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Article 7

Compulsory Public School Attendance

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COMPULSORY PUBLIC SCHOOL ATTENDANCE

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The question of whether the courts shall enforce the acts of the legislature which are repugnant to the spirit of the Constitution, has always been of great interest to people in general; but fortunately, it is not so intricate as to defy authoritative opinion by those familiar with the limitations of legislative power.

At this time there is much speculation as to the ultimate disposition of the recently passed amendment to the laws of the state of Oregon entitled "Compulsory Education." This act provides that parents or guardians who neglect or refuse to send children of the proper age through the eight grades of the public school are guilty of a misdemeanor, and upon conviction are liable to a fine or imprisonment or both. The only persons who are excepted from this law are those who hold state permits to give their children private instruction. But even then the permits can be issued for one year only, and the children must submit to one state examination every three months. Those who oppose this act allege that it is unconstitutional because the body of the act is wider in its scope than the title implies; that in effect it is not a regulation of education, but is either a subterfuge to end religious instruction in schools, or an unintentional infringement upon the positive right of man to be superior to the state in the matter of the ordinary education of his child.

The real result of this legislation is the abolition of the parochial school. Whether this is done maliciously or incidentally is not for our discussion here. But the fact remains that the parochial school, and with it the right to religious education, which is a part of religious freedom, is swept aside in the enforcement of this act.

Federal Guarantees

The Federal Constitution in the form in which it was originally written, provided that "No religious test shall ever be required as a qualification to any office or public trust under the United States." By an amendment, however, it was made to provide that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

It is readily perceived, however, that these are but regulations or limitations on the powers of Congress. They do not apply to the internal government of any of the states.

An analysis of the underlying principles of our constitution clearly demonstrate an intention on the part of the sturdy pioneers who built it, to preserve and perpetuate the free exercise of religion. And it clearly shows an attempt, on their part to forbid any attempt to establish an inequality of the rights of citizenship on the grounds of difference in religious opinion.

"The American people came to the work of framing their fundamenal law after centuries of religious oppression and persecution * * * and this taught them that any domineering of one sect over another was repressing to the energies of the people and must necessarily tend to discontent and disorder and certainly opposed to the spirit of our institutions. Whatever therefore may have been their individual sentiments on religious questions * * * the general voice has been that persons of every religious persuasion should be made equal before the law and that questions of religious belief and religious worship should be questions between each individual man and his Maker. And of these questions human tribunals, so long as the public order is not disturbed are not to take cognizance."

To secure compliance with these rights, and non-interference with civil and political rights, the fourteenth amendment was passed. It provided that

> No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the law.

The provisions of this fourteenth amendment encompass the preservation of religious liberty. See *Cooley Prin. Const. Law,* page 224.

State Guarantees

Thus we readily discern that the preservation of religious freedom in any state is left to legislation in that state, provided such legislation does not transcend or violate the restrictions of the Federal Constitution. Each state has the right to legislate on any subject whatsoever, except as restricted or forbidden by the Federal Constitution. The Federal Government may act

on those subjects only, which are enumerated in its Constitution. It may be of interest to know that every state in the Union has a constitutional guarantee in regard to the subject of religious freedom. Though some of these are more liberal than others, and though in some, petty jealousies are apparent, still Cooley maintains that the state guarantees of religious freedom are fundamentally the same and that they can be summed up as follows:

1. They establish a system, not of toleration merely, but of religious equality. All religions are equally respected by the law; one is not to be favored at the expense of others, or to be discriminated against, nor is any distinction to be made between them, either in the laws, in positions under the law, or in the administration of the government.

2. They exempt all persons from compulsory support of religious worship, and from compulsory attendance upon the same.

3. They forbid restraints upon the free exercise of religion according to the dictates of conscience, or upon the free expression of religious opinions.

The Oregon Law

May it be maintained that the right of a church and its members, to keep up a school for the purpose of supplementing regular education by religious instruction, is a right secured by the Constitution?

The very fact that children may not and cannot be given sectarian instruction in the public schools makes it necessary for those who deem it necessary, to establish and maintain their own schools for that purpose. The need for religious instruction is apparent. No argument is necessary to convince any thoughtful person of the necessity of giving such instruction to the youth of America. When we pause to consider that only eight persons out of every thousand in Massachusetts know either the Lord's Prayer or the Ten Commandments, and that this record is better than the one in New York, we come to some realization of the need of religious instruction.

And so if a parent sees fit to protect his child by giving him that spiritual instruction which his conscience demands, and by virtue of a law he may not, then that law acts in contravention to those principles in our constitution which guarantee freedom

of speech and perfect religious toleration. The man is acting in a very vital matter (the proper education of his child), and in a manner prompted by the dictates of his conscience and advised by his religious superiors. He is restrained from worshipping God according to the dictates of his conscience. (A discussion as to whether school instruction is included in the word "worship" is treated subsequently.) Is this right one of those secured by the Constitution?

The states "forbid restraints upon the free exercise of religion according to the dictates of one's conscience or upon the free expression of religious opinion." *Cooley Prin.*, p. 22. "No external authority is to place itself between the finite beings and the infinite when the former is seeking to render the homage that is due and in a mode which commends itself to his conscience and judgment as being suitable for him to render and acceptable to its Object." *Cooley*, Chap. 13 Con. Lim. 7th Ed. P. 665.

It is entirely unnecessary to cite cases to prove its principles. They are fundamental.

They are basic and fundamental truths that no legislature can circumvent or set aside by any proposed regulation. *Lutheran Synod versus State Officers*, Neb.

MAY IT BE MAINTAINED that the right to retain separate schools for religious instruction is such as is incidental to the free exercise of religion according to the dictates of conscience and such as is guaranteed by the Constitution?

AND MAY IT BE MAINTAINED that such right is secured under that part of the fourteenth amendment which guards the citizens against deprivation of life, liberty, or property, without due process of law and which guarantees the equal protection of the law?

Liberty does not mean merely the right to be out of jail or free from physical restraint. It means freedom of religion; freedom to speak, write and contract; freedom of intercourse with members of one's family; FREEDOM TO MAINTAIN PRIVATE INSTITUTIONS AT ONE'S EXPENSE; freedom to have control of one's family. *Lutheran Synod versus State Officers*, Neb.

Thus we see that any interference with religious liberty is a violation of both the state and Federal constitutions with reference to the liberty of the person.

Parochial schools constitute a necessary part of the educa-

tional life of any state. To abolish them would be to inflict an unnecessary hardship on the taxpayers of any state. They have existed and flourished for many years. They have shown themselves the equal of the public school. They have never been convicted of treason, sedition, or immorality. Men and their families have worked hard and have sacrificed to build these schools, and for no other purpose than to secure proper religious instruction for their children in accord with the dictates of their conscience. Thus when legislated against, the value of these institutions (as far as the maintainers are concerned) is destroyed and their usefulness impaired. In order adequately to care for all the children forced to leave the parochial schools new buildings must be erected. This means additional taxation. So in this case not only is a man's right to hold property violated but also he is subjected to additional and unnecessary taxation as a result.

In *Chicago versus Netcher* court says, concerning legislation passed under the guise of accomplishing an end different from its stated purpose

> It is plain that * * * its object is not within the police power and so it is a mere attempt to deny a property right to a particular class in the community, and so it is invalid, 183 Ill. 104.

Consequently, it is a form of religious liberty to enjoy the right of religious education as shown by the above mentioned cases, and, to prove that its denial would be inconsistent with the fundamental principals of our law, allow me to quote:

> And the state is not to inquire into or take notice of religious belief or expression so long as the citizen performs his duty to the state and to his fellows, and is guilty of no breach of public morals or public decorum. *Cooley Const. Lim.*

MAY IT BE MAINTAINED that this law is an infringement upon the right of contract?

If a man deems it necessary for the proper upbringing of his children that he place them in the care of persons capable of furnishing the child with competent religious instruction and he is by law restrained from contracting with such persons for such lawful end, then he is prevented from free exercise of his power of contract.

Anent this subject Cooley says, "No man in religious mat-

ters is to be discriminated against by the law or subjected to the censorship of the state or of any public authority; and the state is not to inquire into or take notice of religious belief or expression so long as the citizen performs his duty to the state and to his fellow and is guilty of no breach of public morals or public decorum."

In the case of *People versus Gillan,* 109 N. Y. at page 341 the court says:

> The word liberty * * * means freedom to make lawful contracts to the end of obtaining happiness.

MAY IT BE MAINTAINED that this law is arbitrary and discriminatory?

It is an undisputed fact that the legislature cannot make arbitrary classification for the purposes of legislation. But the question presented to us is somewhat different. Can a legislature pass a law which is in effect arbitrary and discriminatory? Or can it pass a law discriminatory in itself even though it be under the guise of a civic good? A law compelling all children of a certain age to attend public schools, forces those people who maintain private institutions to move their children to such public institution, and does not affect those whose children already attend public schools. There is much authority on each side of this question. Allow me to refer

City of Chicago versus Netcher, 183 Ill. 104.
Vermont versus Whithead, 49 N. W. 318.

In the recent case Ex Parte Arata 198 P. 814 the Supreme Court of California says apropos the subject of the rights of the individual to liberty,

> One of the most important rights guaranteed under our Constitution, that of liberty of the citizen, is involved and cannot be lightly passed over; nor can encroachment upon that right be tolerated even under the argument that, in the main, the general result sought is a beneficial one.

From this we may safely assume that a law arbitrary and discriminating in effect and encroaching upon the rights of citizens is ineffective, despite any real or supposed public good which might be calculated to ensue.

MAY IT BE MAINTAINED THAT the State is supreme in the matter of education?

There can be no doubt that the state may compel normal children of certain age to be in school. Or it can require a

reasonable minimum of education; but this does not mean that it has the power to make the children the wards of the state as regards education; nor does it mean that it could require them all to complete high school or to attend the State University. The Spartans of old tried to make the children the wards of the state, and tried to deprive parents of any jurisdiction over the education of their offspring.

The fallacies of such legislation were shown at the time and have been thoroughly demonstrated since. State monopoly of education is based on the discarded philosophy of Plato, and has no place in America where the first concern of the government is the right of the individual. A. F. Mullen to Sup. Ct. Neb. *Luth. vs. State.*

MAY IT BE MAINTAINED THAT BY EXEMPTING ALL PERSONS from the support and attendance of religious institutions, the state is virtually contravening its own legislation by instilling a new religion into the children?

It is readily granted by all that there can be no positive void in the mind of a child as regards religion. Religion is a fundamental thing and exists in one form or another in the mind of everyone. Broadly defined it is one's concept of his relation to his Creator. "Now it is just as true," says Hon. Bird Coler on this very subject, "in psychology as in physics that nature abhors a vacuum." There must be something in any proposed system of common compulsory education, to fill that vacuum. As all children are subject to the same instruction under such law, then their religious impressions will be the same. Can we maintain that a conscientious avoidance of any reference to any existent religion will make irreligion, agnosticism, atheism, skepticism, or a new ism the state religion? Considering how few children receive any religious instruction outside of school, we certainly find grounds for such assertion. Of course it is a question of whether the courts would take notice of this matter. But if any tangible evidence to prove the assertion could be offered, the courts would give it cognizance. And if the court were to take judicial notice of such existent conditions there can be no doubt of its final disposition. Speaking of state religion Cooley says, "No state has the power to coerce it" . . . . . And if the state has no power to coerce any one religion, can it assimilate unto itself the power of so limiting the right of existing religions to instruct properly, as to amount to

a coercion of a new but definite system of ideas regarding the relation of a child to its Creator?

MAY IT BE MAINTAINED THAT the State under its police power may enact such legislation for the purpose of securing good citizenship?

Now the police power may be defined as "that power inherent in our government to enact laws WITHIN CONSTITUTIONAL LIMITATIONS, to promote the health, morals, safety, order, and general welfare of society." Now it cannot be denied that the State may enact any legislation it may desire for the purpose of securing good citizenship. But in the procurement of its end it may not violate any of the rights of the individual. That parochial school education is a right secured by the constitution has been shown. And it has also been shown that an enactment providing for compulsory public school education acts as an abolition of the parochial school system, and an infringement on one's right to religious liberty, personal liberty, right to hold property, right to contract, and the right of the individual to be supreme as to the education of his children. Cooley in his *Constitutional Limitations,* 3rd edition, page 251, says,

> In the exercise of this power regard must be paid to the fundamental principles of religious liberty, civic liberty, and to the processes that are adapted to preserve and to secure civil rights; persons cannot be arbitrarily deprived of equal protection of the laws or of life, liberty or property because the state purports to be exercising police power.

The question of whether this enactment would be arbitrary has been discussed above. In the case of *Ex rel Adams versus Burdge,* we read:

> As the police power imposes restrictions and burdens upon the natural and private rights of individuals, it necessarily depends upon the law for its support; and although of comprehensive and far-reaching character IT IS SUBJECT TO CONSTITUTIONAL RESTRICTIONS * * * ." 95 Wis., 390. In the case of *State Ex Rel Zillner vs. Kreutzberger* the Wisconsin Supreme Court has to say "It would be inconceivable that the people of Wisconsin in establishing a government to secure the rights of life, liberty and pursuit of happiness should by general grant of legislative power have intended to confer upon that government authority to wholly subvert those primary rights; and in this view it has been held by this court that legislative actions conflicting with that declared purpose are

forbidden by the Constitution and must be denied efficacy by the courts. 114 Wis., 530.

The police power has been wittily defined as the power to pass unconstitutional laws, and some utterances of courts have seemed to justify such conception. It is nevertheless erroneous. An act which the Constitution clearly prohibits is beyond the power of the Legislature, however proper it might be as a police regulation but for such prohibition. *State ex rel Jones v. Froehlick,* 115 Wis., 32.

So legislation referring to police authority for legitimacy like any other exercise of the lawmaking power, must bear the test of Constitutional limitations, which will be found upon all sides. On the one side it may meet the barrier of an express prohibition; on the other, the implied prohibition of any law not in harmony with the all-prevailing purposes of the Constitution; on another the implied prohibition involved in the declaration that "the blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles." 115 Wis. 32.

By presenting these questions and quoting these authorities the writer does not attempt to promote casuistry, but simply asks the reader to decide for himself whether the amendment of the Oregon Legislature, or any similar enactment, is as inconsistent with the letter of the law as it is with the fundamental spirit of our Constitution.

NOTE: From time to time during the history of the United States cases have come to public notice, in which demands were made for the real interpretation of the provisions of the Federal Constitution. The justices all over the land seem to be unanimous in their opinions as to what the fourteenth amendment sought to secure. Although these opinions may be said to be no more than dicta as regards the situation at hand, still it is apparent that their general trend does not countenance the amendment to the Oregon Constitution. Witness the following cases:

Home and Day School vs. Detroit, 76 Mich., 521.
Mich. Female Sem. vs. Sec. of State, 115 Mich., 118.
Columbia Trust Co. vs. The Lincoln Institute, 138 Ky., 104.
Berea College vs. Kentucky, 211 U. S., 45.
Smith vs. Texas, 233 U. S., 640.
Butcher's Union Co. vs. Crescent City Co., 111 U. S., 756.
Corfield vs. Coryell, 4 Wash., 371.
Ward vs. Maryland, 12 Wallace, 418.
Allgeyer vs. State of Louisiana, 165 U. S., 578.

In compiling the cases in this note I have referred to the articles of Hon. P. J. Hally of Detroit.

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