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SUMMARY OF ARTICLES

Economic Law

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On some problems about chattel mortgage on shifting stock in trade (1)

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We find a great demand for chattel mortgage on shifting stock in trade. However, the law of the very chattel mortgage is not always clear. This unclarity is the chief reason why really the security device is not so used.

Discussing on some problems about the device, the author aims at the clarification of the chattel mortgage law on shifting stock in trade. He will discuss on the following problems :

1. Controversy between one doctorine which solving legal problems sees the collateral (shifting stock in trade) as one entity, and another which considers it the congregation of all items, is not so fruitful, or even fruitless.
2. How to determine the scope of the collateral.
3. We think each item shifting of the collateral is covered by or is exempted from the security interest. How do we rationalize logically this conclusion ?
4. Does the debtor's unrestricted dominion over the collateral conflict with the secured party's right and possession ?

The Principle of Separation of Church and State in the United States of America (VI)

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Conclusion

Sec. 3. Problems Concerning Free Transportation for Children to and from Parochial Schools

1. Tendency of State Supreme Court Findings

(1) Outline of Problems

The third problem concerning state aid to religious organizations is relevant to the provision of free transportation for children to and from parochial schools. The problem of state aid to parochial schools will be discussed in this section in terms of a problem of a free supply textbooks. We may categorize state supreme court findings into three major groups upon an analysis of these court cases. Firstly the cases in which the courts rejected such free transportation by the board of education, secondly the cases in which the courts proclaimed primarily bus transportation unconstitutional, but later constitutional, through amendments to the state constitution or providing new statutes, and thirdly the court findings in which free bus transportation by the board of education or the school district was admitted.

In the first group, judges of the state supreme courts had not paid attention to the notion of *the exercise of police power*. In cases of the second group, however, state court judges stood severely by the separation principle between church and state as results of comparing the notion of *the exercise of state police power* with that of the separation principle enforced by the First Amendment. But the three findings of state supreme courts categorized in the third group arrived at admitting *the police power notion* in this field. They allowed the board of education or the school district to provide public free transportation.

Following these state court findings, the Federal Supreme Court expressed court opinion supported by four judges and two desenting

agreed by one in *Everson v. Board of Education.* This five to four federal case treated not direct transportation to and from parochial school but direct payment of public money to the parents whose children attend parochial school.

This Federal Supreme Court case was based upon the conclusions of these state supreme court findings stated above.

(2) State Court Findings against Free Transportation (I)

In 1923, the Wisconsin State Supreme Court proclaimed public transportation unconstitutional in *Van Straten v. Milquet*[1] in which parochial school children were transported by the same bus that was used by public school children.[4]

In *Hlebanja v. Brewe*[2] case of 1931, the South Dakota Supreme Court did not uphold bus fee imbursement by the state.

Following *Smith v. Donahue*[3], *Van Straten v. Milquet*[4] and a dissenting opinion of *Borden v. Louisiana State Board of Education*[5], the Delaware Supreme Court did not support a state statute providing free transportation. The court opinion, however, does not contain specific reasons for rejecting the majority opinion of the *Borden v. Louisiana State Board of Education*[6].

In *Gurney v. Furguson*[7] (1941) and *Silver Lake Consolidated School District v. Parker*[8] (1947), the Oklahoma and Iowa Supreme Courts rejected a notion of extending the meaning of *all* children in the statute to parochial school children, which was insisted by a plaintiff.

Based upon interpretations of the provisin of a contract, statutes or limitations of the state constitutions and court findings, public

1 192 N.W. 392.
2 236 N.W. 296.
3 195 N.Y.S. 715. It was stated in 17 Hokkaido L. Rev. 107-112 (No. 1) by the present writer.
4 192 N.W. 392.
5 123 So. 655. It was stated in 17 Hokkaido L. Rev. 113-118 (No. 1).
6 Ibid. pp. 113-118.
7 122 Pac. 2d 1002.
8 29 N.W. 2d 217.

bus transportation was rejected in this first group by reason of unconstitutional exercises.

(3) State Court Findings against Free Transportation (II)

In contrast to the first group stated above, there are *Judd v. Board of Education*[9] in New York (1938), *Sherrard v. Jefferson County Board of Education*[10] in Kentucky (1942) and *Mitchell v. Consolidated School District*[11] in Washington (1943) in which public transportation done by the school districts were found unconstitutional, based upon the severer requirements by the separation principle than the requirement from the *police power notion* in *Judd v. Board of Education*[12] and in *Mitchell v. Consolidated School District*[13]. It must be remarked, however, that there were three dissenters against the majority opinion of four judges in the former case and four dissenters against the court opinion of five judges in the latter case. These court opinions stood upon the precedents such as *Traub v. Brown*,[14] *Van Straten v. Milquet*[15] in the former case, and *Judd v. Board of Education*,[16] *Van Straten v. Milquet*[17] in the latter case. As stated above, in *Sherrard v. Jefferson County Board of Education*,[18] the Kentucky Supreme Court ruled in 1942 that the portion of the school law which requires transportation of parochial school children was unconstitutional, standing on the dissenting opinion of *Borden v. Louisiana Board of Education*.[19]

Thinking of the reasons stated in these three cases, it is obvious that they did not draw upon *the child benefit theory*, but upon interpretations of state constitutions, especially in *Judd v. Board of*

9 278 N.Y. 200.
10 171 S.W. 2d 963.
11 135 P. 2d 79.
12 278 N.Y. 200.
13 135 P. 2d 79.
14 172 A. 835.
15 192 N.W. 392.
16 278 N.Y. 200.
17 192 N.W. 392.
18 171 S.W. 2d 963.
19 123 So. 655.

Education[20] in New York. Standing on the conclusion of the decision, the New York Constitution was amended to legalize bus transportation to any kind of school without distinction.[21]

In the Kentucky case, *Sherrard v. Jefferson County Board of Education*,[22] free transportation was declared unconstitutional. But later the Kentucky Supreme Court changed its attitude to uphold the program in a latter case, *Nichols v. Henry*, through an amendment to the law giving county superintendents authority to provide public funds to transport parochial pupils.

In 1945 the State of Washington passed a law providing for transportation of parochial school children.

(4) State Court Findings for Free Transportation

Considering these two patterns stated in (2) and (3) above, the conclusions of *Board of Education of Baltimore County v. Wheat*,[23] (Maryland, 1938), *Nichols v. Henry*[24] (Kentucky, 1945) and *Bower v. Baker*[25] (California, 1946) were in the natural process of development of the court findings mentioned in this section.

Namely these three findings were decided upon *the notion of the exercise of police power*. Especially, in the California case, the reasons, and precedents stated in the majority or dissenting opinions of the state supreme courts in this field were argued by plaintiffs and defendants, standing on the solution that the California Court affirmed public bus transportation.

It must be noted that the court stood on the notion that the rejecting of such a general benefit to the children attending parochial schools means discriminative treatment to those children by reason of their religion.

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20 278 N.Y. 200.

21 It is as follows: ....but the legislature may provide for the transportation of barning. (Formerly 4 of Art. 9. Renumbered and amended by constitutional Convention of 1938 and apporoved by vote of the people November 8, 1938.)

22 171 S.W. 2d 963.

23 199 A. 628.

24 191 S.W. 2d 930.

25 167 P. 2d 256.

2. Federal Supreme Court Finding for Free Transportation

As stated above, the two cases, *Nichols v. Henry*[26] and *Bowker v. Baker*,[27] both in favor of transportation argued strongly the need of safeguarding the health and welfare of children.

It was with this emphasis that the United States Supreme Court in a five to four decision upheld the first school bus case. The case came to the court from New Jersey late in 1946. In this case the parents or guardians would he reimbursed by the state according to the provisions of the state statute.

The decision in the case was handed down on February 10, 1947. The finding of the court was that the New Jersey law is constitutional. The argument of the court supporting the legislation was presented under two heads, corresponding to the plea of the appellants.

The first was a consideration of the question whether payments for transportation to parents who chose to send their children to church schools was a violation of the "*due process*" clause of the Fourteenth Amendment. The court decided it was not.

The second classification in the majority decision considered the question of whether the New Jersey statute violated the First Amendment of the Federal Constitution because it gave support to a religious establishment by paying the transportation of pupils to parochial schools. Answering to the second question, the court emphasized that under the First Amendment church and state in the United States must be kept separate, quoting Jefferson's letter to the Baptist Society in 1802. The letter states in part, "to erect a wall of separation between church and state". But the court insisted also that other language of the amendment commands that the state can not hamper its citizen in a free exercise of their religion. The court stated:

"Consequently, it cannot exclude, Cathorics, Lutherans, Mo-

26 191 S.W. 2d 930.
27 167 P. 2d 256.

hammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or members of any other faith, *because of their faith, or luck of it*, from receiving the benefits of public welfare legislation,..."[28]

Two dissents were filed in this case by JJ. Jackson and Rutledge. They emphasize the fact that by the majority opinion the wall separating church and state in this country was breached. The majority opinion affirmed the notion of *the exercise of police power* though standing on the wall of separation principle.

In consideration of this context, the dissenting opinion argued by J. Rutledge is clearer than the court opinion on the wall of separation doctrine.

The opinions of this case were devided into five to four. If it had not been the question of the imbursement to the parents, but just transportation exercise itself done by the board, would it have been the same conclusion?

Surely there may be no bistinction between reimbursement by the public fund and transportation exercise by the board from a viewpoint of spending public money to church-relating children.

As stated in Jackson's opinion, this case which is relevant to reimbursement of bus fee to the parents is different from the state cases mentioned in (2), (3) and (4) which argued the concreate exercise of bus transportation by the board of education.

3. Summary

Reviewing the foregoing findings of state and federal supreme courts, it will be understood that the notion of *the exercise of police power* in these transportation cases is essentially equal to the notion of *the child benefit theory* in those free textbook cases stated in Section 2, chapter III.

The findings on public bus transportation program of the state supreme courts have been changed from rejecting to exercise free transportation, to admitting to do it. Based upon these state findings,

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28 Everson v. Board of Education of Ewing Township et al., 330 US 16, 91 L ed 724.

the Supreme Court of the United States upheld it in a *five to four* decision.

From this fact, however, when we compare the decision with the *unanimous* opinion for free textbook supply in *Cohran v. Louisiana State Board of Education*,[29] we would not argue immediately that this Federal Supreme Court of 1947 showed more severe attitude of the separation principle under First Amendment case than the court in 1930.

For it will be obvious from the fact that this *Everson v. Board of Education*[30] does not directly deal with transportation for the children as the state supreme court findings, but deal with the reimbursment of bus fee to their parents.

29 281 US 370 (1930).
30 330 US 1.

Das Recht auf Kriegsdienstverweigerung aus den Gewissensgründen

——Zur Theorie und Praxis in Art. 4 Abs. 3 Bonner Grundgesetz——(2)

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Inhalt

B) 2. 1) Was bedeutet das Gewissen ? Das bedeutet letzte Bindung des Menschen an eine ihm übergeordnete, unmittelbar verpflichtende Instanz. Die Struktur des Gewissens entspricht damit der des Gerichts.

2) Was sind Gewissensgründe, die den Kriegsdienst mit der Waffe verbieten? Auf die Art der Motive kommt es nicht an. Rationale, weltanschauliche und politische Überlegungen, ja beliebige äußere Einflüsse können eine Gewissensentscheidung i.S. des Gesetzes auslösen.

3. Was das situationsgebundene Gewissen betrifft, die das Gewissen enthaltende Auslegung des Art. 4 Abs. 3 GG ist zutreffend. Sofern Art. 25 WehrpfG das situationsgebundene Gewissen ausschließt, ist er verfassungswidrig. Wer behauptet, die Übereinstimmung des Art. 25 WehrpfG mit dem Art. 4 Abs. 3, betont den Ausdruck Waffe des Art. 4 Abs. 3. Er

wiederholt nur die Auffassung von Franz Lubbers. Seine Auffassung aber kommt in Frage.

Nach der Rechtsvergleichenden Betrachtung auch steht die Übereinstimmung des Art. 25 WehrpfG mit Art. 4 Abs. 3 GG noch in Frage. (Der Vergleich der englischen praktischen Behandlung der "non-pacifists" mit der amerikanischen praktischen Auffassung von "any". Und der Vergleich des Art. 4 Abs. 3 GG und Art. 25 WehrpfG mit ihr.)

(Fortsetzung folgt.)