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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. ~~190~~ 12

BEREA COLLEGE

vs.

THE COMMONWEALTH OF KENTUCKY.

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

BRIEF FOR PLAINTIFF IN ERROR.

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The indictment in this case charges Berea College with the offense of "maintaining and operating a school for whites and negroes," which is alleged to have been committed as follows:

> "The said Berea College, being a corporation duly "incorporated under the laws of the State of Ken- "tucky and owning, maintaining and operating a col- "lege, school and institution of learning known as "'Berea College,' located in the town of Berea, Mad- "ison 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."

There was a demurrer to the indictment, which was overruled by the court, and exceptions taken, and on the trial the

court gave the following instruction to the jury, to which the plaintiff in error objected and excepted:

> "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 Mad-"ison County, Kentucky, after the 15th day of July, "1904, and before the 8th day of October, 1904, un-"lawfully and wilfully, that is, intentionally, permit "and receive both the white and negro races as pupils "for instruction in said college, school and institu-"tion of learning, the jury should find the defendant "guilty and fix its punishment at a fine of one thou-"sand dollars."

The plaintiff in error asked the court to give the following instructions, to which the Commonwealth objected, and the objections were sustained and both of the instructions were refused, to which the plaintiff in error excepted:

> "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.'
>
> "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."

The jury found the plaintiff in error guilty, and the court imposed a fine of $1,000. An appeal was taken to the Court

of Appeals of the State, and on the 12th day of June, 1906, that court affirmed the judgment. (See Opinion, R., 27-37.)

The indictment was found under an act approved on the 22d of March, 1904, entitled "An act to prohibit white and colored persons from attending the same school," which reads as follows:

"SECTION 1. That it shall be unlawful for any "person, corporation or association of persons to "maintain or operate any college, school or institu- "tion where persons of the white and negro races are "both received as pupils for instruction, and any "person or corporation who shall operate or main- "tain any such college, school or institution shall "be fined $1,000, 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 oper- "ate said school, college or institution after such con- "viction.

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

"SECTION 3. It shall be unlawful for any white "person to 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 in- "struction. 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 con- "strued to prevent any private school, college or in- "stitution of learning from maintaining a separate "and distinct branch thereof in a different locality, "not less than twenty-five miles distant, for the edu- "cation 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, p. 181.

As the court below decided all the questions arising under the Constitution of the State, the only question here is whether or not the act in question is a violation of the Fourteenth Amendment to the Constitution of the United States. There is no controversy about the facts, and if there was, this court would not review them. It was shown that in the forenoon of September 13, 1904, one white pupil and one colored pupil were presented to a teacher at the college, and he gave them instruction together (R., 22). It is not improper to say that this was done for the purpose of making the strongest possible case in favor of the Commonwealth and securing a decision for the guidance of the college in the future. The indictment did not charge that both races had been instructed together, nor does the statute make that fact material. It was sufficient to constitute the offense that if any person, corporation, or association of persons maintained or operated any college, school, or institution of learning *where* persons of the white and negro races are both received as pupils for instruction. In construing this part of the act, the court below said:

> "It evidently was thought that the effect of the "statute might be nullified by teaching the two races "in the same school at the time and place, in fact, "but perhaps in different rooms of the same build- "ing, 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" (R., 36, 37).

The Fourteenth Amendment to the Constitution of the United States provides:

> "No State shall make or enforce any law which "shall abridge the privileges or immunities of citi-

"zens of the United States; nor shall any State de-
"prive any person of life, liberty or property without
"due process of law; nor deny to any person within
"its jurisdiction the equal protection of the law."

Our contention is that a legislative enactment depriving a person of the right to pursue his usual occupation or depriving a person of the right to attend a school or institution of learning of his own choice is not due process of law, and if the person is a citizen of the United States such an enactment abridges his privileges and immunities as such.

Berea College was incorporated under the laws of the State of Kentucky, in July, 1859, for the purpose of "promoting the cause of Christ," when the institution of slavery still existed in the State, and amendments to the charter were adopted in April, 1897, and July, 1899 (see Appendix), and it has maintained its school continuously from its first organization until this legislation took effect. It has invested large sums of money in the purchase of land, the erection of necessary buildings, providing furniture, books, etc., for the use of its pupils. It has received considerable sums as endowments, to be used only for the education of the two races, all of which would be lost if it is prevented from continuing to do so, and besides the value of a large part of its property will be destroyed or greatly impaired if this act is enforced. The act in question declares its occupation unlawful and imposes penalties upon the institution for continuing it. Not only is the institution declared guilty of crime if it receives as pupils for instruction persons of the white and colored races, but the teachers are declared guilty of crime if they teach in the institution, and all pupils, white or colored, are declared guilty of crime if they attend.

It will be observed that the statute does not merely prohibit the teaching of the two races together, or from teaching them in the same room, or from giving instruction from the same teachers, but is intended to prevent the same

person, association, etc., from receiving both races for instruction, no matter where or by whom they may be taught, if they are taught at the same place.

The act cannot be separated into several parts and held to be partly constitutional and partly unconstitutional; it relates to but one subject and has only one purpose, which, as just stated, is to prohibit the same person, or the same corporation, or the same association of persons from receiving pupils of the two races for instruction; and in order to acomplish this purpose penalties are imposed, not only upon the offending person, association, or corporation, but also upon all persons who teach for the institution, although they may teach the two races separately, and upon all pupils who attend such schools, although the two races may be taught separately by different teachers and in different rooms.

In view of this it follows that the constitutionality of each and every provision of the act, all being intended to accomplish one purpose and all having a direct bearing on the rights and interests of the plaintiff in error, must be inquired into by the court, and if any one of them is unconstitutional, the entire act is invalid.

There are two classes of cases in which a party has a right to rely upon the unconstitutionality of a statute. First, where his rights are injuriously affected by the unconstitutional provision contained in the statute; and, second, where the unconstitutional provision would not of itself directly affect his rights, but is so connected with the constitutional provisions which do affect them that it invalidates the entire act. As to the first of these propositions there can be no room for controversy, while as to the second its correctness has been repeatedly recognized by the courts. It would be tedious to cite all the cases on this point, but we call the attention of the court to two of them decided by the Supreme Court of the United States.

In *Field vs. Clark*, 143 U. S., 649, and the cases reported

with it, the question argued and decided by the court was whether the so-called reciprocity clause of the act of March 3, 1883, which related solely to the duties on sugars, molasses, tea, and hides, was or was not constitutional. The parties who instituted the actions had no interest whatever in the duties imposed upon any one of those articles, but they claimed that the alleged unconstitutional clause invalidated the whole act, and that therefore they were entitled to recover back the duties paid by them on woolen goods, silks, and cotton. The court took jurisdiction of the constitutional question, but decided that the clause assailed was not invalid.

The other case is *Pollock vs. Farmers' Loan & Trust Company*, 158 U. S., 601 (the Income Tax cases), where it was held that several long sections of the statute, in which the complaining parties had no interest whatever, were unconstitutional and void *in toto*, because they contained, among many other things, provisions imposing a tax on incomes derived from personal property and real estate.

In the case at bar the rights of the plaintiff in error are directly and injuriously affected, not only by the first section of the act, which we claim is clearly unconstitutional, but by the second and third sections, which prohibit all persons from teaching at its school and prohibit all persons from attending it, its purpose being to prohibit the same person, corporation, or association of persons from teaching pupils of both races at the same place, even though they may be taught separately. The provisions of the act which impose penalties upon the teachers and pupils are parts of the means employed to accomplish that one purpose.

If the act had imposed no penalty whatever upon the persons, corporations, or associations for operating or maintaining the school, but had subjected all teachers and pupils to fines, as is done in the second and third sections, it is evident that the effect upon the institution would be just the same as it is now; that is, its business would be de-

stroyed and the value of its property would be greatly impaired, for, without teachers and pupils, it would be forced to abandon the work for which it was organized. It is plain that the college is directly interested in resisting the enforcement of the act as a whole, and the enforcement of any part of it, and therefore has a right to rely in this proceeding upon the unconstitutionality of all, or any one, of its provisions. Even if the interests of the institution were not directly and injuriously affected by the sections of the act imposing penalties upon the teachers and pupils, the statute, as already stated, is an entirety, and all its provisions are intended to effect a single purpose; so that if any material part of it is unconstitutional, the whole is void. There are many cases in which part of a statute may be declared unconstitutional, while other parts are held to be valid; but they are all cases in which the parts are clearly separable and may well stand alone; and, besides, they are not cases in which the enforcement of the unconstitutional parts would affect the complaining party just as much as the enforcement of the constitutional parts. In no case will the constitutional part of an act be enforced when other parts are unconstitutional, unless the court can assume that the legislature would have passed the act if the void part had been omitted.

The simple act of operating and maintaining the school constitutes the offense charged in the indictment, and it was not necessary or proper under the statute to make any further charge. In order, therefore, to sustain the validity of this legislation as a proper exercise of the police power, the court must know judicially, outside of the statute and outside of the indictment, that the operation and maintenance of such a school are detrimental to the public peace, health, or safety, or it must concede that the legislative judgment upon that subject is conclusive. Is there any fact judicially known to the court which would authorize it to decide that such schools or institutions are so detrimental.

in any of these respects that the legislature has authority to suppress them by the imposition of fines and penalties upon the proprietors, teachers, and students? That both races shall be educated is the settled policy of the State, and that they are taught in schools maintained by public taxation in the same towns, villages, and districts throughout the State is a public fact of which the court will take judicial notice.

The legislature is not the final judge of the extent of its own power; for if it were, constitutional limitations would be useless. But, in the present instance, the legislature has, in the very statute before the court, recorded its judgment that the coeducation of the two races at the same place and in the same building, and by the same teachers, is not contrary to a sound public policy, nor in and of itself detrimental in any way to the health or morals of the teachers or pupils or injurious to the health, morals, or peace of the community at large. By a proviso in the third section of this act it is expressly provided that its provisions shall not apply to any penal institution or house of reform. This, of course, includes all public penal institutions and all houses of reform, whether conducted by the public authorities or by private individuals or associations, and completely removes the only ground upon which this statute could possibly be supported as a valid enactment under the police power.

The difference between the extent of legislative power over schools and other institutions established and maintained by the State and its power over private schools and institutions is obvious. In the case of public schools the legislature may regulate the hours of teaching, prescribe the text-books, the qualifications of teachers, the ages at which pupils shall be admitted, classify the students who shall be instructed together, and in fact do almost anything which does not make unjust or unconstitutional discriminations among the people who contribute by taxation to the funds used in defraying the expenses of the system. But

a private school stands upon exactly the same footing as any other private business, and the power of the State to prohibit it, or to interfere with the right to teach in it, or to attend it, is no greater than its power to prohibit any other ordinary occupation of the people. The statute is unnecessary and unreasonable, and therefore an arbitrary interference with the rights of the people in the conduct of their private business and in the pursuit of their ordinary occupations. The right to maintain a private school is no more subject to legislative control than the right to conduct a store, or a farm, or any other one of the various occupations in which the people are engaged. Could the legislature impose a penalty upon a merchant, or a farmer, or a manufacturer for employing persons of the white and colored races to work together in the same room or field? These questions seem almost absurd; and yet the answer to them must decide this case, unless it can be shown that the legal and constitutional rights of those who engage in the business of conducting private schools or teaching in such schools are not entitled to the same measure of protection as the rights of citizens engaged in other pursuits. The right of the citizen to choose and follow an innocent occupation is both a personal and a property right (*Cummings vs. Missouri*, 4 Wall., 321).

Speaking of the right to make contracts, this court said in *Allgeyer vs. Louisiana*, 165 U. S., on page 591:

> "To deprive the citizen of such a right as herein
> "described without due process of law is illegal.
> "Such a statute as this in question is not due process
> "of law, because it prohibits an act which, under the
> "Federal Constitution, the defendants had a right
> "to perform. This does not interfere in any way
> "with the acknowledged right of the State to enact
> "such legislation in the legitimate exercise of its
> "police or other powers as it may deem proper. In
> "the exercise of such a right, however, care must be
> "taken not to infringe upon those other rights of the
> "citizen which are protected by the Federal Constitu-
> "tion."

In the recent case of *Schnair vs. Navarro Hotel Imp. Co.*, reported in 182 N. Y., 83, the statute involved declared it unlawful for a copartnership in the city of New York to engage in or carry on the business, trade, or calling of employing or master plumber unless the name and address of such persons and of each and every member of said copartnership shall have been registered, etc.

In deciding the case the court said:

> "The right to follow any lawful pursuit is one of "the inalienable rights of a citizen of the United "States. * * * There is no more sacred right "of citizenship than the right to pursue unmolested "a lawful employment in a lawful manner. It is "nothing more or less than the sacred right of labor. "All laws therefore which impair or trammel these "rights, which limit one in his choice of a trade or "profession, or confine him to work or live in a "special locality, or exclude him from his home or "restrain his otherwise lawful movements, are in-"fringements upon his fundamental rights of lib-"erty which are under constitutional protection. "The common business and callings of life, the ordi-"nary trades and pursuits which are innocent in "themselves and have been followed in all countries "from time immemorial, must therefore be free in "this country alike upon the same terms. The lib-"erty of pursuit, the right to follow any of the ordi-"nary callings of life, is one of the privileges of a "citizen of the United States."

In support of these propositions the court cited:

Butchers' Union Co. vs. Crescent City Co., 111 U. S., 746.
Yick Wo vs. Hopkins, 118 U. S., 356.
Slaughter-house case, 16 Wall., 36.
Colon vs. Lisk, 153 N. Y., 188.
People vs. Gibson, 101 N. Y., 389.
People vs. Marx, 99 N. Y., 377.
In re Jacobs, 98 N. Y., 98.
Lochner vs. State of New York, 198 U. S., 45.

Mr. Justice Washington, in the case of *Corfield vs. Coryell,* Washington C. C., 371, in defining what were the privileges and liberties of citizens of the several States, said:

> "We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature FUNDAMENTAL; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which comprise this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are it would be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the Government; * * * the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain hapiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the general good of the whole."

This was quoted and approved by this court in the case of *Maxwell vs. Dow,* 176 U. S., 588-589.

Speaking of the restraints which legislatures may constitutionally impose upon the people for the general good, the court said, in the case of *Munger vs. Kansas,* 123 U. S., 661:

> "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking Fund cases,* 99 U. S., 700, 718), the courts must obey the Constitution rather than the law-making department of the Government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said in *Marbury vs. Madison,* 1 Cranch, 137, 176, 'are powers limited, and to what purpose is that limitation committed to writing, if

"'these limits may, at any time, be passed by those
"'intended to be restrained? The distinction be-
"'tween a government with limited and unlimited
"'powers is abolished if those limits do not confine
"'the persons upon whom they are imposed, and if
"'acts prohibited and acts allowed are of equal obli-
"'gation.' The courts are not bound by mere forms,
"nor are they to be misled by mere pretenses. They
"are at liberty—indeed, are under a solemn duty—
"to look at the substance of things, whenever they
"enter upon the inquiry whether the legislature has
"transcended the limits of its authority. If, there-
"fore, a statute purporting to have been enacted to
"protect the public health, the public morals or the
"public safety, has no real or substantial relation to
"those objects, or is a palpable invasion of rights se-
"cured by the fundamental law, it is the duty of the
"courts to so adjudge, and thereby give effect to the
"Constitution."

The nature or extent of legislative power cannot be affected by calling it the "police power." Absolute arbitrary power over the lives, liberties, and property of the people cannot exist in this country, under any name or in any form, and it is always the duty of the courts to disregard mere names and forms in determining whether the legislature has or has not exceeded its authority. It is for the court to decide, not only whether the subject to which legislation relates is within the scope of the power attempted to be exercised, but also whether the legislation itself is in violation of the personal or property rights of the citizen. The subject to which the legislation relates may be clearly within the scope of the police power, and yet the enactment may be so unreasonable, unnecessary, or inappropriate for the accomplishment of the purpose ostensibly designed, that the courts, in the discharge of their duty to protect personal and property rights, will be bound to hold it null and void. The Supreme Court of Illinois has very clearly stated the functions of the legislature and the courts in relation to this subject.

In *Ritchie vs. People,* 155 Ill., 98-110; *Eden vs. People,* 165 Ill., 296-318, the court said:

> "The police power of the State is that power which enables it to promote the health, comfort, safety and welfare of society. It is very broad, but it is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the Constitution and must have some relation to the ends sought to be accomplished, that is to say, to the comfort, welfare or safety of society.
>
> "Where the ostensible object of an enactment is to secure the public comfort, welfare or safety, it must appear to be adapted to that end.
>
> "It cannot invade the rights of persons and property under the guise of a mere police regulation when it is not such in fact; and where such an act takes away the property of a citizen or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the protection of the comfort, safety and welfare of society." (*Ritchie vs. People,* 155 Ill., 98-100; *Eden vs. People,* 161 Ill., 296-318).

Up to the time of the passage of the statute under which these indictments were found, the business conducted by the appellant was as lawful as any other business carried on in the State; and it is not claimed by anyone that its affairs had not been at all times conducted in a peaceable and orderly manner. Nor is it claimed that its managers, teachers, or pupils have not been at all times quiet and law-abiding members of the community; or that their teachings or example have in fact been in any way injurious to the public morals or the general welfare. No immoral or seditious instruction has been given, either inside or outside of the school, by any one connected with it. It is not claimed that the doctrine of the social equality of the two races has been promulgated, or that social equality or amalgamation has in fact resulted in the locality where the college is located, or at any other place in the State. It is evident, how-

ever, that the legislation complained of was prompted by the fear, notwithstanding the experience of nearly fifty years to the contrary, that social equality and amalgamation might be promoted and encouraged by the coeducation of the two races, for there is no other ground upon which an argument could be made in support of the statute.

While we do not claim that the act makes any discrimination between the two races in a legal or constitutional sense, it is plain that race prejudices, or at any rate racial differences, are factors which must be considered in determining how far the legislature, in the exercise of the so-called police power, can constitutionally go in controlling the voluntary personal intercourse of different races in the various walks of life; for it must be conceded that if the power now claimed is sustained, it cannot be judicially confined to such legislation as relates only to the white and colored races. In fact, if the legislature can separate the people into classes according to race or color for the purpose of prohibiting voluntary personal intercourse between them, there is no reason why it may not, for the same purpose, separate them into classes according to any other rule or test it may deem proper to adopt.

The Constitution makes no distinction between the different races or different classes of the people, and if a distinction is to be made, it must be done by the legislature in the exercise of the police power. All such legislation is necessarily injurious to the peace and prosperity of the people and its validity ought to be clearly established before it receives the sanction of the courts. It is common knowledge that the manufacture and sale of ardent spirits, gambling, the maintenance of nuisances, the keeping of disorderly houses, and many other vocations which are subject to regulation and control in the exercise of the police power, are in themselves injurious to the health, morals, and safety of the public; but even over these subjects the legislative authority

is limited to the enactment of reasonable and necessary laws; or, as was said in *Lawton vs. Steele*, 152 U S., 133:

> "The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In re Jacobs, 98 N. Y., 115, the court said:

> "When a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the court must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adequate to that end. That we have not been able to see in this law, and we must, therefore, pronounce it unconstitutional and void."

In *Bertholf vs. O'Reilly*, 74 N. Y., 515, it was expressly held that one may be deprived of his liberty in a constitutional sense without putting his person in confinement, and that one of the constitutional rights of the citizen is his right to exercise his faculties, and to follow a lawful occupation for the support of himself and his family; and in the case of Jacobs, cited above, the court said:

> "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed, or its value may be annihilated; it is owned and kept for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes, without which property cannot be conceived; and hence any law which destroys it or its value, or takes away of its

"essential attributes, deprives the owner of his prop-
"erty.

"The constitutional guaranty would be of little
"worth, if the legislature could, without compensa-
"tion, destroy property or its value, deprive the
"owner of its use, deny him the right to live in his
"own house or to work any lawful trade therein.
"If the legislature has the power under the Consti-
"tution to prohibit the prosecution of one lawful
"trade in the tenement house, then it may prevent
"the prosecution of all trades therein. 'Ques-
"'tions of power,' says Chief Justice Marshall, in
"*Brown vs. State of Maryland* (12 Wheat., 419),
"'do not depend upon the degree to which it may be
"'exercised. If it may be exercised at all it must
"'be exercised at the will of those in whose hands it
"'is placed.' Blackstone in his classification of
"fundamental rights, says: 'The third absolute right
"'inherent in every Englishman is that of property,
"'which consists in the free use, enjoyment and
"'disposal of all his acquisitions without any control
"'or diminution, save only by the law of the land'
"(1 Com., 138). In *Pumpelly vs. Green Bay Co.*
"(13 Wall., 166, 177), Miller, J., says: 'There may
"'be such serious interruption to the common and
"'necessary use of property as will be equivalent
"'to a taking within the meaning of the Constitu-
"'tion.' In *Wynehamer vs. People* (13 N. Y., 378,
"398), Comstock, J., says: 'When a law annihilates
"'the value of property and strips it of its attributes,
"'by which alone it is distinguished as property,
"'the owner is deprived of it according to the plain-
"'est interpretation, and certainly within the con-
"'stitutional provision intended expressly to shield
"'personal rights from the exercise of arbitrary
"'power.' In *People vs. Otis* (90 N. Y., 48), An-
"drews, J., says: 'Depriving an owner of property
"'of one of its attributes is depriving him of his
"'property within the constitutional provision.'"

The Matter of the Application of Jacobs, 98 N. Y., 99.

See also Cooley on Const. Lim., § 393.

This court, in the case of *Butchers' Union vs. Crescent City Company,* 111 U. S., 756, says:

"As in our intercourse with our fellow-men cer-
"tain principles of morality are assumed to exist,
"without which society would be impossible, so cer-
"tain inherent rights lie at the foundation of all
"action, and upon a recognition of them alone can
"free institutions be maintained.

"These inherent rights have never been more hap-
"pily expressed than in the Declaration of Independ-
"ence, that new evangel of liberty to the people:
"'We hold these truths to be self-evident'—that
"is, so plain that their truth is recognized upon their
"mere statement—'that all men are endowed,' not
"by the edicts of emperors, or decrees of Parliament,
"or acts of Congress, but 'by their Creator with
"'certain inalienable rights'—that is, rights which
"cannot be bartered away, or given away, or taken
"away except in punishment of crime—'and that
"'among these are life, liberty, and the pursuit of
"'happiness, and to secure these'—not grant, but
"secure them—'governments are instituted among
"'men, deriving their just powers from the consent
"'of the governed.'

"Among these inalienable rights, as proclaimed
"in that great document, is the right of men to pur-
"sue their happiness, by which is meant the right to
"pursue any lawful business or vocation, in any
"manner not inconsistent with the rights of others,
"which may increase their prosperity or develop
"their faculties so as to give them the highest en-
"joyment.

"The common business and dealings of life, the
"ordinary trades and pursuits, which are innocuous
"in themselves, and have been followed in all com-
"munities from time immemorial, must therefore be
"free in this country to all alike upon the same con-
"ditions. The right to pursue them, without let
"or hindrance, except that which is applied to all
"persons of the same age, sex and condition, is a
"distinguishing privilege of citizens of the United
"States, and an essential element of that freedom
"which they claim as their birthright.

"It has been well said, that 'the property of any
" 'man is his own labor, as it is the original founda-
" 'tion of all other property, so it is the most sacred
" 'and inviolable. The patrimony of the poor man
" 'lies in the strength and dexterity of his own hands,
" 'and to hinder his employing this strength and
" 'dexterity in what manner he thinks proper without
" 'injury to his neighbor, is a plain violation of this
" 'most sacred property. It is a manifest encroach-
" 'ment upon the just liberty of the workman and of
" 'those who might be disposed to employ him. As
" 'it hinders the one from working at what he thinks
" 'proper, so it hinders the others from employing
" 'whom they think proper.' "

Adam Smith's Wealth of Nations, Bk. 1, chapter 10.

Again:

In a late case upon this subject, *Lochner vs. People of State of New York*, decided in April, 1905, and reported in 198 U. S., 45, the court said:

"There are, however, certain powers, existing in
" the sovereignty of each State in the Union, some-
" what vaguely termed police powers, the exact de-
" scription and limitation of which have not been
" attempted by the courts. Those powers, broadly
" stated and without, at present, any attempt at a
" more specific limitation, relate to the safety, health,
" morals and general welfare of the public. Both
" property and liberty are held on such reasonable
" conditions as may be imposed by the governing
" power of the State in the exercise of those powers,
" and with such conditions the Fourteenth Amend-
" ment was not designed to interfere.

Mugler vs. Kansas, 123 U. S., 123 U. S., 623.
In re Kemmler, 137 *id.*, 436.
Crowley vs. Christensen, 137 *id.*, 86.
In re Converse, 137 *id.*, 624.

"The State, therefore, has power to prevent the
" individual from making certain kinds of contracts,
" and in regard to them the Federal Constitution

"offers no protection. If the contract be one which "the State, in the legitimate exercise of its police "power, has the right to prohibit, it is not prevented "from prohibiting it by the Fourteenth Amendment. "Contracts in violation of a statute, either of the "Federal or State government, or a contract to let "one's property for immoral purposes, or to do any "other unlawful act, could obtain no protection from "the Federal Constitution, as coming under the lib-"erty of person or of free contract. Therefore, when "the State, by its legislature, in the assumed exercise "of its police powers, has passed an act which seri-"ously limits the right to labor or the right of con-"tract in regard to their means of livelihood between "persons who are *sui juris* (both employer and em-"ployee), it becomes of great importance to deter-"mine which shall prevail—the right of the indi-"vidual to labor for such time as he may choose, or "the right of the State to prevent the individual "from laboring or from entering into any contract "to labor, beyond a certain time prescribed by the "State.

"This court has recognized the existence and up-"held the exercise of the police power of the States "in many cases which might fairly be considered "as border ones, and it has, in the course of its deter-"mination of questions regarding the asserted invalid-"ity of such statutes, on the ground of their viola-"tion of the rights secured by the Federal Constitu-"tion, been guided by rules of a very liberal nature, "the application of which has resulted, in numerous "instances, in upholding the validity of State stat-"utes thus assailed."

* * * * * * *

"It must, of course, be conceded that there is a "limit to the valid exercise of the police power by "the State. There is no dispute concerning this "general proposition. Otherwise the Fourteenth "Amendment would have no efficacy and the legisla-"tures of the States would have unbounded power, "and it would be enough to say that any piece of "legislation was enacted to conserve the morals, the "health or the safety of the people; such legislation

"would be valid, no matter how absolutely without
"foundation the claim might be. The claim of the
"police power would be a mere pretext—become an-
"other and delusive name for the supreme sover-
"eignty of the State to be exercised free from con-
"stitutional restraint. This is not contended for.
"In every case that comes before this court, therefore,
"where legislation of this character is concerned
"and where the protection of the Federal Constitu-
"tion is sought, the question necessarily arises: Is
"this a fair, reasonable and appropriate exercise of
"the police power of the State, or is it an unreason-
"able, unnecessary and arbitrary interference with
"the right of the individual to his personal liberty
"or to enter into those contracts in relation to labor
"which may seem to him appropriate or necessary
"for the support of himself and his family?"

The personal and property rights recognized by the decisions of the courts in this country do not depend for their protection solely upon express or implicit constitutional guaranties. They were declared in the Great Charter nearly seven centuries ago in these memorable words:

"No freeman shall be taken or imprisoned or be
"disseized of his freehold or liberties, or free cus-
"toms, or be outlawed or exiled, or any otherwise de-
"stroyed; nor will we pass upon him nor condemn
"him but by lawful judgment of his peers, or by the
"law of the land."

The words "the law of the land" are said by Coke, in his Institutes, to be the equivalent of the words "due process of law," as found in 37 Edward 3, and incorporated into the Bill of Rights or Constitution of nearly all our States.

The words "law of the land" and "due process of law" mean much more in this country, where we have written constitutions with express and implied limitations upon legislative power, than they ever meant in England. We have no omnipotent legislative body in this country, and an act of the legislature not authorized by the Constitution has no

more validity than the judgment of a court rendered without affording the party who is to be affected by it an opportunity to be heard. An unconstitutional statute is not "the law of the land," and no matter how regular and formal the judicial proceedings may be for the enforcement of such a statute, they do not constitute "due process of law." It has been many times decided that the first ten amendments to the Constitution of the United States were limitations upon the power of the General Government, and not limitations upon the power of the several States; but the purpose of the Fourteenth Amendment was two-fold—first, to enforce the absolute equality of the two races before the law, so far as civil rights are concerned, and, second, to protect the civil rights of both races against encroachments by the State authorities.

While that amendment may not limit the subjects upon which the police power of a State may be exercised, so long as there is no discrimination on account of race or color, yet in the exercise of that power the State cannot disregard the limitations which the amendment imposes.

> "The recent amendments to the Constitution have
> "not changed nor diminished their (the States')
> "previously existing power to legislate respecting the
> "public health and public morals. But though this
> "power rests with them, it cannot be admitted that,
> "under the pretense of providing for the public
> "health or public morals, they can encroach upon
> "public rights which those amendments declare shall
> "not be impaired."
>
> *Ex parte Virginia,* 100 U. S., 339, page 347.

Mr. Justice Field said in *Bashier vs. Connolly,* 113 U. S., 27-31:

> "The Fourteenth Amendment, in declaring that
> "no State shall deprive any person of life, liberty or
> "property without due process of law, nor deny to
> "any person within its jurisdiction the equal pro-
> "tection of the laws, undoubtedly intended not only

"that there should be no arbitrary spoliation of prop-
"erty, but that equal protection and security should
"be given to all under like circumstances in the en-
"joyment of their personal and civil rights; that all
"persons should be equally entitled to pursue happi-
"ness and acquire and enjoy property; that they
"should have like access to the courts of the country
"for the protection of their persons and property,
"the prevention and redress of wrongs, and the en-
"forcement of contracts; that no impediment should
"be interposed to the pursuits of any one except as
"applied to the same pursuits by others under like
"circumstances; that no greater burdens should be
"laid upon them than are laid upon others in the
"same calling and condition."

There is no doubt that the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States were adopted for the protection of the colored race, or that their primary purpose was to establish absolute civil equality—that is, to place the colored race, in respect to civil rights, upon the same basis as the white race.

The Slaughter-house cases, 83 U. S., 36.
Strauder vs. West Virginia, 100 U. S., 303.
Virginia vs. Rives, 100 U. S., 313.
Bush vs. Kentucky, 107 U. S., 110.

But the effect of the Fourteenth Amendment, as has been repeatedly decided, is not only to secure equal civil rights to the colored race, but to protect the white race also in the unmolested enjoyment of all its rights of person and property.

In order to avail himself of the protection guaranteed by that amendment, it is not necessary for a party to show that the legislation complained of makes a discrimination against the white race, as such, or against the colored race, as such. It is sufficient if it can be shown that an attempt has been made to abridge the privileges or immunities of citizens of the United States, or to deprive persons of life, liberty or property without due process of law, or to deny to any person

within the jurisdiction of the State, the equal protection of the law; and if the legislation attempts to do any of these things, and the complaining party is, or will be, injured by its enforcement, he has a right to contest its validity. It is well settled that the word "person" in the amendment includes corporations as well as individuals.

The cases in which it has been held competent for the legislature to provide for the separation of the two races by common carriers of passengers and in the common schools supported at the public expense have no bearing upon the questions involved in the case at bar. The legislature undoubtedly possesses a very large measure of control over all individuals and corporations engaged in public or quasi-public occupations, such as common carriers, innkeepers, proprietors of ferries, etc., and in the case of public schools its power to regulate them or abolish them cannot be questioned unless there are express constitutional provisions restricting its authority. There have been many statutes enacted requiring railroad companies to provide separate coaches for white and colored passengers, and in some instances making it a penal offense for a person of one race to ride in a coach set apart for the use of the other, and the validity of such acts has generally—perhaps always—been sustained by the courts. No statute, however, has ever been enacted requiring railroad companies to carry their white and colored passengers on different trains or in different cars wholly detached from each other, and we feel quite sure that if such legislation should be enacted it would not be sustained by this or any other court. Independently of the fact that these statutes all relate to common carriers engaged in a quasi-public service, there are other considerations which clearly distinguish them from the act now before the court. If separate accommodations are not provided on railways, it is not possible for persons of one race to use that method of conveyance without mingling with persons of the other race. There is therefore substantially an enforced

association of the two races, and such enforced association may very properly be prevented by legislation.

Colored persons may be prohibited from forcing themselves into the presence or society of white persons in a public conveyance contrary to their wishes, and a white person may be prohibited from compelling persons of the colored race to associate with them contrary to their wishes. So long as separate accommodations are not provided and maintained by law, the two races have equally the right to enter the same coach and remain there, no matter how objectionable the presence of one may be to the other. The reasons, therefore, for the enactment of separate coach laws and others of like character and effect are altogether different from any that can be suggested in support of the legislation involved in the case at bar.

Social equality between persons of the white and colored races, or between persons of the same race, cannot be enforced by legislation, nor can the voluntary association of persons of different races, or persons of the same race, be constitutionally prohibited by legislation unless it is shown to be immoral, disorderly, or for some other reason so palpably injurious to the public welfare as to justify a direct interference with the personal liberty of the citizen; and even in such a case the restriction should go no further than is absolutely necessary.

This case involves many questions not presented or decided in any of the cases arising under statutes providing for the separation of the two races in public conveyances and public schools. The right of a person, corporation, or association of persons to maintain and operate a private school and to receive or reject such pupils as it may choose; the right of a teacher to accept employment in a private school and to follow a peaceable occupation for a support; the right of a pupil to attend a private school of his choice and to pursue his literary and religious studies in a peaceable and orderly manner—all those rights are not only infringed,

but totally destroyed by the act now in question, if it is a valid law.

These questions are much broader and more important than any that could possibly arise in cases where the court has only to decide whether a person, white or colored, shall be permitted to force his way into a particular car when another one just as comfortable has been provided for his use, or where it has to decide whether a person has a right to demand admission to a particular public school when other public schools of the same character have been established for his use.

But even if it were conceded that any legislative interference with the personal and property rights of the citizen could be justifiable in such a case as is presented here, the question would still remain whether the act is a reasonable and necessary exercise of power, or whether its provisions are unreasonable, unnecessary, and arbitrary. If any one of the statutes providing for the separation of the two races on railroads had declared that no railroad company should receive for transportation persons of the white and colored races, with a proviso, however, that they might be received and carried if the coaches in which they were separately accommodated were at all times kept entirely disconnected from each other, it is safe to say that every court in the country would have condemned it as a flagrant abuse of legislative authority. Yet such a provision in a separate coach law would have been fully as reasonable and necessary as in the act now before the court.

In *Plessy vs. Ferguson*, 163 U. S., 256, the leading separate-coach case, the validity of the statute was sustained, but Mr. Justice Harlan, in a vigorous opinion, dissented, and said:

> "If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each."

And again:

> "If a State can prescribe as a rule of civil conduct
> "that whites and blacks shall not travel as passengers
> "in the same railroad coach, why may it not so
> "regulate the use of the streets of its cities and towns
> "as to compel white citizens to keep on one side of a
> "street and black citizens to keep on the other? Why
> "may it not, upon like grounds, punish whites and
> "blacks who ride together in street cars or in open
> "vehicles on a public road or street?
>
> "Why may it not require sheriffs to assign whites
> "to one side of a courtroom and blacks to the other?
> "And why may it not also prohibit the comming-
> "ling of the two races in the galleries of legislative
> "halls or in public assemblages convened for the con-
> "sideration of the political questions of the day?
> "Further, if this statute of Louisiana is consistent
> "with the personal liberty of citizens, why may not
> "the State require the separation in railroad coaches
> "of native and naturalized citizens of the United
> "States, or of Protestants and Roman Catholics?"

Although Mr. Justice Harlan stated extreme cases for the purpose of illustrating his argument in opposition to the act before the court, he did not assume that the decision of the majority could possibly establish a precedent for legislation requiring the separation of the two races in private schools or in private places of business of any kind. He spoke only of separation in public places, such as streets, public roads, street cars, courthouses, legislative halls, public assemblages, &c.; but the act now before the court makes a long stride in advance of any legislation that could have been reasonably expected to result from any judicial decision yet pronounced. The court, in the case cited, evidently did not believe that the consequences apprehended by the dissenting justice could follow from its decision, for it said in response:

> "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 for the pro-

> motion of the public good and not for the annoyance or oppression of a particular class."

That education in private schools is not a matter of public or State control was directly decided in *Clarke vs. Maryland Institute*, 87 Md., 643. In that case a colored man claimed the right to have his son attend the institute, upon the ground that equal facilities for education must be provided for both races, and that this school was amenable to the rule of race equality because it received appropriations of public money from the city. The court held, however, that the mere receipt of aid from the city did not make the institution public, and, being still a private institution, it could do as it pleased in the selection of its pupils.

The court below cited and relied upon the cases of *Roberts vs. Boston*, 5 Cush., 198, and *Westchester and Phila. R. R. Co. vs. Miles*, 55 Pa. St., 209, but an examination of those cases will show that they have no bearing upon any legal or constitutional question presented on these appeals.

In the Massachusetts case Chief Justice Shaw simply decided that under the statute of that State the public-school authorities had plenary power "to arrange, classify and distribute pupils in such manner as they think best adapted to their general proficiency and welfare," and that they therefore had a right to designate and maintain separate public schools for the instruction of the two races. The legislature of Kentucky has done the same thing in regard to the public schools, and no one questions its power over that subject. In the Pennsylvania case the railroad company had itself provided for a separation of the two races on its cars, and the question was whether it had a right to do so. That case was decided in 1867, before the adoption of the Fourteenth Amendment, and the points decided, as stated in the syllabus, were:

> "1. No one can be excluded from a carriage on account of color, religious belief or political relations or prejudice.

"2. If there be no clear and reasonable difference to base separation of passengers upon, it cannot be justified by mere prejudice.

"3. The right of a carrier to separate passengers is founded on his right of private property in the means of conveyance and the public interest."

In the course of its opinion the court said:

> "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 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.*"

We respectfully submit that no sufficient reason can be shown for such legislative interference with the private business of the people as is attempted by the act under consideration; that even if the business of the appellant was constitutionally subject to legislative control, this statute is in the highest degree unreasonable and oppressive; that it imposes penalties for the commission of acts which are in themselves entirely innocent and harmless; and that it violates the fundamental principles of free government and is expressly inhibited by the Constitution of the United States and is null and void.

A reversal of the judgment is respectfully asked.

J. G. CARLISLE,
GUY WARD MALLON,
Attorneys for Appellant.

The court below appeared to think the validity of this act might be sustained upon the ground that it was an amendment or repeal of the charter of the college, and referred to *Allgeyer vs. La.*, 165 U. S., 578 (R., 37). We do not see that the case cited has any bearing upon this question, as the trustees did not acquire the right to maintain the school by any grant from the State. That right constitutes no part of the franchise of this voluntary corporation. It is a right which belongs to every free citizen; the absolute repeal of the charter would not have prevented the trustees, as individuals, from continuing the school; the only franchise the association acquired by the charter was the right to be a corporate body and to conduct its business as such, and the only effect of a repeal would have been to dissolve the corporation, leaving the trustees and those associated with them entirely free to maintain and operate the school as it had been conducted for nearly half a century.

APPENDIX.

Original Articles of Incorporation.

CHAPTER II.

HISTORICAL DOCUMENTS.

I. ORIGINAL ARTICLES OF INCORPORATION.

(See Madison Co. Deed Book 15, page 204.)

In order to promote the cause of Christ, we, the undersigned, do voluntarily unite ourselves together to establish and maintain an institution of learning under the following Articles of Agreement:—

ARTICLE I.

This Institution shall be called Berea College.

ARTICLE II.

This College shall be under the care of a Board of Trustees, who shall receive and hold in trust all lands, legacies, moneys, and other property committed to them for said Institution, and exercise their trust in the use and disposal of the same in such manner as shall, in their judgment, promote the highest interests of said College.

ARTICLE III.

The Board of Trustees shall elect a President, Vice-President and Secretary of said Board from their own number.

ARTICLE IV.

It shall be the duty of the Board of Trustees to appoint the President and Teachers of the College, also a Secretary and Treasurer of the same, fix their salaries, prescribe the courses of study, confer degrees, receive and disburse moneys, make contracts and enforce the same, audit accounts, ap-

point examiners, and transact all other necessary business for the interests of the Institution.

Article V.

The Board of Trustees may make such By-laws as it may deem necessary to promote the interests of the Institution.

Article VI.

The Persons signing these Articles of Agreement shall constitute its original Board of Trustees, and new members may be added to said Board, or vacancies therein filled by the addition of such persons as shall be elected members thereof by the Board.

Article VII.

In case of the dissolution of this Institution all its funds, real estate and property shall be given to the American Missionary Association of New York City, to be applied under the direction of the Executive Committee of that Association to its charitable uses and purposes.

Article VIII.

This Constitution may be amended by a vote of three-fourths of the Trustees at any annual meeting, providing a written notice of amendment shall have been sent to each Trustee as much as three months previous to said meeting.

(Articles VII and VIII were added after the Civil War.)

Chapter III.

ARTICLES OF INCORPORATION.

Complying with Ky. Statutes, Chap. XXXII, Art. VIII, and Recorded in Madison County Deed Book 47, page 619, June 10, 1899.

Whereas, in the year 1859, Berea College, an institution of learning, was organized by written articles, afterwards entered on record in the office of Clerk of the Madison

County Court in the State of Kentucky, which institution has existed until the present day; and,

Whereas, it is deemed best to conform the Institution, in its organization, to the present laws and constitution of Kentucky, the following

ARTICLES OF INCORPORATION

are hereby adopted:—

(1) The name of the corporation is

"BEREA COLLEGE."

(2) Its principal place of business is Berea, in Madison County, Kentucky.

(3) Its object is the education of all persons who may attend its institution of learning at Berea, and, in the language of the original articles, "To promote the cause of Christ."

(4) There will be no capital stock.

(5) The following are the incorporators.

(Here follow the names.)

(6) The corporation will continue business under these Articles for one hundred years from and after the 31st of May, 1899.

(7) The affairs of the corporation will be conducted by twenty-five persons, who shall be called

"THE BOARD OF TRUSTEES OF BEREA COLLEGE,"

and the President of the College shall be one of these Trustees. Said Trustees, other than the President, shall be divided into six classes of four persons each, as hereinafter provided, the terms of one class to expire each year, their successors to be elected by the Board of Trustees, which shall also elect all officers of the Institution. The present Trustees are hereby designated to act from this date as follows, to-wit:—

(Here follow the names.)

Each of said Trustees shall hold his office until his term shall expire, as fixed by these Articles, and until his successor is elected; and said Trustee shall be elected and hold by classes as hereinbefore set out. A vacancy in any trustee-

ship or other office or position shall be filled by the Board of Trustees, and each person so elected shall fill out the expired term and serve until his successor is elected. Wm. Goodell Frost, now President, and T. J. Osborne, who has been and is acting Secretary and Treasurer, and the present Prudential Committee, shall continue to act until the next annual election. The present Investment Committee will continue in office until the next annual election, and until its successors are elected. An election for Trustees and Officers as their term shall expire, and as vacancies may occur, shall be held at Berea on the third Wednesday in June of each year. But if for any reason the Board of Trustees shall meet at a different date the election may be held at the date of the meeting.

(8) The corporation shall not at any time incur an indebtedness exceeding in the aggregate the sum of $50,000.

(9) The private property of the incorporators and members of the corporation shall not be subject to the payment of corporate debts.