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## THE HOKKAIDO LAW REVIEW

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### SUMMARY OF ARTICLES

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#### Ulpian ad Sabinum Liber XVII (Part 1)

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To provide materials for "Problemendenken" of the classical Roman jurists (Viehweg, *Topik und Jurisprudenz*, 1953, 26ss. approved by Wieacker, *Textstufen klassischer Juristen*, 1960, 286 n. 38), the author comments on the texts of Ulpian's book 17 *ad Sabinum* contained not only in Justinian's Digest but also in the *Fragmenta Vaticana*, and intends to illustrate, comparing one version with the other, the work of Justinian's compilers having deformed the original problematic contexts of Ulpian as they are preserved in Vatican fragments. This first part covers Vat. 59 to 64.

## **Criminal Aspect of Disposition of Goods on Installment**

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From the traditional way of thinking, when installment purchaser dispose those goods before completing his payment, embezzlement was applied (Art. 252 of Criminal Law). But this does not bring reasonable results in respect of the punishment and the others.

Here, I would like to assert to apply misappropriation by Art. 247 of Criminal Law to it. This method is, exclusive of the name of crime, similar to the way of "Model Penal Code" of the United States.

## **The Principle of Separation of Church and State in the United States of America (V)**

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### **Chap. I Colonial Days**

- Sec. 1. Unity of Church and Politics in the Colonies
- Sec. 2. Separation of Church and Politics in the Colonies
- Sec. 3. Religious Tolerance and Causes of Separation of Church and State (15 Hokkaido L. Rev. 3)

### **Chap. II First Amendment**

- Sec. 1. Situations before the Enactment of First Amendment
- Sec. 2. Enactments of Article 6, Sec. 3 and First Amendment
- Sec. 3. Situations after the Enactment of Article 6, Sec. 3 and First Amendment (15 H. L. Rev. 4)
- Sec. 4. Interpretations of First Amendment
- Sec. 5. First Amendment and Its Application to States (16 H. L. Rev. 1)

### **Chap. III Some Problems Concerning Substantial Aid by Public Organizations**

- Sec. 1. Aid to Institutions Controlled by Religious Organizations (16 H. L. Rev. 1)
- Sec. 2. Problems Concerning Free Textbooks to Children in Parochial Schools
  - 1. Tendency of Supreme Court Findings
    - (1) Points of the Problems
    - (2) State Court Findings against Free Textbooks
    - (3) State Court Findings for Free Textbooks
    - (4) Federal Court Findings for Free Textbooks
    - (5) State Court Findings for the Loan of Free Textbooks
  - 2. Laws Providing Free Textbooks to Children
  - 3. Problems Concerning Sec. 305 of "The National Defence Education Act of 1958"
    - (1) Point of Arguments
    - (2) The N.D.E.A. of 1958
    - (3) Insistence upon Unconstitutionality (I)
    - (4) Insistence upon Constitutionality
    - (5) Insistence upon Unconstitutionality (II)

## 4. Summary (Foregoing expounded in this Number)

Chap. IV Some Problems Concerning Religious Education and  
Religious Service

## Conclusion

**Sec. 2 Problems Concerning Free Textbooks to Children in Pa-  
rochial Schools****1. Tendency of Supreme Court Findings**

## (1) Points of Problems

The second problem concerning state aid to religious organizations is relevant to the provision of free textbooks to children enrolled in parochial schools. The notion of *the welfare of the state* in 1930's should not be left out of account in the background of this problem. Two types of treatment follows: one type was the rejection of the provision of free textbooks to children in parochial schools, and the other the affirmation thereof on the basis of *the child benefit theory*. In case of the latter, the extent of state aid or the expansion of *the child benefit theory* was argued against by the absolutists on the principle of separation of church and state.

## (2) State Court Findings against Free Textbooks

In *Smith v. Donahue*,<sup>1</sup> J. Van Kirk rejected the free textbook program, judging by the account that not only a direct aid but also an indirect aid violate the state constitution.<sup>2</sup> His statement is of the opinion that textbooks and supplies are nothing less than an indirect aid to the parochial school itself. He took no cognizance of *the child benefit theory*, despite that he admitted that the part and duty of a board of education were directed to public, educational and social activities for *the welfare of children*.

Found among same type of cases are in Maine (1854),<sup>3</sup> in New York (1938),<sup>4</sup> and in New Mexico (1951).<sup>5</sup>

1 *Smith v. Donahue*, 195 N.Y.S. 715.

2 195 N.Y.S. 719.

3 *Donahoe v. Richards*, 38 Me. 375 (1854).

4 *Judd v. Board of Education*, 278 N.Y. 200 (1938).

5 *Zellars v. Huff*, 55 N.M. 501 (1951).

## (3) State Court Findings for Free Textbooks

In contrast to the foregoing findings, the Louisiana Supreme Court rendered in favor of a defendant in *Borden v. Louisiana State Board of Education*<sup>6</sup> in 1929, holding that the purchasing of free textbooks for children attending schools, private or otherwise does not violate constitutional prohibition in respect to religion. The reason follows: books are not granted or donated to children but are merely lent to them, and, despite that the state acts in the form of lending things of value belonging thereto, the Louisiana State Constitution does not prohibit such lending, whereas it is necessary to promote education of children in *the reasonable exercise of state's police power*.<sup>7</sup>

The Court finds that appropriations were made for *children's benefit* with the resulting benefit (the eventual results for the benefit) to the state and that schools are not beneficiaries of the appropriations. The notion of *the exercise of police power* expounded in this case presents another distinguished view.<sup>8</sup>

J. Rogers dissents by his rejection of the notion of *the resulting benefit* to the state, *the welfare of the state*, and the application of *the exercise of police power* to this case. However, the majority opinion stated by J. Overton ruled this Court.<sup>9</sup>

The same case as *Borden v. Board of Education* was handled by the same Court, namely, in *Cochran v. Louisiana State Board of Education*.<sup>10</sup> Later, the plaintiff of this case appealed to the Federal Supreme Court.

Another two cases were appealed to the Louisiana Court by reason of unconstitutionality of the Free Text Book Act of 1928 cited in *Borden v. Louisiana State Board of Education*. However,

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6 *Borden v. Louisiana State Board of Education*, 168 La. 1005, 123 So. 655 (1929).

7 123 So. 661.

8 123 So. 661.

9 J. Land, J. Paul and J. Braunot concurred in J. Overton, while J. O'Niell and J. Thompson followed J. Rogers.

10 *Cochran v. Louisiana State Board of Education*, 123 So. 664 (1929).

they were rejected, because no rights or cause of action was disclosed and no interests sustained by these suits.<sup>11</sup>

#### (4) Federal Court Findings for Free Textbooks

Quoting the statement delivered by J. Overton in *Borden v. Board of Education*, Mr. Chief J. Hughes affirmed, in *Cochran v. Board of Education*, that the appropriation of public funds for the purchase of free textbooks to school children of the state is for the benefit of children, not for the school itself.

The contention of the appellant under the 14th Amendment in this case was that taxation for the purchase of school books constitutes a taking of private property for a private purpose. However, the Court did not admit this contention. That is, it found as follows : "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 interests are safeguarded.*"<sup>12</sup> (Italics by the present writer)

The Supreme Court in this case confirmed *the child benefit theory* within the framework of the general welfare of the state. These cases indicate the trend that there may be a doctrine of equal protection : namely, whereas textbooks are to be supplied equally, the refusal thereof to school children just for attending parochial schools is inconsistent.<sup>13</sup>

#### (5) State Court Findings for the Loan of Free Textbooks

The notions of *the welfare of children* as well as *the exercise of police power* were affirmed again in *Chance v. Mississippi State Text Book Rating and Purchasing Board*.<sup>14</sup> The Mississippi Supreme

11 *Bossier Parish School Board v. Louisiana State Board of Education and Caddo Parish School Board v. Same*, 123 So. 665.

12 281 U.S. 375 (1930).

13 *Borden v. Board of Education*, 123 So. 655, *Cochran v. Board of Education*, 123 So. 664 (1929), 281 U.S. 370 (1930).

14 *Chance v. Mississippi State Textbook Rating and Purchasing Board*, 200 So. 706. (1941).

Court stated that the duty of the state in the encouragement of the pupil to fulfil its duty to the state by attending a parochial school must be performed "by suitable means."<sup>15</sup>

It appears that the Court stands on the notion of doctrine of equal protection, which I suggested in my previous statement as to "benefits common to all."<sup>16</sup>

Should they forbid common welfare to the children only because of their attendance to parochial schools, it would mean religious disqualification.<sup>17</sup>

There are two viewpoints as to these cases regarding the free textbook program, in particular, as to the child benefit theory. One originates from an affirmative attitude to the theory,<sup>18</sup> and the other from a critical attitude.<sup>19</sup>

## **2. Laws Providing Free Textbooks to Children**

There are some acts designed to provide the board of education the right to furnish textbooks to school children, regardless of whether they attend private or public schools.

## **3. Problems Concerning Section 305 of "The National Defence Education Act of 1958"<sup>20</sup>**

### **(1) Point of Arguments**

### **(2) The N.D.E.A. of 1958**

Section 305 of the Act authorizes the commissioner of education to make loans to private, non-profit elementary and secondary schools for providing education in science, mathematics, or modern

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<sup>15</sup> 200 So. 710.

<sup>16</sup> 200 So. 710.

<sup>17</sup> 200 So. 710.

<sup>18</sup> For example, Paul G. Kauper, *Church and State: Cooperative Separatism*, 60 Mich. L. Rev. 35-36 (1961), Citing *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930) he states. "This (the distribution of secular textbooks to children in parochial schools) was even more direct aid to education conducted under the auspices of a church. But the distribution of these books served a valid secular purpose."

<sup>19</sup> For example, Leo Pfeffer, *State, and Freedom* (The Beacon Press, Boston: 1953) p. 469. His statement stands on absolute separatism, based on the "Wall of Separation" Doctrine.

<sup>20</sup> Public Law 85-864, 85th Congress, H.R. 13247 September 2, 1958. 72 Stat. 1580.



foreign languages. Three arguments are categorized as to the meaning of this section, centering on the key question as to whether the loans serve as aid to parochial schools or not.

(3) Insistence upon Unconstitutionality (I)

One of the statements insists on the inclusion of religious elements in textbooks of science, mathematics or modern foreign languages that deal with secular subjects.<sup>21</sup>

(4) Insistence upon Constitutionality

In opposition to the opinion stated above, another one takes an affirmative attitude toward the program based on the public benefit theory.<sup>22</sup>

(5) Insistence upon Unconstitutionality (II)

Against the insistence stated in the foregoing, another opinion throws a doubt to the extent of the child benefit theory.<sup>23</sup> Namely: what is the limit of this doctrine? Why does it not apply to textbooks in secular subjects or to the salaries of teachers of secular subjects?<sup>24</sup>

#### 4. Summary

Reviewing the foregoing cases and arguments, we may find two main patterns in relevance to free textbook problem: One refers to a group of cases and arguments against the program, based on the "Wall of Separation" Doctrine. The other is represented by a group of cases and arguments in favor of constitutionality of the program, based on the "No Preference" Doctrine. In the latter, the constitutionality of providing free textbooks to children in parochial schools depends on *the child benefit theory* and the notion of *police power*. Some entertain, however, a doubt about the limit or the expansion of these theories.

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21 George R. LaNoue, "Religious Schools and 'Secular' subjects; An Analysis of the Premises of Title III, Section 305 of the N.D.E.A." 32 Harvard Educational Rev. 3, pp. 255-291 (1962).

22 Charles W. Radcliff, Loans to Non-Profit Private Schools, The Constitutionality of Sec. 305 of the N.D.E.A., 33 H.E.R. 3, pp. 336-356. (1962).

23 Dunbar Holmes, Comment on "Loans to Non-Profit Private Schools, 33 H.E.R.3, p. 356. (1962).

24 Ibid., p. 358.