occur to the thoughtful mind on reflection. Some are the following: In Eminent Domain the taking must be for a public purpose, yet in almost every instance of its exercise, it indirectly benefits some individuals or corporations. No one has ever successfully urged that such indirect benefit invalidated the taking; in the vacation of public streets, individuals are almost invariably indirectly benefited, yet this does not invalidate the vacation. It must, therefore, be always borne in mind that the Constitutional provision does not use the words *indirect* or *indirectly,* and hence any argument therefrom is impermissible in the instant case.

The language in the *Voorhees* case, hereinbefore referred to on page 147, was: "A gift of public funds or property to a private corporation is unconstitutional whether made directly or indirectly; and the annulling by the legislature of a financial obligation due from such corporation to the state, the right to which has theretofore already become fixed and vested in the state, is (unless supported by some legal, equitable or moral consideration therefor) such a gift, and

hence invalid." Here is a strange confusion of language by the Vice-Ordinary. He entirely overlooks the meaning of the words "direct" and "indirect," and completely misapplies them. He says, at page 146: "there is no distinction between *direct* pecuniary aid and *indirect* aid by release from a pecuniary burden; and that there is no distinction between a release of an obligation for license fees and a release of an obligation for taxes." (Italics ours.) Of course there is no distinction between the examples cited, because in each instance the aid is *direct* and not *indirect;* the two modes of extending pecuniary aid are different but neither is *indirect.* It is as direct a means to convey a pecuniary benefit on a corporation to forgive an existing valid pecuniary obligation, as it is to turn over to such corporation a sum in money equal in amount thereto. Each method pursues a straight course and the shortest course to the end desired, and hence is the most *direct* method to its accomplishment. If a gift of cash money is desired to be given then, of course, the *direct* method is to turn it over to the donee; if a gift of pecuniary aid or value is to be given to a debtor, a direct and immediate way of conferring it is to forgive the debt or obligation. A debt is *property.* The constitutional inhibition is expressly directed against giving money or *property.* The direct and straight way to *give* the property in a debt is to forgive or release it. There is nothing *indirect* about such a transaction, and no question of *indirect* giving was involved in the *Voorhees* case, and any remarks with respect thereto were *obiter.*

The Statute Under Review Does Not Violate Paragraphs 3 or 4 of Article I of the Constitution

As heretofore pointed out, there is no basis whatever for the contention that this statute, with its obvious intent to benefit the child, compels this Prosecutor-Appellee and other taxpayers to pay anything "for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry," and we urge that the challenge on this ground should be held to be without substantial merit. We have heretofore dealt with the contention that free transportation of these pupils induces attendance at the parochial schools and as a result violates this constitutional provision. In this connection, the Prosecutor-Appellee appears to rely on the reasoning of opinion writers in the New York case of *Judd* v. *Board of Education,* 278 N. Y. 200, 15 N. E. (2d) 576, 118 A. L. R. 789, and in the Oklahoma case of *Gurney* v. *Ferguson,* 190 Okl. 254, 122 Pac. (2d) 1002; and attention is directed to the language of the constitutions of said states and their use of the phrase "directly or indirectly" in their so-called sectarian constitutional provisions. And attention is invited to a discussion of this phase of these decisions in the opinion of Justice Robinson in *Mitchell* v. *Consolidated School District No. 201,* 135 Pac. (2d) 79.

Cases of Other States and of New Jersey Dealing with the Subject Generally

We have examined the cases on this subject decided in the courts of other states, and while there is an admitted lack of consistency in the decisions

themselves, we have found that an unusual number of opinions were written by the judges who participated therein. We appreciate that this may be due in part to the delicate nature of the subject, in that the so-called sectarian sections of the various state constitutions plays a great role in the consideration of this type of legislation, but the extent of the interest aroused has resulted in the expression of a wealth of logical and thoughtful views on the question here involved and kindred questions. The most pertinent of these cases are now referred to.

In *Gurney* v. *Ferguson,* 112 Pac. (2d) 1002, the holding was that a legislative enactment purporting to authorize payment or expenditure of public funds for transporting pupils to and from sectarian schools was violative of the Oklahoma Constitution, which, in substance, prohibited the application of public money directly or *indirectly* for the use, benefit, or support of any sect, church, denomination, or system of religion. The determination was influenced by the phraseology of the Constitution in question and by the arguments of the Court of New York in the case of *Judd* v. *Board of Education,* 278 N. Y. 200; 15 N. E. (2d) 576.

In the case of *Judd* v. *Board of Education, supra,* a New York statute 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 that the statute was unconstitutional by reason of a provision of the New York Constitution which forbade public aid or maintenance of denominational schools. The majority held that the statute was invalid as vio-

lative of the provisions of the State Constitution which prohibited the use of any public money "directly or indirectly" in aid of any sectarian school, and plaintiffs were entitled to judgment upon the pleadings; three judges dissenting.

It was held that the sectarian amendment to the constitution of that state restricted the use of public moneys raised by taxation exclusively to the common schools as a system, and that any contribution in aid of any private or sectarian school is in violation of a concept in complete separation of church and state. The court disposed of the "child benefit theory" by saying this ignores the spirit and intent of the constitutional provisions. But we submit the reasoning is hard to follow. The opinion makes this declaration:

> "The purpose of the transportation is to promote the interest of the private school or religious or sectarian institution which controls or directs it * * * *without pupils there could be no schools.*" (Italics ours.)

In commenting upon this theory, in *Mitchell* v. *Consolidated School District No. 201,* 135 Pac. (2d) 79, at p. 85, Justice Robinson, in part, said:

> "At first blush, this seems to be a devastating argument, but it is nevertheless fallacious. It has no validity unless it be assumed that, if there be no buses there will be no pupils; but can anyone doubt but that the parents who pay taxes to support the public schools, and yet share in the expense of maintaining parochial schools, will contrive in some way or another to send their children to those schools, as they have heretofore sent them whether bus service is available or not? No pupil, no school is in no way involved. The Legislature in passing Chapter 53, Laws of 1941, was not concerned with supplying pupils to the parochial schools, but with furnishing *safe* transportation to those pupils who do attend parochial schools."

The arguments noted in these New York and Oklahoma cases are typical of those used by the courts which have held against the furnishing of transportation. In *State* v. *Brown,* 172 Atl. 835, the Superior Court of Delaware, which was the court of first instance, not the Appellate Court of Delaware, went the whole way and held that the word "fund" in this matter meant any fund whether segregated or not. Incidentally, since this decision in the *Judd* case, the people of New York have provided in their Constitution provisions for free transportation for private school children. (See Appendix No. 1 hereto.)

In *State* v. *Milquet,* 192 N. W. 392, the Supreme Court of Wisconsin, in determining a controversy of transporting children to a parochial school, followed along the same general lines as in the above cases, the Court holding that it was beyond the power of the school board to make a contract furnishing transportation to those who attended other than a public school. Here there is evidence that the court is following the theory that expenditures are restricted to the public school as a system. However, it will be observed that this case is a comparatively old one having been decided in 1923, and that there was no consideration by the court of the theory which since that time has grown in favor and which is known as the "Child Benefit Theory." A close reading of this case will show it depended upon the construction of a statute, and it was held that statute did not confer the power on the school district, a quasi-corporation, which had only the powers given it by statute and that in the light of the constitutional scheme the claimed powers not having been expressly given could not be implied.

There is a fine expression of this Child Benefit Theory in the *Louisiana* case involving text books

of *Bordon* v. *Louisiana State Board,* 168 La. 1006. There the plaintiff sought to restrain the Board from using tax money for the furnishing of text books to pupils of the State on the ground that this violated the State Constitution. In the bill the Legislature had authorized the Board of Education to provide "school books for school children free of cost to such children." The crux of the discussion hinges about the contention that this is the taking of public property for a private purpose and is hence unconstitutional. The reasoning back of this contention is that the purpose of the law was said to aid private, religious, and sectarian schools not embraced in the public educational system of the state by furnishing free text books to the children attending such schools. In commenting on this claim, the opinion of the Court reads as follows:

> "One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. 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, the latter, 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 re-

> sult, 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 * * *. What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is expected, adapted to religious instruction."

A companion case was appealed to the United States Supreme Court, *Cochran* v. *Louisiana State Board,* 281 U. S. 370, and in delivering the opinion for the Court, affirming the judgment of the State Court, Chief Justice Hughes quoted the above statement from the opinion of the State Court and commented as follows:

> "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."

The support Respondents-Appellants in the instant case obtain from this adjudication is the holding that the test of public purpose in connection with taxation and what is general welfare leaves the State Legislature with broad discretion, which will not be upset by the judicial branch of the government unless it is a plain case of departure from public purpose.

The so-called Child Benefit Theory was specifically applied to a statute providing for bus transportation in the Maryland case of *Board of*

Education of Baltimore vs. *Wheat,* 199 Atl. 628. In upholding the statute against a claim that its application involved a diversion of public money for a private purpose, the Court made some observations that are pertinent in the determination of the instant case. Among them is the statement:

> "Whether it is private within that rule appears to be, finally, whether it is a furtherance of a public function in seeing that all children attend some school, and in so doing have the protection from traffic hazard. School attendance is compulsory, and attendance at a private or parochial school is a compliance with the law."

After discussing the cases dealing with the furnishing of textbooks, the Court continues:

> "Starting with the interest which the state is acknowledged to have in seeing that all children of school age acquire an education by attending some school, and the fact that they are complying with the law in going to such a school as the parochial school involved in this case, their accommodation in the buses appears to the court to be within the proper limits of the duty imposed. Compliance having been made dangerous in a much greater degree removal of the danger to any extent would seem to be within the same public function."

The above-quoted matter is from the opinion written by Chief Justice Bond for the Court, who places a great deal of emphasis on the matter of traffic hazards. But attention is also directed to the concurring opinion of Judge Sloan, who finds the Act to be valid on still broader grounds.

In his Brief in the Supreme Court, Prosecutor-Appellee points to a comment in 118 A. L. R. 806, at pp. 807 and 808, relative to the *Wheat* case, where the Commentator says: "It was also held

that the appropriation did not impugn a state constitutional provision that 'the school fund of the state shall be kept inviolate, and appropriated only to the purposes of education' saying: 'Apart from any other reason, this [contention] interprets "purposes of education" too narrowly * * *.' In view of the difference in constitutional provisions considered by the New York and Maryland Courts, respectively, and the character of the appropriation, it cannot be said that there is necessarily any conflict in the decisions, and if the New York constitutional provision had been in force in Maryland it may be doubted if the decision of the Maryland Court would have been the same." This is a surprising quotation for the Prosecutor-Appellee to make. The provisions of the New Jersey Constitution *are* similar to those of that of Maryland. The above quotation, therefore, means no more nor less than that the dissimilarity in the Constitutions of New York and Maryland explained the conflict in the decisions in the *Judd* and *Wheat* cases, and hence if the Maryland Constitution had been in force in New York, the decision in the *Judd* case would have been the same as that in the *Wheat* case, and, therefore, the *Judd* case is not an authority against the decision in the *Wheat* case, and is a direct authority for New Jersey to follow the *Wheat* and not the *Judd* case.

On February 24, 1941, in another free text book case, *Chance* vs. *Mississippi,* 200 So. 706, the Supreme Court of Mississippi accepted the same reasoning as that expressed in the cases of *Borden* vs. *Louisiana State Board, supra,* and *Cochran* vs. *Louisiana State Board, supra.* The Court further intimated that the exclusion of any one group from the benefits of the legislation would conflict with the first section of the Fourteenth Amendment, and commented as follows:

> "The State which allows the pupil to subscribe to any religious creed, should not, because of his exercise of this right, proscribe him from benefits common to all * * *. Even as there is no religious disqualification in its public servants for office, there should be no religious disqualification in its private citizens for privileges available to a class to which they belong."

This Statute Does Not Provide for the Borrowing, Appropriating, or Using of Any Part of the Fund for the Support of Free Schools Referred to in Article IV, Section 7, Paragraph 6, of the Constitution

Prosecutor-Appellee points to "The Fund for the Support of Public Schools," and referring to the dedication of the income from said funds, under the constitutional provision, to the public free school uses, asserts that the action of the Respondents-Appellants Board of Education, in issue here, should be held to be invalid in that the expenditures incurred for the transportation of these parochial school children was obtained from the said Fund.

The case of *Rutgers College* vs. *Morgan,* 70 N. J. L. 460, is authority to the effect that if the Legislature may constitutionally provide for the transportation of these children, that body has the power to meet the costs thereof out of other public funds.

In his Brief in support of the effort to have the Respondents-Appellants' resolution set aside on the ground that it violates Article 4, Section 7, Paragraph 6, of the Constitution, Prosecutor-Appellee claims that the Respondents-Appellants are without funds to defray the expenditures incident to transporting these children to parochial

schools in that all the moneys received by the Board are received for expenditure by it for public school purposes. Our reply to this claim is that the record contains no evidence establishing this fact, and that in the absence of some factual foundation of record proving the claim it may not be treated as established.

Assuming, for argument purposes only, that the Court should undertake to determine the facts under discussion by itself ascertaining the source of and amounts of money received by Respondents-Appellants and other like agencies under the various statutes pursuant to the authority of which State grants and other moneys are received by local school boards, we contend that there may be no finding that none of this money is expendable by said boards in the carrying out of the terms of the statute in its entirety. It is permissible to hold that transportation of these children for remoteness has always been a police power activity of the State rather than a strict technical public school activity. *Board, etc.*, vs. *Atwood,* 74 N. J. L. 368, lends support to this theory. The Court of Errors and Appeals in the case of *McKnight* vs. *Cassady,* 113 N. J. L., 565, having recognized that the provision for transportation grew out of the serious problem then (1903) arising by the introduction of the automobile and its promise of soon supplanting the horse-drawn vehicle, recognized the authority of a board of education over an activity which was not strictly educational, but undertaking something beneficial for the children in the nature of a physical protection against fatigue because of remoteness from school and the danger on the highways. However, in no real sense is the carrying out of such a law an alien task for a school board, and there has never been any constitutional inhibition preventing the Legislature from casting this

duty on such an agency. The enactment of Chapter 191, P. L. 1941, amounts to an appropriation of funds sufficient to defray the additional transportation expenses and to a repeal of any prior appropriation of such money.

The specific legislative command to these boards is that they "make rules and contracts for the transportation of such children to and from school * * *." To the presumed knowledge of the Legislature, by a practical construction of long standing, the above-quoted language has been treated as a vesting of authority in the various boards to expend public funds in this activity of protecting school children from the road hazards incident to traveling to and from the schools. And the clear intent of Chapter 191, P. L. 1941, is to provide that this activity be continued and extended to children attending private schools, and that the money to accomplish this be taken from any of the moneys coming to the boards, excepting, of course, funds constitutionally dedicated to public free school purposes, that is, "the State School Fund." An examination of the Revised Statutes shows that these boards are entitled to receive moneys from other sources than the "State School Fund."

The Statute Does Not Violate the Fourteenth Amendment to the Constitution of the United States

Prosecutor-Appellee contends that the statute violates the Fourteenth Amendment to the Constitution of the United States, but does not point out the basis of his contention, otherwise than to state that it constitutes a taking of private property for private use, and does not provide for transportation of all children of the State, but

segregates non-public schools not operated for profit as its beneficiaries. We would point to *Cochran* vs. *Louisiana State Board,* 281 U. S. 370, as authority for *holding otherwise.*

Other Cognate Considerations

Some suggestion was made in the earlier stages of this case that inasmuch as at the time of the adoption of Chapter 191 of the Laws of 1941 transportation of children to public schools had been construed to be a public school facility, and that, therefore, it could not be contended that transportation to a private school is not a private school facility. This is, of course, a bold *non-sequitur* and further violates practically every other rule of logic and of truth. Who, at the time of the enactment of Chapter 191 of the Laws of 1941, construed such transportation as a public school facility? The Board of Public Utility Commissioners, the Supreme Court of New Jersey, and the general public did not so construe it, but just the contrary, as the passages which immediately follow will demonstrate.

That the transportation of children to schools in the advancement of education is a proper exercise of the police power and not a mere part of a public school system, and may be exercised by government by compelling the public utility companies to carry the children at a lesser rate than that charged to passengers generally even though such charge for carriage may be unprofitable, or even at a loss to these companies, and against their protest, has been settled by the decision of the Supreme Court of the United States in the case of *Interstate Railway Co.* vs. *Massachusetts,* 207 U. S. 79, in a very illuminating opinion written by Holmes, *J.,* who points out that "Educa-

tion is one of the purposes for which what is called the police power may be exercised."

We may point out that long before 1913 there was such transportation in nearly forty municipalities in the State of New Jersey, in which Public Service Railway Company operated providing for the carrying of school children to and from school in school hours at reduced rates. Among these municipalities were Belleville Township, Bloomfield Township, Clark Township, Clinton Township, Cranford Township, Dunellen Borough, East Orange Township, Elizabeth, Fanwood Township, Glen Ridge Borough, Harrison, Irvington, Linden Township, Linden Borough, Metuchen, Montclair, Newark, New Brunswick, North Plainfield, Nutley, Orange, Perth Amboy, Piscataway, Plainfield, Rahway, Raritan Township, Roselle Borough, Sayreville, South Amboy, South Orange, Springfield, Westfield, West Orange, and Woodbridge.

We may further point out that the Board of Public Utility Commissioners of the State of New Jersey, by its order dated December 31, 1915, ordered the said Company "not to put into effect the proposed withdrawal of the sale of tickets for the transportation of pupils in attendance at schools, and traveling to and from schools over its several lines * * *," and that this order comprehended schools operated as private and parochial schools. The decision of the Board was followed by a decision of the Supreme Court of the State of New Jersey entitled *Public Service Railway Company* vs. *Board of Public Utility Commissioners,* argued June 10, 1911, and decided June 12, 1911, 81 N.J.L. 363. Mr. Justice Minturn, who wrote the opinion in that case, stated therein "When the railway, *a decade ago,* instituted the system of three cent fares upon some of its

lines, and entered into contracts in the form of municipal ordinances on other lines, it did so under the aegis of this common law rule, now transmuted into statute law.

* * * * *

"This company had practically converted itself by its low fares into an auxiliary of the state, in assisting in the spread and maintenance of education, by facilitating the transportation of school children at low fares. * * * It was in line with the spirit of our constitution and with the laws and immutable traditions of our state, making for the perpetuation of an enlightened citizenship based upon the education afforded by our schools." (Italics ours.) This low fare to school children was afforded to *all* children of schools, private and parochial as well as public schools, and, as shown by Justice Minturn's opinion, dated from a decade before its pronouncement in June, 1911.

Another suggestion insinuated into the case by Prosecutor-Appellee was that in 1903 automobile traffic had not become a serious problem from the standpoint of hazards of the highways, particularly in rural sections, where children were most apt to live remote from a schoolhouse, and that at that time there was not a single automobile in many of our rural townships. Coupled with this was another suggestion that such hazards of the highway could not have been a reason for the adoption of transportation statutes. These suggestions are both shallow and are really answered by other suggestions made by their author. He quotes *Read, et al.*, vs. *Roxbury Township Board of Education,* p. 763, School Law Decisions (1938 edition):

" 'Boards of education are not authorized by law to provide for the safety of children

in reaching school. While a board should be concerned as to the safety of children and should report to the State Police or local officers the reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. *Highways and street dangers demand parental concern and care of children to avoid accidents* and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation. *While there may be danger to children because of the traffic on highways in this case, as there is now danger upon most of our State and county highways*, the testimony does not disclose automobile traffic which would appreciably delay children in going to and from school.' " (Italics ours.)

This case was decided in 1938, three years before the enactment of the 1941 statute. Its citation by Prosecutor-Appellee in his Reply Brief in the Supreme Court is remarkable for it practically and completely destroys the very grounds he relies on it for. In 1938 the Board of Education thought it was not authorized to provide for the safety of children in reaching school—of *any* children in reaching *any* school, public or private, unless such schools were *remote* as remoteness was construed by the said Board. It admitted the Board should be concerned about the *safety* of the children, but definitely decided that such safety was not the concern of the Board of Education, hence was no part of the school system, but it demanded *parental concern* and *care of children* to avoid accidents, and also a civic enforcement of traffic laws, and a report to the State Police and local officers. What is this but saying that it is a matter of the exercise of the *police power* of the State, and is no part of the school's business; in other words, it is such a matter as to warrant and

require the exercise of the *police power* and not of that of the Board of Education. There is danger to children because of the traffic on the highways, as there was then "danger upon most of our State and county highways." Not only danger from auto hazards, but even from "sand and mud." It is rather difficult to conceive of muddy and sandy highways and a constant necessity for a look-out for the danger from autos "upon most of our State and county highways" not "appreciably delay[ing] children in going to and from school." The English Channel is only 20 miles wide, but its rampageousness is a constant source of delay and danger. Hence remoteness may well result from difficulties of travel as well as from mere extent of distance.

It was further suggested that the Commission had put a practical construction on the statute of 1903, and that "We may not attribute to the legislature an intention that the statute does not contain." The answer to this is very clear. The statute under construction is not the Act of 1903 but that of 1941, and this latter Act the Commissioner has not essayed to construe in the particular in question. Furthermore, the interpretation by the Commissioner alone in the two cited cases is insufficient in time, scope, and circumstances to add up to a practical construction, and certainly is not, under all the cases, conclusive, or in this case even persuasive in favor of Prosecutor-Appellee, for it has not the sanction of long and consistent usage. Its persuasive force, if it has any, is in favor of Respondents-Appellants, as shown above, for it shows the need for the exercise of the police power, and that the remedy required is not to be considered a part of the public school system, and something to be deemed the concern of the parent and the State, and not the school. The

suggestion that "We may not attribute to the legislature an intention that the statute does not contain" is not a complete statement, but a garbled one. The true rule is that we may not attribute to the legislature an intention that the statute does not contain, *or by necessary inference support.* Whether it does so support is to be determined by the evident purpose which its language expresses. There is not, and never has been, a requirement that each statute should contain an index of its purposes, and, in fact, if a statute did, such expression of its purpose might be ignored as not warranted, as shown elsewhere herein.

Mr. Justice Cardozo, in his book "On the Nature of the Judicial Process," has this to say:

> "Today, for every tendency, one seems to see a counter-tendency; for every rule its antimony. Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless 'becoming'. We are back with Heraclitus."
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> * * * * * *
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> "In this perpetual flux, the problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi;* he must then determine the path or direction along which the principle is to move and develop, if it is not to wither and die.
>
> "The first branch of the problem is the one to which we are accustomed to address ourselves more consciously than to the other. Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization till we know it as it is. That in itself is no easy task. For the thing adjudged comes to us oftentimes swathed in obscuring dicta, which must be stripped off and cast aside. Judges differ greatly in their reverence for the illustrations and comments and side-remarks of their predecessors, to make

no mention of their own. All agree that there may be dissent when the opinion is filed. Some would seem to hold that there must be none a moment thereafter. Plenary inspiration has then descended upon the work of the majority. No one, of course, avows such a belief, and yet sometimes there is an approach to it in conduct. I owe that it is a good deal of a mystery to me how judges, of all persons in the world, should put their faith in dicta. A brief experience on the bench was enough to reveal to me all sorts of cracks and crevices and loopholes in my own opinions when picked up a few months after delivery, and reread with due contrition. The persuasion that one's own infallibility is a myth leads by easy stages and with somewhat greater satisfaction to a refusal to ascribe infallibility to others. But dicta are not always ticketed as such, and one does not recognize them always at a glance. There is the constant need, as every law student knows, to separate the accidental and the non-essential from the essential and the inherent. Let us assume, however, that this task has been achieved, and that the precedent is known as it really is. Let us assume too that the principle, latent within it, has been skillfully extracted and accurately stated. Only half or less than half of the work has yet been done. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways."

Every word of the above remarks of Justice Cardozo has a special application to the opinion and judgment of the majority of the Supreme Court in this case when they say that the matter involved "is not one of first impression in this State", and cite *Rutgers College* vs. *Morgan* and *In re Voorhees,* as cases concluding it, as has been herein elsewhere amply demonstrated.

Conclusion

We have pursued the issues involved in this case from every angle, even though some avenues of approach may seem to be inconsistent with others, since an examination will show that all avenues lead to the same result, *i. e.*, the constitutionality of the statute and the legality of the resolution of the Board of Education and hence the reversal of the judgment of the Supreme Court. Any apparent inconsistency will be seen to be the result of a variation in the language of the Constitutions and statutes involved, the attribution in the opinions of an impermissible meaning to a word or a phrase, or the too-broad meaning allowed to a word or a phrase. As examples of some of the latter-mentioned instances of such misuse or misinterpretation of language, the word "indirectly" and the phrase "to or for the use of" may be taken as vivid instances. As is pointed out in Justice Heher's dissenting opinion in the instant case, there is no gift either direct or indirect "to or for the use of" the parochial schools. This statement amply borne out by the evidence in this case is alone sufficient to require the reversal of the judgment, but it was deemed useful to demonstrate that the argument in the majority opinion, drawn from the contention that the payment to the child or its parent or guardian of the cost of transportation to and from school is in some remote and incidental way *indirectly* a benefit to the school, does not and cannot, even if true, infringe the constitutional provisions involved in the instant suit. It obviously does not subtract from or impair the free school fund either directly or indirectly, and is not in violation of Article I, paragraph 20, of the Constitution, as we shall now summarize.

We have shown elsewhere that neither section 19 nor section 20 uses the word "indirectly" with respect to the matters involved in this case, and that its use in a totally inapplicable section of section 19 is significant of its inapplicancy to section 20. Its use, therefore, by the Court is purely a matter of construction, and cannot be extended beyond the precise facts of the case in which it was used, and that its meaning in any case depends upon the facts of that case, and under any and all circumstances its application is limited at least to the purposes intended to be accomplished by the provision under construction, and in no event is it to be extended to every possible case to which the subtility of man can draw it out. Instances are found in every department of the law where qualifications are necessary to limit the generality of the idea expressed by the word. The case of *Chance* vs. *Mississippi State Textbook R. & P. Board*, 200 So. 706, richly warrants a considerate reading. It was a textbook case, but it deals with practically all the questions involved in the instant case with such fullness, and draws the distinctions which should properly be made in the instant case with such clearness that it furnishes a solid basis for reversal in the instant case.

As to the question of so-called *indirect aid*, the remarks of Hughes, *C. J.*, in the case of *Cochran* vs. *Board of Education, supra*, are most significant. The Louisiana Supreme Court had held that "Appropriation by the State of money derived from taxation to the supplying of school books free for children in private as well as public schools is not objectionable under the Fourteenth Amendment * * * where the books furnished for private schools are not granted to the schools themselves but only to or for the use of the children, and are the same as those furnished for public schools and are not religious or sectarian in

character." With this decision in front of them, the Supreme Court of the United States unanimously decided, as expressed in the Chief Justice's opinion—"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."

What is this but saying that individual benefit which is incidental to the effectuation of a public project is not, *in a legal sense,* indirect aid to the individual.

Practically every public project carried on at public expense is in the *broad* but not in the *legal* sense an indirect aid or benefit to some individuals or corporations. The Fielder Grade Crossing Act furnished one example; street vacation another. In *Board of Education of Baltimore County* vs. *Wheat, supra,* a decision fully sustaining every contention made by us in the instant case, Prosecutor-Appellee, in the Supreme Court, relied strongly upon the dissenting opinion of Judge Parke therein. Yet even in that we find Judge Parke saying:

> "* * * Thus, it is a reasonable exercise of the police power to require a lessened speed in vehicular traffic within a specified section of a highway in a vicinity of a school; and to station traffic officers to regulate and safeguard children at street and highway crossings near schools. The extension of the application of this principle to the transportation of school children, because of the dangers of pedestrian travel by children upon

the public highway, is of doubtful legality, even if it be an effort of the state to protect, without discrimination, all school children. Should the statute have this purpose in providing for free transportation of all school children, without discrimination in this exercise of the police power, there is great weight to the argument that the children are the real beneficiaries of the statute, and any advantage derived by the schools attended would be incidental and immaterial. 51 Harvard Law Review, 935; compare *Cochran* v. *Louisiana State Board of Education,* 168 La. 1030, 123 So. 664; Id., 281 U. S. 370, 50 S. Ct. 335, 74 L. Ed. 913; *Meyer* v. *Nebraska,* 1923 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446; *Pierce* v. *Society of the Sisters, etc.,* 1925, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468."

The citation in the above excerpt of 51 Harvard Law Review was one where a decision of *Tyrie* vs. *Board of Education of Baltimore County* was reviewed which held that a statute requiring children of private and parochial schools to be transported to and from schools under regulations identical with those applying to public school children was valid as an exercise of the State's police power to provide for the safety of its citizens, and that the incidental benefit to private institutions was immaterial. The Harvard Review stated: "The basic problem involved in these cases is not a new one, but changing conditions have given new weight to the courts' arguments." Then, after citing some of the earlier cases in antagonism to this view, the reviewer continued: "Despite these arguments the fact that the highways are extremely dangerous, especially to children, should be sufficient to induce a court to hold that an effort by the state to protect all children is a valid exercise of police power. If this is the purpose of the statute providing free transporta-

tion, the children may well be considered its true beneficiaries, and any advantage received by the private and parochial schools incidental and immaterial"—another evidence of the distinction between *moral directness* and *legal directness.*

Board of Education vs. *Wheat,* 199 Atl. 628, was decided on May 20, 1938. The same Court on May 26, 1942, over four years afterward, again considered the same question and held, with only one Judge dissenting and he writing no opinion, in *Adams* vs. *County Commissioners of St. Mary's County,* 26 Atl. Rep. (2d) 377, at p. 380:

> "The decision in the *Wheat* case is not in agreement with decisions of similar questions in other jurisdictions. It is usually held that the furnishing of transportation to children of parochial schools is, as objected, an appropriation of public funds to private purposes" —citing the *Judd, Van Straten,* and *Gurney* cases. "Those courts have construed the aid to have been given to the schools rather than to the children in attending some school, while the view taken in the *Wheat* case was that it could have been the design of the General Assembly in the statute considered to give aid and protection to the children on the highways, or to facilitate the compulsory attendance at some school, and that the possibility of this design prevented holding the enactment unconstitutional. 174 Md. 322, 323, and 325, 199 A. 628. This court still considers that reasoning sound and adheres to the decision on that statute."

The above is another illustration that whatever benefit the school got, if any, it was only incidental, and so indirect as to be in a legal sense innocuous to the validity of the statute.

There has been a trend of public opinion on this subject which has had a steady and healthy development since the days when the controversy

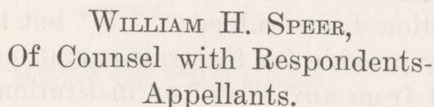
over the issue of the separation of the church and the state engendered so much fervid oratory, so much narrow partisanship, such a volume of violent bigotry, and such an output of court decisions which owed its existence to and was tinctured by this poisoned atmosphere. Prosecutor-Appellee seeks to perpetuate this unhealthy climate of the soul by citing six cases which he thinks support his contentions, and calling attention to the fact that there are, as he claims, only four decisions on the other side. Without pausing to correct his mathematics we call attention to the fact, so often adverted to by Mr. Justice Holmes, that the life of the law has not been logic—it has been experience. What has this experience across the continent of the years demonstrated? Why, simply that the fears and prophesies which this handful of decisions evidenced were utterly groundless. These decisions were merely expressive of what the Courts therein thought was the sentiment of the people of the State. Since their rendition the leading case of them all, *Judd* vs. *Board of Education, supra,* has been overruled by the people of the State of New York, and a constitutional Amendment and an act of the Legislature have been adopted erasing the last vestige of the fear and narrowness which that decision evidenced. A brief index of the course of that contest is appended hereto. The real gauge, however, of the trend and direction of public opinion on the groundlessness of the fears which survived this thoroughly settled controversy is not to be found in the scant handful of decisions which has emerged from its past, but rather in the avalanche of legislation of the several states, elsewhere herein enumerated, where free textbook privileges to pupils of private schools and free transportation to such pupils have been granted. There are four states which

have granted free textbook privileges and twelve which have granted free transportation to such pupils, in addition to the aforementioned signal constitutional and legislative eruption in the State of New York. There are the decisions of the Courts and the opinions of the Attorneys-General of numerous states herein elsewhere referred to. All these constitutional, legislative, judicial, and administrative actions demonstrate that the palsied hand of the past should no longer be permitted to throw barriers of groundless fear and bigotry across the path of the future.

The result of the application of the above principles is a reversal of the judgment of the Supreme Court.

Respectfully submitted,

William Abbotts,
Attorney for Respondents-Appellants.

William H. Speer,

Of Counsel with Respondents-
Appellants.

APPENDIX NO. 1

Résumé of Legislation Pertaining to Transportation of School Children in the State of New York

1. First bill introduced in 1935. Passed Legislature and vetoed by Governor Lehman on May 11, 1935.

2. Substantially same Legislation introduced in 1936. Signed by the Governor on May 13, 1936.

3. Constitutionality tested November, 1937. Upheld by the Supreme Court, Second Department. Affirmed by Appellate Division, Second Department.

4. The two lower courts were reversed, and Legislation declared unconstitutional by Court of Appeals, four to three decision on May 24, 1938.

5. Constitutional Convention in fall of 1938, Renumbered Article 9, Section 4, to Article 11, Section 4, and added: "* * * but the Legislature may provide for the transportation of children to and from any school or institution of learning." Approved by vote of people on November 8, 1938. This removed the objections of the Court of Appeals to constitutionality of that provision.

6. Chapter 465 of the laws of 1939 added Subdivision 18 of Section 206 and Section 503 of the Education Law. Signed by the Governor and became law on May 16, 1939, and gave force and effect to the constitutional change.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ARCH R. EVERSON,
Prosecutor-Appellee,
vs.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, et al.,
Respondents-Appellants.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF OF PROSECUTOR-APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Supreme Court, on *certiorari,* setting aside a resolution of the respondent-appellant Board of Education.

Prosecutor-appellee is a resident and taxpayer of the Township of Ewing in the County of Mercer (S. C., p. 19, ll. 21-27; p. 20, ll. 1, 2). The writ of *certiorari* was issued to review the action of said Board of Education in agreeing to pay the cost of transportation of certain children from said Township to certain parochial schools in the City of Trenton, and in paying a portion thereof and agreeing to pay the remainder thereof (S. C., pp. 1-2a). The reasons filed by prosecutor-appellee challenged the constitu-

tionality of Chapter 191 of the Laws of 1941, and the resolution adopted by said Board of Education (S. C., pp. 13-15).

On September 21, 1942, said Board of Education adopted a resolution authorizing the transportation of pupils from Township of Ewing to "Catholic Schools by way of public carrier as in recent years" (S. C., p. 20, ll. 29-33; p. 12, ll. 23-30).

Thereafter certain pupils were transported from that Township by public carrier to St. Hedwig's Parochial School, St. Francis Parochial School, Catholic Boys' High School and St. Mary's Cathedral High School, and the parents of the pupils were reimbursed by said Board of Education for the cost of such transportation for the first half of the school year 1942-43 (S. C., pp. 21-27).

Certain pupils from the Township were transported by public carrier to said schools during the last half of the school year 1942-1943, but the Board of Education, on advice of counsel after the institution of these proceedings, has withheld payment to the parents for the cost of such transportation (S. C., p. 29, ll. 31-34).

All of said schools are Roman Catholic Parochial Schools in the City of Trenton, and religion is taught as part of the curricula in each of said schools (S. C., p. 32, ll. 36-40; p. 33, ll. 1-10).

Said schools are not operated for profit in whole or in part (S. C., p. 33, ll. 12-20).

QUESTIONS INVOLVED.

1. Is it legal to use public school moneys for transportation of pupils to schools other than public schools?

2. Is Chapter 191, Laws of 1941, constitutional?

With respect to the issues involved, Mr. Justice Heher, in his dissenting opinion says:

> "The attack is upon the statute itself, not the use of public moneys as in contravention of this constitutional provision (S. C., p. 61, ll. 31-33). * * * The sole question raised here is the constitutional sufficiency of the statute." (S. C., p. 62, ll. 10-11), 132 N.J.L. 98, at 105.

However, Mr. Justice Parker, in the majority opinion says:

> "We conclude that the resolution under review must be set aside, on the fundamental ground that the amendment of 1941 is in violation of paragraph 6 of Section 7 of Article IV of the Constitution, * * *" (S. C., p. 53, ll. 18-21). 132 N.J.L. 98, at 99.
>
> "We are called upon to decide the purely legal question whether or not the township board of education in appropriating money for transportation of pupils to and from parochial schools in a neighboring city, i.e., other than public schools, contravened paragraph 6 quoted above." (S. C., p. 53, ll. 38-48; p. 54, ll. 4-10). 132 N.J.L. 98, at 100.

Whether the resolution *and* the statute are in contravention of the constitution were the questions raised in, and decided by, the Supreme Court. That court clearly held that the resolution and the statute contravene paragraph 6 of Section 7 of Article IV, and set aside the resolution (S. C., p. 55, l. 21). In our brief in that court we argued that the resolution *and* the statute are in contravention of all the provi-

sions of the constitution hereinafter quoted. We do not abandon that contention.

The writ of certiorari challenged the action of the Appellant Board (S. C., p. 1), and the reasons relied upon challenge the constitutionality of the resolution *and* the statute (S. C., p. 13, et seq.).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Chapter 191, Laws of 1941, entitled "An Act relating to education, and amending Section 18:14-8 of the Revised Statutes," which we contend is unconstitutional, reads as follows:

> "1. Section 18:14-8, of the Revised Statutes is amended to read as follows:
>
> "18:14-8. Whenever in any district there are children living remote from *any** schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, *including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.*
>
> "*When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a*

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* All italics ours unless otherwise indicated.

public school, except such school as is operated for profit in whole or in part.

"Nothing in this section shall be so construed as to prohibit a board of education from making contracts for the transportation of children to a school in an adjoining district when such children are transferred to the district by order of the county superintendent of schools, or when any children shall attend school in a district other than that in which they shall reside by virtue of an agreement made by the respective boards of education.

"2. This act shall take effect July first, one thousand nine hundred and forty-one."

The 1941 amendment changed the words "the schoolhouse" in the first paragraph of R. S. 18:14-8 to read "any schoolhouse," and the other parts of the statute italicized above were added by said amendment.

It is our contention that Chapter 191, Laws of 1941, and the resolution of the Appellant Board of Education violate the following provisions of the Constitution of New Jersey:

Article 1, Paragraph 3, which reads as follows:

> "No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform."

Article 1, Paragraph 4, which reads as follows:

"There shall be no establishment of one religious sect, in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right, merely on account of his religious principles."

Article 1, Paragraph 19, which reads as follows:

"No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money on credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation."

Article 1, Paragraph 20, which reads as follows:

"No donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation whatever."

Article 4, Section 7, Paragraph 6, which reads as follows:

"The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free

schools, for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund or any part thereof, for any other purpose, under any pretense whatever. The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years."

We also contend that the statute and the resolution violate the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT.

Point I.

Chapter 191, Laws of 1941, and the Resolution of the Appellant Board of Education violate Paragraphs 19 and 20 of Article 1 of the State Constitution.

Paragraph 19 of Article 1 prohibits gifts of money "*to or in aid of* any individual, association or corporation", and paragraph 20 of Article 1 prohibits any "appropriation of money * * * *to or for the use of* any society, association or corporation *whatever*".

In *Rutgers College v. Morgan,* 70 N.J.L. 460, at 474, affirmed 71 N.J.L. 663, the Supreme Court, referring to the provisions of Paragraph 20 of Article 1 and the provision relating to special laws, said:

> "They were designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced * * *."

In the instant case Mr. Justice Parker, referring to the *Rutgers College case,* supra, said that "the same principle was applied by Vice Chancellor Buchanan *in re Voorhees,*" 123 N.J.E. 142, affirmed 121 N.J.L. 594, affirmed 124 N.J.L. 35, in which it was held that the state cannot make a donation to a private school either directly or indirectly.

In an annotation in 141 A.L.R. 1144, 1152, it is stated that:

> "It seems to have been held, in most cases, that the transportation of pupils to a sectarian school amounts to the appropriation of moneys *in aid of* the school and is therefore unconstitutional."

The courts of six of the seven states in which the question has arisen have held that use of public funds for transportation of children to such schools is an aid to the schools and is therefore unconstitutional.

In *Judd v. Board of Education,* 278 N. Y. 200, 15 N. E. (2d) 576, 118 A.L.R. 789 (decided in 1938), the New York Court of Appeals held that a law providing for the use of public funds for the transportation of children to and from private or sectarian schools is unconstitutional. Relative to the argument that the furnishing of transportation was not in aid or support of the schools, the court said:

> "Free transportation of pupils induces attendance at the school. *The purpose of the transportation is to promote the interests of*

the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations.' State ex rel. Traub v. Brown, 6 W. W. Harr., 36 Del. 181, 172 A. 835, 837, writ of error dismissed Feb. 15, 1938, Del. Sup. 197 A. 478. Without pupils there could be no school. *It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid.* * * * If the cardinal rule that written constitutions are to receive uniform and unvarying interpretation and practical construction is to be followed, in view of interpretation in analogous cases *it cannot successfully be maintained that the furnishing of transportation to the private or parochial school out of public money is not in aid or support of the school.* A similar argument was advanced in *Smith v. Donahue,* 202 App. Div. 656, 195 N.Y.S. 715, in *State ex rel. Traub v. Brown,* supra, and in *Williams v. Board of Trustees Stanton Common School Dist.,* 173 Ky. 708, 191 S. W. 507, L.R.A. 1917D, 453, reversing, on rehearing 172 Ky. 133, 188 S. W. 1058, and discarded.

"We have found but two decisions upon the precise question involved in this case (*State ex rel. Van Straten v. Milquet,* 180 Wis. 109, 192 N. W. 392, and *State ex rel. Traub v. Brown,* supra), in both of which it was held that the furnishing of transportation at public expense to private or parochial school children was prohibited by the provisions of their respective Constitutions which were similar to ours. To

like effect was Report of the Minnesota Attorney-General, 1920, page 300.

"A related question arises on the constitutionality of statutes authorizing the furnishing out of public funds of free textbooks to private schools. Such a statute was held unconstitutional in *Smith v. Donahue,* supra. It was there urged that the furnishing of the textbooks was in aid of the pupils rather than in aid of the schools, but the court unanimously reached a contrary result. It is said that *Cochran v. Louisiana State Board of Education,* 281 U. S. 370, 50 S. Ct. 335, 74 L. Ed. 913, is controlling authority to the contrary. That is not the case, however. In *Borden v. Louisiana State Board of Education,* 168 La. 1005, 123 So. 655, 67 A.L.R. 1183, it was held that the furnishing of school books to all the children of the State regardless of where they attended school did not violate a constitutional provision of that State to the effect that no money should ever be taken from the public treasury, directly or indirectly, in aid of any church or religious association, or another constitutional provision to the effect that no public funds should be used for the support of any private or sectarian school, on the grounds that the private or sectarian schools were not the beneficiaries of the appropriations made for that purpose but rather the school children and the State alone. Three of the seven judges of the court dissented from that reasoning. That decision was immediately followed in the *Cochran case,* 168 La. 1030, 123 So. 664, which latter went to the Supreme Court. The question of the constitutionality of the act authorizing the appropriation of public funds for the purpose indicated under the Louisiana Con-

stitution was not a federal question, and the only question involved or decided in the Supreme Court was whether or not the act in question authorized the taking of private property for a private purpose and was thus violative of the provisions of Fourteenth Amendment to the Federal Constitution, U.S.C.A. Const. Amend. 14. *The reasoning followed in the Louisiana State courts has been followed in no other case to which our attention has been called, but has been expressly disapproved in State ex rel. Traub v. Brown,* supra. In the *Borden case* the minority presented the better-reasoned opinion, in accord with the reasoning in *Smith v. Donahue,* and said, among other things (123 So. page 663): 'The maintenance of private or sectarian schools, however valuable may be the work which they perform, is *not a public purpose so as to justify the expenditure of the public money in their support.* School books are as essential to the means of imparting instruction to the children as are other education appliances, schoolhouses and school teachers. But I do not believe that any one will contend for a moment that, in the face of the prohibitory clauses of the Constitution, money can be taken from the public treasury for the purpose of furnishing the children in private and sectarian schools with these necessary educational facilities. To say the least, the appropriation of the public funds for the purchase of books for all the school children of the state *is an attempt to do indirectly that which cannot be done directly.* * * *'

"The courts of this country have been unanimous in prohibiting a use of public funds to pay, *directly or indirectly,* tuition fees of pupils in

> private or sectarian schools * * * (citing cases), in spite of the argument presented that tuition fees were for the benefit of pupils exclusively and not for the schools and the economic argument that it would be less expensive for the State to pay the tuition fees of these children in private schools than to provide for them in public schools. (15 N. E. 582, at 583.)
>
> * * *
>
> "It is claimed that the statute may be sustained as a valid exercise by the Legislature of the police power of the State. This argument overlooks the consideration that even the police power must be exercised in harmony with the restrictions imposed in the fundamental law. * * * (p. 584)
>
> * * *
>
> "No authority has been called to our attention nor has one been found in any jurisdiction to the effect that a statute purporting to be enacted in the exercise of the police power of the State may be held valid if repugnant to any constitutional provision or restriction. * * *" (p. 584)

In State ex rel. Traub v. Brown, 36 Delaware 181, 172 A. 835, at 837 (decided in 1934), writ of error dismissed, 197 A. 473, the court held that a statute appropriating money for transportation of pupils to private or sectarian schools is unconstitutional and said:

> "It is true that the appropriation is not made to any sectarian school, but it is not so clear that it is not made to be used by or in aid of such school. In discussing the word 'aid' in a constitutional provision somewhat similar to

section 3 of article 10 of our Constitution, the Supreme Court of South Dakota said:

"'What, then constitutes benefit or aid? Webster defines * * * "aid" as "to support, either by furnishing strength or means to help to success".' *Synod of Dakota v. State of S. D.,* 2 D. D. 366, 50 N. W. 632, 635, 14 L.R.A. 418.

"In discussing a somewhat similar question, the Appellate Division of the Supreme Court of New York said:

"'The school is not the building and its equipment; *it is the organization, the union of all the elements in the organization, to furnish education in some branch of learning.* * * * *It is the institution, and the teachers and scholars together, that make it up. The pupils are a part of the school.* * * * *It seems to us to be giving a strained and unusual meaning to words if we hold that the books and the ordinary school supplies, when furnished for the use of pupils, is a furnishing to the pupils, and not a furnishing in aid or maintenance of a school of learning.* It seems very plain that such furnishing is at least *indirectly in aid* of the institution, and that, if not in actual violation of the words, it is in violation of the true intent and meaning, of the Constitution, and in consequence equally unconstitutional.' *Smith v. Donahue,* 202 App. Div. 656, 195 N.Y.S. 715, 721.

"*We are of the opinion that to furnish free transportation to pupils attending sectarian schools, is to aid the schools.* It helps build up, strengthen and make successful the schools as organizations.

"The relators cite in opposition to the above

> cases, the case of *Borden v. Louisiana State Board of Education,* 168 La. 1005, 123 So. 655, 67 A.L.R. 1183. We are not impressed by the reasoning of this case. There was a strong dissenting opinion. Four of the justices concurred in the majority opinion and three in the dissenting opinion. The case apparently stands alone and we prefer to follow the South Dakota and New York cases. The case of *State v. Milquet,* 180 Wis. 109, 192 N. W. 392, is also in point."

In State ex rel. Van Straten v. Milquet, 180 Wis. 109, 192 N. W. 392, 395 (Supreme Court of Wisconsin, 1923), the Court held that a contract of a Board of Education for transportation of pupils to parochial schools was prohibited by the state constitution, and said:

> "Under the constitutional mandate, it was the duty of the Legislature to provide a free school. This it had done by providing for the organization of a school district. * * * 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."

In *Gurney v. Ferguson,* 190 Okl. 254, 122 P. (2d) 1002 (Oklahoma Supreme Court, 1941), certiorari denied, 317 U. S. 588, 63 S. Ct. 34, 87 L. Ed. 21, rehearing denied 317 U. S. 707, 63 S. Ct. 153, 87 L. Ed. 107, the court held unconstitutional a statute authorizing transportation of pupils to private or parochial schools where the private or parochial schools were along or near the route of the buses provided by the board of education for transportation

of pupils attending public schools. In holding that such transportation was an aid to the private or parochial schools, the court said:

"It is urged that the present legislative act does not result in the use of public funds for the benefit or support of this sectarian institution or school 'as such'; that such benefit as flows from these acts accrues to the benefit of the individual child or to a group of children as distinguished from the school as an organization. That argument is not impressive. A similar argument was said to be 'utterly without substance' in *Judd v. Board of Education,* 278 N. Y. 200, 15 N. E. 2d 576, 582, 118 A.L.R. 789. It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child. *We are convinced that this expenditure, in its broad and true sense, and as commonly understood, is an expenditure in furtherance of the constitutional duty or function of maintaining schools as organizations or institutions. The state has no authority to maintain a sectarian school.* Surely the expenditure of public funds for the erection of school buildings, the purchasing and equipping and the upkeep of same; the payment of teachers, and for other proper related purposes is expenditure made for schools as such. Yet the same argument is equally applicable to those expenditures as to the present one.

"If the cost of the school bus and the maintenance and operation thereof was not in aid of the public schools, then expenditures therefor out of the school funds would be unauthorized and illegal. Yet, we assume it is now acquiesced

in by all that such expenditures are properly in aid of the public schools and are authorized and legal expenditures. *If the maintenance and operation of the bus and the transportation of pupils is in aid of the public schools, then it would seem necessarily to follow that when pupils of a parochial school are transported that such service would likewise be in aid of that school.*

"The expenditure of the public funds for the purposes here shown is confined to children attending school. Thus *refuting any argument that such transportation is for the benefit of children generally and not for schools* or that such transportation is furnished in regulating traffic within the police power, or primarily in promoting the health and safety of the children of the state. In *Consolidated School Dist. v. Wright,* 128 Okl. 193, 261 P. 953, 56 A.L.R. 152, it was held that transportation of pupils is an act done in carrying into effect the educational program contemplated by the Constitution and statutes.

"*The appropriation and directed use of public funds in transportation of public school children is openly in direct aid to public schools 'as such'.* When such aid is purported to be extended to a sectarian school there is in our judgment a clear violation of the above-quoted provisions of our Constitution."

In *Mitchell v. Consolidated School Dist. No. 201* (Washington Supreme Court, 1943), 135 P. (2d) 79, the court held unconstitutional a statute authorizing transportation of pupils to private or parochial schools where such schools were along or near the routes of the public school buses. In holding that

such transportation is an aid to the private or parochial schools, the court said:

> "In Section 1, the legislature declares that its intent is to exercise the police power of the state; and that the purpose of the act is to avoid and minimize the accidents and traffic hazards to which children of school age are subjected in 'attending elementary schools and high schools in accordance with the laws of this state.'
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> * * *
>
> "In face of these constitutional provisions, it would seem too clear for argument that the act (Chapter 53, Laws of 1941) transcends the police power of the legislature. Giving the act its fullest import, it is nothing more nor less than a mandate to the directors of public school districts in which buses are operated for the transportation of pupils to and from public schools to carry children to and from private schools.
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> * * *
>
> "We think it equally clear that it contravenes Art. IX, Sec. 4, and Art. I, Sec. 11, unless it may be said that the transportation of pupils to and from the Christian school is of no benefit to the school itself. Appellants endeavor to uphold the act upon that qualification, contending that the transportation of pupils to and from the school inures exclusively to the benefit of the pupils and their parents, in that it simply relieves them from the obligation incident to compulsory attendance statutes of providing transportation themselves. *Conceding validity to the argument, it runs afoul of another constitutional inhibition; Art. VIII, Sec. 7, which provides*

that 'No county, city, town, or other municipal corporation shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, * * * except for necessary support of the poor and infirm, * * * .'

"*We cannot, however, accept the validity of the argument that transportation of pupils to and from school is not beneficial to, and in aid of, the school.* Even legislation providing for transportation of pupils to and from public schools is constitutionally defensible only as the exercise of a governmental function furthering the maintenance and development of the common school system. * * * (citing cases).

* * *

"*We think the conclusion is inescapable that free transportation of pupils serves to aid and build up the school itself.* That pupils and parents may also derive benefit from it, is beside the question."

In *Sherrard v. Jefferson County Board of Education* (Kentucky Court of Appeals, 1942, Rehearing denied June 21, 1943), 294 Ky. 469, 171 S. W. (2d) 963, at 968, the court declared unconstitutional a statute (adopted in 1934) requiring boards of education to provide "from its general funds or otherwise" for the transportation of children to private schools, on the ground that it violates a constitutional provision requiring taxes to be levied and collected only for public purposes, as against the contention that such transportation aids the children and not the private schools. In a unanimous opinion the court rejected the reasoning of the Louisiana Court in *Cochran v. State Board of Education,* 168 La. 1030, 123 So. 664 (infra), involving free text books, and said:

> "It is obvious that the Louisiana case and a few others of similar import relied on for defendants are *contrary to the great weight of authority, and are lacking in persuasive reasoning and logic.* We are of the opinion, therefore, that the act here under consideration is unconstitutional and therefore void."

In the case of *Susan B. Henry v. William E. Nichols* (decided on March 10, 1945 and not reported), the Circuit Court of Fayette County, Kentucky, declared unconstitutional the statute adopted in 1944 authorizing use of general funds of the county for transportation of children to private schools. The court said:

> "The act purports to render aid to the pupils attending these schools. This was evidently for the purpose of avoiding conflict with the constitution. However, the Court of Appeals in the *Sherrard case* rejected the doctrine of the Louisiana case and a few others of similar import that the aid was to the pupils rather than to the schools, and followed what they described as 'The great weight of authority.' "

Maryland is the only state in which the courts have sustained the constitutionality of a statute authorizing use of public moneys for transportation of children to private or sectarian schools. *Board of Education of Baltimore County v. Wheat* (1938), 174 Md. 314, 199 A. 628; and *Adams v. County Commissioners of St. Mary's County* (1942), 26 A. (2d) 377.

In the *Wheat case,* supra, the Maryland court sustained a statute which authorized transportation of private or sectarian school children entering and leaving public school buses along the regular routes

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of such buses. Four of the eight judges sitting were of the opinion that the statute could not be sustained on the "ground of the protection it affords children attending schools * * * against the hazards of the road." (See concurring opinion of Judge Sloan, 199 A. 632 and dissenting opinion of Judge Parke, 199 A. 635.) All the judges concurred in that part of the majority opinion which held that the Maryland constitutional provision that the state school fund can be appropriated "only to purposes of *education*" did not prohibit use of the state school fund for transportation of children to private schools. (See last paragraph of the majority opinion, 199 A. 632, and the last paragraph of the dissenting opinion, 199 A. 642.) That constitutional provision seems to have been an important reason for the decision reached by the court, and it stands out in marked contrast with the New Jersey constitutional provision that the State school fund can only be "appropriated to the support of *public free schools*" and shall not be appropriated "for any other purpose under any pretense whatever". (Article 4, Section 7, Paragraph 6.) Three of the eight judges were clearly of the opinion that furnishing transportation of pupils to private schools was an aid to the schools. See dissenting opinion, 199 A. 639, at 640, where it was said:

> "In a certain sense, the child is a beneficiary, *as he is of everything which contributes to his ability to go to school and there to receive an education.* * * * To maintain the parity of its secular advantages with the public school, the sectarian school should provide equal facilities, if the public school supplies transportation to its pupils. If there is to be vehicular carriage of pupils to and from the sectarian school, the

transportation service would originate with that school, and the cost of its operation, it is reasonable to assume, would be primarily borne by the school. Any apt means for relieving the sectarian school of providing transportation for its pupils at the immediate charge against public funds is as direct and substantial a donation to the sectarian school, as if the moneys thus appropriated by statute had been paid into the treasury of the school. The device of providing a bus for the common carriage of public and sectarian school children or a bus for their separate carriage cannot affect this conclusion. *State v. Milquet*, 180 Wis. 109, 192 N. W. 392. An appropriation which would be *unlawful by direct action may not be lawfully accomplished by indirection.* If so, circumvention would attain a new use."

In an annotation in 118 A.L.R. 806, at pages 807 and 808, in a comment relative to the *Wheat case*, supra, it is stated that:

> "It was also held that the appropriation did not impugn a state constitutional provision that 'the school fund of the state shall be kept inviolate, and appropriated only to the purposes of *education*,' saying: 'Apart from any other reason, this (contention) interprets "purposes of education" too narrowly. * * * ' In view of the difference in constitutional provisions considered by the New York and Maryland courts, respectively, and the character of the appropriation, it cannot be said that there is necessarily any conflict in the decisions, and if the New York constitutional provision had been in force in Maryland it may be doubted if the decision of the Maryland court would have been the same."

In the *Adams case,* supra, the Maryland court sustained a contribution made *directly* to the parochial schools for transportation in parochial school buses. Certainly such a decision could only be reached under a constitutional provision permitting school funds to be used for "purposes of education," as contrasted with a provision limiting their use "to the support of public free schools". It is interesting to note that the court in that case admitted that the *Wheat case* is opposed to the decisions in all other states in which the question of the constitutionality of the use of public funds for transportation to private or sectarian schools has arisen, when it said:

> "The decision in the *Wheat case* is not in agreement with decisions of similar questions in other jurisdictions. It is usually held that the furnishing of transportation to children of parochial schools is, as objected, an appropriation of public funds to private purposes. * * * (citing cases). Those courts have construed the aid to have been given to the schools rather than to the children * * * ." (26 A. (2d) 377, at 380.

In the *Mitchell case,* supra, the Washington Supreme Court made the following comment relative to the *Wheat case:*

> "In the Wheat case, however, the Supreme Court of Maryland upheld a statute of similar import to Chapter 53, Laws of 1941, as a valid exercise of the police power. *Were the decision not in lone minority, we should be unable to follow it for the reason indicated earlier in this opinion: That the police power cannot be exercised in contravention of plain and unambigu-*

> *ous constitutional inhibitions.*" (135 P. (2d) 82.)

Appellants cite *Borden v. Louisiana State Board of Education,* 168 La. 1005, 123 So. 665, 67 A.L.R. 1183, in which the child benefit theory seems to have originated. The court sustained the "loaning" of textbooks to the children of the state, including pupils in private and sectarian schools, on the ground that it was an aid to the children and not the schools, citing no authority to support that theory. Three of the seven judges sitting dissented from that view in a well reasoned opinion, quoted by the New York Court in the *Judd case,* supra.

In *Cochran v. Louisiana State Board of Education,* 281 U. S. 370, 50 Sup. Ct. 335, 74 L. Ed. 913 (decided in 1930, and referred to in the *Judd case,* supra), affirming 168 La. 1030, 123 So. 664, the United States Supreme Court, "viewing the statute as having the effect thus attributed to it" (74 L. Ed. 915) by the Louisiana Supreme Court in the *Borden case,* supra, (its construction, operation and effect being a matter which the state court only could determine, *Senn v. Tile Layers Union,* 301 U. S. 468, at 477, 81 L. Ed. 1229, at 1235), held that, as thus construed, it did not violate the Fourteenth Amendment of the Federal Constitution, as a taking of private property for private use.

In the *Wheat case* (supra), 199 A. 628, 640, Judge Parke makes the following comment relative to the *Cochran case,* supra:

> "The decision of the state court on the constitutionality of the Louisiana statute was a matter for the state court alone, and the affirmance was simply to the effect that the statute *as construed by the state court* was not in vio-

lation of the 14th Amendment to the Federal Constitution."

In an annotation in 67 A.L.R. 1196, at 1197, it is stated, relative to the *Cochran case,* supra, that:

> "The Federal Supreme Court passed only on questions of violation of the Federal Constitution, so that the issue as to whether free textbooks may be supplied to children in private or sectarian schools under constitutional provisions of the kind indicated is a matter of interest which cannot be said to be authoritatively settled (by that case) in other states." (Matter in parenthesis inserted by us.)

In the *Judd case,* supra, the court, referring to the *Cochran case,* said:

> "The question of the constitutionality of the act authorizing the appropriation of public funds for the purpose indicated under the Louisiana Constitution was not a federal question, * * *."

We think that the true meaning of the decision of the United States Supreme Court in the *Cochran case* is that "the operation and effect of the legislation (there) in question were described by the Supreme Court of the State", and the United States Supreme Court *"viewing the statute as having the effect thus attributed to it",* held that it did not violate the fourteenth amendment of the constitution of the United States as a taking of private property for a private purpose.

That the court of last resort in each state is free to determine whether a state statute authorizes use of *public funds* for a *private purpose* is fully demon-

strated by the fact that the Supreme Court of the United States *twice* refused to review the Oklahoma Court's decision in the *Gurney case,* supra. (*Certiorari* denied, 317 U. S. 588, 63 S. Ct. 34, 87 L. Ed. 21, rehearing denied, 317 U. S. 707, 63 S. Ct. 153, 87 L. Ed. 107.)

On pages 31 and 32 of the brief of Appellants the cases approving the child benefit theory and the cases rejecting that theory are arranged in such a manner as to give the impression that there are six cases approving that theory and six cases rejecting it. The fact is that the child benefit theory has been approved in only two cases involving transportation to private or sectarian schools (the Maryland court decisions in the *Wheat* and *Adams cases,* supra), and has been approved in only three other cases (the free textbook decisions of the Louisiana court in the *Borden* and *Cochran cases,* supra, and the free textbook decision of the Mississippi Court in *Chance v. Mississippi State Textbook R. & P. Board,* 200 So. 706.) In other words, that theory has been approved by the courts of only three states, whereas it has been rejected by the courts of New York, Delaware, Kentucky, Oklahoma, Washington and Michigan, in cases involving the precise question before the court in the instant case, i.e., free transportation of children to private or sectarian schools. It has also been rejected in *Smith v. Donahue,* 202 App. Div. 656, 195 N.Y.S. 715, a case involving free textbooks, and in *Williams v. Board of Trustees, Stanton Common School Dist.,* 173 Kentucky 708, 191 S. W. 507, L.R.A. 1917 D 453, reversing, on rehearing 172 Kentucky 133, 188 S. W. 1058, and discarded; *Otken v. Lamkin,* 56 Miss. 758; *Synod of Dakota v. State,* 2 S. D. 366, 50 N. W. 632, 14 L.R.A. 418; *In re Opinion of the Justices,* 214 Mass. 599, 102 N. E. 464; *People ex rel Roman Catholic Orphan Asylum Soci-*

ety in City of Brooklyn v. Board of Education of City of Brooklyn, 13 Barb. 400, all involving tuition fees of pupils in private or sectarian schools. "The courts of this country have been *unanimous* in prohibiting a use of public funds to pay, *directly or indirectly,* tuition fees of pupils in private or sectarian schools * * * ." (Citing the foregoing cases relative to tuition fees.) *Judd case,* supra (15 N. E. 2d 583).

Transportation of public school children is a "direct aid to public schools", the cost of which "is an expenditure in furtherance of the constitutional duty or function of maintaining schools". If it is not "in aid of the public schools, then the expenditure therefore out of school funds would be unauthorized and illegal". Transportation of children to a parochial school "would likewise be in aid of that school". Gurney v. Ferguson, supra (122 P. 2d 1002, at 1004); and *Mitchell v. Consolidated School Dist.,* supra (135 P. 2d 79, at 82).

Mr. Justice Heher, in his dissenting opinion in the instant case, said:

> "It would seem that the statutory provision for the transportation of *public school pupils* was primarily designed to make such educational facilities available to pupils remotely situated from the seat of instruction, and thus *aid in the performance of the public educational function."* (S. C., p. 61, lines 15-21.)

If it is true that transportation of children to public school is an "aid in the performance of the public educational function", there can be no doubt that transportation of children to parochial school aids in the performance of the educational function of the parochial school.

Transportation of public school children is regarded in this state as a public school facility in the same category as school buildings, furniture, equipment and courses of study.

In *Phillips v. Board of Education of West Amwell Township,* page 754 of School Law Decisions (1938 edition), affirmed by State Board of Education, page 756 of School Law Decisions, the Commissioner of Education held that a board of education is required to furnish, as a necessary public school facility, transportation to "children living remote from the schoolhouse". The commissioner refused to sustain the contention that "the obligations of the school board end with the establishment of a schoolhouse generally convenient for the inhabitants of the district", and said:

> "Not only does the section as amended add the *requirement of 'convenience of access' to the specifically enumerated school facilities and accommodations to be provided by boards of education for* all the pupils of their districts, but connects Section 126 (now R. S. 18:11-1 and R. S. 18:11-2) as aforesaid with Sections 117 (now R. S. 18:14-8 and R. S. 18:14-9), 118 (now R. S. 18:14-5) and 119 (now 18:14-6) by requiring that school facilities be provided either in schools within the district convenient of access to the pupils or that the provisions of Sections 117, 118 and 119 be complied with as alternatives. It is obvious from such alternatives that school facilities must either include the establishment within a school district of a schoolhouse convenient of access by location or transportation for all the pupils therein, or that pupils be transported to schools in other districts, or, if remote from the school in their

own district, that their tuition be paid in a nearby school in an adjoining district. Convenience of access, however, by one means or another is specifically provided for in every one of the above quoted alternatives for providing proper school facilities for 'all the children residing in the district.'

"* * * On the contrary (contrary to appellant board's contention), since the enactment of the statutory amendment, many cases have been decided by both the Commissioner and State Board of Education in which school boards have been ordered to provide for individual pupils, *as a part of the necessary school facilities,* convenience of access by means of transportation in lieu of the location convenient of access of the schoolhouse itself. * * * " (matter in parentheses supplied by us).

The West Amwell Board of Education refused to furnish transportation to the Phillips children in accordance with the above decision, and the State Commissioner of Education made an order, dated January 27, 1926, directed to the County Collector to withhold school moneys from the board of education pursuant to the statutory provisions now contained in R. S. 18:11-1 and R. S. 18:11-2, which provide that school moneys may be withheld from any school district which fails to furnish "school facilities". On *certiorari* to review the Commissioner's order (*Board of Education of West Amwell Township v. State Board of Education,* 5 N. J. Misc. 152, 135 A. 664), the Supreme Court affirmed the order and said:

"Our reading of the statute agrees with the construction and application made by the Com-

missioner of Education; hence, the order of January 27, 1926, now under review is affirmed.''

Appellants contend that transportation of children to public schools has been considered to be ''a police activity of the State rather than a strict technical school activity'', citing *Board of Education v. Atwood,* 74 N.J.L. 638, affirming 73 N.J.L. 315. (Brief of Appellants, pp. 44 and 74.)

Board of Education v. Atwood, supra, does not decide that transportation of pupils to public school is not a public school activity or facility. It merely decides that state school moneys could not be withheld from a school district under the provisions of Section 126 of the school law (now R. S. 18:11-1 and 18:11-2), *prior to the amendment of 1907,* for failure to furnish transportation of pupils to school, and that *such moneys could be withheld only for failure to provide suitable schoolhouses,* in view of the fact that Section 126, prior to the 1907 amendment, was the first of six sections which referred only to *schoolhouses,* and could not be interpreted to include other school facilities. (Supreme Court's opinion, 73 N.J.L. 315, at bottom of p. 316 and top of page 317.) This is made clear by the portion of the Supreme Court's opinion which was approved by the Court of Errors and Appeals. (74 N.J.L. 638.) State school moneys, since the 1907 amendment of Section 126 (Chapter 123, Laws of 1907), can be withheld from a school district for failure to furnish transportation as required by Section 117 (now R. S. 18:14-8 and 18:14-9). *West Amwell Township Board of Education v. State Board of Education,* supra (5 N. J. Misc. 152, 135 A. 664), approving ''the construction and application'' of the statute ''made by the Commissioner of Education'' in *Phillips v. West Amwell Township Board of Edu-*

cation, supra (page 754, School Law Decisions, 1938 edition), where the Commissioner held that school boards are required to furnish transportation "as a part of the necessary school facilities".

There can be no doubt that, at the time of the adoption of Chapter 191, Laws of 1941 (the statute challenged in the instant case), transportation to public school had been construed in New Jersey to be a public school facility, and in view of the statutes mentioned above, was so considered by the legislature.

Also see *Rynehart v. Spaulding,* 244 N.Y.S. 569, at 571, affirmed 249 N.Y.S. 897, where it was held that:

> "Such transportation, therefore, seems clearly to be a part of the state's system of education."

It having been held that transportation of public school children is a public school facility, it is clear that transportation of parochial school children is a parochial school facility and is an aid to the school.

It is immaterial whether the aid to the private or parochial school be made directly or indirectly.

The prohibition against public *gifts* of "money * * * to *or* in aid of *any* individual, association or corporation," contained in Paragraph 19 of Article 1 of the Constitution, and the prohibition against "*appropriations* of money * * * to *or* for the use of any society, association or corporation *whatever,*" contained in Paragraph 20 of Article 1, clearly contemplate all *appropriation* or *gifts* of money whether made directly or indirectly.

In *Judd v. Board of Education,* supra, the New York Court of Appeals defined direct aid and indirect aid as follows:

"Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces *any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course* for the open and avowed aid of the school, *that may be to the benefit of the institution or promotional of its interest and purposes.*" (15 N. E. 2d 582).

The cases from other jurisdictions which hold that transportation to private or parochial schools is an aid to the schools are in accord with the New Jersey cases which hold that a gift of public funds "is unconstitutional whether made directly or indirectly." Wilentz v. Hendrickson, 133 N.J.E. 447, at 464, affirmed 135 N.J.E. 244, at 252; and *In re Voorhees,* 123 N.J.E. 142, at 147, affirmed 121 N.J.L. 594, affirmed 124 N.J.L. 35.

In the case of *In re Voorhees,* supra, the late Vice Chancellor Buchanan held that the legislature could not make an indirect gift to the New Jersey College for Women. In his opinion he comments upon the cases theretofore decided and says:

"* * * They do *not* hold that a legislative grant or appropriation may be made, purely as a gift, to any corporation whatever (whether charitable, **educational** or of any other nature) without violating that provision. (Italics and parenthesis by court; bold face type by us.)

"In *Strock v. Mayor, &c., of East Orange,* 77 N. J. Law 382, 72 Atl. Rep. 34, it was held by the Supreme Court that a statute authorizing the granting of the *use* of municipal playgrounds

was in violation of Section 20 *as well as* Section 19 of Article I of the Constitution, in that it amounted to a gift of public property to *private persons* or corporations. It will be observed that the legislative grant here held void was not an appropriation of money technically as such.

"The same court, in *Mayor, &c., of Jersey City v. North Jersey Street Railway Co.,* 78 N. J. Law 72, 73 Atl. Rep. 609, expressed itself in positive terms (p. 74), to the effect that since the adoption of Sections 19, 20, Article I, of the Constitution, it has been *legally impossible* for the legislature *to authorize the giving,* or *itself to give,* public aid to private corporations; and that there is no distinction between direct pecuniary aid and indirect aid by release from a pecuniary burden; and that there is no distinction between a release of an obligation for license fees and a release of an obligation for taxes.

"Even in *Trustees of Rutgers College v. Morgan,* supra, the court says that this constitutional prohibition was designed to prevent giving 'free state aid and donations to private * * * schools,'—and 'should be rigidly enforced.' * * *

"* * * A gift of public funds or property to a private corporation is unconstitutional whether made directly or indirectly; * * *."

While our constitution does not enumerate the private purposes for which public funds cannot be used, the cases hereinbefore cited clearly hold that the all-inclusive provisions of Paragraphs 19 and 20 of Article 1 prohibit gifts of public funds "to *or* in aid of *any* individual, association or corporation," or "to *or* for the use of *any* society, association or corporation *whatever," for any private purpose whatever, whether the gift is made directly or indirectly.*

Those provisions are "general and all-comprehensive." In re Voorhees, supra (123 N.J.E. 142, at 148; and *Wilentz v. Hendrickson,* supra (133 N.J.E. 447, at 464). By reason of their general terms and comprehensiveness they prohibit all the evils specifically mentioned in the constitutions of some of the other states. There can be "no doubt there exists the constitutional limitation (Article I, Paragraph 20), as it has existed since 1875, to remedy, to strike down the recurring evils which gave it birth and are here present." *Wilentz v. Hendrickson,* supra (135 N.J.E. 244, at 253).

Mr. Justice Heher, in the instant case, says that Paragraph 19 of Article 1 "is not in terms applicable to school districts" (S. C., p. 57, l. 4), and appellants quote that statement without further comment. (Appellants' Brief, p. 61.)

In view of the fact that "school districts are only smaller municipalities" (*Landis v. School District,* 57 N.J.L. 509, at 510; and *State v. Deshler,* 25 N.J.L. 177, at 182), it is difficult to see why Paragraph 19 is not applicable to school districts. See *Strock v. East Orange,* 77 N.J.L. 382, where Paragraphs 19 and 20 were held to be violated by the grant of the use of playgrounds under the "control" (p. 382), of a board of playground commissioners for the reason that it "would be taking from the public its property rights and giving them to private persons" (p. 384); and *Pell v. Newark,* 40 N.J.L. 550, at 555, where it was held that the constitutional provision prohibiting special legislation regulating the internal affairs of "towns and counties" embraces cities, on the ground that cities are "within the mischiefs to be remedied." Also see *Mitchell v. Consolidated School Dist. No. 201,* supra, where it was held that even if free transportation to private schools could be considered to inure exclusively to the benefit of the pupils and their

parents, "it runs afoul of" a constitutional provision (similar to Paragraph 19, Article 1 of the New Jersey Constitution) prohibiting gifts of money "to or in aid of any individual" (135 P. 2d 79, at 81), *in spite of the fact that the constitutional provision did not mention school districts.*

There is no doubt that Chapter 191, Laws of 1941, is unconstitutional for the reason that "since the adoption of Sections 19, 20, Article I, of the Constitution, it has been legally impossible for the legislature *to authorize the giving,* or *itself to give,* public aid to private corporations" or "private persons." (In re Voorhees, supra, and cases there cited.) Moreover, the gift made by the resolution of the appellant board of education and by Chapter 191, Laws of 1941, is a gift of state moneys. It is a gift by the state, prohibited by Paragraph 20 of Article 1. See *Society for Useful Manufactures,* 89 N.J.L. 208, at 209, where the Court of Errors and Appeals said:

> "As we have already pointed out, the people of this state, by the amendment to the constitution which we have cited, made the maintenance and support of free public schools a matter of state, instead of local concern. The school tax is laid for the purpose of carrying out *this state system* of educating our children; it is used for that purpose; and such a use, in our opinion, is as much a *state use* as the appropriation of moneys to be expended in the support of the state government is an appropriation for state use; the *distribution by the state of the moneys so raised,* in such a way as, in the judgment of the legislature, would best subserve the purpose of the constitutional mandate being a *mere matter of administration.*"

All the moneys of the boards of education raised by taxation within the district, as well as all revenue received by them from the state, are dedicated to the support of the public schools established and maintained pursuant to the constitutional mandate, and can be used for no other purpose.

The school law is contained in Title 18 of the Revised Statutes (R. S. 18:1-1, et seq.), and the source of Title 18 is Chapter 1, Laws of 1903, entitled:

> "An Act to establish a thorough and efficient system of free public schools, and to provide for the maintenance, support and management thereof."

It is elementary that moneys raised by taxation can be used for no other purpose than the purpose for which the tax is levied. School districts can raise money by taxation only for the purposes set forth in the statute which authorizes the tax, and the money can be used only for the purpose for which it was raised, *State v. Garrabrant,* 32 N.J.E. 444.

R. S. 18:6-50 and R. S. 18:6-53 give to school districts operating under Chapter 6 of the school law power to raise money by taxation within the district only "for the use of the public schools in the district."

R. S. 18:7-78, which gives to school districts operating under Chapter 7 of the school law power to raise money by taxation within the district, cannot be interpreted to confer power to impose taxes for any other purpose than the support and maintenance of public schools. The source of that section is the Act of 1903, mentioned above, as amended by Chapter 243, Laws of 1928. R. S. 18:7-78 cannot, therefore, be given a scope beyond the object expressed in the title of the Act of 1903 (*Jordan v. Moore,* 82

N.J.L. 552; *Addotta v. Blunt,* 114 N.J.L. 85, 87; *John the Baptist, etc. Church v. Gengor,* 121 N.J.E. 349, 353; and *Joyce v. Price,* 123 N.J.L. 171, 173); and the enactment of the Revised Statutes cannot be deemed to have enlarged the scope of R. S. 18:7-78. *Crater v. County of Somerset,* 123 N.J.L. 407, at 414.

R. S. 18:10-18 provides for an annual legislative appropriation and a state school tax "for the purpose of maintaining free public schools."

R. S. 18:10-30, 18:10-32, 18:10-33 and 18:10-38 clearly provide that the revenue derived from the tax on railroad and canal property can be used for no other purpose than "the support and maintenance of the free public schools of the school district to which apportioned and paid."

R. S. 18:10-39 provides:

> "The several counties in this state shall appropriate the interest of the surplus revenue to the support of the public schools."

The sections cited above clearly show that *all* revenues received by school districts, whether raised by taxation within the districts, or received from the state or county, are dedicated to the support and maintenance of public schools and can be used for no other purpose whatever. *It is equally clear that moneys raised by taxation pursuant to those sections for public school purposes only, have been used in the instant case for free transportation of children to sectarian schools pursuant to the resolution of the appellant board of education and Chapter 191, Laws of 1941.* Appellants have not called attention to any statute which authorizes the levying of a tax to provide revenues for boards of education to be used for any purpose other than public schools. There is no such statute.

Appellants argue that the purpose of providing transportation to private or parochial schools is to protect the children from traffic hazards, citing *McKnight v. Cassady,* 113 N.J.L. 565 (Brief of Appellants, pp. 43 and 74). In presenting that contention, appellants seem to overlook the fact that even the decision of the Maryland Court in the *Wheat case,* supra, is not based upon that theory.

*Four of the eight judges sitting in that case were of the opinion that the statute could not be sustained on the "ground of the protection it affords children attending schools * * * against the hazards of the road."* (Concurring opinion of Judge Sloan, 199 A. 632; and dissenting opinion of Judge Parke, 199 A. 635.)

The original source of R. S. 18:14-8 (which Chapter 191, Laws of 1941, purports to amend) is Section 117, Chapter 1, Laws of 1903 (2d Special Session). We do not think anyone could successfully sustain a contention that in 1903 automobile traffic had become a serious problem from the standpoint of hazards of the highways, particularly in rural sections, where children are most apt to live "remote from any schoolhouse." At that time there was not a single automobile in many of our rural townships.

McKnight v. Cassady, supra, does not hold that the purpose of transportation of children to public schools is to protect the children from the hazards of the highways. It does not mention hazards of the highways. It holds merely that the power to make rules for transportation of public school children conferred upon a school board the authority to own and operate its own buses; that the operation of a public school bus by a school board is a governmental function; and that a recovery cannot be had for personal injuries received as a result of the

operation of the bus by the board of education. The court further held that "the true intent and purpose of Section 117" (now R. S. 18:14-8 and 18:14-9) was "to provide for the transportation of children living *remote* from the schoolhouse" (page 568).

It has been held that the only factors to be considered in determining "remoteness" from any schoolhouse are those which increase the time necessary to reach a school building, or which delay the progress of a child on his way to school and hence contribute to "remoteness" from school. Read, et al. v. Roxbury Township Board of Education, page 763, School Law Decisions (1938 edition); and *Foose v. Holland Township Board of Education,* page 621, School Law Decisions (1925 edition).

In the *Read case,* supra, the Commissioner of Education held that traffic hazards are not a factor to be considered in determining "remoteness" from school, and said:

> "The factors that contribute to remoteness in *Foose vs. Holland Township Board of Education,* namely, age, sex, condition of the roads, etc., are such as may increase the time necessary to reach a school building. * * * Danger does not in itself make a place remote unless it increases the time necessary to cover the distance to such an extent as to constitute remoteness. It seems, therefore, that only in its relation to delay can danger be considered and not because of the possibility of a child being hurt by automobiles.
>
> "*Boards of education are not authorized by law to provide for the safety of children in reaching school.* While a board should be concerned as to the safety of children and should

report to the State Police or local officers the reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highways and street dangers demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation. While there may be danger to children because of the traffic on highways in this case, as there is now danger upon most of our State and county highways, the testimony does not disclose automobile traffic which would appreciably delay children in going to and from school."

In view of this prior practical interpretation of the statute by the Commissioner in the exercise of his administrative and judicial functions, we cannot, in construing the amendment of the statute, attribute to the legislature an intent to protect children from traffic hazards, in the absence of language in the amendment expressing such intent. *Ross v. Miller,* 115 N.J.L. 61, 65; *Burlington County v. Martin,* 129 N.J.L. 92; and *State v. Kelsey,* 44 N.J.L. 1. Moreover, "We may not attribue to the legislature an intention that the statute does not contain." *Burlington County v. Martin,* 128 N.J.L. 203, 205, affirmed 129 N.J.L. 92.

It has been held that, generally, high school children who live within two and one-half miles of the school which they attend, and elementary school children who live within two miles of the school which they attend, do not live "remote" from school and are not entitled to transportation. *Sigafoos, et al. v. Phillipsburg Board of Education,* page 760, School

Law Decisions (1938 edition), at page 762; and other decisions reported on pages 748 to 774 of School Law Decisions (1938 edition).

When a child lives along a main highway, upon which traffic hazards are great, and his home is one mile from the school which he attends, can it be said that he does not need protection from traffic hazards, while another pupil of the same school, who lives along the same highway, and whose home is situate two miles from the school, does need such protection?

It appears in the *Mitchell case,* supra, that the Washington legislature, in the statute which the court held unconstitutional, *expressly* declared that the purpose of the statute was to minimize accidents and traffic hazards to the children. (135 P. 2d 79, at 80.) Nevertheless, the court held that the statute transcended the police power of the state (page 81). The New Jersey Statute contains no *express* declaration of legislative intent whatever. It provides for transportation only for *"children living remote from any schoolhouse* * * *, including the transportation of school children to and from school other than a public school, *except such school as is operated for profit in whole or in part."* That language completely negatives any legislative intent to protect all the school children of the state from the hazards of the highway, for the reason that it contains no provision for transportation of any child who does not live *remote* from the schoolhouse or who does live remote from the schoolhouse but attends a school which is "operated for profit in whole or in part." It clearly shows a legislative intent to aid private or sectarian schools which are not operated for profit. The statute contains no language whatever evidencing legislative intent to protect the children from road hazards. Had that been the intent

of the legislature, it would not have excluded children who do attend schools operated for profit or who attend *any* school and who live far enough away from the school to make hazardous their journey to it although not sufficiently *remote* to entitle them to transportation under the interpretation given the word "remote" by the Commissioner of Education prior to the adoption of Chapter 141, Laws of 1941.

The statute cannot be sustained on the ground that it facilitates attendance at some school.

Appellants argue that, inasmuch as the statute (R. S. 18:14-14, as amended by Chapter 154, Laws of 1940) requires a child to attend school, and his attendance at a parochial school is a compliance with the statute, "public policy would seem to entitle the child to free transportation in the event the school is remote from his home." (Brief of Appellants, p. 47.) Again, the plain language of Chapter 191, Laws of 1941, will not permit of such construction. If that were the proper construction of the statute, a parent could elect to send his child to a private school not operated for profit, in which event transportation would be provided at public expense, or he could elect to send his child to a private school operated for profit and in that event such transportation would not be furnished. Attendance at either of those schools is a compliance with the compulsory attendance statute, but Chapter 191, Laws of 1941, provides for free transportation to one and not the other. Had it been the legislative intent to facilitate attendance at some school, the statute would have provided for free transportation to any school for any "children living remote from any schoolhouse." The statute does not meet the test of even the Maryland court decision in the *Wheat case,* namely it is not "in furtherance of a public function in seeing that *all* children attend some school."

The fallacious reasoning relied upon by Appellants and set forth in the decisions supporting the child benefit theory is demonstrated in the following language of the Mississippi court in *Chance v. Mississippi State Textbook R. & P. Board,* supra:

> "If a pupil may fulfil its duty to the state by attending a parochial school it is difficult to see why the state may not fulfil its duty to the pupil by encouraging it *'by all suitable means.'* "

The courts sustaining the child benefit theory say that free transportation to children attending private or sectarian schools, or the furnishing of textbooks to children in such schools is not an aid to the schools, and in the next breath say that, inasmuch as attendance at such schools is a compliance with the compulsory education law, the state should *encourage* the child to attend such school *"by all suitable means."* They would have the state say to the child: "You have rejected the *'means'* provided by the state to enable you to get an education, but the state will *encourage* you *'by all suitable means'* to obtain your education at any non-public school which you elect to attend."

That theory obviously approves the expenditure of public funds for a private purpose. If pursued to its logical conclusion, the state can pay the entire cost of operation of non-profit private and sectarian schools, including salaries of teachers, textbooks, transportation and all other school facilities on the ground that they are an aid to the children and not the schools, and are furnished as a *suitable means* of encouraging the children to comply with the compulsory education law. The courts of the States of Delaware, Kentucky, Massachusetts, Oklahoma, Michigan, New York, South Dakota and Washing-

ton have considered and rejected that theory "as lacking in persuasive reasoning and logic" (*Sherrard v. Jefferson County Board,* supra), in the cases involving public expenditures for tuition, textbooks and transportation for children attending private or sectarian schools, hereinbefore cited.

Synod of Dakota v. State, supra, is an early case which discusses the child benefit theory and its companion theory of benefit to the state as a result of use of public funds for education of children at private schools. The reasoning in that case is as follows:

> "The question, then, is, What constitutes an appropriation for 'the benefit of' or 'aid to' a sectarian school or institution? That such an appropriation is not limited to a gift or donation on the part of the State is clearly shown in section 3, art. 6, which provides: 'No money or property of the State shall be given or appropriated.' The State is not only prohibited from giving or donating state funds, but from appropriating them. This term 'appropriation,' used in this connection with 'gift' was evidently intended to mean something different from gift or donation. * * * What, then, constitutes benefit or aid? Webster defines 'benefit' to mean 'whatever contributes to promote prosperity; . . . add value to property; advantage; profit.' 'To aid' is defined by the same author 'to support, either by furnishing strength or means to help to success.' * * * But the learned counsel for plaintiff strenuously contends that the sum due plaintiff will not be contributed for the benefit of or to aid the university, but in payment for services rendered the State, or to its students, in preparing them for

teaching in the public schools. This contention, while plausible, is, we think, unsound, and leads to absurd results. If the State can pay the tuition of twenty-five students, why may it not maintain at the institution all that the institution can accommodate, and thereby support the institution entirely by state funds? The theory contended for by counsel would, in effect, render nugatory the provisions of the Constitution, as the claim that the appropriation was made as compensation for services could be made in all cases.'' (14 L. R. A. 422.)

When a parent rejects the means provided by the state, at public expense, to enable him to comply with the compulsory education law, namely the public school system and all its facilities, including transportation to public school, then the furnishing of ~~full~~ free *transportation of his child to a private school, whether operated for profit or not, is not a use of public funds for a public purpose.*

The State has no public function to perform in order to facilitate the attendance of children at a private school to which their parents elect to send them at the expense of the parents or the private school. The state has fully and completely performed its function with respect to the education of children between the ages of five and eighteen years by establishing ''a thorough and efficient system of free public schools for the instruction of *all* the children in this state between the ages of five and eighteen years,'' pursuant to the constitutional mandate, and it has no function to perform with respect to the education of any such child at a private or sectarian school.

In *Judd v. Board of Education,* supra, the court points out that:

"Section 1 makes it mandatory for the Legislature to 'provide for the maintenance and support of a system of free common schools, wherein all the children of this State may be educated.' Under this provision, the schools provided must be sufficiently numerous so that *all the children of the State* may receive their education, whatever may be their race, creed, color or condition. Private, denominational and sectarian schools, and schools or institutions of learning in which denominational tenets or doctrines are taught or those wholly or in part under the control or direction of any religious denomination are no part of and are not within that system." (Italics by court.) 15 N. E. 2d 579.

In the well reasoned dissenting opinion in the *Wheat case,* supra (concurred in by three of the eight judges sitting in that case), it was said:

"On the other hand, and as a necessary and logical complement to the principle which has been here stated, money has not been properly paid for a public purpose, but for a private one, when and should the appropriation and disbursement of public funds to private persons or for their use be an employment of the funds for such an object or purpose *which the State has fully and completely assumed and performs for the welfare and benefit of the entire class of its citizens within the object and scope of that purpose.* An illustration of this is at hand. The proper and sufficient education of its citizens is of primary concern to the State, whose importance is recognized by the constitutional mandate to the General Assembly that it shall establish by law throughout the State a thorough and effi-

cient system of Public Schools, and shall provide by taxation or otherwise for their maintenance. Const. art. 8, sec. 1. The General Assembly has established and does maintain this system, which affords to every eligible child a free public school education. * * * The duty of the State with respect to transportation is to the public school children, and none other. Should the parent of a child prefer to have him taught in an accredited private, denominational or parochial private school, the parent may thus educate the child, the statute so permits, but *the child thus withdrawn from the universal system of public schools, becomes, by this withdrawal, a private pupil in a private school at private expense,* and, so long as this relation continues, the State is relieved and the pupil is not entitled to share in the benefits and advantages of the public school educational system. *Nor is the State under any obligation to educate the pupil at a private school when substantially the same or an equivalent education is afforded in the public school. Hence, there can be no public benefit derived from public money spent to procure what has already been adequately provided for at public expense.* If, therefore, money be appropriated by the General Assembly to pay for the pupil's tuition, expenses, books and supplies or for his transportation to and from the private school, or for any other purpose in this connection, it is an appropriation of public funds for a fundamentally private purpose, no matter whether the pupil or the private school be regarded as the real beneficiary of the appropriation. *In no true sense was the money raised for a public object.*" (199 A. 638.)

The contention that the use of public funds for transportation to private or sectarian schools is valid "wholly ignores the underlying fundamental purpose of our educational system as set forth in the constitution." *State ex rel. Van Straton v. Milquet*, supra (192 N. W. 392, at 395).

Even if transportation to private or sectarian schools could be regarded as a public purpose, the state cannot accomplish that purpose by means of aid to an individual, association, society or corporation, who or which is not an agent or agency of the state.

In the recent case of *Wilentz v. Hendrickson* (Court of Chancery, 1943), 133 N. J. E. 447, 480, Vice Chancellor Jayne held that:

> "These constitutional amendments were, however, directed at the *means of effectuating that public purpose.* They were intended to prevent the accomplishment of that purpose by the means of aid to *private corporations not constituting public agencies controlled by the state.* (Italics by the court.) This important distinction is stated with clarity by the New York Court of Appeals in *People v. Westchester County National Bank*, 231 N. Y. 465; 132 N. E. Rep. 241 (1921), where it was said (at p. 244):
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> > " 'Whether the purpose is a public one, therefore, is no longer the sole test as to the proper use of the state's credit. *Such a purpose may not be served in one particular way. However important, however useful the objects designed by the legislature, they may not be accomplished by a gift or a loan of the credit to an individual or a corporation.* It will not do to say that the character of the act is to be judged by its main object—that because the purpose is public, the means

adopted cannot be called a gift or a loan. To do so would make meaningless the provision adopted by the convention of 1846. Gifts of credit to railroads seemed an important public purpose. That purpose was distinctly before the legislature that made them. Yet they were still gifts and so were prohibited.' (Italics supplied.)

"In our own state, the decisions in *Rutgers College v. Morgan,* supra; *Trustees of Newark Free Public Library v. Civil Service Commission,* 83 N. J. Law 196; 83 Atl. Rep. 980; affirmed, 86 N. J. Law 307; 90 Atl. Rep. 261; *Romano v. Housing Authority,* Newark, 123 N. J. Law 428; 10 Atl. Rep. (2d) 181; affirmed, 124 N. J. Law 452; 12 Atl. Rep. (2d) 384, are similarly elucidative."

In the case of *In re Voorhees* (supra), 123 N. J. E. 142, 147, the late Vice Chancellor Buchanan said:

"And in *Trustees of Newark Free Public Library v. Civil Service Commission,* 83 N. J. Law 196, 83 Atl. Rep. 980; aff'd. 86 N. J. Law 307, 90 Atl. Rep. 261, the constitutional validity of the appropriation of public moneys by municipalities to free public libraries, is rested on the ground that the libraries in question were public agencies for public education and the appropriations are expenditures by the state or municipality for such public education *through* such agents." (Italics by court.)

In *Trustees v. Civil Service Commission,* 83 N. J. L. 196, 202, affirmed 86 N. J. L. 307, the court said:

"To sustain the right to make these donations, in view of article 1, sections 19 and 20 of the

constitution, * * * it would seem necessary to hold that these corporations are a branch or a board of the municipal government, *public in their character,* to manage educational matters for the benefit of the whole community. * * *

"To justify the donations of public moneys, it seems necessary to regard these organizations as *public agencies of the state,* created by it in connection with its municipalities and as an incidental part of their government."

In *Rutgers College v. Morgan* (supra), 70 N. J. L. 460, 473, affirmed 71 N. J. L. 663, the court, with reference to paragraph 20 of Article 1, said:

"This provision, as well as that relating to special laws, does not bar instrumentalities for public education *provided by the state and under its control* by general laws where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced; but they were not intended to narrow or circumscribe the legislative power to furnish *facilities* by general laws for public education *under its own supervision.*"

Romano v. Housing Authority, 123 N. J. L. 428, 433, Affirmed 124 N. J. L. 452, involved an appropriation from the State's general fund and it was sustained for the reason that it was "for the benefit and support of one of the *state's agencies* organized to engage in the accomplishment of an important public work." (Citing *Rutger's College v. Morgan,* supra.)

The principle that a gift of public money for a pub-

lic purpose can be made only to an agency of the state is particularly applicable in the instant case in view of the fact that the State has established and maintains the public school system as its agency to perform fully and completely the functions of the state with respect to education of all the children of the state.

Inasmuch as "the constitutional validity of a law is to be tested, not by what has been done under it, but by what, by its authority, may be done" (*Henderson v. Atlantic City,* 64 N. J. L. 583, at 588; *Strock v. East Orange,* 77 N. J. L. 382, at 384; and *St. John the Baptist, etc., Church v. Gengor,* 118 N. J. L. 467, at 478), we desire to point out that Chapter 191, Laws of 1941, not only authorizes transportation of private and sectarian school children "on routes established for the conveyance of public school children" (Justice Heher's dissenting opinion, S. C., p. 56, lines 27-29), but, in the first paragraph thereof, authorizes transportation of such children on the same basis as public school children. A board of education can *be compelled* to furnish such transportation. *West Amwell Twp. Bd. of Education,* supra (5 N. J. Misc. 152, 135 A. 664).

The statute purports to amend R. S. 18:14-8, and it must be read with related sections of the school laws. It has been held that R. S. 18:14-8 and 18:14-10 authorize boards of education to own and operate buses or to enter into contracts providing for the furnishing of transportation. *McKnight v. Cassady,* 113 N. J. L. 565. It would seem, therefore, that a board of education, under the first paragraph of R. S. 18:14-8 as amended by Chapter 191, Laws of 1941, can own and operate buses for the purpose of transporting children to private and sectarian schools, and, under the provisions of R. S. 18:14-8 and 18:14-10 can enter into a contract with a parochial school

providing for transportation of parochial school children in parochial school buses, as was done in Maryland. *Adams case,* supra.

The letter and spirit of the provision of Paragraphs 19 and 20 of Article 1 should not be permitted to be whittled away by highly technical exceptions and refinements.

In *Wilentz v. Hendrickson,* supra, Vice Chancellor Jayne said:

> "Unless cautiously controlled, fine-spun and technical exceptions and refinements soon devour the virtue of laws and constitutions. Unfortunately, few propensities have been more noticeable in recent years than the adroit endeavors to circumvent our laws and constitutions by some artifice or stratagem. (133 N. J. E. 473.)
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> * * *
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> "* * * If a financial donation of public funds can be lawfully made to a privately owned utility corporation to emancipate it from 'probable bankruptcy,' then the pertinent restriction in our constitution is a mere whimwham. (p. 479.)
>
> "Courts must always be alert to detect and suppress all evasions of constitutional interdictions. Thus, the determination of the basic questions in the present cause *ought not to rest so much upon technicalized reasoning as upon a circumspect and enveloping comprehension of the effect of these statutes.* (page 484.)
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> "Courts should not gradually emasculate or whittle away the beneficent provisions of the supreme law. Constitutional provisions, protective and remedial in their nature, are not to be construed so stringently as to defeat the intended protection or remedy. Such regulatory

provisions deemed to be of sufficient importance to the welfare of our government as to be incorporated in our constitution, must be interpreted to accomplish effectively and comprehensively the purposes for which they were introduced. If, when so interpreted, a legislative enactment is not fairly susceptible of a construction consistent with such provisions, it becomes the inescapable duty of the court to recognize and declare its invalidity." (p. 487.)

Point II.

Chapter 191, Laws of 1941, and the Resolution of the Appellant Board of Education violate Paragraph 6, Section 7, Article 4 of the State Constitution.

Paragraph 6, Section 7, Article 4, of the State Constitution establishes a state school fund and provides that the income therefrom "shall be annually appropriated to the support of free public schools" and shall not be used "for any other purpose, under any pretense whatever."

R. S. 18:10-15, in accordance with the constitutional provision, provides:

> "The income of the school fund shall be used for the support of public schools, the payment of the salaries of the county superintendents of schools, the payment of premiums and accrued interest on bonds purchased by the Board of Trustees of the fund and for no other use or purpose whatever."

It is beyond the power of the legislature to use the state school fund or the income therefrom for

any purpose other than the maintenance of the free public schools of the state, established pursuant to the constitutional mandate. *Rutgers College v. Morgan,* 70 N.J.L. 460; *Trustees of Public Schools v. Trenton,* 30 N.J.E. 667, 680; *Am. Dock and Imp. Co. v. Trustees of Public Schools,* 35 N.J.E. 181, 255; *Henderson v. Atlantic City,* 64 N.J.E. 583; and *State v. Rutherford,* 98 N.J.L. 465, 467.

No part of the state school fund or income therefrom can be used even for state aid to or support of "instrumentalities for *public* education provided by the state and under its *control*" (*Rutgers College case,* supra, at pages 473 and 474), which are not part of the free public school system established and maintained for all children between the ages of five and eighteen years.

In the *Rutgers College case,* supra, the Supreme Court held that it was competent for the legislature to establish an agricultural college, and that the Act of April 7, 1903, which provided for payment for scholarships "out of the state's general fund, and not out of the school fund" (70 N.J.L. 460, at bottom of p. 476), substituted "a legal mode of payment for the illegal one adopted in the Act of 1890" (p. 477), which had provided for payment "out of the income of the fund for the support of public free schools" (pp. 465 and 470). The Court of Errors and Appeals affirmed the decision of the Supreme Court by a vote of 6 to 5 (71 N.J.L. 663) and said:

> "The correct view of the later act is that expressed in the other suggestion of the learned justice, viz., that it was the substitution of a legal mode of payment for the illegal one adopted by the Act of March 31st, 1890."

If it is beyond the power of the legislature to appropriate money for a state agricultural college out

of the income from the state school fund, certainly no part thereof can be used for transportation of children to private or sectarian schools.

Chapter 191, Laws of 1941, amends Section 18:14-8 of the school laws, and, when it is read with the related sections of those laws, there can be no doubt that it appropriates moneys from the state school fund, as well as other state moneys dedicated to public school purposes, for the transportation of children to private and sectarian schools, and that the moneys used in the instant case for such transportation were derived from those sources.

R. S. 18:10-17 provides for apportionment from the state to the counties from the state school fund. It reads in part as follows:

> "The Commissioner of Education shall equitably apportion to the several counties the amount appropriated for the support of public schools from the *state school fund* * * *."

The only statutory provisions for apportionment of state school moneys from the counties to the school districts are contained in R. S. 18:10-41, et seq.

R. S. 18:10-41 reads in part as follows:

> "The county superintendent of schools of each county shall, on or before April first in each year, apportion to the several school districts of the county the State school moneys and the interest of the surplus revenue in the manner provided in this section and Section 18:10-42 of this Title:
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> * * *
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> "p. *Seventy-five per centum (75%) of the cost of transportation of pupils to a school or schools pursuant to the provisions of Section* **18:14-8** of this title, when, subject to the appeal

under Sections 18:3-14 and 18:3-15 of this Title, the necessity for such transportation and the cost and method thereof have been approved by the county superintendent of schools of the county in which the district paying the cost of such transportation is situated."

The state school moneys including income from the state school fund, apportioned to school districts for 75% of the cost of transportation of pupils, pursuant to R. S. 18:10-41, is not a reimbursement. Its object is not to reimburse the school district for 75% of the cost of transportation of pupils but to provide funds for that purpose for the ensuing year. See *Board of Education of Lumberton Township v. New Jersey State Board of Education,* 125 N.J.L. 590, at 593, a case involving the interpretation of Subsection m of R. S. 18:10-41, providing for payment of $60.00 to school districts for each pupil who attends a high school in a district other than the district in which he resides. In that case Mr. Justice Perskie held that:

> "It is altogether clear that the object of the statute is not to reimburse the sending school district for the amount which it paid out to the receiving school district during the preceding year; rather is its object to provide funds for the ensuing year. To attain that object the statistics of the past year are employed for the purpose of calculating the amount that would probably be needed the ensuing year."

It is, therefore, clear that 75% of the money authorized to be used by Chapter 191, Laws of 1941, and actually used during the school year 1942-1943 in the instant case, for transportation to private and

sectarian schools is derived from income from the state school fund and other state moneys received from the state, not as a reimbursement, but for use during the ensuing year, i.e., the school year 1942-1943.

Appellants have omitted from their brief any mention of the effect of the provisions of R. S. 18:10-41 in this case. That speaks eloquently of the importance of that section in the determination of the issue before the court. That section was called to the attention of the Supreme Court in our brief filed in that court, and the court determined that the resolution of the appellant board and the statute violate Paragraph 6, Section 7, Article 4 of the Constitution.

R. S. 18:10-42 provides in part as follows:

> "The county superintendent of schools of each county, after making the apportionments under Section 18:10-41 of this title and making such other apportionments as are required by law, shall apportion the remainder of the moneys to the several school districts of the county on the basis of the total days' attendance of all pupils enrolled in the public schools thereof as ascertained from the last published report of the commissioner.* * *"

It is quite obvious that the money apportioned to the Appellant Board of Education by the County Superintendent for the school year 1942-1943, pursuant to R. S. 18:10-42, became mingled with the total funds in the hands of the board and were used to pay the cost of transportation of children to private and sectarian schools.

R. S. 18:10-17, 18:10-41 and 18:10-42 fully sustain our argument made in the Supreme Court that part

of the moneys used by school districts for transportation of pupils to private and sectarian schools can be traced to the school districts directly from the State school fund mentioned in the Constitution.

Point III.

Chapter 191, Laws of 1941, and the Resolution of the Appellant Board of Education violate Paragraphs 3 and 4 of Article 1 of the State Constitution.

A careful examination of the federal and state constitutions discloses that nothing is more fully set forth or more clearly expressed than the determination of the founders of this country to preserve and perpetuate religious liberty and to guard against the slightest infringement thereof. They believed that a union of church and state like that which existed in other nations was opposed to the spirit of this country.

The federal and state constitutions prohibit any law respecting an establishment of religion. They prohibit compulsory support of religion through taxation or otherwise. Any alliance or bond joining church and state in their separate functions is deemed injurious to both.

Our government is founded upon the principle of separation of church and state. All citizens, whatever their religious affiliations, may well consider the danger involved in any departure from that principle. The experience of centuries of church control of the state in some European countries, and state control of the church in others, warns us against any partnership of government and religion. There is sufficient evidence to show that our churches have

prospered far better without state aid than they would if they were connected with or supported by our government. Churches will exert a greater influence upon the people in that way than by attempting to make of our public institutions agencies for the propagation or fostering of religion. The strong arm of the State should never be used to foster religion.

There is no question that many of the persons who seek state aid for the propagation of religion are sincere and mean well, but they fail to see in the history of the past what such attempts have always led to, and fail to interpret properly the American principle of separation of church and state. By keeping church and state separate and distinct, each performing its functions without aid, support or interference from the other, we have avoided the religious prejudices, conflicts and persecutions experienced in other countries. Any union of church and state whatever would have emphasized our religious differences. The "fundamental conception of civil and religious liberty" would not have "brought together our forefathers of all religious persuasions upon common ground," and the "constitutional compact of our national life" would not have produced "our present harmonious and cherished design of national existence, the idealic conception of Webster: 'an indestructible union of indestructible states' " (*Knibb v. Knibb,* 94 N.J.E. 747), if the principle of separation of church and state had not been a part of our forefathers' conception of civil and religious liberty. It has been very essential to the elimination of discord and strife over religious differences. Had the functions of government been permitted by our state and federal constitutions to foster the religious beliefs of any group of our people we would never have

acquired "our present harmonious and cherished design of national existence."

The same spirit that has manifested itself in opposition to state control or support of religion is likewise opposed to state control or support of sectarian schools. If education is to include religious instruction it must be carried on by the churches without the support of the state. The state functions only in civil affairs, and consequently concerns itself only with good citizenship in its educational program. The state protects the rights of every citizen regardless of his religion, but should not promote or foster any religion to the slightest extent.

The founders of our country frequently found it necessary to deal with the question of the propagation of religion by the state. The question arose in the State of Virginia immediately after the signing of the Declaration of Independence. The Episcopal Church had been the established church of the Colony, which had involved the payment of public funds to the Episcopal clergy. The Presbyterians on October 24, 1776, presented a memorial to the General Assembly of the State requesting the abolition of the establishment (American State Papers Bearing on Sunday Legislation, William Addison Blakely, Washington, 1911, p. 92), in which they said:

> "In this enlightened age, and in a land where all of every denomination are united in most strenuous efforts to be free, we hope and expect our representatives will cheerfully concur in removing every species of religious as well as civil bondage."

The Baptists and Quakers joined with the Presbyterians, with the result that the Episcopal Church was disestablished as a state church, but "a bill es-

tablishing a provision for teachers of the Christian religion,'' defeated in 1779, was again introduced in 1784. Madison immediately wrote and circulated his famous pamphlet, ''A Memorial and Remonstrance'' (The Letters and Other Writings of James Madison, 1:163, 164), in which he made the following statement, which is as applicable today as it was then, however innocent the intrusion of religion into matters relating to the state may be:

> ''It is proper to take alarm at the first experiment upon our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution. *The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle.* We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease, any particular sect of Christians, in exclusion of all other sects? That *the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?''*

Madison's remonstrance aroused such sentiment against the bill that not only was it defeated but there was passed instead an ''Act for establishing religious freedom,'' written by Thomas Jefferson, which is a declaration of religious independence applicable to all situations arising out of a union of

state with religion. (The Writings of Thomas Jefferson, edited by H. A. Washington, 8:454).

The First Amendment to the Federal Constitution was in accord with the views of the advocates of religious freedom as expressed in the words of Thomas Jefferson, who said:

> "I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' *thus building a wall of separation between church and State.*" (*Reynolds v. United States,* 98 U. S. 145, 25 L. Ed. 244, 249.)

In the *Reynolds case,* supra, the United States Supreme Court pointed out that:

> "The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and *nowhere more appropriately, we think than to the history of the times in the midst of which the provision was adopted.* The precise point of the inquiry is, what is the religious freedom which has been guaranteed?
>
> "Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. *The people were taxed,* against their will, for the support of religion and sometimes *for the support of particular sects to whose tenets they could not and did not subscribe.*"

The feeling against any union of church and state, and state support of churches, was so strong that Benjamin Franklin declared:

> "When a religion is good, I conceive that it will support itself; and when it cannot support itself, and God does not take care to support it, so that its professors are obliged to call for the help of the civil power, it is a sign, I apprehend, of its being a bad one." (Complete Works of Benjamin Franklin edited by John Bigelow, 7:140.)

We do not think that a religion which seeks state aid for propagation of its tenets is "a bad one". State aid for that purpose is frequently sought merely because those who seek it do not have a proper conception of the meaning of religious liberty or the evils produced by a union of church and state or state support of the church. Those who would use state agencies to propagate the tenets of the church are often entirely unaware of the testimony of history that always, sooner or later, all the evils experienced in other countries will attend civil espousal of the church program.

In the past the movements for a union of church and state have always been inaugurated with mild measures that appeared innocent enough on the surface. There is only one way to maintain the principle of separation of church and state and that is to deny to the church any control of, or support from, the state, and to deny to the state any control of the church, and to prevent any kind of alliance between state and religion. "Eternal vigilance is the price of constitutional rights." *People v. Graves* (New York Court of Appeals, 1926), 245 N. Y. 195, 156 N. E. 663. We cannot wait until, in the words of Madison, "usurped power" has "strengthened itself by exercise, and entangled the question in precedents"; we must see "all the consequences in the principle", and avoid "the conse-

quences by denying the principle'' of union of church and state. Only as this distinction between the functions of the church and those of the state is maintained can we protect and safeguard the rights of the citizen and preserve the stability of religion.

Education of our children is now recognized as a governmental function and the public schools are the agencies of the state for the exercise of that function. This does not mean, of course, that the responsibility of education may not be assumed by private persons or organizations. That denominational schools should teach religion is entirely proper. Each denomination naturally teaches the tenets of its own beliefs, but there must not be any state support of church schools. The experiences of American life, particularly those of the nineteenth century attending the growth of the public school system, have shown that nowhere are the evils of partnership of church and state more accentuated, nowhere must a more determined effort be made to maintain complete separation, than in the matter of education. It is the letter and spirit of our constitution that schools supported wholly or in part by public funds shall be free from sectarian control or influence.

Many American statesmen have expressed their views on the subject of separation of state and sectarian schools. President Grant said:

> ''Leave the matter of religious teaching to the family altar, the church, and the private school, supported entirely by private contribution. *Keep church and state forever separate.''* (Speech delivered to G.A.R. veterans at Des Moines, Iowa, in September, 1875, quoted in ''The Catholic World'', 22:434, 435, January, 1876.)

Philander P. Claxton, former United States Commissioner of Education, when he was commissioner, said:

> "In this country we have, and I most earnestly hope we shall continue to have, separation of church and state. * * * *Separation of church and state has contributed to the vitality of religion in this country.*" (Speech delivered on November 27, 1916, quoted from "Liberty", Vol. XII, No. 1, 1917.)

That the public school system was established only for the purpose of giving secular instruction, that the public school and the sectarian school must operate independently and separately in their respective spheres, and that the state must not sponsor or contribute to the support of sectarian schools, is clearly set forth and sustained by the decisions of the courts.

In *Judd v. Board of Education,* supra, in which transportation to sectarian schools at public expense was held unconstitutional, the New York Court of Appeals said:

> "While a close compact had existed between the Church and State in other governments, the Federal government and each State government from their respective beginnings have followed the new concept whereby the State deprived itself of all control over religion and has refused sectaries any participation in or jurisdiction or control over the civil prerogatives of the State. And so in all civil affairs there has been a complete separation of Church and State jealously guarded and unflinchingly maintained. *In conformity with that concept, education in State supported schools must be non-partisan*

and non-sectarian. This involves no discrimination between individuals or classes. It invades the religious rights of no one. While education is compulsory in this State between certain ages, the State has no desire to and could not if it so wished compel children to attend the free public common schools when their parents desire to send them to parochial schools (*Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary,* 268 U. S. 510, 45 S. Ct. 571, 69 L. ed. 1070, 39 A.L.R. 468), but *their attendance upon the parochial school or private school is a matter of choice and the cost thereof not a matter of public concern.* As Judge Pound aptly said, in *People ex rel. Lewis v. Graves,* 245 N. Y. 195, 198, 156 N. E. 663, 664, 'Neither the Constitution nor the law discriminates against religion. *Denominational religion is merely put in its proper place outside of public aid or support.'* We furnish free common schools suitable for all children of the State regardless of social status, station in life, race, creed, color or religious faith. *Any contribution directly or indirectly made in aid of the maintenance and support of any private or sectarian school out of public funds would be a violation of the concept of complete separation of Church and State in civil affairs and of the spirit and mandate of our fundamental law.*" (15 N. E. 2d 581, at 582.)

In *Harfst v. Hoegen* (Missouri Supreme Court, 1941), 163 S. W. (2d) 609, 141 A.L.R. 1136, at 1143, the court said:

"We recognize as well the great need of spiritual training not only in our own country,

but throughout this troubled world. The right of freedom of worship, which at this time is being denied to the peoples of two foreign governments in particular must be restored before the world is again secure. Nevertheless, the question confronting us is one only of law; of upholding our Constitution as it is written which, as lawyers and judges, we have dedicated our professional life to do. The constitutional policy of our State has decreed the *absolute separation of church and state, not only in governmental matters, but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise.*"

In *Knowlton v. Baumhover* (1918), 182 Iowa 691, 166 N. W. 202, 5 A.L.R. 841, the Iowa Supreme Court, in a well written opinion, collects the authorities on the question, and says:

> "If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the *fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used directly or indirectly for religious instruction,* and above all that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief." (5 A.L.R. 848.)

* * *

"* * * We can and do hold in high respect the convictions of those who believe it desirable that secular and religious instruction should go hand in hand, and that the school which combines mental and spiritual training is best adapted to the proper development of character in the young. The loyalty to their professed principles which leads such persons to found and maintain schools of this class at their private expense, while at the same time bearing their equal burden of taxation for the support of public schools, is worthy of admiration and convincing proof of their sincerity. But it is doubtless true that this double burden (double only because voluntarily assumed) sometimes renders those who bear it susceptible to the misleading argument that because they thus carry an extra load for conscience's sake, there is something wrong in the policy which forbids them to make the public school a means for accomplishing the end for which the parochial school is designed. * * * But, as we have before intimated, the right of a controversy of this kind is not to be decided by a count of the number of adherents on either side. The law and one are a majority, and must be allowed to prevail. The spirit which would make the state sponsor for any form of religion or worship, and the religion, whether Protestant or Catholic, which would *make use of any of the powers or functions of the state to promote its own growth or influence,* are un-American; they are not native to the soil; they are inconsistent with the equality of right and privilege and the freedom of conscience which are essential to the existence of a true democracy." (5 A.L.R. 858.)

In *State ex rel Freeman v. Scheve* (Nebraska Supreme Ct., 1903), 65 Neb. 853, 91 N. W. 846, 93 N. W. 169, 59 L.R.A. 927, at 932, the court, on rehearing, said:

> "It has been the policy of some rulers (as, for instance, Catherine d'Medici) to strengthen the throne by dividing the people; but in this country it has been the constant policy of government to unite the people to bring them closer and closer together, *to dissipate race and religious prejudices,* and to fuse their sentiments and aspirations. *One of the means to accomplish this end was to give all religious sects and systems a free field and no favors."*

In *Dakota Synod v. State,* 2 S. D. 366, 50 N. W. 632, 14 L.R.A. 418, it was held that a payment by the State for tuition charges in favor of a school under the influence of the Presbyterian denomination could not be enforced, although the service so rendered was by the direction of the state authorities pursuant to statute, and although the studies pursued by the students were wholly secular.

In *State ex rel Weiss v. District Board* (Wisconsin Supreme Court, 1890), 76 Wis. 177, 44 N. W. 967, 7 L.R.A. 330, 344, Judge Orton, in his concurring opinion, said:

> "The common school is one of the most indispensable, useful and valuable civil institutions this State has. It is democratic, and free to all alike, in perfect equality, where all the children of our people stand on a common platform, and may enjoy the benefits of an equal and common education. * * * *Religion needs no support from the State. It is stronger and much purer without it. This case is important*

and timely. It brings before the courts a case of the plausible, insidious and apparently innocent entrance of religion into our civil affairs, and of an assault upon the most valuable provisions of the Constitution. Those provisions should be pondered and heeded by all of our people, of all nationalities and of all denominations of religion, who desire the perpetuity, and value the blessings of our free government. That such is their meaning and interpretation no one can doubt, and it requires no citation of authorities to show. * * *

"The connection of church and state corrupts religion, and makes the state despotic."

In *Williams v. Stanton Common School District*, 173 Ky. 708, 191 S. W. 507, L.R.A. 1917 D, 453, at 461, the Kentucky Court of Appeals held unconstitutional an agreement by which certain public school children were taught in a sectarian school building by teachers paid by the public school district, and said:

"The common school, however humble its surroundings or deficient its curriculum, is the most valuable public institution in the state, and its efficiency and worth *must not be impaired or destroyed by entangling it in denominational or sectarian alliances.* As an independent, nonsectarian unit, it is entitled to the sincere and energetic support of all the people of the state, as well as to the hearty good will of all classes, irrespective of their religious views or church affiliations, and this on account of the inestimable blessing it confers on thousands of girls and boys in affording them the only opportunity for acquiring an education that could come

within their reach; and if it is to live and grow in usefulness and strength, as it will surely do, *the spirit of the Constitution must pervade its life and leave no one to say it has lost its carefully builded and jealously protected undenominational and nonsectarian character.* This school system derives its support from the communicants of all churches, without being subservient to any of them, and *its integrity and its safety depend on a strict adherence to the principle of separation of church and school, not only according to the letter, but to the spirit of the Constitution.*"

In *Knibb v. Knibb* (supra), 94 N.J.E. 748, our Court of Errors and Appeals, in an opinion written by Mr. Justice Minturn, recognized and applied the principle of separation of church and state, and said:

"In pursuance of the power conferred upon it by the fifth article of the constitution, the congress shortly thereafter buttressed that keystone of the constitutional arch by providing in the first amendment to the basic law that 'congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'

"Our state constitution shortly thereafter, guided by the inspiring influence, provided: '* * * There shall be no establishment of one religious sect, in preference to another * * * ' Manifestly the spirit of our law, upon this important subject, could not be more adequately, emphatically or frankly expressed."

In *City of Newark v. Board of Education of Newark,* 30 N.J.L. 374, at 377, it appears that the

City Council had made an appropriation of $5,000 in addition to the usual school appropriation, and in the resolution making the appropriation, it was specified that the $5,000 should be used by the Board of Education for the support of certain schools which were not under the jurisdiction of the school board. These schools were open to the public and had in the past been supported entirely by voluntary contributions of citizens. Under those circumstances the School Board refused to accept the money, and, in an action to compel them to do so, our Supreme Court said:

> "But by the resolution of the common council, the board of education is to select neither the teachers nor the books to be used in the schools, *nor to interfere with the religious exercises therein.* All these things are to be left to the determination of other persons, having the management of the schools referred to in the resolution. We are not informed of the character of these schools, who are to teach them, or what is to be taught in them, and I can see no reason why they may not be Mohammedan, Mormon, or Chinese. And if the common council has the power claimed, and if we order this *mandamus,* the board of education may be compelled to become the protectors and guardians of schools, for the teaching of the exalted and bewildering delights of the koran, the inexpressible blessings of an indefinite number of wives, or the sublime and idolized philosophy of Confucius. I do not think that the board of education is bound to do any such thing, or that the common council of the city have any such power over them."

Transportation is one of the privileges that accompanies attendance at a public school, and it is only as children are enrolled in the public school that this privilege of transportation facilities may be shared by them. Any other course would constitute an appropriation of public funds for sectarian purposes, and would ignore the fundamental purpose of our public school system as set forth in our constitution.

When public funds are used for transportation of children to a sectarian school in which the tenets of a particular church are taught, it cannot be denied that any taxpayer who does not believe in the tenets of that church is thereby compelled to contribute to the "maintenance of" a religious "ministry, contrary to what he believes to be right, or has deliberately and voluntarily engaged to perform," and is thereby "deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience" in that he is compelled to contribute to the propagation of a religious faith in which he does not believe, taught by a church whose "place of worship" he could not "under any pretense whatever be compelled to attend * * * contrary to his faith and judgment," all in violation of the spirit and letter of Paragraph 3 Article 1 of our State Constitution. Chapter 191 of the Laws of 1941 clearly violates that provision of the constitution.

In the case of *Susan B. Henry v. William E. Nichols*, supra (decided on March 10, 1945, and not reported), the court said:

> "If the county uses funds raised by taxation to assist in transporting pupils to private, sectarian and parochial schools, would not this be compelling every tax payer in the county to

contribute to each of the private, sectarian and parochial schools in the county to which pupils are transported, since the said transportation redounds to the benefit of these schools? If this is not contributing to the erection or maintenance of any place of worship or to the salary or support of any minister of religion, is it not dangerously near to if not actually, violating the spirit, if not the letter of this provision of the Constitution? Would not the religious sects, societies and denominations, which own, maintain and conduct these private schools, indirectly if not directly be given a preference thereby? Would not the particular creed, mode of worship, or system of ecclesiastical polity, which was taught by these schools, be given a preference thereby? Would not their rights, and privileges be enlarged, and the rights and privileges of the sects, societies and denominations who do not have such schools be diminished thereby?

"If these questions are answered in the affirmative, and we think they must be, then the Act of 1944 violates Section 5 of the Constitution."

Paragraph 4 of Article 1 of our state constitution must be read in the light of the First Amendment of the Federal Constitution, which Justice Minturn, in *Knibb v. Knibb,* supra, said was the "inspiring influence" which "guided" our state in adopting Paragraphs 3 and 4 of Article 1.

In *Davis v. Benson,* 133 U. S. 333, 33 L. Ed. 637, at 640, the Court said:

"The First Amendment to the Constitution, in declaring that Congress shall make no law

respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, *and to prohibit legislation for the support of any religious tenets,* or the modes of worship of any sect."

In the light of *Davis v. Benson,* supra, Chapter 191, Laws of 1941 violates Paragraph 4 of Article 1 of our State Constitution in that it "provides for support of * * * religious tenets" by authorizing use of public funds for transportation of children to sectarian schools where such tenets are taught.

The statute clearly violates the American principle of separation of church and state and the spirit and letter of Paragraphs 3 and 4 of Article 1, the "all pervading potency" of which was referred to by Justice Minturn in *Knibb v. Knibb,* supra. It is designed to aid by taxation sectarian schools which devote a part of their educational training to religious tenets, which may compel attendance at certain churches, and which are not under the control of the state. Under this statute the state would help support such schools and even be compelled to do so.

There is great need for religious instruction for children, but this obligation should be met by the home, sectarian schools and the churches without public aid. Public support or assistance to any school in which the function or ministry of any church is performed is unconstitutional. It is con-

trary to established principles of American government. When children are segregated according to the religious affiliations of their parents and are transported at public expense to non-public schools in which religious instruction is given, the clear distinction between the functions of church and state is broken down, and the "wall of separation between church and state" referred to by Jefferson (*Reynolds v. United States,* supra), no longer exists.

In *Gurney v. Ferguson* (supra), 122 P. (2d) 1002, 1004, the court held unconstitutional a statute authorizing transportation of parochial school children, and said:

> "The brief for plaintiff in error emphasizes the wholesomeness of the rule and policy of separation of the church and the state, and the necessity for the churches to continue to be free of any state control, leaving the churches and *all their institutions to function and operate under church control exclusively.* We agree. In that connection we must not overlook the fact that if the Legislature may *directly or indirectly aid or support* sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regulation and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete control might well be the expected development. *The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution.*"

In the case of *Susan B. Henry v. William E. Nichols,* supra, the court held:

> "Under the Constitution these schools cannot receive public aid unless they are judicially declared to be public institutions or declared to be rendering public aid. If this should be established by the judgments of our courts, then the Legislature could extend its control over them to an extent that the very purposes for which they were established and are maintained would be destroyed. The assumption of a part of the burden of support is inevitably followed by the desire to participate in control."

The allegation that children attending non-public schools will be discriminated against if they are not furnished with transportation is without foundation. All children of the State are accorded the same rights and privileges without discrimination. They may attend the public schools, entirely supported by public funds, and have the benefit of all its facilities, including transportation to and from school. If their parents choose to send them to a non-public school, no part of the expense should be paid from public funds.

The struggle for the maintenance of the principle of separation of church and state has been a long one. All citizens, whatever their religious affiliations, may well consider the danger involved in any departure from that principle. The failure to maintain that principle would be fraught with grave consequences to all of us. The breakdown of this fundamental principle would lead us directly into the religious prejudices, controversies and bitterness other countries have experienced.

Point IV.

Chapter 191, Laws of 1941, and the Resolution of the Appellant Board of Education violate the Fourteenth Amendment of the Constitution of the United States.

The use of public funds for the transportation of children to a "school other than a public school, except such school as is operated for profit in whole or in part", constitutes a taking of private property for private use and violates the Fourteenth Amendment. The statute does not provide for transportation of all school children of the state, but segregates non-public schools not operated for profit as its beneficiaries. *Cochran v. Louisiana State Bd. of Education,* 281 U. S. 370, 74 L. Ed. 913; *Citizens' Sav. & L. Asso. v. Topeka,* 20 Wall. 655, 22 L. Ed. 455.

CONCLUSION.

For the reasons herein urged it is respectfully submitted that Chapter 191, Laws of 1941, and the resolution of the Appellant Board of Education are unconstitutional and that the decision of the Supreme Court should be affirmed and its judgment sustained.

Respectfully submitted,

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NEW JERSEY COURT OF ERRORS AND APPEALS.

ARCH R. EVERSON,
Prosecutor-Appellee,
vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING,
in the County of Mercer, et al.,
Respondents-Appellants.

ON APPEAL FROM NEW JERSEY SUPREME COURT.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION.

INTEREST OF THE AMERICAN CIVIL LIBERTIES UNION.

The American Civil Liberties Union is a national organization, members of which are citizens and residents of the State of New Jersey. It counts among its members persons of all religious sects and views. As an organization devoted solely to the protection of the Bill of Rights, one of the bases on which we stand is the historic American doctrine of the separation of the church and state. Only by a strict adherence to this doctrine do we believe that the religious freedom of all may be preserved.

In appearing as amicus curiae in this case, we wish to have it clearly understood that we are in no way attacking any of the tenets or dogma of any religious organization. We are solely concerned with the constitutionality of public expenditures for transportation of pupils to private denominational schools.

The certiorari in this matter challenged the constitutionality of P. L. 1941, Chapter 191, R. S. 18:14-8, which provides in substance that the Board of Education of any school district may pay for transportation of children to and from schools other than public schools. The reasons challenge the constitutionality of such Statute under several sections of the Constitution.

Article I, Paragraph 20, is as follows:

> "No donation of land or appropriation of money shall be made by the State or any municipal corporation to or for the use of any society, association or corporation whatever."

Article IV, Section 7, Paragraph 6, relating to the perpetual fund for the maintenance of free public schools is as follows:

> "The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the state; and it shall not be

competent for the legislature to borrow, appropriate or use the said fund or any part thereof, for any other purpose, under any pretense whatever. The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this state between the ages of five and eighteen years."

Article I, Paragraph 3 of the Constitution provides that no person shall be obliged to pay taxes for the support of a church.

R. S. 18:10-15 relating to use of the State school fund is as follows:

> "The income of the school fund shall be used for the support of public schools, the payment of the salaries of the county superintendents of schools, the payment of premiums and accrued interest on bonds purchased by the board of trustees of the fund, and for no other use or purpose whatsoever."

R. S. 18:14-78 is as follows:

> "No religious service or exercise, except the reading of the Bible and the repeating of the Lord's Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools."

R. S. 18:22-9 provides that:

> "No disbursement of the money raised by the state for the purpose of public higher education shall be made to any institution wholly or in part under the control of a religious denomination or in which a denominational tenet or doctrine is taught."

The expense of the public schools in this State is paid from money raised by taxation and such schools are designated by Statute as "free public schools." It is a school system under the control of the State and provided for by the Constitution of the State. Each school district is under the control of a Board of Education, subject to supervision by the State Commissioner of Education.

As pointed out in *Council of Newark v. Board of Education of Newark,* 30 N. J. L. 374 at Page 377, the Board of Education has power to select and employ teachers, provide what books shall be used for study and to provide school libraries. Private schools are not subject to such supervision and are free to select any books it may desire for study and as Van Dyke, J. said the Board of Education by being compelled to provide funds may:

> "be compelled to become the protectors and guardians of schools, for the teaching of the exalted and bewildering delights of the koran, the inexpressible blessings of an indefinite number of wives, or the sublime and idolized philosophy of Confucius. I do not think that the board of education is bound to do any such thing, or that the common council of the city have any such power over them."

It appears from the testimony of Mr. Latham, the District Clerk of the Board of Education of the Township of Ewing, respondent, that money raised by taxation for the support and maintenance of the free public schools of that township have been and, subject to the decision in this case, will be used for the transportation of pupils to parochial schools (S. of C. pg. 27). In fact, it is the only fund under the control of that Board of Education.

It appears from the testimony of Father Endebrock that the parochial schools are not a part of the free public schools of the State and that "part of the curricula of such schools is the teaching of religion." (S. of C. pg. 33).

In *Trustees of Rutgers College vs. Morgan,* 70 N. J. L. 460, 57 A. 250 at Page 255, Van Syckel, J. referring to appropriations by the Legislature for tuition of pupils attending an agricultural college said:

> "Does it violate section 20 of article 1, which provides 'that no donation of land or appropriation of money shall be made by the state or any municipal corporation to or for the use of any society, association or corporation'? This provision, as well as that relating to special laws, does not bar instrumentalities for public education provided by the state and under its control by general laws, where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced, but they were not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for public education under its own supervision."

It is immaterial that the Board of Education might otherwise be required to educate the children at a greater expense because we are here dealing with a restraint imposed by the Constitution itself upon the Board of Education and its prohibitions are to be interpreted broadly and liberally to promote the policy behind them. The inquiry is not whether the Board of Education may get a consid-

eration for such expenditure of its public schools funds when the State has a constitutional policy for the maintenance of free public schools and the expenditure of funds raised by taxation therefor.

It may be urged by the respondent, Board of Education, that the appropriation was not to any society, association or corporation as specially mentioned in Article 1, Section 20 of the Constitution but to the parents of the pupils transported. Article 1, Section 20, however, goes further and enlarges the prohibition "to or for the use of," which has great legal significance and is meant to cover any indirect benefit to be derived from the use of money raised by taxation for the support of a free public school system. This was discussed in the dissenting opinion of Green, J. in the Rutgers College case on appeal, 71 N. J. L. 663, 60 A. 205 at page 207 and will be further discussed under the following title:

SEPARATION OF CHURCH AND STATE.

While we believe this case could be decided on other grounds, such as a violation of Article IV, Section 7, Paragraph 6, which prohibits use of the educational fund *for any purpose whatsoever, save for the support of public free schools,* we think the constitutional issues involved so important that they should be raised and decided.

We maintain that Chapter 191, Laws of 1941, and the action of respondents in providing funds for transportation of pupils to parochial schools under that statute violate:

1. New Jersey Constitution, Article 1, Paragraph 3 which provides:

> "No person shall be deprived of the inestimable privilege of worshipping Almighty God in a manner agreeable to the dictates of his conscience; nor under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment, nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry contrary to what he believes to be right; or has deliberately and voluntarily engaged to perform."

2. New Jersey Constitution, Article 1, Paragraph 4 which provides:

> "There shall be no establishment of one religious sect, in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right, merely on account of religious principles."

3. U. S. Constitution Amendments 1, and Fourteen. See *Barnette v. West Va. Board of Education,* (1943) 319 U. S. 624.

There can be no doubt that separation of church and state was a fundamental doctrine in the establishment of the constitutional form of government under which we exist. As quoted in *Reynolds v. United States,* (1878) 98 U. S. 45, Thomas Jefferson said,

> "Believing with you that religion is a matter which is solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the

government reach actions only, and not opinions—I contemplate with sovereign reverence that act of the whole American people which declares that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof, ***thus building a wall of separation between church and state'***". (Emphasis supplied.)

A leading educator in an authoritative study declares,

"A careful examination of the federal and state constitutions discloses that nothing is more fully set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty and to guard against the slightest approach toward the infringement of such rights. Nor did they fail to perceive that a union of church and state like that which existed in other countries was, if not wholly impractical in America, certainly opposed to the spirit of this country." Alvin Johnson, The Legal Status of Church-State Relationships in the United States. The University of Minnesota Press, 1935, p. 385. See ibid 112, 90-99.

The question then devolves upon whether a public expenditure for free school bus service to transport students to parochial schools is a public grant in aid or support a religious denomination. We respectfully refer the Court to the discussion in Dr. Johnson's book, cited above, at pages 185-189. We agree wholeheartedly with his position that such expenditures are for the support of a religion, violate the doctrine of church and state and hence are illegal. He states,

> "The position here taken (referring to a ruling by the Minnesota attorney-general declaring illegal expenditures for transportation of pupils to private denominational schools) may be said to be consistent with our general public school policy and the American principles of separation of church and state. It may be difficult for some to see why their children going to a private or parochial school should be denied transportation in the public school bus which passes their doors, and for whose support they are taxed. This denial is, however, the only course that may be rightfully pursued. The matter of transportation is one of the privileges that accompanies attendance at a public school, and it is only as the children are enrolled in the public school that this privilege of transportation facilities may be shared by them. Any other course would directly and indirectly constitute an appropriation of public funds for private or sectarian purposes, and would thus ignore the fundamental purpose of our educational system as set forth in our constitutional and statutory laws." Johnson, op. cit. 188, 189.

During the period when the Constitutions of the States were being adopted in the latter part of the Eighteenth and the earlier part of the Nineteenth Centuries, the Church had been part of the Colonial systems and the citizens had been taxed for the support of the Church. In some, notably Maryland and Virginia and some other southern colonies, the established Church of England was as firmly a part of the system of government as in England itself. When the Revolution severed the civil bonds with England, a strong tendency towards the separation of the Church from all political government imme-

diately set in. The people insisted on placing the support of the Church, in all its departments, upon the voluntary judgment of its adherents. This assertion of the voluntary principle in ecclesiastical support of government was one of the most original of all the great phenomena of this stage of our national life.

The principle involved was to free the citizens from any tax or assessment for the benefit of the Church, directly or indirectly, and that found expression in the several constitutions being then adopted by the States during the period from 150 to 100 years ago.

As an example, in 1777 and 1778, the contest between the friends and the enemies of a proposal for a general assessment for the support of all denominations—which seemed likely to be adopted—the Presbytery of Hanover, Virginia, presented a remonstrance in which we have this language:

> "As it is contrary to our principles and interest, and, as we think, subversive to religious liberty, we do again most earnestly entreat that our Legislature would never extend any assessment for religious purposes to us or to the congregations under our care."

The proposed assessment was abandoned. Other States proceeded in different ways to establish the same principle. A singular provision of the New Jersey State Constitution was to the effect that no Protestant inhabitant shall be deprived of his civil and political rights. It was not until 1844 that a new constitution suppressed this invidious clause.

The principle, however, has for from 150 to 100 years become generally and firmly established in our national life that no citizen shall be taxed, directly

or indirectly, for religious purposes and we urge that this principle be jealously guarded; that departure therefrom, in the slightest degree, may open the door to an insidious and unconscious whittling away of a very great principle of our national life.

While it is true that conflicting decisions exist, nevertheless the majority and sounder view as we see it declares such expenditures illegal. We rely upon the well-reasoned argument supporting the decision.

The fact that in a great many of the very carefully considered opinions on the problem here at issue there have been strong dissents shows how important this question is becoming and how urgent is the endeavor to undermine it.

The reasoning of the majority opinions in the following cases fully covers the question herein presented:

In *Judd vs. Board of Education, etc.*, 278 N. Y. 200, 15 N. E. 2nd 576, decided by the Court of Appeals of New York, May 24th, 1938, where the appropriation of school funds for transportation of pupils to parochial schools was settled in that State and the use of such funds for that purpose was held unconstitutional.

In that case the appropriation was to pay the expense of the pupils and the constitutional prohibition was against the use of public money "directly or indirectly in aid or maintenance" of a denominational school. It was held that the aid furnished, even indirectly, was proscribed:

> "The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils.

That argument is utterly without substance. It not only ignores the spirit, purpose and intent of the constitutional provisions, but, as well, their exact wording. The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it, and this intent is to be found in the instrument itself unless the words or expressions are ambiguous (Cooley's Constitutional Limitations, 8th Ed., pp. 124-126). There is nothing ambiguous here. The wording of the mandate is broad. Aid or support to the school 'directly or indirectly' is proscribed. The two words must have been used with some definite intent and purpose; otherwise why were they used at all? Aid furnished 'directly' would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished 'indirectly' clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes. How could the people have expressed their purpose in the fundamental law in more apt, simple and all-embracing language? Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations.' State ex rel. Traub v. Brown, 6 W. W. Harr., 36 Del. 181, 172 A. 835, 837, writ

of error dismissed. Feb. 15, 1938, Del. Sup. 197 A. 478. Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid. In the instant case, $3,350 was appropriated out of public moneys solely for the transportation of the relatively few pupils attending the specific school in question. If the cardinal rule that written constitutions are to receive uniform and unvarying interpretation and practical construction is to be followed, in view of interpretation in analogous cases it cannot successfully be maintained that the furnishing of transportation to the private or parochial school out of public money is not in aid or support of the school.''

The Judd case also holds that even the police power must be exercised in harmony with restrictions imposed in the Constitution. It also points out that if transportation may be furnished so also might text books be furnished out of the public school fund.

The case further points out as we have shown above that the Federal government and each State government from beginning has followed the concept that the State has deprived itself of all control over religion and has refused to religious organizations any participation in jurisdiction or control of civil prerogatives of the State; that in all civil affairs there has been a complete separation of Church and State.

''In conformity with that concept, education in State supported schools must be non-partisan

and non-sectarian. This involves no discrimination between individuals or classes. It invades the religious rights of no one. While education is compulsory in this State between certain ages, the State has no desire to and could not if it so wished compel children to attend the free public common schools when their parents desire to send them to parochial schools (Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468), but their attendance upon the parochial school or private school is a matter of choice and the cost thereof not a matter of public concern. As Judge Pound aptly said in People ex rel. Lewis v. Graves, 245 N. Y. 195, 198, 156 N. E. 663, 664, 'Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support'. We furnish free common schools suitable for all children of the State regardless of social status, station in life, race, creed, color or religious faith. Any contribution directly or indirectly made in aid of the maintenance and support of any private or sectarian school out of public funds would be a violation of the concept of complete separation of Church and State in civil affairs and of the spirit and mandate of our fundamental law."

It should be noted that the Court's decision was arrived at in spite of the arguments that tuition fees were for the benefit of the pupils exclusively and not to the schools; and that it would be less expensive for the state to pay the tuition fees of children in private schools than to provide for them in public schools.

In reviewing the cases, it found that the courts of this country have been unanimous in prohibiting the use of public funds to pay, directly or indirectly, tuition fees of pupils in private or sectarian schools.

It is submitted that furnishing transportation to pupils is for the use and benefit of the institution as it could not exist without pupils and it is not a question of degree but of principle.

In *Mitchell v. Consolidated School Dist. No. 201*, 135 p. 2d 79 (1943) the Supreme Court of Washington, in a carefully considered and comprehensive opinion, rejected the theory of benefit to pupils and the exercise of police powers to protect children and held that these cannot be invoked in contravention of constitutional inhibitions. It said:

> "We cannot, however, accept the validity of the argument that transportation of pupils to and from school is not beneficial to, and in aid of, the school. Even legislation providing for transportation of pupils to and from public schools is constitutionally defensible only as the exercise of a governmental function furthering the maintenance and development of the common school system."

In *Knowlton v. Baumhover*, 182 Iowa 681, 166 N. W. 202 (1918), the Supreme Court of Iowa held:

> "The authorities to which we have referred show in the clearest possible manner the fixed policy of this nation and of its several states to maintain the common school system free from sectarian influence or control and to preserve the equal right of every citizen to have his children educated in these schools of the people without being subjected to the slightest sectarian leading upon the part of their teachers." (166 N. W. 202 at p. 212.)

In *State ex rel. Freeman v. Scheve,* 65 Neb. 853 on rehearing 93 N. W. 169 (1903), the Supreme Court of Nebraska held:

> "It is said that the relator's children were subjected to no compulsion, but that is not true. It was not only their right to attend the school, but, under the statute (section 1, subd. 16, c. 79, Comp. St. 1901), it was their duty to attend that school, or some other. As the morning exercises were conducted during school hours, it is difficult to see how they could attend the school without attending worship. But in our view they were not only compelled to attend worship, but to participate in it. The school being in session, the right to command was vested in the teacher, and the duty of obedience imposed upon the pupils. Under such circumstances a request and a command have the same meaning. A request from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form."

To hold that money raised by taxation for a free public school system may be used for the benefit of a denominational school where the teaching of a particular religion is compulsory means that the State is thereby supporting that particular religion by helping it to be taught to the children and enabling a larger enrollment of children for that purpose.

A relaxation of this correct and important principle may lead to other inroads upon taxpayers where they are already providing for a well developed public school ssytem, and the possibility that taxes used for sectarian purposes, in times of emergency at least, may be insufficient to preserve the fundamentals of our system of government, includ-

ing the all important system of free public schools if it is burdened with the indirect support of denominational school teaching, including the teaching of sectarian religions, as an added part of our school system.

It is respectfully submitted that P. L. 1941, Chapter 191, is void and an unconstitutional invasion of the rights of the Prosecutor as a taxpayer within the taxing district of the respondent Board of Education.

JOSEPH BECK TYLER,
Attorney for and of Counsel with American Civil Liberties Union.

32 MAY 1 1945

New Jersey Court of Errors and Appeals.

Between:	
ARCH R. EVERSON, *Prosecutor,*	
and	On Certiorari.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, *et als., Respondents.*	

BRIEF *AMICUS CURIAE.*

This brief is filed, with the permission of the Court, by George G. Tennant, Esq., as *Amicus Curiae;* and its only purpose is to urge that the consideration of the case be confined to the record as found in the State of the Case.

IT IS RESPECTFULLY SUBMITTED THAT THE SUPREME COURT TOOK UNDER CONSIDERATION MATTERS WHICH WERE NOT PROPERLY BEFORE THE COURT. The Constitution was not involved.

The writ brought up the action of the Board of Education in agreeing to re-pay the cost of carfare paid by parents for transporting pupils of Union Township to and from Parochial Schools in Trenton.

POINT I.

The constitutionality of the so-called Bus Act of 1941 (Pamph Lans P. 581) was not in question.

The opinion of the Supreme Court quotes from our State Constitution (Par. 6, Sec. 7, Art. 4) as follows: "The fund for the support of free schools and all money, stock and other property which may hereafter be appropriated *for that purpose,* or received into the treasury under the provisions of any law heretofore passed to augment said fund, shall be securely invested and remain a perpetual fund; and the income, except so much as it may be adjudged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools for the equal benefit of all the people of the State; and it shall not be lawful FOR THE LEGISLATURE to borrow, appropriate, or use the said fund or any part thereof for any other purpose under any pretense whatever."

The Supreme Court thereupon said that they were called upon to decide "whether or not the TOWNSHIP BOARD OF EDUCATION in appropriating money for transportation of pupils to and from Parochial Schools in a neighboring city, *i. e.,* other than puplic schools, contraversed paragraph 6 quoted above".

It is to be observed that the prohibition in the Constitution above quoted is against any action by the *legislature;* while the resolution brought up under the writ is a resolution of the local *Board of Education.*

The State of the Case (p. 23, l. 31) shows that on September 21, 1942 the *Township Board of Education* adopted a resolution that "the transportation committee recommended the transportation of pupils of Ewing to the *Trenton and Pennington High Schools* and *Catholic Schools* by way of *public* carriers as in recent years".

Payments had been made ("in recent years") to the parents of children who had attended Parochial Schools, for the purpose of reimbursing them *for the fares* they had paid for their transportation to and from said Parochial Schools for the first half of the year 1942 (p. 26, l. 25).

Reimbursement for the last half of 1942 was not paid because of the advice of counsel after the issue of the writ of certiorari in this case.

The Supreme Court held that "the result, of course, is to provide for free transportation of children at the expense of the *home municipality* and of the *State School Fund*".

The record does not disclose that any part of the amount covered by the resolution of September 21, 1942 came from the *State School Fund.* The Court will take judicial notice of the fact that moneys in the hands of the Board of Education were not exclusively moneys coming to it from the State School Fund. Under the Taxation Act (N. J. S. A. 54:39-40-41) each municipality contributes part of the moneys raised by general tax levy and there is no reference to be found in the State of the Case to any allocation of contributions from the State School Fund. So that when the Supreme Court determined (as above quoted) that the action of the Board

of Education provided for the transportation expenses *out of the State School Fund, it read into the case something that does not otherwise appear.* Obviously, therefore, the provision of paragraph 6, Section 7 of Article IV of the Constitution does not apply to the case before the Court.

In *Conover* v. *Bird,* 56 L. 229, the Supreme Court (Judge Dixon) said "whenever the proceedings of a court of record are to be reviewed on certiorari, the record itself is the primary source of information as to those proceedings". See also *Smart* v. *North Hudson R. R. Co.,* 66 L. 156; *South Brunswick* v. *Cranbury,* 52 L. 298; *Siebke* v. *Township,* 4 Misc. 226.

In the *Voorhees* (cited in the Supreme Court opinion) the only question was the constitutionality of an exemption act. It is difficult to understand how it is relevant to the instant case.

Because of the "paucity" of the record the Supreme Court dismissed the writ (*Naples* v. *Civil Service* (12 Misc. Rep. 377)) and the Court of Errors affirmed this judgment in 113 N. J. L. 426.

The Supreme Court acted illegally in respect to the constitutionality of the so-called "Bus Act", as that question was not before the Court under the State of the Case (*Willis* v. *Wilkins,* 32 Atl. Rep. (2nd) 323).

POINT II.

There was no appropriation for the use of any society or corporation.

Further objection is made to the resolution under review because of paragraph 19 of the Constitution which reads as follows:

> "No County, City, Borough, Town, Township or Village shall hereafter give any money or property or loan its money or credit to the aid of any individual association or corporation."

As Justice Heher points out in his dissenting opinion in the Supreme Court, Boards of Education are not mentioned in the foregoing section of the Constitution. They are municipal corporations *separate and distinct* from those mentioned in Article 19 of the Constitution; so that the prohibition there does not apply to them (N. J. S. A. 18:7-54).

It is interesting to note that by the Act concerning Definitions and General Rules of Construction (Chapter 1:1-2), "the word 'municipality' and 'municipal corporations' include cities, towns, townships, villages and boroughs, and any municipality governed by a board of commissioners or an improvement commission." There does not appear any law which includes Boards of Education in the same heading as "County, City, Borough, Town, Township or Village". It seems, at least, reasonable to believe that if the legislature had intended to include Boards of Education, it would have so provided.

And the prohibition of paragraph 20 is against any donation of land or appropriation of money to or for the use of any *"society, association* or *corporation* whatever". Obviously this language cannot be extended to include reimbursements for carfares paid to *individuals.*

POINT III.

The reasons assigned did not attack the validity of the resolution itself.

1. The question on appeal is not one of fact, but distinctly one of law and is, therefore, reviewable (*Hulley* v. *Mooseburgger* (Ct. of Errors) 88 L. 162).

2. All of the Reasons assigned *are based on the alleged unconstitutionality* of the "Bus Act" (18:14-8). If therefore the Act is not involved, the ruling of the Supreme Court should be reversed and the writ vacated. The resolution itself is not otherwise attacked in any of the Reasons assigned.

> "Matters not covered by any of the reasons assigned cannot be considered. *Murray* v. *Sisters,* 68 L. 311."

3. All of the Reasons assigned (excepting the final one) deal with the constitutional questions regarding which I have endeavored to point out are not involved in this case.

4. The last Reason (2 on p. 17, l. 21) is a general Reason only and without some amplification is of no value.

5. Attention is called to the first Reason assigned which recites that the resolution of the Board of Education "was taken *pursuant to authority purported to be given by the provisions of 18:14-8 of the Revised Statutes* (The Bus Act). There is nothing in the record to justify this statement. There is no reference to the statute in the resolution under review.

> "Matters not covered by any of the reasons assigned cannot be considered" (*Murray* v. *Sisters,* 68 L. 311).

In *Franklin* v. *Horton* (97 L. 25) the resolution under review provided for the employment of an engineer to draw plans for a system of electric lighting. The reason assigned by the prosecutor was that no ordinance had been adopted to provide for a lighting plant. But the Court held that the reason assigned did not apply to the resolution under attack. This case was affirmed by the Court of Errors in 98 L. 262 where an attempt was made to cover a point not made in the Supreme Court and the same was not allowed to be considered.

POINT IV.

There was no violation of the Constitution.

It may be urged that the action providing for the *reimbursement* of fares to the parents of Parochial School children is a violation of the constitutional objections heretofore quoted. But the argument heretofore made to objections to the Resolution itself applies with equal force to the *actual re-payment* of the fares. In other

words, the constitutional provisions do not apply to (1) Boards of Education, or (2) to individuals. The parents are not "any society, association or corporation".

Purpose of This Brief.

Purposely this brief does not discuss the constitutionality of the School Bus Act of 1941. The brief is confined to what the writer conceives to have been an erroneous discussion of the Constitution, when it had no place in the Case. The Supreme Court opinion ought not to serve as a precedent that the Bus Act is unconstitutional.

CONCLUSION.

For the reasons hereinbefore set forth, the judgment of the Supreme Court should be reversed.

Respectfully submitted,

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NEW JERSEY
Court of Errors and Appeals

ARCH R. EVERSON, *Prosecutor-Appellee,* *vs.* BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, et al., *Respondents-Appellants.*	On Appeal from the Supreme Court.

BRIEF OF JOSEPH LANIGAN— AMICUS CURIAE

This is an appeal from the Supreme Court where, in a proceeding on Certiorari, the Court adjudged Chapter 191 of the Laws of 1941 to be unconstitutional.

The opinion of the Court below is reported in 39 Atlantic Reporter (2nd Series), page 75; 132 N.J.L. 98.

The pertinent and essential parts of the Supreme Court opinion follow:

"The question raised by this writ, and submitted on briefs without oral argument, is as to the legal validity of a resolution adopted by the Board

of Education of the township of Ewing, adjoining the City of Trenton, relating to the transportation to Trenton and return, of school children. It appears that the public school facilities in the township do not extend beyond the eighth grade, and that pupils past that grade have customarily attended public schools in Trenton or Pennington, the township paying the tuition and also the costs of transportation advanced by parents or other relatives. Previous to July 1, 1941, all children so transported attended public high schools, and the township Board contracted for their transportation pursuant to R. S. 18:14–8, N. J. S. A., the first paragraph of which provided that 'whenever in any district there are children living remote from the schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school.' The original act seems to date from 1903. (Acts of second special session, page 45.) But in 1941 (P. L., page 581, N. J. S. A. 18:14–8) the paragraph above quoted was amended and another paragraph added. In the first paragraph the words 'the schoolhouse' are changed to read 'any schoolhouse' and after the words 'to and from school' the paragraph continues 'including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.' The additional paragraph reads: 'When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.'

"The result, of course, is to provide for free transportation of children at the expense of the home municipality and of the State school fund to and from any school, other than a public school, which is not operated for profit; and accordingly, the resolution brought up by this writ provides for the transportation of school children of Ewing township, not only to Trenton and Pennington High Schools, but to certain other designated schools in Trenton not operated for profit, but not connected with the public school system, 'by way of public carriers as in recent years.' It is stipulated that the township authorities pursuant to the resolution agreed to pay for the then current school year the cost of transportation to such non-public schools approximately $859.80 and actually did pay part thereof.

"We conclude that the resolution under review must be set aside, on the fundamental ground that the amendment of 1941 is in violation of paragraph 6 of Section 7 of Article IV of the Constitution, N. J. S. A., which reads: 'The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the State; and it shall not be competent for the Legislature to borrow, appropriate or use the said fund or any part thereof, for any other purpose, under any pretense whatever. * * *'

"The facts are not in dispute. We are called upon to decide the purely legal question whether or not the township board of education in appro-

priating money for transportation of pupils to and from parochial schools in a neighboring city, i. e., other than public schools, contravened paragraph 6 quoted above.

"There are two theories. * * *

"We are not required to make a choice between these two theories, as the matter is not one of first impression in this State. In the case of *Rutgers College* vs. *Morgan,* 70 N. J. L. 460, at pages 474, 475, 57 A. 250, at page 255, it was held by this court, in an opinion by Justice Van Syckel, that the constitutional provision (paragraph 20 of Article 1) and the provision relating to special laws 'does not bar instrumentalities for public education provided by the State and under its control by general laws, where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free State aid, and to donations to private or sectarian schools, and should be rigidly enforced, but they were not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for public education under its own supervision.' The decision was affirmed by the Court of Errors and Appeals in all essential features in 71 N. J. L. 663, 60 A. 205. The same principle was applied by Vice-Chancellor Buchanan in *Re Voorhees' Estate,* 123 N. J. Eq. 142, 196 A. 365, affirmed by this court 121 N. J. L. 594, 3 A. 2d 891, and by the Court of Errors and Appeals, 124 N. J. L. 35, 10 A. 2d 650.

"The resolution under review will be set aside, with costs."

POINT I

The question raised by the issue joined in this case is not the same question considered and decided in Rutgers College vs. Morgan, Comptroller, 70 N. J. L. 460. Hence, the judgment of the Court in the instant case, that the Legislature was without power under the Constitution to legislate, as in Chapter 191 of the Laws of 1941, may not be supported by the application of the doctrine of stare decisis.

Recognizing that this case presents the question whether the 1941 Act has as an objective, assistance to children in going to and returning from school, or is an aid to the agencies conducting the schools, the Supreme Court holds that it is not called upon to resolve this issue, asserting that its judgment must be against the constitutionality of the statute by reason of the judgment in the case of *Rutgers College* vs. *Morgan, Comptroller, supra.* It is suggested that the *Rutgers* case is not a controlling precedent. In that case there was submitted for decision the question whether an appropriation made by the statute of 1903 (P. L. 1903, page 201) was legal, the purpose of the appropriation being to satisfy an obligation of the State to Rutgers College out of the State's general fund. Incidental to sustaining the appropriation, the Court held that (1) the provisions of Article IV, Section VII, paragraph 6 of the State Constitution are not a limitation on legislative power over the subject of free public education. The constitutional provision merely prescribes what must be done with "the school fund" and that in no way restricts what may be done at public expense out of the "general funds of the State," and (2) that it was competent for the Legislature to establish an agricultural college at Rutgers and to support it out of the State's general fund, and further, legislation on that subject was not infirm by reason of the constitu-

tional provision against private, special or local legislation, or by reason of the further provision—"No donation of land or appropriation of money shall be made by the State or by any municipal corporation, to or for the use of any society, association or corporation whatever." (State Constitution—Art. I, par. 20.)

The last-named provision of the Constitution is not here involved, inasmuch as the opinion indicates the Court did not determine that the expenditures of money for bus fares was for the benefit of the agencies conducting the schools. The Supreme Court opinion, however, expressly states that the moneys were taken from the *income* arising from "The Fund for the Support of Public Schools"—the School Fund—the moneys dedicated by the Constitution (Art. IV, Sec. VII, par. 6) to public free school uses and this must have been the single determination which induced the Court to hold the *Rutgers* case as controlling.

It is here contended the Court's conclusion that the transportation afforded children who attended nonpublic schools, was at the "expense of the * * * State School Fund," is not a correct one in that there is nothing on the face of the pertinent statute, nor any facts of which the tribunal must take cognizance, requiring that moneys from the income of the State School Fund must be used in defraying these expenditures. Furthermore, there was no admission by the Ewing Board of Education nor any evidence offered by the certiorarist, from which it might be inferred, that such moneys were used in carrying out the resolution brought up by the Certiorari.

The rule is established that the only facts which may be *presumed* by the Court are facts favorable to the constitutionality of an act of the Legislature. The Legislature never intends its enactments to be invalid. A court never indulges the presumption

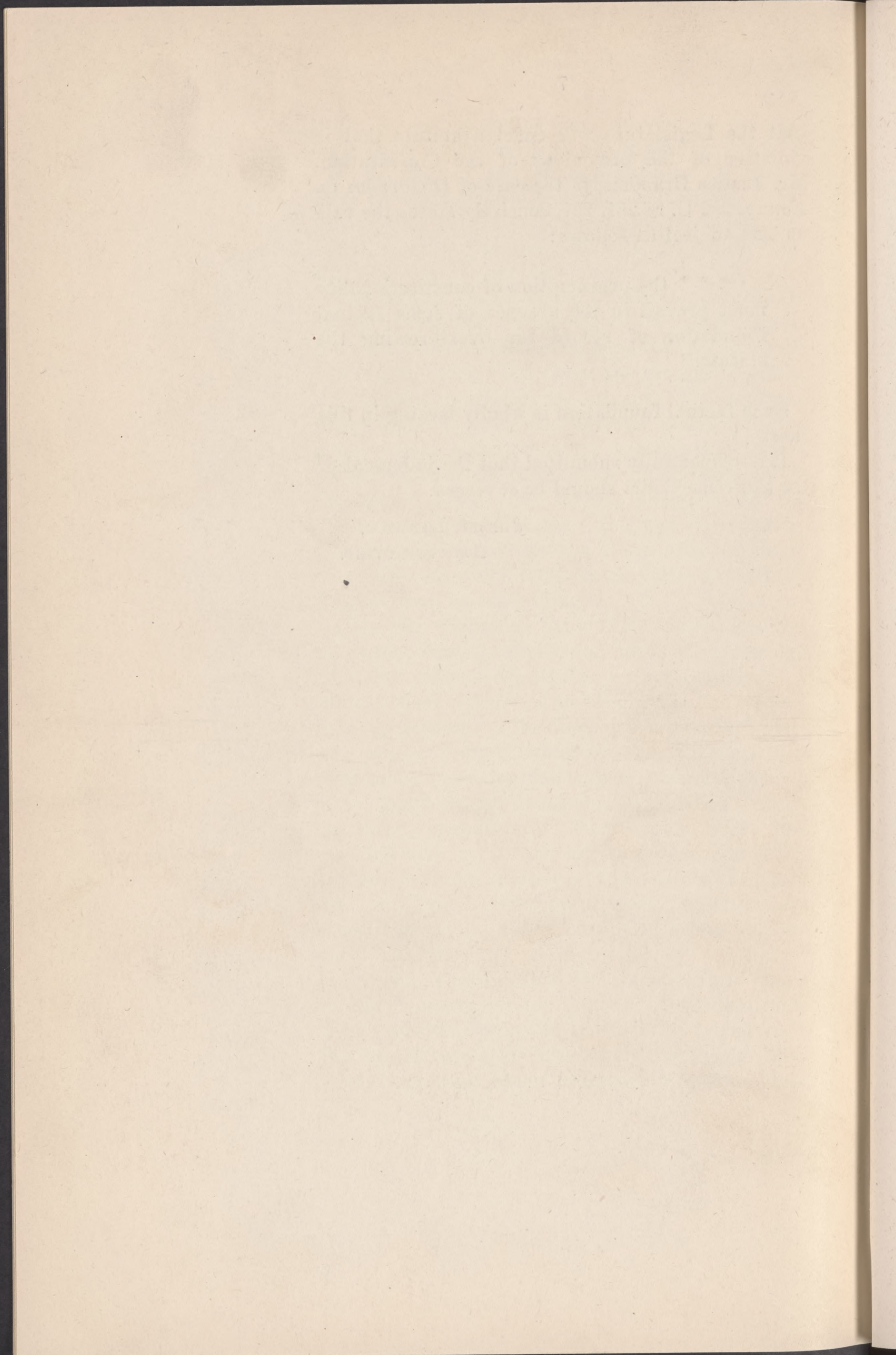
that the Legislature will enact a statute that is violative of the provisions of the Constitution. Mr. Justice Brandeis, in the case of *O'Gorman* vs. *Young,* 282 U. S. 251, 257, concisely states the rule on this subject as follows:

> "* * * the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."

Such factual foundation is wholly lacking in this case.

It is respectfully submitted that the judgment of the Supreme Court should be reversed.

JOSEPH LANIGAN,
Amicus Curiae.



New Jersey Court of Errors and Appeals

ARCH R. EVERSON, Prosecutor-Appellee, *vs.* BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, in the County of Mercer, *et al.*, Respondents-Appellants.	On Appeal from New Jersey Supreme Court. Sat Below: Parker, Perskie, and Heher, *JJ.*

REPLY BRIEF OF RESPONDENTS-APPELLANTS.

If the Court should desire to consider the proposition, that notwithstanding no money is shown to have been taken from the school fund to meet the cost of transportation in the instant case, it is clear that such an expenditure might constitutionally be made from the general funds of the State without touching the free public school fund, but even if the expenditure were to be considered as made from the school fund, such expenditure would be constitutionally justifiable.

It is all a part of the school and educational system of the State. Any notion that provisions concerning transportation were designed to aid the school are entirely erroneous; they were clearly and obviously designed to secure the *attendance* of pupils, in the interest of the State. The matter of *attendance* at public schools was never the sole purpose of our school system, since we early adopted the compulsory education law and expressly nominated *day* schools other than public schools, but of a standard equivalent there-

to, and required, under the sanction of the penalty of a misdemeanor that *parents* should be responsible for such attendance, and appointed attendance officers to compel, at the public expense, the attendance of pupils at such schools. Thus having imposed a penalty on parents to compel their action in securing attendance, the transportation statute was not designed to aid the school, but the parents and the State, except in a purely speculative and psychological sense.

It is all advancive of the school system of the State and the upkeep of its standard of education which its compulsory school attendance was adopted to stabilize.

Any benefit the school could get would be purely psychological and in no way financial.

Always bear in mind the compulsory attendance was *not* adopted for the benefit of the school, but for the benefit of the State and the pupils.

The majority opinion says the Resolution must be set aside because it purports to pursue the 1941 Act in making payment for transportation of pupils to and from school out of the Free Public School Fund. Now there is not the slightest shred of evidence that such payment was made out of the Free Public School Fund, nor is it necessary to construe the 1941 Act as requiring such payment to be made out of that Fund. If two constructions are legally permissible, one of which would render the said Act constitutional and the other of which would render it unconstitutional, the Court *must* adopt the former. It is further said that such payment would constitute a gift or a donation because it would be made from the Free Public School Fund, but it is clear that if there was neither payment nor need therefor from the said Fund, then the indubitable right of the State to make pro-

vision for required attendance of pupils at school, as an exercise of the police power for the education and physical and mental condition of its citizens, demonstrates that such payment is not a gift or donation. This is borne out by the title of the statute as one providing for ''education.'' But even if the payment were made from the Fund, it would be a perfectly permissible expenditure since the Public School Act provides and pays for an attendance or truant officer whose duty it is to compel the attendance of pupils at parochial schools, and of a school doctor, to see that their health will permit such attendance.

If all incidental and remote benefit is prohibited then our tax statutes exempting non-profit parochial schools from taxation would be unconstitutional. And if the separation of Church and State would be jeopardized by any incidental advantage to a denominational church, then all our exemption statutes would be held to be unconstitutional. Furthermore, the Federal and State constitutional provisions leveled against making any laws for the establishment of religion or a religious sect, are not provisions against making any law affecting a religious establishment. All laws granting exemptions of religious bodies from taxation are laws affecting religious establishments, but they are not laws, and have never been so considered, for the establishment of religion, or a religious sect, or discriminating in favor of one sect over another.

The "no pupils no school" argument in *Judd* v. *Board of Education* (278 N. Y. 200).

Is it meant by this argument that reimbursement of parents for transportation charges to and from school would *encourage* them to send their children to parochial schools? If so, then the

withholding of it would *discourage* them from doing so and cause them to send their children to the public schools, and hence deprive them of the right—a right definitely recognized and enforced in our courts. (*Pierce* v. *Society of Sisters,* 268 U. S. 510, and *Meyer* v. *Nebraska,* 262 U. S. 390.)

No PUPILS NO SCHOOL. If without transportation there would be no pupils, then without births there would be none. Suppose the passage of a law to encourage large families by paying a bounty on births. Would such a payment to Catholic families for raising prospective pupils for parochial schools be considered a donation to the schools? Yet would not such a contribution be as much an indirect aid to such schools as would transportation, and infinitely more prolific in such pupils since it would pay for indulgence in an unalloyed pleasure?

The compulsory school provisions of the school law are directed against the parents, and an infraction thereof by them is made a misdemeanor by that law. The whole expressed purpose of that law is to compel attendance at *either* a *public* school or a *day* school of equivalent character. That law surely will not be held to be unconstitutional because it compels parents, under the sanction of criminal penalties, to send their children to parochial schools and pays an attendance or truant officer out of the school fund for taking the pupil to such school in case the parents fail to do so. The compulsion is upon the parent, the law is for the benefit of the State, otherwise it would be invalid. The parent, at the command, and for the benefit of the State, must pay the

transportation charge or be penalized. How can it be said, with this purpose manifest on the face of the law, that mere reimbursement to the parent, for an expenditure made at the State's command and for the State's interest and benefit in the advancement of the education of its citizens, is either a gift or a donation to the school, or if it affects the school at all does so in a merely collateral and incidental way.

The compulsory attendance at school to increase the intelligence, morale, and team-spirit of the pupils in the interest and for the benefit of the State, and the supervision of the health and safety of the children by protecting them from the exhaustion induced by traveling long distances on foot over county roads and frequently in inclement weather through mud or slush or snow, and at the hazard of accidents from vehicles, have demonstrated their value in the intelligence, team-spirit, and endurance of our soldiers on the far-flung battle fronts in the titanic struggle in which we are now engaged.

In *Mitchell* vs. *Consolidated School Dist. No. 201,* 135 P. (2d) 79, at page 84, Justice Robinson said:

> "While, in his briefs and upon oral argument, the respondent placed his main reliance upon the Oklahoma decision in Gurney *v.* Ferguson, *supra,* the majority opinion mainly relies upon the case of Judd *v.* Board of Education, 278 N. Y. 200, 15 N. E. 2d 576, 582, 118 A. L. R. 789. Briefly, that case disposes of the question in this wise: 'The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls or directs it. * * * *Without pupils there could be no school.'* (Italics mine.)

"At first blush, this seems to be a devastating argument, but it is nevertheless fallacious. It has no validity unless it be assumed that, if there be no busses, there will be no pupils; but can any one doubt but that parents who pay taxes to support the public schools, and yet share in the heavy expense of maintaining parochial schools, will contrive in some way or another to send their children to those schools, as they have heretofore sent them, whether bus service is available or not? No pupils, no school, is in no way involved. The legislature, in passing chapter 53, Laws of 1941, was not concerned with supplying pupils to the parochial schools, but with furnishing safe transportation to those pupils who do attend parochial schools."

The rule which reason and inveterate practice alike have sanctioned is well stated in *Dunn* v. *Chicago Industrial School,* 280 Ill. 613, 117 N. E. 735, in deciding a case in the light of Constitutional provisions much more specific and restrictive than ours. "Not only have the people, by the Constitution and by their representatives in the General Assembly, recognized and provided for the enjoyment of religious liberty, but the court has not adopted any rule antagonistic thereto." In *Nichols* v. *School Directors,* 93 Ill. 61, 34 Am. Rep. 160, the Court said:

"Religion and religious worship are not so placed under the ban of the Constitution that they may not be allowed to become the recipient of any incidental benefit whatever from the public bodies or authorities of the state."

The list of things conceivable as legal incidental benefits to churches, private and parochial schools, monasteries and nunneries, is extremely long and many of them are enumerated in my

brief. In the *Dunn* case, *supra,* it was paying a sectarian institution for the care of wards of the State. The prime example, of course, is exemption from taxation. There is a vast difference between the constitutional provision that "Congress shall make no law respecting an establishment of religion and a complaint that the law affects a religious establishment." *Bradfield* v. *Roberts,* 175 U. S. 291. Our Constitution, Article 1, Paragraph 4, provides "There shall be no establishment of one religious sect, in preference to another; no religious test shall be required as a qualification for any office or public trust; and no person shall be denied the enjoyment of any civil right, merely on account of his religious principles." There surely is no evidence of an attempt to the establishment of one religious sect, in preference to another, in the instant case. The challenged act, Chapter 191, Laws of 1941, makes no reference to any religious sect whatever. It expressly refers to the transportation "of school children to and from school other than a public school except such school as is operated for profit in whole or in part." Here, it will be observed, *all* school children in public schools and in private schools not operated for profit are treated exactly alike. No effort is made for the establishment of one religious sect, in preference to another, but, on the contrary, a clear intention to treat *all* school children, who come within the class designated in the Act, exactly alike. Furthermore, it clearly appears that Prosecutor-Appellee's complaint is not that the establishment of a religious sect is attempted by the Act, but that it results in incidentally benefiting a religious establishment.

A point that must never be lost sight of is that counsel for Prosecutor-Appellee claims that there is no basis for the levying by the Township of a tax to pay for the transportation of pupils. In addition to those expressly provided in the statutes of our State, it is to be inferred that when the legislature of the State authorizes a county or a city to contract a debt, it intends to authorize it to levy such taxes as are necessary to pay the debt, and hence the legislature must here be inferred to have meant that the Township should levy taxes to meet the cost of such transportation when it authorized the municipality to contract and pay therefor by the Statute of 1941. *Citizens' Sav. & L. Asso.* v. *Topeka,* 20 Wall. 655, 22 L. Ed. 455.

The basis of the majority decision is worded as follows: "We are not required to make a choice between these two theories, as the matter is not one of first impression in this State. In the case of *Rutgers College* v. *Morgan,* 70 N. J. Law, 460, at pages 474-475, it was held by this court, in an opinion by Justice Van Syckel, that the constitutional provision (paragraph 20 of Article I) and the provision relating to special laws 'does not bar instrumentalities for public education provided by the state and under its control by general laws where the appropriation is made for such schools. They were designed as an insurmountable barrier to giving free state aid, and to donations to private or *sectarian* schools, and should be rigidly enforced; but they were not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for public education under its own supervision.' The decision was affirmed by the Court of Errors and Appeals in all

essential features in 71 Id. 663. The same principle was applied by Vice-Chancellor Buchanan *in re Voorhees,* 123 N. J. Eq. 142, 196 A. 365, affirmed by this court, 121 N. J. L. 594, 3 A. 2d 891, and by the Court of Errors and Appeals, 124 N. J. L. 35, 10 A. 2d. 650."

Here assuming, merely for the sake of argument, that the cited portion of said opinion is *not,* what it indubitably is, a mere *obiter dictum,* it still is *no* authority for setting aside the resolution on the ground that the Act of 1941 is in violation of Paragraph 6, of Section 7, of Article IV of the Constitution, or of Paragraph 20 of Article I of the Constitution for the following among other reasons:

(a) There is not even a shred of proof in the case to show that any part of the school fund was so used.

(b) If transportation of children was paid for out of the school fund, it was in no sense "free state aid" or a "donation to a sectarian school."

(c) It referred solely to *transportation* of children to and from school. But the School Law makes *attendance compulsory* and provides for the payment *out of the fund* of an *"attendance or truant officer"* whose duty it is to *compel* attendance of truants and *deliver them to the school,* at the State's expense. This, of course, is a prime example of the legitimate exercise of the "police power," which extends to the regulation of *education.*

(d) The matter of *attendance* at school is under the State's *supervision* and *control.* By law it compels and enforces attendance at both public and private schools, it supervises and compels such attendance through attendance or truant officers,

at public expense, and the matter of transporting children is entirely under its control and may be continued or terminated at its own free will.

(e) The *State* cannot make a donation to a private school directly or *indirectly*. This is *bosh!* It would prohibit exemption from taxation to a private school, and, if a valid statement, then it would prohibit the services of an attendance or truant officer; or a school doctor.

Respectfully submitted,

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