Marquette Law Review

Volume 9
Issue 3 *April 1925*

Article 2

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HISTORICAL BACKGROUND OF RELIGIOUS DAY SCHOOLS

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WHEN, in the '30's and '40's of the last century, the Public School System of the United States, under the leadership of Horace Mann of Massachusetts, commenced its glacier-like advance it found in its way a variety of grammar schools. Some of these were conducted by public bodies such as cities, counties and townships and hence were true public schools. Others were parochial schools conducted by a Protestant or Catholic Church or a Synagogue. Still other schools were founded by charitable donations. Purely commercial schools conducted as mere business ventures also were by no means infrequent. Most of these institutions were wiped out by the public school system. Charitable schools were generally absorbed by the new arrival in the educational field, the courts applying the *Cy-pres* doctrine to them.[1] Commercial ventures were generally made unprofitable by the competition offered by schools which demanded no tuition and disappeared quite promptly. The existing public schools, of course, were continued, generally with improvements. A strong tendency developed to absorb the parochial schools and most of such schools were taken over by the public school system and in many instances were for years and even decades conducted substantially in the same manner as was the case before the change. To be more specific the particular religious instruction given before the change was usually continued after the change had taken place.

What has just been said, however, must be taken with some qualification. The Protestant denominations, being generally in the majority, naturally were somewhat favored, and quite frequently succeeded in having their particular religious instruction continued in the public school which succeeded their parochial school. In consequence the shift of Protestant parochial schools into the public school system was rapid and unimpeded. The same cannot be said of the Catholic schools. The Catholics, being in the minority in most communities, naturally received a less liberal treatment. Hence, they quite generally retained

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[1] 1896 *In re John's Will,* 30 Ore. 494, 509, 47 Pac. 341, 50 Pac. 226, 36 L.R.A. 242; 1895 *Attorney General v. Briggs,* 164 Mass. 561, 42 N.E. 118; 1896 *Green v. Blackwell,* 35 Atl. 375, 376 (N. J.).

their parochial schools and have them to the present day. Where Catholic schools were given up, this result in many instances was due to the fact that in the particular community the Catholics were sufficiently strong to be able to control their school and its religious teaching after it had been allowed to pass under the control of the public authorities.

Of course the general tendency was against the continuance of religious instruction in the public schools, once they had become such, no matter what their previous connections might have been. Anti-religious and non-religious elements of the population were actively working for a separation of religious instruction from them. Differences in religious belief became more pronounced in the various local communities and certainly within the various states as migration, immigration and emigration increased. Centralization of school control and the adoption of uniform textbooks further enhanced the difficulties in the way of teaching any sectarian tenets. The states being committed to two important principles, universal education and religious liberty, the elimination of religious instruction in the public schools became an unavoidable consequence. A resort to mere majority rule could not be tolerated, since religious freedom is more important than any such rule. The result to-day is a public school system conducted by the state, divorced from all church control and given over exclusively to the dissemination of secular information.

The situation in the public schools themselves during the transition period, of course, was not without its complications. There were no express constitutional provisions barring religious instruction in them. The conception of a public, as distinguished from a parochial school had not yet been clearly developed. Traces of this confusion remain to the present day. As late as 1894 and 1918 the Supreme Courts of Michigan[2] and Iowa[3], respectively, have had occasion to sever in a more or less Alexandrian manner a Gordian knot presented by such a merger. Where parochial schools maintained themselves there developed to some extent even a system of compensation by which the state paid to the parochial schools a part of the cost of imparting *secular* information to its pupils. The benefits derived from such a compromise was shared about equally by all denominations whether they, like the Catholics, retained their parochial schools and received compensation from the state or whether they, like the Protestants, gave them up and allowed the public authorities to continue religious instruction in them.

Then came the Civil War and brought the country to the brink of dissolution and shook it to its very foundation. When the din and clash

[2] 1894 *Richter v. Cordes,* 100 Mich. 278, 284, 56 N.W. 1110.

[3] 1918 *Knowlton v. Baumhover,* 182 Iowa 691, 166 N.W. 202, 5 L.R.A. 841.

of arms finally ceased with the meeting of Grant and Lee at Appomattox there arose out of the smoking embers of the conflict, in very much the same manner as the present Ku Klux Klan has come out of the strain and stress of the World War, a society known as the A.P.A. or American Protective Association. The purposes of this association were frankly anti-Catholic. To maintain itself for the short period of time to which all such movements are inherently limited an issue had to be found. It was close at hand. The Catholic school system was determined upon as the point of attack. This, of course, brought the Catholics themselves out onto the firing line. As the problems of reconstruction were solved one by one, the country turned from them and toward the new controversy. It is not astonishing that Catholic journals at that time even became aggressive in defending the justice and equity of the compensation which their schools were receiving. A controversy which could not be heard during the long debate which preceded the Civil War, which was hushed during the four years of that conflict, now demanded for the first time the attention of the country.

It was at this juncture that President Grant, on Sepember 29, 1875, addressed the Army of the Tennessee at Des Moines, Iowa. He said in part:

The centennial year of our national existence, I believe, is a good time to begin the work of strengthening the foundations of the structure commenced by our patriotic forefathers one hundred years ago at Lexington. Let us all labor to add all needful guarantees for the security of free thought, free speech, a free press, pure morals, unfettered religious sentiments, and of equal rights and privileges to all men, irrespective of nationality, color or religion. Encourage free schools and resolve that not one dollar appropriated for their support shall be appropriated to the support of any sectarian schools. Resolve that neither the state nor the nation, nor both combined shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and state forever separate. With these safeguards, I believe the battles which created the Army of the Tennessee will not have been fought in vain.[4]

Events now followed fast on each other's heels. Grant in his annual message of 1875, recommended an amendment to the United States Constitution forbidding the teaching in any public school of religious tenets and further prohibiting "the granting of any school funds, or school taxes, or any part thereof, either by legislative, municipal, or

[4] Hecker *Catholics and Education* 180, Sevett *American Public Schools* 72.

other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination."[5] Exactly a week after the submission of this message James G. Blaine, the plumed knight, who was then the leader of the house and who, nine years later, was defeated by Grover Cleveland in a contest for the presidency introduced a rather colorless resolution for a constitutional amendment which on August 4, 1876, was overwhelmingly passed by the house.[6] The famous Tilden-Hayes campaign in the meantime had come into swing and this matter now became one of its issues. Accordingly, the Republican National Platform of 1876 called for an amendment to the federal constitution forbidding "the application of any public funds or property for the benefit of any school or institution under sectarian control."[7] When the constitutional amendment, submitted by Blaine, in a greatly strengthened form,[8] was finally voted on in the Senate it resulted, on August 14, 1876, in a strictly partisan vote, all Republican senators voting for and all Democratic senators voting against it[9] and was lost because it had not received the necessary two thirds majority. With this vote the agitation for a federal amendment has come to an end.

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[5] *Congressional Record* Vol. 4, Part 1, p. 175.

[6] *Congressional Record* Vol. 4, Part 6, p. 5190. This resolution reads as follows: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations."

[7] Paragraph 7.

[8] *Congressional Record* Vol. 4, Part 1, XX, p. 5580. This resolution reads as follows: "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article."

[9] *Congressional Record* Vol 4, Part 1, p. 5595.

This, however, was not the final settlement. Feelings had been deeply stirred. A public school system entirely divorced from all religious affiliations was now deemed essential. Accordingly, nine of the ten states since admitted into the Union have been required, as a condition of admission, to provide, by an ordinance irrevocable, without the consent of the United States and of the people of the new state that provision shall be made "for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control" and eight of these states have literally complied with this condition.[10]

This compact is not the only safeguard against sectarian control of public schools. Indeed, four states, Ohio, Kansas, Nebraska and Mississippi,[11] had forbidden such control even before the school controversy had come to its sensational head, while Wisconsin and Nevada had forbidden sectarian instruction in public schools.[12] Since the controversy the Wisconsin and Nevada provisions have been substantially copied by Nebraska, Colorado, California, Montana, Idaho, South Dakota, Wyoming and Arizona.[13] That there are not more such provisions is undoubtedly due to the fact that an attempt to induce public schools to teach sectarian doctrines has not, since the Civil War, been generally made and in fact constituted the minor phase of the school agitation. Though relatively unimportant, this phase of the controversy has definitely settled one of the principles of our political philosophy. "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

[10] Arizona, 1912 Art. 20; Montana, 1889 Ordinance attached to constitution; New Mexico, 1912 Art. 21, Sec. 4; Oklahoma, 1907 Schedule attached to constitution, see Art. 1, Sec. 5; South Dakota, 1889 Art. 26, Sec. 18; Utah, 1895 Art. 3. See Art. 10, Sec. 1; Washington, 1889 Art. 26; see Art. 9, Sec. 4; Wyoming, 1889 Art. 21, Ordinance Sec. 5. The same condition was imposed on North Dakota and was fulfilled by its constitution of 1889 though not in the form of a compact. Art. 9, Sec. 147. The constitution of Idaho of 1889 does not contain this provision. See Art. 21, Sec. 19.

[11] Ohio, 1851 Art. 6, Sec. 2; Kansas, 1859 Art. 6, Sec. 8; Nebraska, 1866 Art. 2, Title Education Sec. 1; Mississippi, 1868 Art. 8, Sec. 9.

[12] Wisconsin, 1848 Art. 10, Sec. 3; Nevada, 1864 Art. 11, Sec. 9.

[13] Colorado, 1876 Art. 9, Sec. 8; California, 1879 Art. 9, Sec. 8; Montana, 1889 Art. 11, Sec. 9; Idaho, 1889 Art. 9, Sec. 6; South Dakota, 1889 Art. 8, Sec. 16; Wyoming, 1889 Art. 7, Sec. 12; Arizona, 1912 Art. 11, Sec. 7. See Art. 6, Sec. 3.

for religious instruction, and above all that it shall not be made an instrument of proselyting influence in favor of any religious organization, sect, creed or belief."[14]

This leaves the major phase of the controversy to be dealt with. This is concerned with the appropriation of public school funds to sectarian institutions. It was this phase against which President Grant directed his main attack and at which the proposed amendment to the United States Constitution was aimed. Like the minor phase it had been anticipated by a number of states. Massachusetts, in 1855, had provided that public school money "shall never be appropriated to any religious sect for the maintenance, exclusively, of its own school."[15] Five other states—Wisconsin, Michigan, Indiana, Oregon and Minnesota,[16] had forbidden the appropriation of such moneys for the benefit of any religious or theological seminary or institution.

Such anticipation, however, was slight compared with what was to follow. State after state fell into line, either by amending its constitution or by adopting a new one. The provisions adopted, of course, vary greatly in detail. Some are very general, others very specific indeed. All, however, have one object—to prevent the appropriation of public school funds to the uses of sectarian schools. Lack of space prevents us from reciting these provisions in detail. All that can be done is to enumerate the states which have taken action. Such enumeration is imposing enough.

Three states, New Hampshire,[17] Minnesota,[18] and Nevada,[19] the first two in 1877, the last in 1880, accomplished results by constitutional amendments. Illinois[20] and Pennsylvania[21] acted as early as 1870 and 1873, and Missouri[22] and Alabama[23] as early as 1875, accomplishing

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[14] 1918 *Knowlton v. Baumhover,* 182 Iowa 691, 166 N.W. 202, 5 L.R.A. 841, 843.

[15] Massachusetts Constitution, 18th Amendment. In 1913, *In re Opinion of Justices,* 214 Mass. 599, 601; 102 N.E. 464, the court held that this provision did not apply to higher schools.

[16] Wisconsin, 1848 Art. 1, Sec. 18; Michigan, 1850 Art. 4, Sec. 40; Indiana 1851 Art. 1, Sec. 6; Oregon, 1857 Art. 1, Sec. 5; Minnesota, 1857 Art. 1, Sec. 16. The Michigan provision has been readopted in the constitution of that state of 1908.

[17] New Hampshire, Art. 82. This provision was readopted in subsequent constitutions.

[18] Minnesota, Art. 8, Sec. 3.

[19] Nevada, Art. 11, Sec. 10.

[20] Illinois, 1870 Art. 8, Sec. 3.

[21] Pennsylvania, 1873 Art. 3, Sec. 18; Art. 10, Sec. 2.

[22] Missouri, 1875 Art. 2, Sec. 7.

[23] Alabama, 1875 Art. 12, Sec. 8. This provision was readopted in 1901.

their purpose through new constitutions. Texas,[24] Colorado,[25] Georgia,[26] California,[27] and Lousiana[28] had acted before 1880. Florida followed in 1885,[29] and Idaho,[30] Montana,[31] North Dakota,[32] South Dakota,[33] Washington,[34] and Wyoming,[35] in 1889. Mississippi[36] and Kentucky[37] ushered in the last decade of the last century by falling in line in 1890 and were joined by New York,[38] South Carolina,[39] Utah,[40] and Delaware[41] before the dawn of the new century. Oklahoma,[42] New Mexico[43] and Arizona[44] are the only states admitted into the Union since 1900 and by their constitutions, adopted respectively in 1907, 1911 and 1912, have joined the procession. Virginia, in 1902, forbade the appropriation of public funds to schools not owned or exclusively controlled by the state, but excepted certain non-sectarian institutions from this provision.[45] Massachusetts, in 1917, greatly strengthened the provision above referred to.[46] New Hampshire, Louisiana and Alabama have, since 1900, adopted new constitutions which retain the provision in which we are interested.[47] In view of this history the truth of a statement by the South Dakota Court that "the policy of prohibiting the use of funds belonging to all for the benefit of one or more religious sects has been adopted in most of the states,"[48] is undisputable.

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[24] Texas, 1876 Art. 7, Sec. 5; Art. 1, Sec. 7.
[25] Colorado, 1876 Art. XX 5, Sec. 34.
[26] Georgia, 1877 Art. 1, Sec. 14. But see Art. 8, Sec. 5.
[27] California, 1879 Art. 9, Sec. 8.
[28] Louisiana, 1879 Art. 228. But see Art. 53.
[29] Florida, 1885 Declaration of Rights Sec. 6; Art. 12, Sec. 13.
[30] Idaho, 1889 Art. 9 Sec. 5.
[31] Montana, 1889 Art. 11, Sec. 8.
[32] North Dakota, 1889 Art. 8, Sec. 152.
[33] South Dakota, 1889 Art. 8, Sec. 16; Art. XX 6, Sec. 3.
[34] Washington, 1889 Art. 1, Sec. 11; Art. 9, Sec. 4.
[35] Wyoming, 1889 Art. 1, Sec. 19.
[36] Mississippi, 1890 Sec. XX 208.
[37] Kentucky, 1890 Sec. 189.
[38] New York, 1894 Art. 9, Sec. 4.
[39] South Carolina, 1895 Art. 11, Sec. 9.
[40] Utah, 1895 Art. 1, Sec. 4; Art. 10, Sec. 13.
[41] Delaware, 1897 Art. 10, Sec. 3.
[42] Oklahoma, 1907 Art. 2, Sec. 5.
[43] New Mexico, 1911 Art. 12, Sec. 3.
[44] Arizona, 1912 Art. 2, Sec. 12.
[45] Virginia, 1902 Art. 9, Sec. 141.
[46] 46th Amendment to the Massachusetts constitution.
[47] New Hampshire, 1902 Art. 82; Louisiana, 1913 Art. 258. But see Art. 53; Alabama, 1901 Sec. 263.
[48] 1891 *Synod of Dakota v. Steele,* 2 S. D. 366, 373, 50 N.W. 632, 14 L.R.A. 418.

There can be no question but that this solution is the only feasible one, no matter what hardships it involves for those who retain their parochial schools. Any arrangement by which parochial schools are allowed to participate in the public school funds cannot but result in political pressure. The first result is a close public control over the denominational schools. The next result is the entry of those schools into politics in order to shape this control to suit their own purposes. Where one denomination or a combination of them becomes strong enough, a shift of such control becomes inevitable. Instead of the public agencies regulating the parochial schools, the latter will control the public schools. The utter impolicy of such an arrangement has been vividly illustrated in two cases of rather recent date. In an Iowa case decided in 1918, the directors of a school district for a "rent" of $2.50 per year, which was never actually paid, obtained a "lease" of the upper room of a parochial school which thereupon was conducted as a unit, the older pupils being instructed by a sister who was paid by the school district while the younger children received instruction from another sister who was paid by the church. Both teachers wore their religious garb and both rooms contained the customary church images. In both, the catechism was taught. The directors cast off all thought of attention except that they yearly appropriated the necessary funds and went through the motions of contracting with the teacher. Though the situation was nine years old when it came before the court on the complaint of a taxpayer, the parties were enjoined from continuing it on the ground that a public school had been perverted into a parochial school and that public funds had been misappropriated.[49] In Michigan, the limits of a school district and those of a parish were substantially identical. Land was bought and title taken in the name of the bishop. A school building was built partly by church subscriptions and partly by public taxes. A teacher was installed who was satisfactory to the church, who taught religion in the school, and whose salary was made up partly from church contributions, partly from tuition money, and partly from the public school funds. Finally the school officers became dissatisfied with the teacher and sought to remove him. When the bishop resisted this action, they took possession of the school building and held it by stationing one of their members in it. An attempt by the congregation to regain possession brought the controversy before the Michigan Supreme Court. The court refused to hold that the bishop and the priest "were guilty of receiving public funds in an illegal and unconstitutional manner" though that was the gist of their own contention, and unscrambled the weird situation by holding that the building was a public school and

[49] 1918 *Knowlton v. Baumhover*, 182 Iowa 691, 166 N.W. 202; 5 A.L.R. 841.

that the bishop was merely a trustee for the school district.[50] Therefore, the Tennessee court says: "It is contrary to law and to public policy to allow the public school money to be invested in property in which any religious denomination or society or any other person has any interest or rights."[51] The Illinois court concludes: "Any scheme, even though hallowed by the blessing of the Church, that surges against the will of the people as crystallized into their organic law, must break in pieces, as breaks the foam of the sea against the rock on the shore."[52]

The result of the school controversy as it stands out to-day is that all sides lost—a result not at all uncommon in such matters. The Catholics lost their subsidies and henceforth were forced wholly to support their schools. The Protestant denominations lost the teaching of their religion in the public schools which henceforth were confined to purely secular subjects. The public school pupils lost a large part of the moral restraint which religion alone can impart. The churches lost many who should have become faithful members and the state finds its burdens vastly increased and its citizenship degenerating. The consequences of a Godless education can be studied to-day at close hand in any penitentiary, house of correction, or reform school. They are vitally felt by every teacher from the kindergarten to the university and by every business man from the corner grocer to the president of the most powerful bank. They fill the courts with litigation, the jails with inmates and the graves with corpses.

Is it any wonder that a remedy is sought by which to bring back religious training to the children of the country? The outcry for such a remedy is universal. It comes from parents, educators, school officials, business men, church men and from those placed in charge of criminals and juvenile delinquents. Such a remedy is proposed by a system of religious day schools which co-operate rather than compete with the public schools. This has been tried out in various parts of the country, including Wisconsin, and has already achieved some measure of success.

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[50] 1894 *Richter v. Cordes,* 100 Mich. 278, 284, 56 N. W. 1110.

[51] 1896 *Swadley v. Haynes,* 41 S. W. 1066 (Tenn.)

[52] 1888 *Cook County v. Industrial School for Girls,* 125 Ill. 540, 563; 8 N. E. 183, 8 Am. St. Rep. 386, 1 L. R. A. 437. See 1917 *Williams v. Stanton School District,* 173 Ky. 708, 725, 191 S. W. 507, L. R. A. 1917 D 453 withdrawing 172 Ky. 133, 188 S. W. 1058. The court on rehearing says: "The constitution not only forbids the appropriation for any purpose or in any manner of the common school funds to sectarian or denominational institutions, but it contemplates that the separation between the common school and the sectarian or denominational school or institution shall be so open, notorious and complete that there can be no room for reasonable doubt that the common school is absolutely free from the influence, control or domination of the sectarian institution."

It is, however, still in its swaddling clothes and its growth will be very largely influenced by the court decisions which will be rendered on its constitutional aspects. Whether or not credit may be given by the public schools for such instruction, whether such instruction may be imparted in the public schools themselves or must be given outside are questions which are unsettled and can best be settled by judicial opinions on the constitutionality of such action. One of the essential tasks to be performed, therefore, relates to the work of fitting these new religious schools into the constitutional restrictions of the various states.

These restrictions have already been outlined in this article. Viewing them in the light of their history and against their proper background they offer no insuperable obstacles. Unfortunately, courts have not heretofore taken such a view of these provisions. The author has failed to find in any one of the fairly numerous decisions arising under these provisions the slightest reference to this history. Each decision treats the constitutional provision before the court as an isolated phenomenon of state history totally unrelated to a national movement of imposing magnitude. Is it any wonder that many courts have completely misconstrued these provisions? The Supreme Court of the state of Washington has furnished an illustration of the length to which courts not properly informed may be expected to go. It has held that a constitutional inhibition of the appropriation or application of public money or property to any religious worship, exercise or instruction prevents a school board from granting credits to high school pupils for successfully passing an examination covering the historical, biographical, narrative and literary features of the Bible based upon an outline provided by the board though no personal instruction is to be given in the school but is left to the home or church of the students.[53]

There can be no doubt, any pacifist delusions notwithstanding, that the question of the constitutionality of these new religious day schools will have its day in court. If its friends do not procure the proper decisions by friendly actions brought in states where the chances for success are most favorable its enemies will make their attack in states where the chances for success favor them. The new system of religious day schools is certainly intended by its friends to be a permanent structure. No owner in his right mind will erect a heavy office building without ascertaining in advance the capacity of the ground on which he builds to sustain its weight. It would seem that those who favor the new development should act with equal intelligence. The fight in the courts in this matter is as certain to come as was the recent total eclipse

[53] 1918 *State ex rel Dearle v. Frazier*, 102 Wash. 369, 173 Pac. 35, L. R. A. 1918 F. 1056.

of the sun. Why not prepare for it now? By doing this, fatal mistakes can be avoided and the whole development guided along rational lines to complete success.

Of course something can always be accomplished by bravely muddling through. A military bridge can be satisfactorily built to fill its temporary purpose without any blueprints. The religious day school movement, as the author understands it, has no such merely temporary object. Comprehensive plans, therefore, should be made in advance and followed out. A permanent structure is begun at the bottom and not at the top. A disregard of the legal background and situation is about as intelligent as would be the erection of a twenty-story building on wooden piles and supplying or attempting to supply the foundations as the structure begins to list.