TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 190.

BEREA COLLEGE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JANUARY 7, 1907.

(20,511.)

(20,511.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 546.

BEREA COLLEGE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 28, 1907.

1 Pleas before the Honorable the Court of Appeals of Kentucky, at the Capitol, in the City of Frankfort, on the 12th day of June, 1906.

BEREA COLLEGE, Appellant,
vs.
THE COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Madison Circuit Court.

Be it remembered that heretofore to-wit on the 17th day of March, 1905, the appellant by its attorney filed in the office of the Clerk of the Court of Appeals a transcript of the record which is in words and figures as follows:

2 *Venue. Pleas.*

STATE OF KENTUCKY, *Madison Circuit Court, sct:*

Pleas before the Hon. J. M. Benton, Judge of the Madison Circuit Court, at the court house, in the City of Richmond, Ky., on the 21st day of February, 1905, in the action of

No. 6009.

Parties:

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BEREA COLLEGE, Defendant.

Be it remembered that heretofore, to wit: On October 8th, 1904, the Grand Jury of Madison County filed an indictment in the clerk's office of said court, to wit:

Indictment.

Madison Circuit Court.

THE COMMONWEALTH OF KENTUCKY
against
BEREA COLLEGE.

Operating a School for Whites and Negroes.

3 The grand jury of Madison county, in the name and by the authority of the Commonwealth of Kentucky, accuse Berea College of the offense of maintaining and operating school for whites and negroes committed as follows, viz: That said Berea College on the 8th day of October, 1904, in the county afore-

said and before the finding of this indictment, it the said Berea College being a corporation duly incorporated under the laws of the State of Kentucky, and owning, maintaining and operating a college, school and institution of learning known as Berea College, located in the town of Berea, Madison County, Ky., did unlawfully and wilfully permit and receive both the white and negro races as pupils for instruction in said college, school and institution of learning, against the peace and dignity of the Commonwealth of Kentucky.

B. A. CRUTCHER,
Commonwealth's Attorney.

Witnesses:
MISS DOUGLAS.
MR. A. BROCK.

Presented by the Foreman of the Grand Jury to the Court in the presence of the Grand Jury and received from the Court by me and filed in open Court.
Oct. 8th, 1904.

ROY C. WHITE, *Clerk.*

October Term, 29th Day of October, 1904.

4 6009.

COMMONWEALTH OF KENTUCKY
vs.
BEREA COLLEGE.

Demurrer.

The defendant demurred to the indictment herein.

February Term, 7th Day of February, 1905.

COMMONWEALTH
vs.
BEREA COLLEGE.

Order Overruling Def't's Demurrer.

This cause came on and was heard on defendant's demurrer to the indictment and the court being fully advised, it is ordered that said demurrer be and is overruled, to which defendant excepts.
The court filed an opinion herein.

Opinion.

Madison Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BEREA COLLEGE, Defendant.

Opinion.

At the October Term, 1904, of this court the Grand Jury found and returned an indictment against the defendant, Berea College, charging it with a violation of the law passed at the session
5 of 1904 of the General Assembly of Kentucky, which law is commonly known as the Day Bill, and is entitled as follows: "An act to prohibit white and colored persons from attending the same school."

The first section of the act provides: "That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school or institution, shall be fined $1000.00, and any person who may be convicted of violating the provisions of this act shall be fined $100.00 for each day they may operate said school, college or institution, after such conviction."

The fourth section of the act provides that: "Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty five miles distant, for the education exclusively of one race or color."

The indictment in this case was found under the first sec-
6 tion of the act. To the indictment the defendant college has interposed a demurrer, and in the argument upon the demurrer counsel for the defendant have vigorously assailed the validity of the act urging with much force that it contravenes several of the provisions of the Bill of Rights contained in the State Constitution, and also the first section of the Fourteenth Amendment to, and possibly some other provisions of the Constitution of the United States.

In addition to these objections of substance some technical criticisms of the indictment are offered which will be first considered and disposed of before the more serious objections to the indictment are discussed.

It is suggested that, conceding the validity of the act, the indictment is not properly drawn to cover any offense defined in the act. This criticism is not well founded. The act makes it unlawful for any corporation to maintain or operate a college, school or institution where persons of the white and negro races are both received as pupils for instruction, and this indictment, in almost the exact

language of the act, charges that Berea College being a corporation and owning, maintaining and operating a college, school and
7 institution of learning, known as Berea College, located in the town of Berea, Madison County, Kentucky, did unlawfully and wilfully permit and receive both the white and negro races as pupils for instruction in said college, school and institution of learning.

The fair meaning and intendment of this language is that the defendant received both races in one and the same college located in the town of Berea? It does not require a very violent stretch of judicial knowledge for the court to know that there could not be a separate or distinct branch of the college, as much as twenty five miles distant from the main college, and yet be in Berea.

The suggestion is made that possibly the indictment is defective because it does not expressly state that the defendant does not come within the exception made by section 4 of the act. Such an allegation is not necessary. In the case of Com'th v. McClanahan, 2 Met., 8, our Court of Appeals said: "It is well settled that where provisos and exceptions are contained in distinct clauses it is not necessary to aver in the indictment that the defendant does not come within the exceptions, or to negative the provisors it contains."

It is the opinion of the court therefore that a commission
8 of the offense sought to be reached by the indictment is sufficiently alleged.

The court is further of the opinion that the defendant college is directly affected by the act in question, and that it, therefore, is in a position to properly raise the constitutional questions which arise under the act.

It is forcibly urged by counsel for the defendant, as before stated, that the act under consideration not only violates many of the provisions of the Bill of Rights contained in the Constitution of Kentucky, but that it also violates the first section of the Fourteenth Amendment to and possibly other sections of the Constitution of the United States.

The sections of the Bill of Rights which it is urged this act violates are those which secure to all citizens the right of enjoying and defending their liberty, the right of worshipping Almight God according to the dictates of their consciences, the right of seeking and pursuing their safety and happiness, the right of freely communicating their thoughts and opinions, the right of acquiring and protecting property, and the right to freely and fully speak, write and print on any subject.

9 The attention of the court is called also to section 26 of the State Constitution which reads as follows: "To guard against transgression of the higher powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution shall be void."

If the act under consideration can be upheld it must be upon the ground that its enactment by the Legislature was a legitimate and

proper exercise of the police power of the state by that department of the State Government.

At first blush it may seem that section 26 of the Constitution just quoted was intended to take away from the Legislature the power to exercise this police power in all cases where the exercise of it would impair or tend in any way to impair or infringe any of the rights guaranteed by the Bill of Rights. That section 26, however, is not peculiar to the present Constitution of Kentucky. It is found in the first, second and third Constitutions of the State which were adopted respectively, in 1792, 1799 and 1850, so that to give that section the meaning for which the defendant's counsel contend would place the Legislature of Kentucky, with reference to its power to exercise the state's police power, in a position peculiar alone to this State, and which condition must have existed since the formation of the original state government.

The court is of the opinion, that section 26 of the Constitution does not deprive the Legislature of the power to enact such measures as come fairly and legitimately within the exercise of the police power which is inherent in all State governments. That right exists as fully in Kentucky as it does in any other state in the Union. The right is not dependent for its existence upon express constitutional sanction.

"Where the letter of the Constitution would prohibit police regulations which by all the principles of constitutional government have been recognized as beneficient and permissible restrictions upon the individual liberty of action, such regulations will be upheld by the courts on the ground that the framers of the Constitution could not possibly have intended to deprive the government of so salutory a power, and hence the spirit of the Constitution permits such legislation although a strict construction of the letter *prohibits*."

Tiedeman's Limitation of Police Powers, p. 212.

"All authorities agree that the Constitution presupposes the existence of the police power, and it is to be construed with reference to that fact," 2 Hare's American Constitutional Law, 766.

The court will not attempt in this opinion to take up seriatim the various sections of the state Constitution or of the Constitution of the United States relied upon by the defendant and discuss the bearing of each of them on the legislation which is now assailed by the defendant, but before the opinion closes several decisions of the Supreme Court of the United States, and of the state courts of last resort, and the views of eminent text writers will be cited wherein the police power of the state governments, its extent and application, and the effect upon it of such constitutional provisions as are relied upon by defendant's counsel have been fully discussed.

The first section of the Fourteenth Amendment to the Constitution of the United States reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. 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 argument presented by defendant's counsel in support of their contention that the Day Bill contravenes the inhibitions found in the first section of the Fourteenth Amendment may be summarized as follows:

First. It would abridge the privileges and immunities of citizens of the United States.

(A) The trustees of the corporation—their privilege to expend their own money and their labor in the establishment and maintenance of a private institution for a worthy object would be abridged.

(B) Each and every teacher in the United States—his or her right to pursue in Kentucky the innocent and laudable occupation of teaching would be abridged.

13 (C) Each and every person in the United States—his or her right to seek instruction, elevating in character, wherever he or she sees fit, and upon invitation, voluntarily to associate, in so far as it may be necessary for the purpose of receiving an education, with any person of good moral character, with whom he may so desire to associate.

Second. By its enactment the State of Kentucky would seek to deprive persons of their liberty and property without due process of law.

(A) Teachers—The right to earn one's living in the pursuit of a lawful calling not interfering with the rights of others, a property right.

(B) Pupils—the right to prepare one's self to earn a living by seeking an education where the opportunity offers and none objects to his presence—a property right.

(C) The Trustees—the right to establish and maintain a school is a property right.

14 (D) The College—By rendering some of its donations subject to forfeiture, a direct pecuniary loss would be sustained.

Third. By its enactment the State of Kentucky would seek to deny persons within its jurisdiction of the equal protection of the laws.

The court is of the opinion that the validity of the act of the Legislature which is being considered and the consequent determination of the questions raised by the defendant's demurrer depend wholly upon the question as to whether the action of the General Assembly in passing the act in question was a legitimate and proper exercise of the internal police power which is the inherent right of all states.

The idea which influenced the Legislature to pass the act must have been that the association, whether voluntary or involuntary, of the persons of the negro and white races in the intimate relation which could reasonably be expected to follow from their being received together as pupils to be educated in the same institution, at the same place and at the same time, was inimical and detrimental to the public peace and morals, and hurtful to society. If such a

view on the part of the Legislature was a reasonable one, the
15 Legislature in question cannot be held to be an unwarranted exercise of the police power. The real question is, was the possible danger to the public peace, morals, and to the welfare of society from such an association so obvious that the Legislature could reasonably anticipate such danger, and therefore be warranted in taking this step to avoid it.

This act does not prevent the teachers in Berea College from exercising their calling even in that institution. Their calling is teaching. Notwithstanding this act, they can teach at all times and in all places, except only that they are prohibited from teaching in any educational institution where members of both races are received together as pupils.

No boy or girl is denied the right to go to school. The two races are simply prohibited from going to school together.

The Trustees are not prohibited from establishing and maintaining schools. If they want to establish and maintain a school for the colored youth they can do it; and if they at the same time want to establish and maintain a school for the white youth they can do it, but if one school is to be a branch of or connected with the other they must be twenty five miles apart. The trustees are pro-
16 hibited simply from establishing and maintaining a mixed school for the education of the two races.

The exercise of the calling of those who teach, the right of the students, and the right of the college to acquire and protect its property must all submit to such reasonable regulations as are deemed proper by the Legislature in the exercise of the police power of the state.

Due process of law and the law of the land are synonymous and the police power is a part of the law of the land. It cannot be said therefore that the exercise of the police power is a taking of property without due process of law. Justice Bradley in 111 U. S., 746, said, "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase, 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; and among these are life, liberty and pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." Further, he said: "I hold that the liberty of pursuit—the right to follow any of the ordinary callings
17 of life—is one of the privileges of a citizen of the United States." Justice Peckham in 165 U. S., 580, after referring to these statements of Justice Bradley said: "The foregoing extracts have been made for the purpose of showing what general definitions have been given in regard to the meaning of the word 'liberty' as used in the Amendment, but we do not intend to hold that in no such case can the state exercise its police power." When and how far such power may be legitimately exercised with regard to these subjects may be left for determination to each case as it arises."

"The constitutional guaranty is, that no person shall be deprived

of life, liberty, or property without a due process of law; but a valid exercise of the police power does not deprive any person of life, liberty or property without due process of law." State *vs.* Holden, 14 Utah, 718.

Chief Justice Shaw of Massachusetts in the case of Comth. *vs.* Alger, 7 Cush. 85, said: "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as
18 the Legislatures, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain,—the right of a government to take and appropriate private property to public use whenever the public exigency requires it,—which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the public power—the power vested in the Legislatures by the Constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same. It is much easier to perceive and realize the source of this power than to mark its boundaries, or to prescribe limits to its exercise."

"The constitutional guaranties that no person shall be deprived of life, liberty or property without due process of law, do not limit and were not intended to limit the subjects upon which the police power of a state may be lawfully exerted, for these guaranties have
19 never been construed as being incompatible with the principle, equally vital, because so essential to peace and safety, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." 22 A. & — Ency. of Law, (2 Ed.,) 937.

The Supreme Court in Powell *vs.* Pennsylvania, 127 U. S., 678, says: "It is scarcely necessary to say that if this statute (An Oleomargarine Statute) is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with the Fourteenth Amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it can not divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with that power by the states."

Counsel for the defendant propound this question: "Is it competent for the legislature to deny the freedom of speech merely because the audience consists of persons of different colors or different races, when the words spoken and the lessons read or recited are entirely free from objection?" Similar questions were propounded by Justice Harlan in his dissenting opinion in the case of Plessy *vs.* Ferguson,
20 163 U. S. 537, and the answer given by the majority of the court to such questions in that case furnish a complete answer to the question now propounded by defendant's counsel. The ma-

jority of the court said to Justice Harlan: "The reply to all this is that every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith, and not for the annoyance or oppression of a particular class."

The constant and daily association of the members of the two races must have been deemed by the Legislature to be the source of danger, and that is manifestly what was intended to be prevented by the adoption of this statute.

Counsel for defendant suggest that "that to sustain the validity of this legislation as a proper exercise of the police power, the court must know, outside of the statutes and outside of the indictment, that the operation and maintenance of such a school is detrimental to the public peace, health, morals or safety." The answer to this suggestion is that such a rule does not obtain and has never been required in the cases growing out of what are commonly known as
21 *Separate Coach Bills*, which are founded upon the same general principle or policy. There is nothing in the language of those statutes to show that it is detrimental to public peace, health, morals or safety, in the two races riding together in the same railway coaches, nor has it ever been held necessary to make such an allegation in any indictment drawn under one of those statutes.

The real question is whether or not the legislation is clearly beyond the province of the lawmakers. If it is not, their action is conclusive. The public policy of the State of Kentucky on this and kindred questions is given expression in section 187 of the Constitution which requires that separate schools shall be maintained for white and colored children, in subsection 7 of section 4521A of the Kentucky Statutes, which provides that no white child shall be permitted to attend or become a pupil in any school for colored children, and that no colored child shall be permitted to attend or become a pupil in any school for white children, in subsection 2 of section 2099 of the Statutes which prohibits marriage between a white person and a negro or mulatto, and in section 795 of the Statutes
22 which requires railway companies to furnish separate coaches for the travel or transportation of white and colored passengers.

The validity of these provisions is not at this day questioned. No court has ever denied their validity, and they have been uniformly upheld upon the grounds of public policy, and as being a proper exercise of the police power. These regulations are based upon racial differences, and if such differences warranted that legislation, why will they not warrant this? If the State of Kentucky is by constitutional provision prohibited from maintaining mixed schools because in the judgment of the framers of the Constitution the comfort, the welfare, the morals, the peace of society might thereby suffer, can it be that the state has not the right to prohibit any of its citizens from violating this state policy? In the case of L. & N. R. R. Company *vs.* Kentucky, 161 U. S., 667, the Supreme Court in affirming a decree of the Kentucky Court of Appeals said: "The general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state, and

in the exertion of such power the legislative control is vested
23 with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry."

The Kentucky Court of Appeals, through Judge O'Rear in the case of Union Central Life Ins. Co. *vs.* Spink, 26 Ky. L. R., 1210, said: "Each state necessarily establishes its own public policy, confined to its own territory. That they may not be uniform throughout the Union is neither surprising nor discouraging, for what may be deemed inimical by one may be treated as immaterial by another, and indeed may be so."

In view of this recognized policy of the state of Kentucky, and the rule announced by the Supreme Court it is extremely difficult to see why the act now being considered does not come fairly within the purview of this policy and this rule. If any danger to the peace, the morals or the comfort of society attends the act of members of the two races riding together in the same railway coaches, or grows out of the association of the youth of the two races in attending together the same public school, can it be certainly said that no possible danger can result from the members of both races being brought into constant contact and into the most intimate social association in the same classes, in the same school room, under the same teachers, in the same private school?

Some question is made to the effect that the require-
24 ment in the fourth section of the act which requires a separate of branch school for the education of the other race or color to be twenty five miles away is an unreasonable requirement, and therefore invalidates the entire act. Attention is called to the fact that the public schools maintained for the two races are not required to be separated by that distance. If it be conceded that the main question affected by this legislation was a proper one for legislative control, then the Legislature necessarily had the power to make its action with reference to that question effective. The purpose sought to be accomplished by this legislation could have been easily frustrated if the act had permitted both races to be received in different rooms in the same building, or even in different buildings in the same immediate vicinity, under the same instructors and under the same control and management. The objectionable *constant contact* and *intimate association* could have continued. In order to make its legislation effective for the accomplishment of the purpose which prompted it, and to certainly avoid the danger sought to be prevented, the Legislature had the right to exercise some discretion in fixing the
25 distance within which the same institution should not undertake the education of both races, and unless the distance so fixed is both arbitrary and unreasonable the judgment of the Legislature must prevail. It is the opinion of the court that it cannot be judicially said that the distance of twenty five miles, as fixed in the Statute, is both arbitrary and unreasonable. From the very necessities of the case the public schools for the benefit of the two races can not be separated to the extent of twenty five

miles or any other substantial distance. The white and colored children, however, in the public schools are not under the same teachers, and there is nothing to throw the children of the two races together, or to bring them into that intimate association which was evidently deemed by the Legislature to be detrimental to the public peace and morals of the state, and the comfort of its citizens.

A further suggestion is made that this act violates the charter rights—the vested rights of the defendant. An examination of the charter of the college shows that there was absolutely nothing in the original articles of incorporation that indicated a purpose on the part of its founders to conduct a mixed school at
26 Berea. The college was never chartered by the General Assembly of Kentucky. In July 1899, certain articles of incorporation were agreed to by the persons associated in the enterprise, and in 1866 those original articles, with two others, were for the first time made a public record, and they were then recorded in one of the Deed Books of the Madison County Court. Not until June, 1899, was it ever expressly stated in any article of incorporation that the object of the institution was "the education of all persons who may attend."

Even charter rights however are subject to the police power of a State. In the case of Lakeshore & M. S. R. Co. *vs.* Ohio etc., 43 U. S., 702, the Supreme Court says: "In our opinion the power whether called police, governmental, or legislative, exists in each state, by appropriate enactments not forbidden by its own Constitution, or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the states is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which na-
27 tional legislation can be constitutionally extended."

"Rights and privileges arising from contracts with the state are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense and to the same extent as are all contracts and all property, whether owned by natural persons or corporations." 22 A. & E. Ency. of Law, (2 Ed.) 938.

Defendant's counsel contend that the act in question is unreasonable and absured and therefore void, and in support of that contention they give this illustration: "Take for instance, the Methodist or the Roman Catholic Church. Such church is an institution. Suppose such church received in its Sunday school, as it does, in Louisville, white children, and in another building in the same city, or in any town in all Kentucky negro children, it would be guilty of violating the first section of the Act, and would not be saved by the proviso of section four, for that applies only to institutions of learning." And again they say: "Therefore the Methodist or the Roman Catholic Church, if it maintains a
28 white Sunday school in any town in Kentucky can not maintain a colored Sunday school in the same town or any other

town or place in all Kentucky." The answer to these suggestions is that the construction given the act must be a reasonable one. The title to the Act is: "An Act to Prohibit White and Colored Persons from attending the same school." The term school must be given its usual and ordinary acceptance, and it is doubtful if a Sunday School comes within the terms of the Statute. It is entirely competent to resort to the title to ascertain the true meaning of an Act. Formerly the titles of legislative acts were not regarded as any part of them. But in the case of Comth. *v.* Barney, 24 Ky. L. R., 2352, the Court says: "To prevent certain abuses of legislation by the use of misleading titles, many of the states now have constitutional provisions identical with or quite similar to our section 51. So that the matter of selecting an expressive and accurate title is committed directly to the Legislature, and its being fairly expressive of the context of the bill is an imperative condition to the validity of the act. It is essentially a part of the
29 act, not only because it has been selected and adopted by the Legislature as one of the tests of their meaning as expressed in the bill, but because the Constitution has made it a part, and the controlling part of the law to which it applies. It is therefore not only useful, in affording a fair index of the legislative intent in case of ambiguity in the context, but it must be read in connection with the remainder of the act—as a part of it—in determining what is the law."

The final, and it seems to the court the strongest ground, upon which the defendant bases its contention that the act under consideration is void, is that while the laws requiring the separation of the two races in public schools and on common carriers have been recognized and upheld as coming within the police power of the state on the ground that a state may determine that an *enforced association* of the two races is inimical to the general welfare; no law has ever been enforced which punishes as a crime the *voluntary association* of the two races, in a *private enterprise.*

The welfare of the state is what the Legislature considers
30 when it comes to exercise the police power, and if an enforced association of the races is so injurious to the welfare of the state as to warrant a prohibition, may it not be reasonably inferred that a voluntary association of the races will prove so hurtful to the welfare of the state as to warrant the state to revoke its police power to prevent it such injury.

Judge Du Relle, in his separate opinion in the case of the Ohio Valley Railway's Rec. *vs.* Lander, etc., 20 Ky., L. R. 913, used this language:

"It seems to me indisputable that whatever a carrier of passengers may do by regulation the government of the state may, in the exercise of its inherent police power, by law require the carrier to do." In the case of Clark *vs.* Maryland Institute for Promotion of Mechanic Arts, 41 Otl. 126, a case cited by defendant's counsel, it was held by the Court of Appeals of Maryland that the institute had the right to refuse colored pupils. The City of Baltimore was entitled, by contract, to designate thirty three pupils to attend the institute.

The privilege was accorded to each member of the City
31 Council to name a pupil from his ward in order to make up the total thirty-three. A youth of African descent was received into the institute as a pupil in 1891, another in 1892, and two others in 1895. In the language of the Maryland Court, "the effect of these four pupils was very disastrous. There was an immovable and deep settled objection on the part of the white pupils to an association of this kind. Notwithstanding earnest and zealous efforts on the part of the Board of Management and faculty of teachers to reconcile the white pupils, their parents and guardians to the innovation, it caused a great decrease in the number of pupils. Finally the Board of Managers adopted this resolution:

"Whereas the popular sentiment of all the citizens is opposed to mixed schools; and whereas the appointment of colored pupils to this school, it is believed, has caused a large decrease in the number of white pupils attending the institute, thus lessening the power for good to the community: Resolved, that hereafter only reputable white pupils will be admitted to the schools." In 1896, one of the
32 members of the City Council appointed Clark, a colored boy, to a scholarship, and he was refused admittance in 1896 and 1897, and the Court of Appeals sustained that action.

Applying the rule announced by Judge Du Relle, and the doctrine of the Maryland case, Berea College would have the right by by-law or regulation, to exclude all except the youth of one race, and therefore the government of the state may, by law, require the students to be confined to one race, or to enforce a separation of the races.

It has been said of this police power that it has been found impossible to frame, and that indeed it is deemed inadvisable to attempt to frame any definition of the police power which shall absolutely indicate its limits by including everything to which it may extend and excluding everything to which it can not extend, the courts considering it better to decide each case as it arises whether the police power extends thereto.

Blackstone says: "The police power is that which relates to the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners and to be decent, industrious and inoffensive in their respective stations."

33 Chief Justice Redfield of Vermont in the case of Thorpe *vs.* Rutland etc. 62 A. D. 625, said:

"By the general police power of the state, persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made."

The Illinois Court has said: "The police power of a state is co-extensive with self-protection, and is not inaptly termed 'the law of overruling necessity.' It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort and welfare of society."

Judge Bannin in his work on the Fourteenth Amendment says: "Police power in its broadest acceptance means the literal power of the government, to preserve and promote public welfare, even at the expense of private right."

The Court of Appeals of New York in the case of People *vs.* Budd, 15 A. S. R., 460, affirmed by the Supreme Court in 143 U. S. 517, said: "The very existence of government presupposes the
34 right of the sovereign power to prescribe regulations demanded by the general welfare for the common protection of all. This principle inheres in the very nature of the social compact. The protection of private property is one of the main purposes of government, but no one holds his property by such an absolute tenure as to be freed from the power of the Legislature to impose restraints and burdens required by the public good, or proper and necessary to secure the equal rights of all." That court in the same case said further: "It (the police power) may be exercised so as to impair the value of property, or limit or restrict the use of property, yet in this there is no infringement of the constitutional guaranty, because that guaranty is not to be construed as liberating persons or property from the just control of the laws."

Judge Dillon says, 1 Munic. Corp. 212: "Every citizen holds his property subject to the proper exercise of this (police) power by the State Legislature. It is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances."

35 This power in the state legislature has always been recognized and given full force by the Supreme Court of the United States. Lakeshore and M. S. R. Co. *vs.* Ohio etc., 43 U. S. 702. The Supreme Court in the case of Barbier *vs.* Connoly, 113 U. S., 27 says: "But neither the Fourteenth Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people." In Boston Beer Co. *vs.* Massachusetts, 97 U. S., 25, the Supreme Court says: "Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature can not, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus*
36 *populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may advise. That discretion can no more be bargained away than the power itself."

The police power in the state corresponds to the right of self defense in the individual, and when it comes to a question of protection from harm or injury from any source, the exercise of the police

power by the state is as much a duty and is as free from restrictions as is the exercise of the right of self defense by the individual. Self defense is everywhere recognized as the first law of nature.

The relative functions of the court and the legislature when called upon to consider questions of police power are well stated in the Jacobs case, 50 A. R., 636, as follows: "Generally it is for the legislature to determine what laws or regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property can not be arbitrarily invaded,
37 and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of the citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

The North Carolina court in State *vs.* Moore, 17 A. S. R., 696, says: "The question being whether the law making branch of the state government has exceeded the limits of its power, it is the duty of the court to resolve every doubt in favor of the validity of the law, and to presume that it was passed in good faith to remedy some evil not reached or corrected by previous legislation."

In State *vs.* Holden, 46 Pac. 1105, the Utah court said: "Though reasonable doubts may exist as to the power of the legislature
38 to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order, or promote the general welfare, we must resolve them in favor of the right of that department of government."

Judge Cooley says: "The judiciary can only arrest the execution of a statute when it conflicts with the Constitution. It can not run a race of opinions upon the points of rights, reason and expediency with the law making power."

Judge Du Rell in his separate opinion in Ohio Valley Railway Rec. *vs.* Lander etc., 20 Ky. L. R. 913, said in discussing the separate coach law of this state: "The policy of such law, its ultimate purpose, or the reasons which led to its enactment are not matters for our consideration. Whether the law is a justifiable exercise of the police power does not depend upon these considerations. That a judge differs with the legislature upon a question of policy does not authorize him to say that a law passed in pursuance of such a policy is not a legitimate exercise of the police powers of the state. For example, a judge may disagree entirely with the reasons which induce a legislature to adopt a quarantine law. He may believe that the disorder, whose spread is thereby sought to be prevented, is not

infectious or contagious. Such belief, however, would not justify him in holding that the law was not within the police power
39 of the government. And so with regard to the laws with regard to the suppression of lotteries. Illustrations might be multiplied." Judge Du Relle here has very clearly defined the function of the courts when called upon to determine the validity of acts of the legislature passed in pursuance of the police power of the state.

The Supreme Court in Missouri Pac. R. Co. *vs.* Humes, 115 U. S., 512, says: "It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from the state legislatures."

The same court in Sinking Fund Cases, 99 U. S., 718, says: "Every possible presumption is in favor of the validity of a statute, and this continued until the contrary is shown beyond a reasonable doubt. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

"It is only when a law amounts to an arbitrary and unwarranted interference with the right of the citizen to pursue any lawful
40 business that it must be declared unconstitutional." State *vs.* Chicago etc. Rwy. Co., 64 A. S. R., 482.

This question of the separation of the races, in some of its phases, has been rather frequently before the courts, and those cases acquaint us with the general policy of the law on the question.

Judge Bannin in his work on the Fourteenth Amendment when referring to laws based upon racial differences says: "Such legislation if the state regards it best for the harmony and comfort of the two races, and conducive to public order, would seem to find full warrant under the police power."

The Supreme Court in Plessy *vs.* Ferguson, 163 U. S., 256, one of the separate coach cases, says: "Laws permitting and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State legislature in the exer-
41 cise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."

Chief Justice Shaw of Massachusetts in the case of Roberts *vs.* Boston, 5 Cush, 198, said: "Conceding, therefore, in the fullest manner, that colored persons, descendants of Africans, are entitled by law to equal rights, constitutional and political, civil and social, the question then arises whether the regulation in question, which provides separate schools for colored persons, is a violation of any of these rights. * * * It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep rooted prejudice in public opinion. This

prejudice, if it exists, is not created by law. Whether this distinction and prejudice, existing in the opinions and feelings of the community, would not as effectually be fostered by compelling
42 colored and white children to associate together may well be doubted.

At all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence; and we can not say that their decision upon it is not founded on just grounds of reason and experience, and is the result of a discriminating and honest judgment."

In an opinion of the Supreme Court of Pennsylvania in the case of the Phil. & Westchester R. R. Co. *vs.* Miles, 93 A. D. 744, is found the fullest and strongest statement of the reasons which justify a separation of the races.

That court says: "The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this state, resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why
43 the Creator made one black and the other white we do not know, but the fact is apparent and the races are distinct, each producing its own kind and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to His creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. The natural law which forbids their intermarriage and that social amalgamation which leads to a corruption of races is as clearly divine as that which imparted to them different natures. The tendency of intimate social mixture is amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is, therefore, an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is
44 but a step to illicit intercourse and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other freedman; that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but no less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations as far as reasonably practicable, but in a

spirit of kindness and charity and with due regard to equality of rights, it is not prejudice not caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator Himself, and not to compel them to intermix contrary to their instincts."

No well informed person in any section of the country will now deny that the position of the Southern people that "segregation in school, church and society is in the interest of racial integrity,
45 and racial progress," is sound and who will deny that that is a laudable desideratum.

Such have been from the earliest history of our country the views of our most profound scholars and wisest philosophers. History tells us that Thomas Jefferson was one of the first advocates of emancipation of the slaves, and that as early as 1778 he drew, offered and had passed in Virginia a bill prohibiting the importation of slaves by land or sea and proclaiming those so imported to be free. In another bill he providid for the emancipation of all after-born slaves, but while he was giving this unmistakable evidence of his abhorrence of slavery, it is said that he unreservedly expressed his disbelief that the two races could mingle in harmony under co-equal conditions of freedom. In 1821 when commenting upon and bewailing the failure of his state to adopt his schemes for emancipation he wrote the following:

"It was found that the public mind would not yet bear the proposition, nor will it bear it even at this day. Yet the day is not distant when it must bear and adopt it, or worse will follow. Nothing is more certainly written in the book of fate than that these
46 people are to be free. Nor is it less certain that the two races can not live in the same government. Nature, habit, opinion, have drawn indelible lines of distinction between them."

In the light of the fulfillment of the portion of this prophecy which the last generation witnessed, and with the race problem still unsolved, can the present generation, until the books of the negro problem in America are finally balanced, say with absolute certainty, that the other part of this great philosopher's prophecy was not forecasted with an equal prescience?

Applying the rules of law set out in this opinion—rules that have been announced by the highest authority and approved by so many courts—to the legislation now under consideration, the court is unable to reach any conclusion other than that the act in question comes clearly within the province of the law making power of the state, and that the court would be unwarranted in holding that the action of the Legislature was not a legitimate exercise of the police power of the state.

The defendant's demurrer to the indictment will therefore
47 be overruled and the defendant will be given an exception.

If this case reaches the higher courts and the views expressed in the opinion are sustained and upheld, it is the personal view of the judge of this court, that the act of the Legislature which is now so vigorously assailed by the defendant will prove to be a blessing to Berea College, and to the colored as well as to the white

youth of Kentucky. Instead of the usefulness of Berea College being hampered, it is the opinion of the judge of this court that its power for good will be greatly extended and enlarged. If it should be determined by the trustees of the College, as the judge of this court hopes and believes it will be, to continue the college at Berea for the reception and education of white boys and girls, and to establish at some other point in Kentucky, beyond the prohibited distance, a college for the reception and education of colored youth, the prejudice which has heretofore existed to some extent in some quarters and from some persons against Berea College, because of the co-
education there of the two races, will completely vanish, and
48 the generous open-handed people of Kentucky will extend their sympathy to, and give substantial aid and encouragement to both institutions to an extent to which many Kentuckians have heretofore been unwilling to do. These views, of course, do not affect the legal questions involved in this case, but they cause the judge of this court to be better satisfied with the conclusions reached as to the legal aspects of the case, than he could be, did he not believe that beneficent results will surely follow a cheerful compliance with and acquiescence in the Day Bill by the defendant.

This court does not believe that the Legislature of Kentucky was prompted by any race prejudice or any hostility towards the negro in passing the act under consideration. Kentucky is not inimical to the education of her colored citizens. The state not only pays annually as much per head for the education of each colored boy and girl between the ages of six and twenty years, as it does for each white boy and girl between those ages, but it maintains for the higher education of the colored race, a colored normal school at Frankfort, and in that school those who will agree to teach in the colored
common schools a period equal to twice the time spent in the
49 normal school are given free tuition. Annual appropriations of $5,000,000, and more are made from the funds of the state to support this school, and in 1902 there was a special appropriation of $15,000.00 made to erect new buildings.

While the legislature is thus constantly evincing a spirit of sympathy with, and giving substantial aid for the education of the colored youth of the state, it should not be said that that body was prompted by other than the purest and best motives in the enactment of this Day Bill.

Order Signing for Trial.

Ordered that this case be, and is, assigned to the 14th day of the present term for trial.

February Term, 21st Day of February, 1905.

6009.

COMMONWEALTH OF KENTUCKY
vs.
BEREA COLLEGE.

Jury, Verdict, and Judgment.

The defendant pleaded "not guilty" and a jury, to wit: Anderson Lake, Tom Hendren, W. J. Wagers, Shelby Million, W. O. Anderson, H. H. Colyer, John Duncan, Oscar Helton, Allen Douglas, F. M. Gibson, George H. Myers and John W. Ballard, were duly impannelled and sworn to try the issue joined. The indictment was read to the jury by the clerk and the jury, who after hearing the evidence and receiving instructions from the court, gave this verdict:

50

"We, the jury, find the defendant guilty and fix its fine at One Thousand Dollars.

H. H. COLYER, *Foreman.*

The defendant then offered a motion in arrest of judgment, on the ground that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court, which motion the court overruled, to which ruling of the court the defendant excepts.

Wherefore, it is adjudged that the plaintiff recover of the defendant the sum of One Thousand Dollars and her costs herein expended.

Order Filing Motion and Grounds for New Trial.

February Term, 22nd Day of February, 19—.

6009.

COMMONWEALTH
vs.
BEREA COLLEGE.

The defendant this day filed grounds herein in writing and thereupon moved the court to set aside the verdict and judgment

51

rendered herein and grant it a new trial, and the court having considered thereof and being advised, it is ordered that said motion be and is overruled, to which ruling of the court the defendant excepts and prays an appeal to the Court of Appeals, which is granted.

Motion and Grounds for a New Trial.

Madison Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BEREA COLLEGE, Defendant.

Motion and Grounds for a New Trial.

Case No. 1.

The defendant moves the court to grant a new trial herein on the following grounds:

First. That the verdict of the jury is contrary to law.

Second. That the court erred in giving to the jury the instructions asked for by the Commonwealth.

Third. That the court erred in refusing to give instruction number one asked for by the defendant.

Fourth. That the court erred in refusing to give instruction number two asked for by the defendant.

Fifth. That the court erred in overruling the motion of
52 the defendant to arrest the judgment.

Order Noting Filing of Bill of Exceptions.

The defendant tendered a bill of exceptions herein, which was approved and signed by the court and ordered to be filed and made a part of the record without being spread upon the order book.

Bill of Exceptions.

Madison Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
BEREA COLLEGE, Defendant.

Indictment: Operating a School for Whites and Negroes.

Be it remembered that on the calling of this case for trial in the Madison Circuit Court, the jury having been impanneled and sworn, the Commonwealth introduced as a witness A. BROCK, who testified as follows:

Direct examination by B. A. CRUTCHER:

Q. Mr. Brock, please state your name to the stenographer.
A. A. Brock is my name.

Q. Where do you reside Mr. Brock?
53 A. I live in Berea.
Q. In this county?
A. Yes, sir.
Q. Are you one of the teachers there, in this county?
A. Yes, sir, I teach there.
Q. Berea College: that is an incorporation?
A. I do not know.

The defendant at this point admitted by counsel that Berea College is a corporation organized and incorporated under the General Statutes of the State of Kentucky, and waived proof of same.

Q. Are you one of the professors in the school?
A. I have charge of the Night School Department only.
Q. At any time previous to the 8th day of October, 1904, was the college open for the reception of students?
A. During the summer, after the spring term had closed, during the summer I had charge of a night school and, as well as I remember, on the 13th, the forenoon of the 13th of September,
54 1904, they presented to me students; that is, one white student and one colored student, and directed me to teach them, and I did so.
Q. Was that in the college building, in Berea in this county?
A. Yes, sir.
Q. They were being taught in the same school?
A. Yes, sir.
Q. At the same time?
A. Yes, sir.
Q. And the same instruction?
A. Yes, sir.
Q. That was under the auspices of the college?
A. Yes, sir.
Q. Maintained and operated by Berea College?
A. Yes, sir.
Q. You are a professor in the college?
A. I do teaching work; that is, I have never received any degree that would entitle me to be called a professor.
Q. You have received your pay from Berea College, a school and institution of learning in this county?
55 A. Yes, sir.
Q. And were acting under their direction at the time you taught the school?
A. Yes, sir.

This being all of the evidence introduced or offered by either party.

The Commonwealth moved the court to give the jury the following instructions:

1. If the jury believe from the evidence beyond a reasonable doubt that the defendant, Berea College, being a corporation and owning, maintaining and operating a college, school or institution of learning known as Berea College, located in the town of Berea in

Madison County, Kentucky, did in Madison County, Kentucky, after the 15th day of July, 1904, and before the 8th day of October, 1904, unlawfully and wilfully, that is, intentionally, permit and receive both the white and negro races as pupils for instruction in said college, school and institution of learning; the jury
56 should find the defendant guilty and fix its punishment at a fine of one thousand dollars.

2. Unless the defendant has been proved guilty beyond a reasonable doubt, the jury should find the defendant not guilty.

To the giving of which instructions, the defendant objected, but the court overruled the objection and gave said instructions to the jury, to which ruling the defendant excepted and still excepts.

The defendant moved the court to give the jury the following instructions:

1. That the Act of the General Assembly of the Commonwealth of Kentucky entitled, "An Act to prohibit white and colored persons from attending the same school," under which the indictment herein was found, is in conflict with the Bill of Rights and the Constitution of the Commonwealth of Kentucky, and is null and void; and the jury is instructed to find the defendant not guilty, to the giving of which instruction the Commonwealth objected, and the court sustained the objection and refused to give said instruction to the jury, to which ruling the defendant excepted and still excepts.

57 The defendant also moved the court to give the jury the following instruction:

2. That the Act of the General Assembly of the Commonwealth of Kentucky entitled, "An Act to prohibit white and colored persons from attending the same school," under which the indictment herein was found, violates the provisions of the Fourteenth Amendment to the Constitution of the United States, and is null and void, and the jury is instructed to find a verdict of not guilty; to the giving of which instruction the Commonwealth objected and the court sustained the objection and refused to give such instruction to the jury, to which ruling of the court the defendant excepted and still excepts.

The foregoing being all the instructions asked by either party and all given or refused by the court, the case was submitted to the jury, who returned the following verdict:

We, the jury, find the defendant guilty and fix its fine at one thousand dollars.

H. H. COLYER, *Foreman.*

Whereupon the defendant moved the court to arrest the judgment, on the following ground; *i. e.*, that the facts stated
58 in the indictment do not constitute a public offense within the jurisdiction of the court, which motion was overruled by the court, to which ruling the defendant excepted and still excepts.

Thereupon, the court entered the following judgment:

Wherefore it is adjudged that the plaintiff recover of the de-

fendant the sum of one thousand dollars and her costs herein expended; to which the defendant excepted and still excepts.

Afterwards, to-wit: on the 22nd day of February, 1905, the defendant filed a motion and the following grounds for a new trial, to-wit:

First. That the verdict of the jury is contrary to law.

Second. That the court erred in giving to the jury the instructions asked for by the Commonwealth.

Third. That the court erred in refusing to give instruction number one asked for by the defendant.

Fourth. That the court erred in refusing to give instruction number two asked for by the defendant.

Fifth. That the court erred in overruling the motion of
59 the defendant to arrest the judgment.

The court overruled said motion of defendant for a new trial, to which ruling of the court the defendant excepted and still excepts; and now prays that this its bill of exceptions be signed, sealed and enrolled and made part of the record, which is done.

And the said defendant prays an appeal to the Court of Appeals of Kentucky, which is granted.

J. M. BENTON, *Judge.*

CLERK'S OFFICE, *March 6th*, 1905.

Order Noting Execution of Supersedeas Bond.

6009.

COMMONWEALTH OF KENTUCKY
vs.
BEREA COLLEGE.

The defendant, Berea College, with S. S. Parks as surety, this day executed supersedeas bond to the Court of Appeals.

Supersedeas Bond.

6009.

BEREA COLLEGE, Appellant,
against
COMMONWEALTH, Appellee.

Upon an Appeal from a Judgment of the Madison Circuit Court, Rendered 21st day of Feby., 1905.

60 Whereas, said appellant, Berea College, an appeal from the judgment of the Madison Circuit Court, rendered at its February Term, 1905, against it in favor of the Appellee, for the sum of One Thousand Dollars, and the costs herein expended, and the appel-

lant desires to supersede the whole the said judgment above mentioned:

Now, we, Berea College with S. S. Parkes, surety, do hereby covenant to and with the appellee, The Commonwealth of Kentucky, that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the whole judgment above stated, in case it shall be affirmed, and any judgment or order which the Court of Appeals may render, or order to be rendered by the inferior court, not exceeding in amount of value the whole judgment aforesaid. *(And also pay all rents, hire or damage, which, during the pendency of the appeal, may accrue on any part of the property of which the appellee is kept out of possession, by reason of the appeal.)

Witness our hands, this 6 day of Mch., 1905.

BEREA COLLEGE,
By T. J. OSBORNE, *Treasurer*,
S. S. PARKES.

61 *This part of the bond may be omitted, except when real estate is in controversy in the suit.

62 STATE OF KENTUCKY, *Madison Circuit Court, set:*

I, Roy C. White, Clerk of the Madison Circuit Court, do certify that the foregoing is a true copy of the record of the Commonwealth of Kentucky *vs.* Berea College, No. 6009, as ful as the same remains of record and on file in my said office.

Witness my hand, this the 15 day of March, 1905.

ROY C. WHITE, *C. M. C. C.*

63 Be it remembered that on the 10th day of April, 1905, at a Court of Appeals held at the Capitol at Frankfort the following order was entered, to-wit:

BEREA COLLEGE
v.
COMMONWEALTH.

Madison.

SAME
v.
SAME.

Madison.

Came the parties by counsel and on motion said cases are ordered set for oral argument on May 19th, 1905, and afterwards on the 27th day of April, 1905, at a Court of Appeals held at the Capitol at Frankfort the following order was entered to-wit:

BEREA COLLEGE
v.
COMMONWEALTH.

Madison.

SAME
v.
SAME.

Madison.

Came appellants in the foregoing cases by counsel and filed an agreement, and on motion it is ordered that the order setting the cases for oral argument on May 19th be set aside and said cases are ordered continued for argument to the September term, and appellant is given until July 1st to file brief, and appellee is given until cases are set on the docket to file brief.

64 And afterwards on the 24th day of October, 1905, at a Court of Appeals held at the Capitol at Frankfort the following order was entered.

BEREA COLLEGE
v.
COMMONWEALTH.

2 Cases. Madison.

Came parties by counsel and on Motion said cases are ordered continued and set for oral argument on January 9th & 10th.

And afterwards on the 10th day of January 1906, at a Court of Appeals held at the Capitol at Frankfort the following order was entered to-wit:

BEREA COLLEGE.
v.
COMMONWEALTH.

2 Cases. Madison.

Came parties by counsel and on motion these cases are continued for oral argument and set for Feb. 2, 1906.

And afterwards on the 2nd day of February, 1906, at a Court of Appeals held at the Capitol at Frankfort the following order was entered, to-wit:

BEREA COLLEGE
v.
COMMONWEALTH.

2 Cases. Madison.

These cases coming on for hearing were argued by John G. Carlisle, C. F. Burnam and Guy Mallon for the appellant and N. B. Hays, Attorney General for the Appellee and submitted.

And afterwards on the 12th day of June, 1906 at a Court of Appeals held at the capitol at Frankfort the following Judg-
65 ment was entered,

6009.

BEREA COLLEGE, Appellant,
v.
COMMONWEALTH, Appellee.

Appeal from Madison Circuit Court.

The court being sufficiently advised it seems to them there is no error in the judgment herein.

It is therefore considered that said Judgment be affirmed, and that appellee recover of appellant ten per cent. damages on amount of the judgment superseded herein, which is ordered certified to said court. (Whole Court sitting except Judge Cantrill. Judge Barker dissenting.)

It is further considered that the appellee recover of the appellant its costs herein expended.

And on said day the following opinion was delivered:

66 Court of Appeals of Kentucky.

June 12, 1906. (To be Reported.)

BEREA COLLEGE, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Appeal from Madison Circuit Court.

Opinion of the Court by Judge O'Rear.

There were two indictments against appellant in the Madison Circuit Court, for alleged infractions of an act of the Legislature, approved March 22, 1904, entitled "An Act to Prohibit White and Colored Persons from Attending the Same School." The first indictment which was numbered 6009 on the circuit court calendar,

charged appellant with operating a school for whites and negroes in violation of the act. The second indictment, numbered 6045, charges appellant with the offense of "maintaining and operating a college, school and institution of learning where persons of the white and negro races are both received, and within a distance of twenty-five miles of each other, as pupils for instruction."

67 The act alluded to, the title to which has been given above, is in the following words:—

"SECTION 1. That it shall be unlawful for any person, corporation or association of persons to maintain or operate any college, school or institution where persons of the white and negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school or institution shall be fined $1000., and any person or corporation who may be convicted of violating the provisions of this act shall be fined $100. for each day they may operate said school, college or institution after such conviction.

"SECTION 2. That any instructor who shall teach in any school, college or institution where members of said two races are received as pupils for instruction shall be guilty of operating and maintaining same and fined as provided in the first section hereof.

"SECTION 3. It shall be unlawful for any white person to

68 attend any school or institution where negroes are received as pupils or receive instruction, and it shall be unlawful for any negro or colored person to attend any school or institution where white persons are received as pupils or receive instruction. Any person so offending shall be fined $50. for each day he attends such institution or school: provided, that the provisions of this law shall not apply to any penal institution or house of reform.

"SECTION 4. Nothing in this act shall be construed to prevent any private school, college or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty-five miles distant, for the education exclusively of one race or color.

"SECTION 5. This act shall not take effect, or be in operation before the 15th day of July, 1904." (Acts 1904, Ch. 85, page 181.)

Appellant was found guilty and *found* $1000. in each case. These appeals involve the constitutionality of the statute. The cases are heard and disposed of together.

69 Appellant Berea College is a private non-sectarian school. It was founded some fifty years ago, for the purpose, it is said, of "promoting the cause of Christ" and to give general and non-sectarian religious instruction to "all youth of good moral character." With a large endowment, extensive buildings and grounds and educational paraphernalia, it had for nearly fifty years before the act in question maintained a school at Berea, in Madison county, this State, presumably upon substantially the same basis as it was doing when the statute was enacted, and the indictments in these cases returned.

The circuit court sustained the constitutionality of the act in

every particular. Appellant assails its constitutionality upon the ground that it violates the Bill of Rights embraced in the Constitution of this State, as well as that it is in conflict with the Fourteenth Amendment to the Constitution of the United States.

It is claimed that the act is repugnant to the Bill of Rights in that it violates the following, which are guaranties to every citizen:—

1. The right of enjoying and defending their liberty.

2. The right of worshipping Almighty God according to
70 the dictates of their own consciences.

3. The right of seeking and pursuing their safety and happiness.

4. The right of freely communicating their thoughts and opinions.

5. The right of acquiring and protecting property.

6. That every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty.

The 26th section of the Bill of Rights concludes:—

"To guard against transgression of the high powers which we have delegated, we declare that everything in this bill of rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this constitution, shall be void."

Appellant's contention is:—

71 "This act violates the letter or spirit of every one of the provisions referred to. It destroys the rights of the teachers and pupils of Berea College to enjoy their liberties and the right of seeking and pursuing their safety and happiness. It denies the right to worship God according to the dictates of their own consciences by attending and participating in non-sectarian religious exercises in a school or institution of their own choice. It denies to the trustees, the teachers and all others connected with the institution the right to freely communicate their thoughts and opinions, and it denies to the institution itself and to its assistants and employees of every grade the right of acquiring and protecting property and the right to follow their usual and innocent occupations."

We understand appellant's argument to reach to the conclusion that the exercise of police power by the State is prohibited concerning the subjects enumerated in the bill of rights, at least
72 it is beneath those rights, and must be exercised so as not to conflict with them.

No jurist has dared to attempt to state the limit in law of that quality in government which is exercised through what is termed the police power. All agree that it would be inadvisable to attempt it. Yet very broadly and indefinitely speaking, it is the power and obligation of government to secure and promote the general welfare, comfort and convenience of the citizens, as well as the public peace, the public health, the public morals, and the public safety. (Cooley's Const. Limitations, 704; Tiedeman's Limitations of Police Power, 212; 1 Hare's American Constitutional Law, 766.) It is not inaptly regarded in some of its most important features as the right of self-protection in government, the right of self-preserva-

tion in society. It inheres in every State, is fundamental in the existence of every independent government, enabling it to conserve the well being of society and prohibit all things hurtful to its comfort, or inimical to its existence. In view of these definitions of the principle, unsatisfactory as they must be conceded to be, it is apparent that even those things reserved by the people in the bill of rights from the powers delegated to their magistrates are impliedly subject also to this power to preserve the State. It has always
73 been so regarded, except wherein its exercise in a particular manner or of a particular thing is expressly excluded, or necessarily so by the language used. It would be more tedious than difficult to enumerate instances. But some of those most readily occurring to the mind which are held subject to this power, are, that life and liberty either or both may be forfeited by the citizen under laws enacted under it. The right of worshipping Almighty God according to the dictates of our own consciences—probably the first great moving cause of our early colonial civilization—yields to the proper exercise of this power. For example, the practices of polygamy, so inimical to the well being of society, though deemed a religious rite, must yield to the police power of the State. If it were held here by some, as it is in some countries, a religious duty that mothers should worship God by sacrificing their babes, throwing them into the rivers to appease His supposed wrath, it would not be tolerated by the State, however conscientious the votary of the right. The pursuit of happiness in any useful and innocent employment, or the free movement of one's person, even when done under considerations of his own safety, are subject to this same power.
74 The most familiar instance probably is the application of quarantine and health laws. Yet this power itself fortunately has its limitations. To be exercised exclusively within the discretion of the political branch of government, it must have a just and real relation to one of the ends for which that power may be lawfully employed. Mere declaration that the proposed exercise is in behalf of such end is not enough. The action must be cognate to one of the subjects to which the power properly pertains. The duty is upon the courts upon a proper application, to declare void an attempted exercise of such power, which is not fairly and reasonably related to a proper end. Thus balanced, there is little danger that oppression can result from its arbitrary employment. The good sense and the honest judgment of each generation must after all furnish the real limit to the police power of government. For each age must judge, and will judge, of what is hurtful to its welfare, of what endangers the existence of society, of what threatents to destroy the race of people who are applying this primal law of self protection to their own case.

Because of its undefined extent, of its overpowering quality, of its unmeasurable value, of the great danger of oppression under
75 its guise, and of its abuse by those intolerant of the restraints of law, any new application of the police power of government is regarded with closest scrutiny, not unmixed with apprehension.

It can be abused, to the hurt of the people. It can be neglected to the hurt of the State.

The application of it by the statute above quoted, is new. It has never before been so applied so far as we are certainly aware. The question is, is it a fair exercise of the police power to prohibit the teaching of the white and negro races together? Is it a fair exercise of the power to restrain the two races from voluntarily associating together in a private school, to acquire a scholastic education?

The mingling of the blood of the white and negro races by interbreeding is deemd by the political department of our State government as being hurtful to the welfare of society. Marriage by members of the one race with those of the other is prohibited by statute. (Sections 2097, 2098, 2111, 2141, Ky. Statutes.) It is admitted freely in argument that the subject of marriage is one of the very first importance to society; that it may be regulated by law even as among members of the same race. Inbreeding is
76 known to lower the mental and physical vigor of the offspring. So incestuous marriages are prohibited. Others not incestuous, but involving the probable effect upon the vitality of the offspring are prohibited also, as marriages by idiots. Still other inhibitions, such as age, and so forth, are imposed, all of which look to the well being of the future generations. No one questions the validity of such statutes, enacted as they confessedly are under the police power of the State. Upon the same considerations this same power has been exercised to prohibit the intermarriage of the two races. The result of such marriage would be to destroy the purity of blood and identity of each. It would detract from whatever characteristic force pertained to either. Such statutes have been upheld in the following cases:

Ex parte Hobbs, 1 Woods, 537;
State *v.* Gibson, 36 Ind. 402;
State *v.* Jackson, 80 Mo. 177;
State *v.* Hairston, 63 N. C. 453;
Brook *v.* Brook, 9 H. L. 193;
Green *v.* State, 58 Ala. 190; 29 Am. Rep. 742;
Lonas *v.* State, 3 Heisk (Tenn.) 309.

77 Another exercise of the police power with respect to the separation of the two races which has been upheld, is the requiring them to use separate coaches in traveling upon railroads, as adopted by certain of the States. These statutes, and regulations of a similar kind even without statute, have been upheld wherever their validity has been questioned. The opinions in the following cases show the unanimity of holding and reasoning on this subject:

West Chester & Phil. R. R. Co. *v.* Mills, 55 Pennsylvania State, 209; 93 Am. Dec. 747; Smith *v.* State, 100 Tenn. 494; L. N. O. & T. R. R. Co. *v.* Mississippi, 133 U. S. 587; Plessy *v.* Ferguson, 163 U. S. 537; C. & O. Ry. Co. *v.* Kentucky, 179 U. S. 392.

We have such statute in Kentucky: section 795 Ky. Statutes. The validity of this statute has been upheld by this Court in L. &

N. R. R. Co. *v.* Commonwealth, 99 Ky. 663; Quinn *v.* L. & N. R. R. Co., 98 Ky. 231; Wood *v.* L. & N. R. R. Co., 19 R. 924; 101 Ky. 703; Ohio Valley R. R. Co. *v.* Lander, 104 Ky. 431; C. & O. Ry. Co. *v.* Commonwealth, 21 Rep. 228.)

78 In the provisions for public education made by the government of the United States for the District of Columbia, and by many of the States, a separation of the races is enforced by requiring separate schools to be provided for each, and prohibiting members of either race from attending the school provided for the other. In every instance in which the question has arisen as to the validity of such legislation it has been upheld as a valid exercise of its police power by the State.

Sections 16 & 17, Ch. 156 U. S. Statutes at Large;
Section 187 Constitution of Kentucky;
Section 4428 Ky. Statutes;
Lehew *v.* Brummell, 103 No. 551;
Corey *v.* Carter, 48 Ind. 362;
Martin *v.* Board of Education, 42 W. Va. 515;
State of Ohio *v.* McCann, 21 Ohio, 210;
Cisco *v.* School Board, 161 N. Y. 598;
Bertonneau *v.* Board of Directors, 3 Woods, 180.

Distinguished counsel for appellant while conceding the correctness of the application of the principle being discussed to
79 public schools and common carriers, seek to distinguish that application from the one contended for by the State in the case at bar upon the ground that in the cases of common schools and railroad travel the State was merely preventing an enforced association by the two races, whereas under the statute now being considered the power is attempted to be extended so as to prevent the voluntary association by the two races.

We cannot agree that the ground of distinction noted could form a proper demarkation between the point where the power might be exercised, and the one where it might not be. The thing aimed at by all this legislation was not that of volition. It was not until recently that attendance upon common or public schools was compulsory. It has nearly always been voluntary. All this legislation was aimed at something deeper and more important than the matter of choice. Indeed if the mere choice of the person to be affected were the only object of the statutes, it might well be doubted whether that was at all a permissible subject for the exercise of the police power.

The separation of the human family into races, distinguished
80 no less by color than by temperament and other qualities is as certain as anything in nature. Those of us who believe that all of this was divinely ordered have no doubt that there was wisdom in the provision, albeit we are unable to say with assurance why it is so. Those who see in it only Nature's work must also concede that in this order, as in all others in nature, there is an unerring justification. There exists in each race a homogenesis by which it will perpetually reproduce itself, if unadulterated. Its

instinct is gregarious. As a check there is another, an antipathy to other races—which some call race prejudice. This is nature's guard to prevent amalgamation of the races. A disregard of this antipathy to the point of mating between the races is unnatural, and begets a resentment in the normal mind. It is incompatible to the continued being of the races, and is repugnant to their instincts. So much mating is universally regarded with disfavor. In the lower animals this quality may be more effective in the preservation of distinct breeds. But among men conventional decrees in the form of governmental prescripts are resorted to in aid of right conduct to preserve the purity of blood. No higher welfare of society can be thought of than the preservation of
81 the best qualities of manhood of all its races. If then it is a legitimate exercise of the police power of government to prevent the mixing of the races in cross-breeding, it would seem to be equally within the same power to regulate that character of association which tends to a breech of the main desideratum—the purity of racial blood. In less civilized society the stronger would probably annihilate the weaker race. Humane civilization is endeavoring to fulfill nature's edicts as to the preservation of race identity in a different way. Instead of one exterminating the other, it is attempted to so regulate their necessary intercourse as to preserve each in its integrity.

The maxims of liberty and the pursuit of happiness which are familiar to the common law, wherefrom the idea found in our bill of rights is probably borrowed, are the principles worked out by the Anglo-Saxon race for its own government. In no other country has it ever been attempted before, at least on so important a scale, to apply such principles alike to so many different races, types and creeds of men. The experiment is great in its importance. It forms now one of the biggest questions being worked out by this great North American republic. That much bitterness
82 has appeared, and some oppression has been practiced, are among the inevitable attendants upon the adjustment by people of different races of the rights justly belonging to each. Clashing of antipathies resulting in outbreaks of violence, tends to disturb the public peace; threatens the public safety, and so disrupts the serenity of common purpose to promote the welfare of all the people, that the question is become one of the first importance to the section where the two races live in the greatest numbers. That it is well within the police power of government to legislate upon this question so as to repress such outbreaks and to prevent disturbances of the public tranquil-ty, we have no sort of doubt. The seriousness of the situation is not new. Even before the abolition of slavery it was keenly and intelligently anticipated. Since the emancipation of the negro it has been not the least of the grave problems of government which have been presented to some of the States for solution. As the outcome of discussion, of agitation, of too-frequent conflicts, of violent turbulence that set even the law at defiance in some localities and in times of great

popular excitement, this species of legislation has been evolved
83 as tending to a solution of the trouble by removing as far as possible its cause. Is not this situation one, if ever there was one, which calls for and amply justifies the exercise of police power of government? Or should this irritating cause be left without restraint or control, till by the exhaustion of one side or the other it is settled by the sheer force of superiority of numbers or physical power? It is idle to talk of controlling ideas by legislation, or even by force. You cannot bind an idea by a statute. The attempt should be made, and we believe is being made, in good faith to so control this situation through the law that neither race can have just cause for complaint; so that each may have every lawful privilege and right that the other has; so that equality of rights before the law shall be a fact as well as a high-sounding theory; yet so as to conserve the very best of the characteristics of each race, to develop its ideals of morality, its thrift, independence and usefulness. Observation and study at close hand of both the theory and practical working of this problem of social existence, of the colaboration of two races so different as the white and black in the same State upon a plane of legal equality, where the government is by the people for the people, it has been found, so the
84 legislative department declares as evinced by the public policy indicated by the statutes discussed in this opinion, that at the very bottom of all the trouble is the racial antipathy to the destruction of its own identity; and that if that danger is removed, the friction practically disappears. A separation of the races under certain conditions is therefore enforced, where it is believed that their mingling would tend to produce the very condition which is found to lie at the base of the trouble. In its application it becomes all the more necessary that the overmastering principles included in the police power of government be firmly recognized, so that a clashing of race prejudices, or race destruction may be lawfully averted.

Counsel resort to conjecture concerning other legislation of this character which they fear might follow that now involved. It is suggested that the State might attempt to regulate, under the same power, the right of the races to work together in the same fields or factories, or to mingle together at all. A sufficient present answer to this is that each proposed application of the power is to be determined upon the circumstances under which it is sought to
85 be applied. If it is arbitrary, unreasonable or oppressive, it will be denied. Nor is it a legitimate argument to prove a negation of power by showing where in it may be abused. If it be conceded, as we think the fact is, that the ultimate object of this legislation providing separate schools for the two races was to separate the youth of each during the most impressible and least responsible period of their lives, and until ripened judgment and observation can have set them well in the safe ways of thinking, much of the dangers of the shame and distress which errors of immaturity might entail would be avoided. The legislation above enumerated is all of a kind. It has two great objects—one,

the preservation of the identity and purity of the races; the other, the avoidance of clashes between the races by preventing their most fruitful sources.

In upholding this character of legislation in a separate coach regulation the Supreme Court of Pennsylvania, in West Chester etc. R. R. Co. *v.* Miles, 93 Am. Dec. 747, thus stated the principal thought:—

"The danger to the peace engendered by the feeling of aversion between individuals of the different races can not be denied. It is the fact with which the company must deal. If a negro takes
86 his seat besides a white man or his wife or daughter, the law can not repress the anger or conquer the feeling of aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it.

"It is much wiser to avert the consequences of this repulsion of race by separation than to punish afterwards, the breach of the peace it may have caused. * * *

"The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is, whether there is such a difference between the white and black races within this State, resulting from nature, law and custom, as makes it a reasonable ground of separation. The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feel-
87 ings which he always imparts to his creatures when he intends that they shall not overstep the natural boundaries he has assigned to them. The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of the races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is, therefore, an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is
88 not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The right of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repul-

sive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, so far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

Appellant's counsel construe this opinion as supporting their theory that the power being discussed may be exercised only where it forbids the enforced association of the races. While such
89 enforced association is more easily distinguished as falling within the power, yet the main idea is that such association at all under certain conditions leads to the main evil, which is, amalgamation of the races, and incidentally to conflicts between their members naturally engendered by too close personal conduct under conditions which are bound to excite prejudices and race animosities. If such evil falls within the police power to prevent, then whatever naturally contributes to them, may also be regulated, provided the regulation is itself reasonable. The act in question is within the legitimate exercise of the police power of the State, provided it is not so unreasonable in its provisions as to be oppressive and obnoxious to the limitations of the power. It is argued for appellant that the act quoted makes it a misdemeanor to teach white and negro pupils in the same institution anywhere in the State, (but for the proviso contained in the fourth section of the act) although there might not be a mingling of the races at all. This would be out of harmony with the spirit of the law. It would be an unreasonable and unwarranted interference indeed with the citizen's right to teach, and the pupils to be taught. Under the
90 rule in the construction of a statute to resolve any ambiguity in its language in favor of that meaning which is not repugnant to the Constitution, if the language admits of more than one construction, we have no doubt that the intention of this act was to prevent the two races from attending the same school at the same place and the same time whereby there would result an intermingling or close personal association between them. Such is the fair, reasonable meaning of the whole act, including title and context.

Section 4 of the statute makes it a misdemeanor not only to teach pupils of the two races in branches of the same institution, even though one race exclusively is taught in one branch, and the other in another branch, provided the two branches are within twenty-five miles of each other. This section is added as a proviso to the previous sections. Without this section as we construe the act, the teaching of the two races in the same school at the same time and place is prohibited. But, if the same school taught the different races at different times, though at the same place, or at different places at the same time, it would not be unlawful. It evi-
91 dently was thought that the effect of the statute might be nullified by teaching the two races in the same school at the same time and place in fact, but perhaps in different rooms of the same building, or in different buildings of the same college plant,

constituting to all intents one building. A teaching in different rooms of the same building, or in different buildings so near to each other as to be practically one, would violate the statute. As it was such intimate personal association of the pupils that was being prohibited, it was attempted by the fourth section to make this impossible by prohibiting such teaching in branches of the same school if done within twenty-five miles of each other. This last section we think violates the limitations upon the police power: it is unreasonable and oppressive. We must look to the object of the legislation as well as to the words of the statute to devine the true meaning. It is not to prevent either race from being taught by an institution which also teaches the other. Nor is it to prevent persons from one race from teaching persons of the other, or employing their means for that purpose. The State itself teaches both races, but in separate schools. They are both taught within twenty-five miles of
92 each other, and within very short distances of each other. But this section can be ignored and the remainder of the act is complete notwithstanding.

The remaining question is whether the act as construed by this Court violates the Fourteenth Amendment to the Constitution of the United States. That amendment guarantees the equal protection of the laws to all citizens of the United States, and prohibits any State from depriving any citizen of the United States of his property, life or liberty without due process of law.

The act involved applies equally to all citizens. It makes no discrimination against those of either race.

The right to teach white and negro children in a private school at the same time and place is not a property right. Besides, appellant as a corporation created by this State has no natural right to teach at all. Its right to teach is such as the State sees fit to give to it. The State may withhold it altogether, or qualify it. (Allgeyer *v.* Louisiana, 165 U. S. 578.) We do not think the act is in conflict with the Federal Constitution.

93 Wherefore, we conclude that the judgment in case 6009 should be *affirmed;* and that the judgment in case 6045 should be *reversed,* and be remanded with directions to dismiss that indictment.

The whole Court sitting, except Cantrill, J. absent. Judge Barker dissents, except in case 6045.

N. B. HAYS,
Att'y Gen'l,
CHAS. H. MORRIS,
For Appellee.

JOHN G. CARLISLE,
C. F. BURNAM,
GUY WARD MALLON,
For Appellant.

94 Be it remembered that on the 21st day of June, 1906 the following order was filed in the office of the Clerk of the Court of Appeals, to-wit:

Court of Appeals of Kentucky.

BEREA COLLEGE
v.
COMMONWEALTH OF KENTUCKY.

Time until the 1st day of next September term of the court is given to counsel for appellant to file a petition for rehearing of this cause heretofore docketed as No. —.

W. E. SETTLE,
Judge Court of Appeals.

95 Be it remembered that on the 25th day of October 1906 at a Court of Appeals held at the Capitol at Frankfort the following order was entered to-wit:

BEREA COLLEGE
vs.
COMMONWEALTH.

Madison.

Come appellant by counsel and filed grounds, and moved the court to grant a rehearing herein, and for a re-argument of said case, and further moved the court for an extension of thirty days to file a bond herein, on a writ of error to the Supreme Court of the United States, which motions are submitted. (The grounds named in the foregoing order are as follows:)

96 No. 1.

BEREA COLLEGE
vs.
COMMONWEALTH OF KY.

The appellants move the court for a rehearing of this cause, and as grounds therefor refer to the brief filed herein by Messrs. Carlisle and Mallon, and especially upon the unconstitutionality of the Kentucky Statute, on which the indictment and trial and judgment rendered by the Madison Circuit Court was based.

With all due respect to this Honorable Court, they think the opinion rendered sustaining in part the validity of that Statute upon Police Power of the State is erroneous, and should be reviewed.

CARLISLE, BURNAM & MALLON.

97 Be it remembered that on the 25th day of Oct. 1906, the appellant filed in the office of the Clerk of the Court of Appeals, an Assignment of Errors, and which is in words and figures as follows:

BEREA COLLEGE
vs.
COMMONWEALTH OF KY.

Assignment of Errors.

The appellant assigns the following errors:
1st. The Court erred in the opinion rendered in not adjudicating that the Kentucky Statute under which the indictment was found and the trial and conviction were *had* to be unconstitutional.
2nd. In not adjudging that said Statute was violative of the 14th Amendment of the Constitution of the United States, and the Bill of Rights of the Kentucky State Constitution.
3rd. It was error not to reverse the judgment of the Circuit Court and gnant a new trial.
98 4th. The court should on the reversal have ordered the Indictment to be dismissed and the appellant discharged from all liability from the fine of $1444 and costs.

CARLISLE, MALLON & BURNAM,
For Appellant.

99 Be it remembered that on the 22nd day of November 1906 at a Court of Appeals, held at the Capitol at Frankfort, the following order was entered, and which is in words and figures as follows:

BEREA COLLEGE
v.
COMMONWEALTH.

Madison.

The court being sufficiently advised it is considered that appellant's motion for a rehearing be and the same is hereby overruled: and it is further considered that the appellant be given 20 days from this date to execute a Writ of Error bond on an appeal to the Supreme Court of the United States.

100 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, sct;

I, J. Morgan Chinn, Clerk of the Court of Appeals of Kentucky certify that the foregoing is a correct copy of the transcript of the record, including the judgment and opinion of the court in the case of

BEREA COLLEGE, Appellant,
v.
THE COMMONWEALTH OF KENTUCKY, Appellee,

Appeal from Madison Circuit Court.

as the same appears from the records of my office.

In testimony whereof I hereunto set my hand and caused my official seal to be hereunto affixed. Done at the Capitol at Frankfort this the 26th day of November, A. D. 1906.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk Court of Appeals of Kentucky.

101 Be it remembered that on the 7th day of December 1906, there was filed in the office of the Clerk of the Court of Appeals of Kentucky, a petition for Writ of Error, and which is hereto attached, and is as follows—

102 Kentucky Court of Appeals.

BEREA COLLEGE, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Court of Appeals in rendering judgment against it in the above entitled case, the Appellant prays a writ of error from said decision and judgment to the Supreme Court of the United States. Assignment of errors herewith.

C. F. BURNAM,
Attorney for Appellant.

STATE OF KENTUCKY, *Court of Appeals, ss:*

The writ of error is allowed upon the execution of a bond by the Berea College to the Commonwealth of Kentucky, in the sum of two thousand dollars said bond when approved to act as a supersedeas. Dated Decr. 3 1906.

J. P. HOBSON,
Chief Justice of the Kentucky Court of Appeals.

[Endorsed:] Filed Dec. 7 1906 J. Morgan Chinn, C. Ct.

103 And on daid date there was filed in the office of the Clerk of the Court of Appeals, the Original Writ of Error, and order allowing same, and which is hereto attached, and is as follows—

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Court of Appeals of Kentucky:

Because, in the records and proceedings, as also the rendition of a judgment in a plea which is in the said Court of Appeals of Kentucky, before you, at the June sitting of the April term, 1906, therof, between Berea College, Appellant, *Versus* Commonwealth of

Kentucky, Appellee, a manifest error has happened, to the great damage of the said Appellant, and plaintiff in error, Berea College, as by its complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the city of Washington, D. C., and filed in the office of Clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this December 7th, 1906

Done in the City of Frankfort, with the seal of the Circuit Court of the United States for the District of Kentucky attached.

[6th Circuit Court, Eastern Ky. Dis., U. S. of America.]

WALTER G. CHAPMAN,
Clerk Circuit Court United States, Dist. of Kentucky.

Allowed,
J. P. HOBSON,
Chief Justice Kentucky Court of Appeals.

[Endorsed:] Filed Dec. 7, 1906. J. Morgan Chinn, C. Ct.

105 And on said date there was filed in the office of the Clerk of the Court of Appeals of Ky. the original Citation, with proof of summons endorsed thereon, and which is hereto attached, and is as follows:

106 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of appeals of Kentucky, wherein The Berea College is Plaintiff in error and you are Defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Court of Appeals of Kentucky, this 7th day of Dec'r, 1906.

J. P. HOBSON,
Chief Justice, Kentucky Court of Appeals.

Attest:
J. MORGAN CHINN,
Clerk, Kentucky Court of Appeals.

FRANKFORT, KENTUCKY, *Decr.* 7, 190–.

I Attorney General, and as attorney of record for the Commonwealth of Kentucky in the above entitled case, hereby acknowledge the service of the above citation.

N. B. HAYS,
Attorney Gen.

Filed Dec. 7, 1906.

J. MORGAN CHINN, *C. Ct.*

107 And on said date there was filed in the office of the Clerk of the Court of Appeals, a writ of Error bond, and which is in words and figures as follows to-wit:

108 Supreme Court of the United States.

BEREA COLLEGE, Appellant and Defendant in Error,
vs.
COMMONWEALTH OF KENTUCKY, Appellee and Plaintiff in Error.

Bond.

Know all men by these presents, that we, The Berea College as principal and The National Surety Co., as sureties, are held and firmly bound unto the Commonwealth of Kentucky in the sum of Two Thousand Dollars, to be paid to the said Commonwealth of Kentucky, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 7th day of Dec., 1906.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Kentucky Court of Appeals.

Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

BEREA COLLEGE,
By F. J. OSBORNE,
Treasurer.

Approved by
J. P. HOBSON,
Chief Justice Ky. Court of Appeals.

THE NATIONAL SURETY CO.,
[SEAL.] By D. D. SMITH,
Resident Secretary.

109 And afterwards on the 20th day of December, A. D. 1906, there was filed in the office of the Clerk of the Court of Appeals of Kentucky, an additional assignment of Errors, and which is in words and figures as follows, to-wit—

BEREA COLLEGE, Plaintiff in Error,
v.
COMMONWEALTH OF KENTUCKY, Defendant in Error.

And now comes Berea College, the plaintiff in error herein by its attorneys J. G. Carlisle, Guy Ward Mallon, and C. F. Burnam, and says there are manifest errors in the judgment rendered by the Court of Appeals of the Commonwealth of Kentucky, on the 12th day of June, 1906, in this, towit—

1. The said Court erred in sustaining the action of the Circuit Court of Madison County in overruling the demurrer to the indictment.

2. The said Court erred in sustaining the action of said Circuit Court in the first instruction to the jury, asked for by the Commonwealth.

3. The Court erred in sustaining the action of the said Circuit court in refusing to give to the jury the several instructions asked for by the defendant.

4. The said Court erred in sustaining the action of the said Circuit Court in overruling the motion to arrest the judgment.

5. The said Court erred in sustaining the action of said Circuit Court in overruling the motion for a new trial.

6. The said Court erred in deciding that the statute under which the indictment was found, did not violate any of the provisions of the Fourteenth Amendment to the Constitution of the United States.

7. The said Court erred in deciding that said Statute did not deprive plaintiff in error of its property and property *and property* rights without due process of law.

110 8. The said Court erred in deciding that said Statute did not abridge the priveleges and immunities of citizens of the United States.

9. The said Court erred in deciding that the said Statute, did not deny to the plaintiff in error, and its teachers and pupils, the equal protection of the law.

10. The said court erred in refusing to reverse the judgment of the Madison Circuit Court.

Wherefore, the plaintiff in error prays, that said judgment and decision be reversed.

J. G. CARLISLE.
C. F. BURNAM.
GUY W. MALLON.

111 THE COMMONWEALTH OF KENTUCKY,
The Court of Appeals, Sct.:

In obedience to the commands of the within Writ of Error, I herewith transmit to the Supreme Court of the United States, a duly

certified transcript of the complete record, and proceedings in the case named in said Writ of Error, with all things concerning the same.

In testimony whereof, I have hereunto set my hand and affixed the seal of my office.

Done at the Capitol at Frankfort, this the 20th day of December, A. D. 1906.

[Seal Court of Appeals, Kentucky.]

J. MORGAN CHINN,
Clerk, Court of Appeals of Kentucky.

Endorsed on cover: File No. 20,511. Kentucky, court of appeals. Term No. 546. Berea College, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed January 7th, 1907. File No. 20,511.