SUPREME COURT OF THE UNITED STATES.

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OCTOBER TERM, 1907.

No. 190.

BEREA COLLEGE

vs.

THE COMMONWEALTH OF KENTUCKY.

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

REPLY BRIEF FOR PLAINTIFF IN ERROR.

A state may make and enforce a law to protect its citizens from enforced association with those of different race and color. A state cannot make nor enforce a law to prevent the voluntary association of persons of different races in their private relations for purposes commendable in themselves.

A state may provide separate public schools, and by the exercise of the police power enforce separation of the races in the public schools. A state cannot, under the guise of police power, control voluntary attendance at a private school, with whose management and support the state has nothing to do, for the right of attendance is purely and exclusively private.

The brief of counsel for the Commonwealth advances neither argument nor authority to support such view of the police power. On the contrary, in *Mugler vs. Kansas*, 123 U. S., 623, more frequently cited by counsel than any other case, the court says on page 660:

> "As was said in *Munn vs Illinois*, 94 U. S., 113, "124, while power does not exist with the whole "people to control rights that are purely and ex- "clusively private, government may require 'each "citizen to so conduct himself, and so use his own "property as not unnecessarily to injure another.'"

Their brief discusses miscegenation, the separation of the races in public schools and upon common carriers and then asks, why cannot the State go one step farther and prohibit the coeducation of the races in private schools? The difficulty is that such attempted action is not one step farther. It is not in the same direction at all.

That laws relating to public schools and common carriers are cited as instances of analogous, though less drastic, applications of the police power, shows an entire misconception of this rather indefinite doctrine of overruling necessity. It is indeed difficult to determine, in certain given cases, how far the police power may interfere with a citizen's personal liberty or may take his property.

We can concede to the several states the highest degree of sovereign authority in matters calling for the exercise of the police power that any one may claim, and yet recognize the final authority of the Constitution and of the Fourteenth Amendment. There is no conflict, for the courts when called upon to examine the state law to be enforced under the police power, will determine whether or not the measure is necessary, reasonable and appropriate and has a real and substantial relation to the *protection* of the *public* in its safety, health or morals. If the law is found to be of such character, then it cannot abridge the

privileges and immunities of a citizen of the United States or of any one else, nor can questions of due process of law, or of equal rights arise.

An attempt to regulate by law the purely personal relations of persons attending a private school, founded for the purpose of advancing the cause of Christ, wherein no improper or seditious doctrine is taught or indecorous conduct allowed, bears no analogous relation to the control of public schools and common carriers, and is not an exercise of the police power at all, for the requisite conditions;—conditions precedent to the right to invoke this supreme law of self-preservation,—are lacking.

These conditions are four:

First—There must exist a danger to the public.

Second—That danger must be of a character calling for police action, *i. e.*, the public peace, the public safety, the public health or the public morality must be affected.

Third—The police measure must have a real and substantial relation to the end sought or rather to the threatened evil which is to be prevented.

Fourth—If so related and appropriate, it must be both necessary and reasonable, and not arbitrary.

Let us test by these four requirements the law relating to the public schools and the common carriers, and then the statute now in question.

In the case of public schools and public railways:

First—The legislature determines that there is a danger. The argument is: The natural antipathy between the two races is such that the two cannot be forced to associate together without public disaster; an attempt to so enforce association will in the case of the schools, lead to disorder, lack of discipline, and destroy the efficiency of the schools; and in the case of railroads, so great is the antipathy, that riots may result, or, at least, great mental

suffering and humiliation will be forced upon unwilling passengers.

Second—Such danger relates directly to the public safety and the general welfare.

Third—The only measure to prevent this condition from arising is to provide separate schools and to compel the railroads to provide separate coaches. If much separate accommodations are not provided, the scholars, being by law compelled to attend school, and the passengers being by necessity compelled to travel by means of the quasi-public railroad, will be forced into an association dangerous to the public peace and safety, because of the violent antipathy existing in many instances, in fact, quite generally, as is claimed. Such measure, *i. e.*, separate accommodations, is directly related to the end sought, *i. e.*, the *prevention of enforced association*, the *protection of the public* from the result which race antipathy might bring about, if the members of the two races were forced to associate together.

Fourth—Hence, if the Court thinks such measure necessary and reasonable, and not arbitrary, it follows that all four conditions exist and the police power, very properly may be invoked for public protection, for the safety and peace of society.

Apply this analysis to this act which seeks to prohibit a purely private school from accepting as pupils persons of the white and of the colored races.

First—The danger. What danger threatens? Health is not in question, neither is peace nor safety. The general welfare cannot be disturbed by race antipathy, for there is no enforced association. Whatever association there may be is purely voluntary.

Second—Morality. Can it be said that the public morality may be affected? In the cases cited, one can well see how the efficiency of a school or the comfort of travel may

be disturbed by enforced association because of race antipathy, but in order to relate this measure to the police power, the diametrically opposite position is taken and voluntary association is assumed to be dangerous to the public morality because of the irresistible attraction of the races for each other, leading to inordinate affections or immoralities.

Third—Relation to the end sought. Can a law which prevents white and colored persons from associating in a school, presided over by watchful and prudent teachers, have any relation to the prevention of the supposed evil? If there is any danger to public morality arising from the irresistible attraction of the races, no legislation can control it. This is, if a danger, not a danger to the public at large. It is primarily a danger to the individuals themselves.

If it is to be said that social equality cannot be enforced by legislation, how much more truly can it be said that voluntary association cannot be prevented by legislation?

Fourth—Reasonableness. It can hardly be contended that this measure is reasonable and necessary to reach the end sought, *i. e.*, the protection of society against the dangers of voluntary association of the races, when their free commingling is allowed to go unrestrained in all other private walks of life, as must of necessity be, and this character of association, under careful supervision, is, and from its very nature must be, the most innocent of all forms of voluntary associations. To avoid the danger, if it is a danger, all association of the races would have to be prevented.

Returning to counsel's brief, we find nothing to controvert our position, which is briefly:—

With the personal occupations and the private contracts of persons, a state has no concern, provided nothing therein contained is in itself either immoral or seditious.

As heretofore stated, their brief rests upon the unwarranted assumption that in pari materia are the act in question, and laws prohibiting intermarriage, providing separate public schools, requiring common carriers to provide separate coaches for the two races.

We desire to show by parallel analogies how far from being in pari materia are this statute, and those above referred to, as well as all others dealing with the public welfare under the police power.

First—As to common carriers. If counsel claim that the right to control voluntary association in private schools can be deduced from the right to prevent the enforced association in public schools, by close analogy, a right to prevent the races from riding together in their own vehicles can be deduced from the right to prevent the enforced association in public coaches of common carriers.

But no one will be heard to suggest that a law could be enforced which would seek to prohibit me from riding with a colored person in my own carriage or wagon.

Second—As to quarantine. Health is a very natural and proper subject for the exercise of the police power. A contagious disease, however, is a subject of police power only as it relates to the public health and the enforced association with the disease or the compulsory exposure to the infection. The sole province of the police power is to prevent one from exposing others, without their knowledge or against their will, to a danger. The analogy, in this connection would be:—if from the right of control of attendance at public schools, can be inferred a right to prohibit mixed attendance at private institutions, similarly from the right of quarantine could be inferred a right to prohibit one from voluntarily incurring risk of disease.

And yet it is uncontrovertible that while strictest provisions may be made to guard you who do not wish to expose yourself, no quarantine law ever devised would prevent me from going to you if you were infected, pro-

vided I did not subsequently associate with others, or from opening my house and receiving all those sick of contagious diseases; in fact, this is exactly what a private hospital does.

Third—as to vaccination. In the very recent case of *Jacobson vs. Massachusetts*, 197 U. S., 11, public vaccination is put upon the ground solely that the health of the public at large cannot be endangered by enforced association with the unvaccinated, in time of public danger from a prevailing epidemic. The Court says, p. 28:

> "We say necessities of the case because it might "be that an acknowledged power of a local com- "munity to protect itself against an epidemic threat- "ening the safety of all, might be exercised in par- "ticular circumstances and in reference to particu- "lar persons in such an arbitrary, unreasonable "manner as might go so far beyond what was rea- "sonably required for the safety of the public, as "to authorize or compel the courts to interfere for "the protection of such persons."

And cites with approval the case of *Viemeister vs. White, President*, 179 N. Y. 235, which involved the validity of a statute excluding from the public schools all children who had not been vaccinated.

Applying the analogy above twice mentioned, we should claim that because vaccination at public schools can be enforced, the conducting or attending a private school where unvaccinated children were received could be declared criminal. But vaccination cannot be enforced at private schools, except in times calling for general precautions, the danger being such as, "under the necessities of the case" would justify the compelling of every one or of all children to be vaccinated.

Fourth—as to labor, buildings, &c. This distinction between matters of public concernment and those of private

contract has been very recently considered by this Court in cases involving entirely different subjects, but resting upon similar reasoning. A law fixing a legal day's work at eight hours upon public municipal work, was upheld (*Aiken vs Kansas*, 191 U. S. 207); but in matters of private contract, it was held that a law limiting the hours of labor was unconstitutional and in violation of the Fourteenth Amendment (*Lockner vs. State of N. Y.* 198 U. S. 45) unless the occupation were in itself clearly deleterious. (*Holden vs. Hardy*, 169 U. S. 366.)

The last case cited illustrates clearly the fundamental proposition that the public must be affected; and the distinction between those laws which seek to control private rights, and are unconstitutional, and those which compel a man to conduct his business, even his private business, so as not to injure or endanger the public, and may, when reasonable, be a valid exercise of the police power, is illustrated by reference to ordinances for fire escapes on hotels, theaters, factories, &c.; for ventilation of mines, &c.; for protection of dangerous machinery, &c.

All such measures rest, in the final analysis, on an effort to protect the public against some danger to its safety or health.

This Court has itself spoken of such cases as "border ones", (*Lockner vs. People of State of N. Y.* 198 U. S. 45), and they remain within the line only as long as they relate to the public or to a certain class of individuals, and further seek to protect such class from an unquestioned, indisputable and imminent danger.

This Court said in speaking of such cases of employment recognized as dangerous to health or life:

> "But the fact that both parties are of full age and "competent to contract does not necessarily deprive "the State of the power to interfere where the par- "ties do not stand upon an equality, or where the "*public* health demands that one party to the con-

"tract shall be protected against himself." (*Holden "vs. Hardy*, 169 U. S. 366-397)."

Fifth—As to intermarriage. It is difficult to see why this subject should have been referred to. It bears not even a remote analogy to the subject matter of this statute, as do in more or less degree the matters dealt with by the four classes of laws above mentioned. Marriage is not a private contract. It is a public status not to be entered into or left at will. Every civilized state controls marriage in all of its terms and conditions. Moreover, the rights of parties seeking to enter the marriage relation are privileges vested in them by virtue of their state citizenship, and are not privileges belonging to them as citizens of the United States to which the Fourteenth Amendment could apply.

That the privileges abridged by this statute of Kentucky are those inherent in citizens of the United States, as distinguished from those secured by State citizenship, has not been questioned.

It is plain from all the decisions cited that the right of a teacher to earn a livelihood by teaching, and the right of a person to attend school and to obtain an education, are fundamental rights of all citizens, whether citizens of the State in which the school is situated, or of other States.

"Any person is at liberty to pursue any lawful "calling and to do so in his own way, not encroach-"upon the rights of others."

Cooley Constitutional Limitations, p. 889.

"It is a part of every person's civil liberty to "provide for his own education as he may have the "means."

Cooley on Torts, p. 296.

It is equally clear that the students as well as the college are deprived of their liberty, without due process of law. The relation between the students and the college is con-

tractual. For a consideration, a small tuition fee, the college and its teachers undertake to impart instruction.

> "The liberty mentioned in that amendment means "not only the right of the citizen to be free from "the mere physical restraint of his person, as by "incarceration, but the term is deemed to embrace "the right of the citizen to be free in the enjoyment of "all his faculties; to be free to use them in all "lawful ways; to live and work where he will; "to earn his livelihood by any lawful calling; to pur- "sue any livelihood or avocation, and for that pur- "pose to enter into all contracts which may be proper, "necessary and essential to his carrying out to a suc- "cessful conclusion the purposes above mentioned."
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> *Allgeyer vs. Louisiana*, 165 U. S. 578-589.
> See also pages 590, 591 and 592 and cases there cited.
> *Butchers' Union Company vs. Crescent City Company*, 111 U. S. 746-762.
> *Powell vs. Pennsylvania*, 127 U. S. 678-684.

This act of the General Assembly of the State of Kentucky not only violates the direct provisions of the Fourteenth Amendment to the Federal Constitution, but it violates the common sense of mankind, and seeks to destroy the work of half a century which has borne no fruits of evil or danger, but, on the contrary, has stood as a conspicuous example of a humanizing and uplifting moral agency.

A careful re-perusal of our opponents' brief discloses that the only basis of the validity of the act claimed is a remote inference that in some way the co-education of the races in a private school may threaten race identity—that this act will protect the purity of blood and prevent amalgamation.

Race amalgamation must be either legitimate or illegitimate. Legitimate amalgamation is prevented now by the constitution of Kentucky. Illegitimate amalgamation is a

curse not only of Kentucky, but of many other localities. It cannot be prevented by legislation.

Absolute prohibition of the voluntary association of the races, in factories, in churches, on the street, everywhere, might have some effect, but no such law would be constitutional. Could such laws be enacted, we do not think that they would have any tendency towards prevention of the mingling of blood, but of all efforts to prevent voluntary association, the last, not the first, should be the destruction of a private school, where are taught lessons of sobriety and religion, where by precept and example, the students are impressed with their duty to themselves and to their Creator, and are guarded from the dangers that beset them in all other walks of life.

The common law has ever regarded with favor the control by educational institutions of their internal, social and administrative affairs. The principle of a certain academic freedom was early recognized, so that by usage, universities, in England, established a jurisdiction over their own students independent, in a degree, of the civil courts.

Likewise, in this country we find in the famous Dartmouth College case, the following:

> "There is not a case to be found which contradicts "the doctrine laid down in the case of Phillips vs. "Bury, namely, that a college founded by an individ- "ual or individuals, is a private charity, subject to the "government and visitation of the founder, and not "to the unlimited control of the government."
> (4 Wheat. 506.)

We have noted above the right of a state to regulate the operation of certain private industries, such as mines and factories, upon the grounds that such occupations are in themselves either dangerous to life or deleterious to health, and that the interests of the public are involved. But with

the freedom of thought and conduct in an institution of learning, no state has attempted to interfere, for the general law of the land has recognized the principle that it makes for the progress of the world for educational institutions to enjoy the largest possible independence, so that there may be diversity of usage and method continually adapted to particular conditions and advancing enlightenment.

No influence in the entire South has been so potent against the evil of race amalgamation as that of Berea College.

The College has always recognized the inherent differences in the races. There is nothing before this Court to show that any teaching of social equality has ever been promulgated. Such is not the fact. Lessons of mutual respect and of Christian forbearance may perhaps be inferred from the purpose of the College's foundation "to promote the cause of Christ". Nothing more.

Berea College, which in the words of the indictment "did unlawfully and wilfully permit and receive both the white and negro races as pupils for instruction in said college", did, by so doing (and for many years past) perform for Kentucky the greatest service yet rendered, in the prevention of the evil, which it is now claimed its existence and its practices threaten to bring to pass.

It is true that the statute is in form general, but it has been assumed and admitted that it is directed against Berea College. Counsel for the Commonwealth, in their brief, not when referring to the indictment, but to the constitutionality of the act, speak of Berea and of Berea only.

We may be pardoned for calling attention to some well known facts outside the record, not that they are necessarily of such character as to command the judicial notice of the Court, but are illuminative of the unreasonableness of the law.

Berea College is in no sense a local school. It is a national institution. It is supported by contributions from citizens of many states. More of its teachers are citizens of other states than of Kentucky. Its students come from nearly every state and from foreign countries.

The institution has attracted wide interest by reason of its special educational adaptations for the great mountain region of the South which it has been foremost in bringing to public attention. Upon its official publications it carries, among others, the following endorsement:

> "The undersigned confidently commend this cause
> "as one of National concern:
>
> Chas. W. Eliot,
> W. Murray Crane,
> Wm. Croswell Doane,
> Daniel C. Gilman,
> David J. Brewer,
> Woodrow Wilson."

Should, therefore, the Court come to view the reasonableness of this legislation, the wide interests involved should not be overlooked.

The Commonwealth of Kentucky has attempted, under guise of the police power, not to regulate some internal difficulty peculiar to itself, but to prohibit the work of an institution in which every citizen of the United States is interested.

Were it conceivable that the States of Maryland, Massachusetts and Connecticut should make and enforce similar laws, the great Universities of John Hopkins, Harvard and Yale would find themselves engaged in criminal acts, and would find themselves compelled to close, or to abandon their precepts and practice of centuries.

Berea is quite as national in its character as any of these and is, in its smaller way, equally a factor in the progress of civilization.

Such statute is not only unconstitutional, and contrary to the practices of civilized peoples, and in violation of the fundamental rights of mankind, but is so contrary to common sense and common usage, that even among races which do not enjoy the civilizing processes of this age of enlightenment, it could not find support.

There is no spot upon this earth, which has the protection of any form of government, where devoted men and women could be fined as criminals, because they gathered students of good moral character, without discrimination as to race or creed, and by teaching the rudiments of knowledge and the elements of religion, sought to contribute to the enlightenment of the world.

Respectfully submitted,

J. G. CARLISLE,
GUY WARD MALLON,
Attorneys for Plaintiff in Error.