MAINE STATE LEGISLATURE

The following document is provided by the

LAW AND LEGISLATIVE DIGITAL LIBRARY

at the Maine State Law and Legislative Reference Library

http://legislature.maine.gov/lawlib

Reproduced from scanned originals with text recognition applied

(searchable text may contain some errors and/or omissions)

STATE OF MAINE

REPORT

OF THE

ATTORNEY GENERAL

For The Calendar Years

1963 - 1964

those elements, use and consumption, are satisfied here.

The court in *Trimount Co. v. Johnson*, 152 Me. 109, in speaking of machines leased by the petitioner said:

> "If petitioner exercises in this State any right or power incident to its ownership of the machine, the tax is imposed. The tax does not rest upon the sum total of rights and powers incident to ownership, but upon any right or power."

It is therefore clear that the utilization of property to produce new property in the circumstances stated, is such an exercise of rights over the property as to subject the materials and parts to use tax.

A comment here relative to the possible interstate character of the transaction is appropriate.

> "And the use tax is valid, if imposed upon local storage or use, such as withdrawal from storage, despite intended subsequent use (not immediate or direct use) in interstate commerce."
> *Prentice-Hall, State and Local Taxes, Sales Tax, Para. 92,600.*

There appears to be no problem here with relation to interstate commerce. See *Hunnewell Trucking v. Johnson*, 157 Me. 338, see also *Ashton Power Co. v. Dept. of Revenue*, 52 N. W. 2d 174 (Mich., 1952).

I conclude therefore that a use tax should be levied on the cost of the materials and parts.

JON R. DOYLE
Assistant Attorney General

November 7, 1963

To: Honorable John H. Reed
Governor of Maine
State House
Augusta, Maine

Dear Governor Reed:

Since the United States Supreme Court decision declaring Bible reading and prayers in the public schools unconstitutional in June of this year, I have received a number of letters from citizens of Maine protesting the decision and also protesting my interpretation thereof as noted in an opinion to the Commissioner of Education on June 21st. I understand that you have received similar letters of protest. I am writing this letter to you in hopes that it will clarify the decision and the position of this office with respect to the practice involved. If necessary, I think this letter should be reproduced and sent to each of those who have made protest or inquiry about the decision.

Of necessity I shall have to reiterate much of my opinion to the Commissioner, but I hope that by giving more of a background to the decision that it will clarify the position of this office and allay the fears of some of our citizens.

It may be important to note at the outset that the *Schempp and Murray* case was an 8 - 1 United States Supreme Court opinion. It is interesting to note also that just a year prior to the *Schempp and Murray* case the Court in a 6 - 1 opinion (2 judges not sitting) decided that the New York Regents

Prayer was unconstitutional. *Engel v. Vitale,* 370 U. S. 421. The opinions in both the Engel case and the Schempp case reflect the thoughtfulness given to the situation involving prayer in the public schools. As Mr. Justice Brennan said in the Schempp case,

> "The Court's historic duty to expend the meaning of the constitution has encountered few issues more intricate or more demanding than that of the relationship of religion and the public schools."
> And Mr. Justice Goldberg said,
>
> "As is apparent from the opinions filed today, delineation of the constitutionally permissible relationship between religion and the government is a most difficult and sensitive task, calling for the careful exercise of both judicial and public judgment and restraint."

I mention this phase only to emphasize that the members of the Court fully realized the seriousness of the question before them and did not lightly regard it. However, except for the one dissent, the Justices had no trouble in agreeing on the final result. It would, of course, be most satisfactory if everyone could not only read, but study, the Schempp case and those prior First Amendment cases in order to understand the history and background to this decision.

The cases arose as follows: Pennsylvania law required that "At least 10 verses from the Holy Bible shall be read, without comment, at the opening of each public school on each public day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." The Appellees, Edward Schempp, his wife and two children are Unitarians. They brought suit to enjoin enforcement of the statute contending violation of their constitutional rights. In Maryland, the Board of School Commissioners of Baltimore adopted a rule pursuant to Maryland law providing for the holding of opening exercises in the schools of the city consisting primarily of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." The petitioners in that case, Mrs. Madalyn Murray and her son, were professed atheists. In the Maryland situation the rule had been amended to permit children to be excused from the exercise on request of the parent. The Murrays protested the rule and the practice as being in violation of their constitutional rights. The two cases were heard together by the United States Supreme Court.

So that we may compare Maine's statute regarding prayer, I will here interject that citation.

> "Readings from scriptures in public schools; no sectarian comment or teaching. To insure greater security in the faith of our fathers, to inculcate into the lives of the rising generation the spiritual values necessary to the well-being of our and future civilizations, to develop those high moral and religious principles essential to human happiness, to make available to the youth of our land the book which has been the inspiration of the greatest masterpieces of literature, art and music, and which has been the strength of the great men and women of the Christian era, there shall be, in all the public schools of the state, daily or at suitable intervals, readings from the scriptures with special emphasis upon the Ten

Commandments, the Psalms of David, the Proverbs of Solomon, the Sermon on the Mount and the Lord's Prayer. It is provided further, that there shall be no denominational or sectarian comment or teaching and each student shall give respectful attention but shall be free in his own forms of worship."

You will note that the Maine law is mandatory in its application and that there is no provision for a child to absent himself should he so desire.

Mr. Justice Clark, in writing the opinion of the Court, found that, "in light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause as applied to the States through the Fourteenth Amendment."

The portion of the First Amendment with which we are here involved reads that, "Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof . . . " This applies to the States through that portion of the Fourteenth Amendment which reads, "No State shall make or enforce any law which shall abridge the privileges or immunities of 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 laws."

The Court cited and reaffirmed the conclusion that,

> "The (First) Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the Colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."

With respect to the interrelationship of the Establishment and Free Exercise Clauses:

> "Our constitutional policy . . . . (D)oes not deny the value or necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the two-fold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private."

Stress is laid on the necessity of the neutral position of the State:

> "And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. . . . The Free Exercise Clause . . . withdraws from legislative power, state and federal, the exertion of any restraint in the free exercise of

religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."

The Court then applies the Establishment Clause principles to the cases before them and finds that the States are requiring the selection and reading of verses from the Holy Bible and the recitation of the Lord's Prayer. Further, that the exercises are prescribed as part of the curricular activities of students who are required by law to attend school; that they are held in the school buildings under the supervision and with the participation of teachers employed in those schools. The Court finds that the exercises are of a religious character. "Given that finding the exercise and the law requiring them are in violation of the Establishment Clause."

> " . . . Nor are those required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause."

It is clear that the exercises as set forth in Maine's statute (R. S. Me. ch. 41, § 145), and the statute itself, are unconstitutional and henceforth null and void.

One general inquiry to this office has been what may be done to nullify or override the opinion of the Supreme Court. The only answer is an amendment to the Constitution of the United States. This is, of course, an involved process which may not be accomplished by Maine citizens alone. The signing and presenting of petitions to officials of this State urging them to reconsider or even to ignore the decision are necessarily of no effect. Neither Education officials nor the Attorney General may violate the law of the land. We are sworn to uphold the Constitutions of this State and of the United States.

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." (Jackson, J., in *West Virginia Board of Education v. Barnette*, 319 U. S. 624.) Cited in Schempp case.

Another question which has arisen is "May a teacher 'voluntarily conduct the reading of the Bible or recitation of prayers in our public schools?"

The answer is No.

The teacher is an agent of the state and carries out its policies. This, of course, places her in the "neutral" position as defined by the Court.

Mr. Justice Brennan in his concurring opinion states:

> " . . . (G)overnment cannot sponsor religious exercises in the public schools without jeopardizing that neutrality."

And Mr. Justice Goldberg adds:

> "The pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influ-

> ence of school administration, staff, and authority, cannot realistically be termed simply accommodation, and must fall within the interdiction of the First Amendment."

The teacher has no inherent authority to conduct religious exercises and she may not effectuate a policy which is beyond the power of her employer to authorize, nor may she attempt to accomplish by indirection that which is directly forbidden by the law of the land. The law under which the teacher mandatorily conducted the religious exercise is no longer of any effect. Section 145, chapter 41, of Maine's Revised Statutes, was the sole authority for the carrying out of religious exercises in the public schools. The teacher's immediate employer, the superintending school committee, has no inherent authority to direct or allow the teacher to conduct such exercises. One of the prime duties of the local committee is to "Direct the general course of instruction . . . . " This duty relates solely to secular studies and in no manner gives the school committee authority to incorporate religious exercises in the public schools.

Most of the letters I have received bemoan the fact that children no longer may be subject to the practice of Bible reading and prayer recitation. There is some expression of fear that, because of the discontinuance of the practice, our children will be deprived of a vital religious indoctrination formally provided by the public school. This is the very nub of the decision, to keep government separate from religion. If we as a society have gone so far that we must depend upon our schools to provide the only touch of devotional exercise for our children, then we should admit to failure in parental and community guidance and leadership. Mr. Justice Brennan concludes his opinion in the Schempp case by quoting the words of a Chief Justice of the Pennsylvania Supreme Court a century ago. They are applicable today.

> "The manifest object of the men who framed the institutions of this country, was to have a *State without religion*, and a *Church without politics* — that is to say, they meant that one should never be used as an engine for any purpose of the other, and that no man's rights in one should be tested by his opinions about the other. As the Church takes no note of men's political differences, so the State looks with equal eye on all the modes of religious faith . . . . Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate."

The devout believer should fear the secularization of a creed which becomes too deeply involved with and interdependent upon the government. Religion belongs in the home and in the church. The Court's ruling should focus our concern for our children upon this simple fact.

Finally, I am alarmed by those who urge defiance of the ruling of the Court.

Disagreement with the Court, or dislike of its rulings, is no excuse for defiance. Private citizens, as well as public officials, are bound by the law as pronounced by the highest court in the land.

> "Our individual preferences . . . are not the constitutional standard. The constitutional standard is the separation of church and state." *Zorach v. Clauson*, 343 U. S. 306.

We cannot properly educate our children, and we cannot demand of them respect and discipline, if we ourselves do not show respect for the law. To be responsible citizens we must practice what we preach and set the example by obeying the law.

Respectfully yours,

FRANK E. HANCOCK
Attorney General

November 7, 1963

To: Philip R. Gingrow, Banks and Banking

Re: Sales Finance Company License

Your memorandum of September 18, 1963, wherein you request an opinion under the Motor Vehicle Sales Finance Act, is hereby acknowledged.

Facts:

The Motor Vehicle Sales Finance Act, R. S. 1954, c. 59, sections 249 to 259, provides in Section 250 for licensing of sales finance companies and retail sellers. Subsection I of said Section 250 provides in part:

> "No person shall engage in the business of a sales finance company or retail seller in this State without a license therefor as provided in Section 249 to 259, inclusive."

Subsection III, paragraph B of said Section 250 relates to the amount of license fee and provides in part:

> "For a sales finance company, the sum of $100 for the principal place of business of the licensee within this State, and the sum of $25 for each branch of such licensee maintained in this State."

You state that a foreign corporation currently maintains two offices within this State through which it purchases conditional sales contracts on consumer goods, excluding motor vehicle transactions. The foreign corporation proposes to commence the purchasing of conditional sales contracts on motor vehicles sold in this State, but it hastens to add that all of this business will be done through an out-of-state office.

Question:

Is it necessary for this company to obtain a sales finance company license for their two Maine offices before they begin to engage in the business of buying conditional sales contracts on motor vehicles?

Answer:

Yes.

Opinion:

Your attention is directed to the opinion of James Glynn Frost, Deputy Attorney General, dated April 29, 1958, wherein it was held that a sales finance company which conducts its business outside the State of Maine and