Supreme Court of the United States.

~~October~~ No. ~~190~~ 12

BEREA COLLEGE, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

In error to the Court of Appeals of the State of Kentucky.

Brief for the Commonwealth of Kentucky.

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POINTS AND AUTHORITIES.

APPENDIX.

No. 546.

Supreme Court of the United States.

OCTOBER TERM, 1906.

BEREA COLLEGE, ... *Plaintiff in error,*

vs.

THE COMMONWEALTH OF KENTUCKY, ... *Defendant in error.*

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

BRIEF FOR THE DEFENDANT IN ERROR.

The Plaintiff in error presents this writ of error from a decision of the Supreme Court of Kentucky, holding an Act of the General Assembly of Kentucky, approved March 22, 1904, prohibiting white and colored persons from attending the same school, constitutional. This Act, and the opinion of the learned Chief Justice of the Kentucky Court of Appeals together with other pertinent acts and laws are printed as an appendix to this brief.

QUESTION FOR REVIEW.

Does the Act of the General Assembly of Kentucky, approved March 22, 1904, as construed and interpreted

by the Supreme Court of Kentucky, deny to the plaintiff in error the equal protection of the law, or abridge the privileges or immunities of its teachers and pupils; or does said Act deprive said teachers or pupils of liberty or property without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution? The decision of these questions require a determination whether the Statute is a valid and reasonable exercise of the Police Power inherent in the sovereign State of Kentucky, or an arbitrary, unreasonable and unwarranted exercise of said power by said State.

FIRST.

THE POLICE POWER.

The Statute is a reasonable exercise of the power. Legislative power is the power and authority vested in the General Assembly to make laws. This power, within constitutional limitations, is absolute and complete. The object and purpose of every government is to foster and promote the happiness and general welfare of its people. The welfare of the State and community is paramount to any right or privilege of the individual citizen: The rights of the citizen are guaranteed, subject to the welfare of the State. **Hence, the State has not surrendered its sovereign power of legislation for the general welfare, by constitutional guaranties of individual liberty.**

> **"Individual liberty of action or right must give away to the greater right of the collective people in the assertion of a well defined policy, designed and intended for the general welfare."**
>
> "In its broadest acceptance, the police power

means the general power of government to preserve and promote the public welfare, even at the expense of private rights."

Cooley's Const. Lim., 6th Ed., 704.

New Orleans Gas and Light Co. v. Hart, 40 La., 474.

"Police power is the right of the State functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the like power vested in Congress by the Federal Constitution."

Lake View v. Rose Hill Cemetery Co., 70 Ill., 192:

"The police power of a State is co-extensive with self-protection, and is applicably termed the law of overruling necessity. It is the inherent and plenary power in the State, which enables it to prohibit all things hurtful to the comfort and welfare of society."

Hare's American Constitutional Laws, page 766:

"The police power may be justly said to be more general and pervading than any other. It embraces all operations of society and government; all the constitutional provisions presupposes its existence and none of them preclude its legitimate exercise."

Police power is the inherent right of self-preservation in the State, and is without and beyond the Constitutional guaranties of individual rights and liberties.

Tiedeman's Limitations of Police Power, page 212.

1 Hare's American Constitutional Law, 766.

111 U. S., 746, Justice Bradley.

165 U. S., 580, Justice Peckham.

State v. Holden, 14 Utah, 718.
Commonwealth v. Alger, 7 Cush., 85.
Power v. Penn., 127 U. S., 678.
22 A. & E. Ency. Law, 2nd vol., 937.

PUBLIC POLICY IN KENTUCKY.

It is the contention of the State that this Statute, the constitutional provision and the Statutes of Kentucky providing for separate public schools for the two races; the Statute prohibiting the intermarriage of the two races; the Statute incapacitating the issue of such marriages from inheriting; and the Statute requiring common carriers to provide separate coaches for the two races, are in pari materia; and the Commonwealth, in the enactment and passage of all these laws had but one common purpose and end—to preserve race identity, the purity of blood, and prevent an amalgamation, and that such is the settled public policy of the State. This will be seen from the following constitutional provision and Statute:

PUBLIC SCHOOLS.

Constitution, Sec. 187:

"In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained."

Kentucky Statutes, Sec. 4428:

* * * "Such contract shall expressly provide that all children of pupil age residing within the district shall have the privilege of attending the said high schools, academy or college for at least five months during the school year without payment of the tuition fees; but nothing in this chapter shall be construed to authorize any white person to attend

a common school or other institution of learning established for colored children, or any colored person to attend a common school or other institution of learning established for white children."

The marriage between the two races is prohibited.

Kentucky Statutes, Sec. 2111:

"If any authorized person shall knowingly, with or without license, solemnize a marriage such as is herein prohibited, he shall be imprisoned not less than one nor more than twelve months, or fined not exceeding one thousand dollars, or both."

Kentucky Statutes, Sec. 2114:

"Any party to a marriage within the incestuous degree herein prohibited, or **between a white person and a negro or mulatto,** shall be fined not less than five hundred dollars nor more than five thousand dollars, and if, after conviction, the parties continue to cohabit as man and wife, they, or either of them, shall be imprisoned not less than three nor more than twelve months in the penitentiary."

Kentucky Statutes, Sec. 2097:

"Marriage is prohibited and declared void, * * * (2) **between a white person and a negro or mulatto.**"

Kentucky Statutes, Sec. 2098:

"The issue of an illegal or void marriage shall be legitimate, except that the issue of an incestuous marriage, found such by the conviction or judgment of a court, in the lifetime of the parties, or **of a mar-**

riage between a white person and a negro or mulatto, shall not be legitimate; and where one of the parties is an idiot or lunatic, the issue shall be legitimate as to both."

Common Carriers to Furnish Separate Coaches.

Kentucky Statutes, Sec. 795, in part provides:

"That any railroad company, corporation or persons * * * doing business in this State, * * * or who may hereafter be engaged in running or operating any of the railroads of this State, either in part or in whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad."

It is the settled policy of the several states that the purity of blood and the indentity of each race shall be preserved; and that all laws which are necessary to prevent an amalgamation are within the reasonable exercise of the police powers.

THIRD.

MARRIAGE.

Laws prohibiting intermarriage between the two races, in force not only in the Commonwealth of Kentucky, but in many of the States, have been held to be a reasonable and valid exercise of the police power of the State; and do not abridge any right or privilege secured by 14th amendment, to either of said races.

Ex Parte Hobbs, 1 Woods, 537 and 543.

State v. Gibson, 36 Ind., 402 and 405.

State v. Jackson, 80 Mo., 177.
State v. Harston, 63 N. C., 453.
Green v. State, 29 Am. Rep., 742.
Brook v. Brook, 9 H. L., 193.
Trasher v. State, 3 Tex. App., 263.
Doc Lonas v. State, 3 Heisk, 309 and 310.

In State v. Gibson, supra in passing upon the constitutionality of a statute of Indiana prohibiting the intermarriage of the races, the Court said:

"In this State marriage is treated as a civil contract, but it is more than a mere civil contract. It is a public institution established by God himself, is recognized in all Christian and civilized nations, and is essential to the peace, happiness and well-being of society. In fact, society could not exist without the institution of marriage, for upon it all the social and domestic relations exist and are based. The right, in the States, to regulate and control, to guard, protect and preserve this God-given civilizing and christianizing institution is of inestimable importance, and can not be surrendered, nor can the States suffer or permit any interference therewith. If the Federal government can determine who may marry in a State, there is no limit to its power. It can legislate upon all subjects connected with, or, growing out of this relation. It can determine the rights, duties and obligations of husband and wife, parent and child, guardian and ward. It may pass laws regulating the granting of divorces. It may assume, exercise and absorb all the powers of local and domestic character. This would result in the destruction of the States. The Federal

government can not exist without the States, but the States could exist without the Federal government, as they did before its creation. There is no necessity for the destruction of either. The authority of the Federal government begins where the authority of the State ceases. The State government controls all matters of a local and domestic character. The Federal government regulates matters between the States and with foreign Governments. There is, and can be, no conflict between the State and Federal governments, if each will act within the sphere assigned to each. The necessity for State and local self-government is shown by the character of our people. The customs, habits and thoughts of the people in one State differ widely from those of the people in another State, and this results in different laws."

"The laws of this State provide that males of the age of seventeen and females of the age of fourteen years, not within the prohibited degrees of consanguinity, are capable of entering into the contract of marriage. The statute provides that the following marriages are void: When one of the parties is a white person, and the other possessed of one-eighth or more of negro blood; and when either party is insane or idiotic, at the time of marriage. Under the police power possessed by the States they undoubtedly have the power to pass such laws. The people of this State have declared that they are opposed to the intermixing of races and all amalgamation. If the people of other States desire to permit a corruption of blood, and a mixture of races, they have the power to adopt such a policy. When the legislature of the

State shall declare such a policy by positive enactment, we will enforce it, but until thus required we shall not give such policy our sanction."

"This subject is discussed with great ability, clearness and force by the Supreme Court of Pennsylvania, in the recent case of The Philadelphia & West Chester R. R. Co. v. Miles, 93 Am. Dec., 747."

In Ex Parte Hobbs, 1 Woods, 537 and 543, the Court said:

"The marriage relation between white persons and persons of African descent is prohibited, and declared to be null and void by the law of Georgia: Held, That marriage laws are under the control of the States, and that the law named is not annulled or affected by the civil rights bill of Congress or the Fourteenth Amendment to the Constitution of the United States. * * *

"The marriage relation, which is a civil institution, has hitherto been regulated and controlled by each State within its own territorial limits, and I can not think it was intended to be restrained by the amendment, so long as the State marriage regulations do not deny to the citizen the equal protection of the laws. Nor do I think that the State law operates unequally; the marriage relation between whites and colored can not exist under the Statutes of this State—it is null and void as to both."

In State v. Hairston, 63 N. C., 453, it is said:

"The marriage relation is a peculiar and important one. The Courts treat it as a contract, only in the sense that contract—consent of parties—pre-

cedes it, and is essential to its validity. **But when formed, it is more than a civil contract, it is a relation, an institution, affecting not merely the parties, like business contracts, but offspring particularly, and society generally.''**

In Brook v. Brook, 9 H. L., 193, Lord Cromwell said:

''There can be no doubt of the power of every country to make laws regulating the marriage of its own subjects; to declare who may marry, how they shall marry; and the consequences of their marriage.

In Green v. State, 29 Am. Rep., 742, the Court said:

''These homes, in which the virtues are most cultivated and happiness most abounds, are the true **officinae gentium—the nurseries of States. Who can estimate the evil of introducing into their most intimate relations elements so heterogeneous that they must naturally cause discord, shame, disruption of families and estrangement of kindred?** While with their interior administration the State should interfere but little, it is obviously of the highest public concern that it should, by general laws adapted to the state of things around them, guard them against disturbances from without.

''Hence it is that, if not in every State in the Union, in all of them in which any considerable numbers of the negro race resided, statutes have been enacted prohibiting intermarriage between them and persons of the white race. Said the Supreme Court of Pennsylvania in a recent case: 'Why the Creator made one white and the other black, 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. * * * The natural law, which forbids their intermarriage and that amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures.' "

In Doc Lonas v. State, 3 Heisk (Tenn.), 309 and 310, Supra, the Court said:

"The highest and holiest duty of every government is to provide for the happiness and general welfare of its people. How and in what manner this is to be best subserved, is a question for the political power; and the **police power**, which is inherent in all governments, is to be exercised without question. * * *

The laws of civilization demand that the races be kept apart in this country. The progress of either does not depend upon an admixture of blood. A sound philanthropy, looking to the public peace and the happiness of both races, would regard any effort to intermerge the individuality of the races as a calamity, full of the saddest and gloomiest portent to the generations that are to come after us."

In State v. Jackson, 80 Mo., 177, Supra, the Court said:

"All of one's rights as a citizen of the United States will be found guaranteed by the Constitution of the United States. If any provision of that instru-

ment confers upon a citizen the right to marry any one who is willing to wed him, our attention has not been called to it. If such be one of the rights attached to American citizenship, all our marriage acts forbidding intermarriage between persons within certain degrees of consanguinity are void, and the nephew may marry his aunt, the niece her uncle, and the son his mother or grandmother."

FOURTH.

PUBLIC EDUCATION.

Laws of several States, as well as Kentucky, prohibit the two races from attending the same public school, and provide separate public schools for the two races. These laws have been held to be a reasonable and valid exercise of the police power of such States, and not to abridge any right or privilege granted by the 14th amendment to either of the races.

Lehew v. Brummell, 103 Mo., 551 and 552.
Cary, et al 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.

In Lehew v. Brummell, 103 Mo., 551, Supra, the Court in passing on a statute requiring the two races to attend separate schools, said:

"The framers of the Constitution, and the people by their votes in adopting it, it is true, were of the opinion that it would be better to establish and maintain separate schools for colored children. The wis-

dom of the provision is no longer a matter of speculation. Under it, the colored children of the State have made a rapid stride in the way of education to the great gratification of every right-minded man. The schools for white and black persons are carried on at a great public expense, and it has been found expedient and necessary to divide them into classes. That separate schools may be established for male and female pupils can not be doubted. No one would question the right of the legislature to provide separate schools for neglected children who are too far advanced in years to attend the primary department; for such separate schools would be to the great advantage of that class of pupils. So, too, schools may be classed according to the attainments of the attendants in the branches taught. That schools may be classed on these and other grounds without violating the clauses of the Federal constitution now in question, must be conceded. But it will be said the classification now in question is one based on color, and so it is; **but the color carries with it natural race peculiarities which furnish the reason for the classification.** There are differences in races, and between individuals of the same race, not created by human laws, some of which can never be eradicated. These differences create different social relations recognized by all well organized governments. If we cast aside chimerical theories and look to practical results, it seems to us it must be conceded that separate schools for colored children is a regulation to their advantage."

In Cary, et al v. Carter, 48 Ind., 362, the Court said:

"It being settled that the legislature must provide for the education of the colored children as well as for the white children, we are required to determine whether the legislature may classify such children, by color and race, and provide for their education in separate schools, or whether they must attend the same school without reference to race or color. In our opinion, the classification of scholars, on the basis of race or color, and their education in separate shools, **involve questions of domestic policy which are within the legislative discretion and control**, and do not amount to an exclusion of either class."

In Martin v. Board of Education, 42 W. Va., 515, the Court in construing a section of the Constitution of the State of West Virginia, which provided that "white and colored children shall not be taught in the same school," said:

"The only **privilege** that appears to be **denied to** colored children in this section **is that of association** with white children, and vice versa. If it had required that they **should** be taught in the same school, then it would have been a compulsory infringement of the rights of both, but, as it is now, it treats both alike, and places them precisely on the same footing."

In State v. McCann, et al, 21 Ohio, 210, Supra, the Court said:

(This statute) "only regulates the mode and manner in which this right shall be enjoyed by all classes of persons. The regulation of this right arises from

the necessity of the case. Undoubtedly it should be done in a manner to promote the best interests of all. But this task must, of necessity, be left to the wisdom and discretion of some proper authority. The people have committed it to the general assembly, and the presumption is that it has discharged its duty in accordance with the best interests of all. * * *

Equality of right does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. **Any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either.** There is, then, no ground upon which the plaintiff can claim that his rights under the 14th amendment have been infringed."

In Bertonneau v. Directors, etc., 3 Woods, 180, Supra, in passing upon a like statute the Court said:

"Both races are treated precisely alike. **White children and colored children are compelled to attend different schools.** That is all. The State, while conceding equal privileges and advantages to both races, has the right to manage its schools in the manner which, in its judgment, will best promote the interest of all. The State may be of the opinion that it is better to educate the sexes separately, and therefore establishes schools in which the children of different sexes are educated apart. **By such a policy can it be**

said that the equal rights of either sex are invaded? Equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the Constitution of the United States. **Equality of right does not necessarily imply identity of rights."**

So the Statute here in question imposes no burden upon either race, and gives to each the same opportunity and privilege to acquire an education. If it be true, as sometimes said, that race prejudices exist in this State, then the co-education of the two races would tend to increase the same, by the close association in the school rooms; and, although some may be found of each race who are willing to associate themselves together, it is however, the safety, good order, peace and general welfare of the State, by which the legislature is guided.

FIFTH.

SEPARATE COACHES OR CARS.

The laws of several States, including Kentucky, require common carriers to provide separate cars or coaches for the white and colored persons who travel over their lines. These laws have been upheld by the Supreme Court of the United States as a reasonable and valid exercise of the police power; and not to abridge any immunity or privilege secured by the 14th amendment to either of the races.

West Chester & Philadelphia R. R. Co. v. Miles, 93 Am. Dec., 747-8.

Smith v. State, 100 Tenn., 494.

L. O. & T. R. R. Co. v. State, 133 U. S., 578 (33: 784).

Plessy v. Ferguson, 163 U. S., 537 (41: 260).

C. & O. Railway Co. v. Kentucky, 179 U. S., 392, (45: 247).

In West Chester, etc., R. R. Co. v. Miles, 93 Am. Dec., 747, Supra, the Court said:

"A railroad company has the right and is bound to make reasonable regulations to preserve order in its cars. It is the duty of the conductor to repress tumults as far as he reasonably can, and he may, on extraordinary occasion, stop his train and eject the unruly and tumultuous. But he has not the authority of a peace officer to arrest and detain offenders. He can not interfere in the quarrels of others at will merely. In order to preserve and enforce his authority as the servant of the company, it must have a power to establish proper regulations for the carriage of passengers. It is much easier to prevent difficulties among passengers by regulations for their proper separation than to quell them. **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 take his seat beside 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. These views are sustained by high authority. Judge Story, in his Law of Bailments, stating the duty of passengers 'to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of the other passengers as well as for their own proper interest,' says 'the importance of the doctrine is felt more strikingly in cases of steamboats and railroad cars.' "

"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 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 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 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 repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as 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."

In L., N. O. & T. Railway Company v. Mississippi, 133 U. S., 578 (33-789), Supra, it was held that the State:

"Could compel railroad companies to provide, within the State, separate accommodation for the two races."

In Plessy v. Ferguson, 163 U. S., 545 (41:259) Supra, the Court said:

"We think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges nor immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the 14th amendment. * * * In this connection it is also suggested by learned counsel for the plaintiff in error that the same argument that will justify the State legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street and white people on the other, or requiring white men's houses to be painted white and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. **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 promotion of the public good and not for the annoyance or oppression of a particular class.** * * *

So far as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a **reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness itt is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order.**"

"Gauged by this standard we can not say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the 14th amendment than the acts of **Congress requiring separate schools for colored children in the District of Columbia,** the constitutionality of which does not seem to have been questioned. We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the State legislature, and should enact a law in precisely similar terms, it would, therefore, relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudice may be **overcome by legislation, and that equal**

rights can not be secured to the negro except by an enforced commingling of the two races. We can not accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said in the New York Court of Appeals, in People v. Gallagher, 93 N. Y., 438, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized, and performed all the functions respecting social advantages with which it is endowed.'

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one can not be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States can not put them on the same plane."

SIXTH.

COMMON CARRIERS—PUBLIC SCHOOLS—PRIVATE SCHOOLS.

Several states have constitutional and statutory laws providing for separate public schools, and requiring

railroad companies to provide separate coaches for white and colored passengers. It was contended in the State Court that if separate accommodations were not made and provided for in the public schools and on the railroads, it would not be possible for persons of one race to use these public utilities without mingling with persons of the other race.

> "There is, therefore, substantially an inforced association of the two races, and such inforced association may very properly be prevented by legislation, * * *. The reasons, therefore, for the enactment of separate coaches and others of like character and the effects, are altogether different from any that can be suggested in support of the legislation involved in this case."

The fallacy in this argument lies in the assumption that the whole of the white race has an antipathy toward the colored race, and vice versa. While those who have such antipathy for each other, were, in the use of the public schools and on the common carriers, prior to such legislation providing for their separation, forced to associate together; yet those who had no such antipathy, but desired and had mutual desire to associate with the other race in such public schools and on the common carriers, were, after the enactment of such legislation, forced to separate. There are some of both races who were and are opposed to this separation of the two races in the public schools and on the common carriers.

We must look deeper for the philosophy and reason upon which the courts have based their opinions and judgments in upholding such legislation. The courts

have upheld this class of legislation upon the ground that such enactments are a reasonable and necessary exercise of the police power for the general welfare of the State, in order to preserve the identity of the races, to maintain the purity of blood and avoid an amalgamation. This is also the object of the Statute in question; and as stated before, all these laws are in pari materia and have for their object this common purpose.

SEVENTH.

DISCRETION OF THE LEGISLATURE TO DETERMINE PRIMARILY, WHAT COMES WITHIN THE POLICE POWER.

The Legislature of Kentucky is vested with a large discretion and is at liberty to act for the preservation of the public peace and general welfare. The political rights of the two races may be equal without being identical. The conditions of this Statute apply equally to both races.

In Mugler v. Kansas, 123 U. S., 678 (31: 210), the Court said:

> "Power to determine such questions, so as to bind all, must exist somewhere, else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police pow-

ers of the State, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health or the pubic safety."

In L. & N. R. R. Co. v. Kentucky 161, U. S. 677 (40: 859), to Court in speaking of the police power 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 within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, **if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry."**

EIGHTH.

GOOD FAITH.

The act of March 22, 1904 was enacted by the Commonwealth of Kentucky, "in good faith for the promotion of the public good and not for the annoyance or oppression of the colored race."

By the emancipation of the colored race, and after the adoption of the 13th, 14th and 15th Amendments to the Federal Constitution, the Commonwealth of Kentucky in her sovereign capacity was, at the close of the civil war, called upon to protect and provide for this unfortunate race. Untutored in the arts of government, without an education, without experience and without an individuality, the colored race was ushered into the highest responsibility of American citizenship—it was

given the right of suffrage and required to wield the ballot in the evolution of a government of, by and for the people. Kentucky did not hesitate or shrink from this new duty, but at once set about the task of the education and the uplifting of the race in order that it might intelligently discharge the duties which the new condition had brought to it.

We have had printed in the appendix the several acts of the General Assembly of Kentucky providing for the education of the negroes which will show, step by step, the generosity toward, and kindly consideration of this race by the people of Kentucky, who, as well as the white people of the entire Southland, more than any other people, have the interest of this race at heart.

By an act of Feb. 16, 1866, all taxes collected from negroes were applied and used entirely for the benefit of said race. "One half, if necessary, to go to the support of their paupers, and the remainder to the education of their children.

By an act of February 23, 1874, the fund was increased by a capitation tax, a dog tax, the taxes on suits, deeds and license, all fines, penalties and forfeitures on colored persons were added; all sums received by virtue of an act of Congress distributing public lands are also applied to the fund for the education of the negroes.

By the act of May 12, 1884, it was further supplemented. In the case of Dawson v. Lee, 6 R., 413, the Kentucky Court of Appeals held the act of February 23, 1874 unconstitutional and held that the negro children of the State, were entitled to an equal per capita of the entire school fund of the Commonwealth. From this time, there has been no discrimination in the distribution of the "school fund," and for such continued distribution,

the following provision was made in section 187 of the present Constitution.

> "§ 187. EACH RACE TO SHARE FUND EQUALLY—SEPARATE SCHOOLS—**In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained.**"

Colored children are now, not only given the same advantages that are given to the white children, but the Commonwealth, by act of May 22, 1893 provided for a colored State Normal School, which as amended by the act of March 18, 1902, has established a State Institution to which colored children may go and complete at public expense the education begun, but necessarily left incomplete in the common public schools. By this generosity of the State's policy, school houses for the education of the colored race, built and supported by a voluntary system of taxation by the white taxpayers, dot every county in the State.

The Commonwealth, in sympathy with the movement of the century to help those who are unable to help themselves, has by a liberal and generous appropriation provided for the education and training of the blind and deaf mutes of the colored children of the State.

NINTH.

THE FOURTH SECTION OF THE STATUTE.

This section was held to be an unreasonable and arbitrary provision, and therefore, unconstitutional, but the remainder of the Statute was held to be a complete and

consistent law within itself, prohibiting the co-education.

TENTH.

INDICTMENT.

The sufficiency of the indictment herein was a question of local practice and procedure and for the decision of the State Court alone; and the overruling of the appellant's demurrer to the said indictment does not present any federal question for review.

Caldwell v. Texas, 137 U. S., 699, (34:818).
Davis v. Texas, 139, U. S., 657, (35: 302).
Bergeman v. Parker, 157 U. S., 655, (39: 846).
Howard v. Fleming, 191 U. S. 127, (48: 124).

ELEVENTH.

FACTS.

This Court will not weigh or review the evidence on the trial, nor the facts alleged in said indictment and admitted on demurrer.

In Clipper Min. Co., v. Eli Min. & L. Co., 194 U. S. 222, (48: 948) the Court said:

> "It is the settled rule that this court, in an action at law, at least, has no jurisdiction to review the conclusions of the highest court of a state upon questions of fact."

Minneapolis & St. Louis R. R. Co. v. Minnesota, 193 U. S., 553, (48: 619).

Southern B. & L. Association v. Ebrough, 185 U. S., 119, (46:833).

TWELFTH.

JURISDICTION OF THE LEGISLATURE.

The legislature of Kentucky was and is vested with the power and jurisdiction to say whether or not the association of the white and colored children of the State and in one and the same school at the same time, is detrimental to the peace, morals and welfare of the State. Neither the Federal Constitution, nor the 14th Amendment thereto has taken this right away from the State of Kentucky.

In Mugler v. Kansas, 123 U S., 678, (31: 210) the Court said;

> **"Under our system that power (police power) is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety."**

In Plumley v. Mass., 155 U. S., 460, (39: 223-230), the Court quoting from Chief Justice Marshall in part, said:

> "Presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which re-

tain and exercise all powers not delegated to the Union, the judiciary of the United States should not strike down a legislative enactment of a state—especially if it has direct connection with the social order, the health and morals of its people—unless such legislation plainly and palpably violates some right granted or secured by the National Constitution, or encroaches upon the authority delegated to the United States for the attainment of objects of national concern."

THIRTEENTH.

CLASSIFICATION FOR PURPOSE OF EDUCATION.

Such a classification is not special legislation. Such a classification may be made with reference to the sexes; or it may be made with the reference to the races; and such a classification will not be an unreasonable or arbitrary exercise of the police power; nor will such a classification, which applies to all under like circumstances and conditions, deny to either race the equal protection of the law, and as heretofore stated, other states have, as well as Kentucky, classified and provided separate public schools for the two races; other states have, as well as Kentucky, classified and required the common carriers therein to provide separate coaches for the two races; other states have, as well as Kentucky, prohibited the intermarriage of the two races, and have declared the issue of such marriage illegitimate and incapable of inheriting. This Honorable Court, when called upon to pass on such legislation, has uniformally held the same to be constitutional, and that when the same op-

portunity was afforded to each, the same accommodation was given to each, and the same prohibitions were extended to both races, **such classification and legislation was clearly within the police power of the State, and did not deny to either race the equal protection of the law or deprive either of any liberty or property guaranteed by the Fourteenth Amendment.**

In Leuhew v. Brummell, 103 Mo., 551, the Court in discussing the 14th Amendment as applied to a statute providing for separate public schools, said:

> "That schools may be classified on these and other grounds, without violating the clauses of the Federal Constitution now in question, must be conceded. **But, it will be said, the classification now in question is one based on color, and so it is, but the color carries with it natural race peculiarities which furnish the reasons for the classification.**"

In Cary v. Carter, 48 Ind., 362, the Court said:

> "In our opinion, **the classification of scholars on the basis of race or color, and their education in separate schools, involve questions of domestic policy which are within the legislative discretion and control, and do not amount to an exclusion of either race.**"

In State v. McCann, 21 Ohio, 210, the Court said:

> "**Equality of right** does not involve the necessity of educating white and colored persons in the same school any more than it does that of educating child-

ren of both sexes in the same school. * * * . **Any classification which preserves, substantially, equal school advantages, is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either.** * * * * * * * Both races are treated precisely alike. White children and colored children are compelled to attend different schools."

In ex parte Hobbs, I Woods, 337-343, the Court recognized the right **to classify the races as to marriage** and said:

"The marriage relation between white persons and persons of African decent, is prohibited and declared to be null and void by the law of Georgia. **Held, that marriage is under the control of the State, and that the law named is not annulled or affected by the Civil Right's Bill of Congress or the Fourteenth Amendment to the Constitution of the United States."**

In Brook v. Brook, 9 H. L. 193, **Lord Cromwell** said:

"There can be no doubt of the power of **every county to make laws regulating the marriage of its own subjects; to declare who may marry; how they shall marry, and the consequences of their marriage."**

FOURTEENTH.

THE STATUTE IN QUESTION.

It will be observed, (1) that by its terms, the first

section of the statute is made to apply to every person, corporation or association of persons who shall maintain or operate any college, school or institution where persons of the white and the negro races are both received as pupils for instruction; (2), that by the second section, every teacher and instructor (white and colored) who shall teach in any such school, college or institution, where both races are received at the same time as pupils for instruction, are alike subject to its provisions; (3), that by the third section of the Statute, it is made to apply to every white person who attends any school or institution where negroes are received as pupils or receive instruction; and to every negro person who attends any school or institution where white persons are received as pupils or receive instruction; and by this section it is further provided:

> "That the provisions of this law shall not apply to any penal institution or house of reform."

We will refer to this proviso later.

Here the same rule is made to apply alike to both races, and the Statute gives to each race equal protection and imposes the same regulation on the white instructor as it does on the negro instructor; the same on the white pupil as on the negro pupil, and there is no discrimination whatever, unless the exemption of the penal institutions of the State and the house of reform from the provisions of the Statute, constitute a discrimination, within the meaning of the 14th Amendment.

By the proviso in the 3d section of the Statute, it does not apply to the inmates of the State penal institutions or the house of reform.

It was contended in the State Court by the distinguished counsel of the plaintiff in error, that this proviso constitutes a discrimination which rendered the Statute unconstitutional and void. The inmates of these institutions—white and colored—are outlawed. They are excluded from the benefit of the law, or by reason of their conduct they are deprived of its protection. They constitute a class to which the Statute does not apply. Such a classification was within the power of the State legislature, unless it was unreasonably and arbitrarily made. This question has substantially been passed upon in a number of cases.

In Magoun v. Bank, 170 U. S., 200, (42: 1042) Justice Kenna said:

> **"That the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion.** * * * * * * It does not prohibit legislation which is limited **either in the objects to which it is directed,** or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and the liabilities imposed."

In Railroad Co., v. Mackay, 127 U. S., 205, (32: 107) Justice Field said:

> **"But when legislation applies to particular bodies or associations, imposing upon them additional liabilities it is not open to the objection that it denies to them the equal protection of the laws,**

if all persons brought under its influence are treated alike under the same conditions."

In Barbier v. Connelly, 113 U. S., 27, (28: 923) it was said:

"Class legislation discriminating against some and favoring others, is prohibited, but legislation which in carrying out a public purpose, is limited in its application, if within the sphere of its operation, it affects alike all persons similarly situated, is not within the Amendment."

FIFTEENTH.

NO RIGHT IS DENIED BY THE STATUTE.

The right to educate and to be educated is not interfered with. The teacher may teach either white or colored pupils; or he may teach both, if he separates his teachings. Any pupil, white or colored, may attend any school or institution in which his race is taught. Berea college may select its race and may continue its good work "in the even channel of its way;" or it may teach both races if it will establish separate schools.

THE STATUTE IS NOT REPUGNANT TO THE FOURTEENTH AMENDMENT.

This Statute neither denies the equal protection of the law, nor does it deprive any person of life, liberty or property without due process of law. Social equality is not guaranteed by the fourteenth amendment, nor is voluntary association guaranteed to the races.

This Statute applies with the same force to both white and colored races, providing that neither shall attend any school where the other is received as a pupil. It is claimed that because of this fact, the Act is obnoxious to the Fourteenth Amendment, securing the privileges and immunities to the citizens of the United States, and protecting them against the deprivation of life, liberty and property without due process of law. The liberty of attending school is not prohibited. It is the liberty of the white person to associate and attend a mixed school, or a school where negroes are taught, or of a colored person attending a school where white persons are taught that is prohibited. No person can claim that he is denied the right to acquire an education, because he or she is denied the right to be educated with persons of a different race.

No person, corporation or association of persons is denied the right to foster, promote, operate or maintain as many colleges or schools for the education of either race as he or it may desire; or if their generosity so permits them, for the education of both races, if separated. **The State by this Statute prohibits the voluntary co-education of the two races together, nothing more. Unless white pupils are guaranteed the right to voluntary associate with the pupils of the colored race, and vice versa, the act is not in conflict with, nor repugnant to the 14th Amendment.**

As in Cary v. Carter, 17 Am. Rep., 757:

"By the solemn decision of that high court, **(the Supreme Court of the United States), the privileges and immunities belonging to the citizens of the states, as such, rest for their security and protection**

where they have heretofore rested, with the states themselves."

If this Statute secures substantially equal school advantages, which is a state and domestic affair, it is neither in conflict with the State nor Federal Constitution.

SIXTEENTH.

NO PROPERTY RIGHT IS INVADED.

Every regulation of a property right has been before the courts of the country in recent years for adjudication. **All property in the Commonwealth and every property right is held subject to those general regulations which are necessary to promote the common good and general welfare.**

The following authorities will illustrate the different phases in which this question has been presented to the courts.

Cooley's Constitutional Limitations, 7 Ed., 830.
Powers v. Commonwealth, 101 Ky., 287.
Dunn v. The Commonwealth, 88 Am. Rep., 344.
N. Y. N. H. & H. R. R. Co. v. N. Y., 165 U. S. 628, (41: 854).
Gladine v. Minnesota, 166 U. S., 427, (41: 1065).
Allgeyer v. Louisiana, 165 U. S., 578, (41:833).
Northern Sec. Co. v. U. S., 193 U. S., 196, (48: 679).
Otis v. Parker, 187 U. S., 66, (47: 323).
Holden v. Hardy, 169 U. S., 366, (42: 780).

In Allgeyer v. Louisiana, Supra, the Court said:

> **"The right to do business within a State may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the State as contained in its statutes."**

SEVENTEENTH.

FOURTEENTH AMENDMENT.

If the voluntary association of the white and the colored races is a privilege guaranteed and secured by the 14th Amendment of the Federal Constitution, then the constitutionality of the Statute may be in question, otherwise no federal question is presented on this appeal.

The 14th Amendment provides:

> "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 law."

This Amendment had for its purpose, (1), to secure so far as civil rights are concerned, absolute equality before the law; (2) to protect the civil rights of every one from encroachment by State authority.

It is the contention of the State, that the statute in question does not encroach on the civil rights of either race, nor does it discriminate against the civil rights of either. This Statute was intended to prevent these two streams of life from flowing into a common channel; to

preserve race identity and to maintain the purity of blood. It is the public policy of Kentucky to require the equal, but separate education of the two races; that while guaranteed equal civil rights, it is the policy of the State of Kentucky to maintain a separate social status.

How is the State to maintain a separate social status? If the young white and colored children are permitted to go voluntarily to school together; to sit together; to eat together; to recite together; to study together; to sleep together; to associate together and to become the guests of each other, may we ask what more is needed to constitute social equality? But let social equality be once established, and mutual attachment will follow as surely as the day does the night; first, among the weaker members of each race, and finally among all, resulting in the destruction or blotting out of the individuality and indentity of each race.

The laws of the State which now prohibit their intermarriage, if not repealed, would leave them to gratify their mutual passions of love in licentiousness. Or, is it reasonable to suppose that social equality may be established between the two races without intermarriage between the white and the colored races, where it is not prohibited by law? The associated education of the two races would lead to social equality, to intermarriage and to an amalgamation.

To guard the rights of the generations yet to be; to preserve the identity of the races, and to maintain the purity of blood, the Commonwealth of Kentucky in the exercise of her sovereign police power, enacted the Statute in question.

The General Assembly of Kentucky and this Honor-

able Court take notice of all facts, truths and matters which are so notorious, and universally known as to form a part of the common information of mankind.

It is shown by Dr. Sanford B. Hunt, Surgeon of United States Volunteers, in the Civil War, that (1). The standard weight of the negro brain is over five ounces less than that of the white. (2) Slight intermixture of white blood diminishes the negro brain from the normal standard, but when the infusion of white blood amounts to one-half (mulatto), it determines a positive increase in the negro brain, which in the quadroon is only three ounces below the standard. (3) The percentage of exceptionally small brains is largest among negroes having but a small proportion of white blood."

Dr. J. Barnard Davis in the Philosophical Transactions for 1868, at page 523, states that the average internal capacity of brain matter in the white race was 92.3 cubic inches, while that of the negro was 86.9, a deficit of nearly 7 per cent.

If we are right in our contention that intimate association in the school room will ultimately lead to social equality and amalgamation, who then will estimate the import of this "mental gap" between the white and the black?

This is not the result of education, but is innate and God-given; and therein lies the supremacy of the Anglo-Saxon-Caucasian race. Education, culture, refinement and civilization is the result of the polishing of the inborn and God-given faculty. Training, culture and education never produce faculty. All these are but the growth, the enlargement and expansion of an inborn capacity.

If the progress, advancement and civilization of the

20th century is to go forward, then it must be left, not only to the unadulterated blood of the Anglo-Saxon-Caucasian race, but to the highest types and geniuses of that race. If this be not true, then Huxley, Darwin, Spencer, Haekel, Weismann, Mendel and Pearson "have labored in vain," and as an eminent writer has said:

> "If accepted science teaches anything at all, it teaches that the heights of being in civilized man have been reached along one path and only one—the path of selection, of the preservation of favored individuals and of favored races. * * * The hope of the human lies in the superhuman; and the possibility of the superhuman is given in selection, in natural and rational selection, among the children that are to be, of the parents of the men to come. The notion of social racial equality is thus to be seen to be abhorent alike to instinct and to reason; for it flies in the face of the process of the Suns; it runs counter to the methods of the minds of God. It is idle to talk of education and civilization and the like, as corrective or compensative agencies. All are weak and beggarly as over against the almightiness of heredity; the omnipotence of the transmitted germ plasma."

The historian and adventurer found the negro race, centuries ago, in barbarian darkness, and the race, as a whole, so remains, a warning and an admonition against social advancement and equality. While the Caucasian takes the white of the Italian marble and the negro the sableness of the night, yet color is not the result of individual choice or preferment; these are a few of the many reasons why the two races should not be educated

together, and the inevitable sequence of social equality avoided.

Feeling satisfied that this Statute deprives neither race of liberty, privelege, property or immunity; nor denies to either the equal protection of the law, and believing that it is for the welfare of both, the Commonwealth of Kentucky on behalf of its generations to come, claims and pleads the inherent sovereign right to require the white and the colored children within her jurisdiction to attend separate schools.

We ask that the judgment of the Kentucky Court of Appeals be affirmed, or the writ of error herein be dismissed.

JAMES BREATHITT,
Attorney-General.
N. B. HAYS,
For Defendant in Error.

THOS. B. McGREGOR,
CHARLES H. MORRIS,
of Counsel.

APPENDIX.

JUDGMENTS AND DECREES OF STATE COURTS ON WRIT OF ERROR.

United States Compiled Statutes 1901, section 709:

"A final judgment or decree in any court in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify or affirm the judgment or decree of such State Court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

"AN ACT TO PROHIBIT WHITE AND COLORED PERSONS FROM ATTENDING THE SAME SCHOOL.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 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 one thousand dollars, and any person or corporation who may be convicted of violating the provisions of this act, shall be fined one hundred dollars for each day they may operate said school, college or institution, after such conviction.

"Sec. 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 be fined as provided in the first section hereof.

"Sec. 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 instruction. Any person so offending shall be fined fifty dollars 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.

"Sec. 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.

"Sec. 5. This act shall not take effect, or be in operation, before the fifteenth day of July, one thousand nine hundred and four."

Approved March 22,1904

Acts 1904, Chap., 85 Page 181.

BEREA COLLEGE V. COMMONWEALTH.

(Filed June 12, 1906).

29 K. L. R. 284.

Under an act of the Kentucky Legislature, approved March 22, 1904, entitled "An act to prohibit white and colored persons from attending the same school," making it 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 $1,000, and any person or corporation who may be convicted of violating the provision of this act shall be fined $100 for each day they may operate said school, college or institution after such conviction," and by section 4, providing that "nothing in this act shall be construed to prevent any private school, college or institution 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." Berea College was indicted in Madison county for "operating a school for white and negro pupils in violation of said act," and in a second indictment was charged 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," in both of which indictments, which were tried together the defendant, Berea College, was found guilty and has appealed. Held—

First. The act 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, the intention of the act being to prevent the two races from attending the same school at the same place and at the same time, whereby there would result an intermingling or close personal association between them, so that a clashing of race prejudices or race destruction may be lawfully averted.

Second. 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. Without this section 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. 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.

Third. Section 4, violates the limitations upon the police power. It is unreasonable and oppressive. The object of the statute is not to prevent either race from being taught by an institution which also teaches the other. Nor is it to prevent persons of 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. Section 4 can be ignored, and the remainder of the act is complete notwithstanding.

Fourth. The act is not in violation of the fourteenth amendment of the Federal Constitution, which 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 applies equally to all citizens and 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. 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 it. The State may withhold it altogether or qualify it.

Fifth. The judgment in the first indictment is affirmed and that under the fourth section of the act is reversed, with directions to dismiss the indictment.

John G. Carlisle, C. F. Burman and Guy Ward Mallon for appellant.

N. B. Hays and Chas. H. Morris for 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 white 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."

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 received as pupils for instruction; and any person or corporation who shall operate or maintain 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 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 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, chapter 85, page 181).

Appellant was found guilty and fined $1,000 in each case. These appeals involve the constitutionality of the Statute. The cases are heard and disposed of together.

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 consti-

tutionality 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:

First. The right of enjoying and defending their liberty.

Second. The right of worshiping Almighty God according to the dictates of their own consciences.

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

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

Fifth. The right of acquiring and protecting property.

Sixth. 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: "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 employes 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 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; I 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-preservation 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 ap-

parent 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 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 worshiping Almighty God according to the dictates of our own conscience—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. The most familar 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 threatens to destroy the race of people who are applying this primal law of self-protection to their own case.

Because of the undefined extent of its overpowering quality, of its unmeasurable value, of the great danger of oppression under 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 inter-breeding is deemed by the political de-

partment 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. (Section 2097, 2098, 2111, 2141, Kentucky 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 known to lower the mental and physical vigor of the off-spring. So incestuous marriages are prohibited. Others not incestuous, but involving the probable effect upon the vitality of the offspring are prohibited also, and marriage 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; Exparte Hobbs, 1 Woods, 537; State v. Gibson, 36 Ind., 402; State v. Jackson, 80 Mo., 177; State v. Hariston, 63 N. C., 453; Brook v. Brook, 9 H. L., 193; Green v. State, 58 Ala., 190; 29 Am. Rep.; Lonas v. State, 3 Heisk (Tenn.) 309.

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. Ferugson, 163 U. S., 537; C. & O. Ry. Co. v. Kentucky, 179 U. S., 392.

We have such statute in Kentucky; section 795, Kentucky 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 Ky. Law Rep., 924; 101 Ky., 703; Ohio Valley R. R. Co. v. Lander, 104 Ky., 431; C. & O. Ry. Co. v. Commonwealth, 21 Ky. Law Rep., 228.

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. (Section 16 and 17, chapter 156, U. S. Statutes at Large; section 187, Constitution of Kentucky; section 4428, Kentucky Statutes; Lehew v. Brummell, 103 Mo., 551; Corey v. Carter, 48 Ind., 362; Martin v. Board of Education, 42 W. Va., 515; State of Ohio v. McCann, 21 Ohio; 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 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 can not 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 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 anitpathy 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 such 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 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 breach 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 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 tranquility, 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 not been 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 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 the 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 physicial power? It is idle to talk of controlling ideas by legislation, or even by

force. You can not 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 ideas 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 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 the 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 field 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 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 wherein 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, 23 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 his seat beside a white man or his wife or daughter, the law cannot 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 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 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 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 consequence 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 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 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 contact 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 pro-

visions 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 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 interminglin 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 exculsively is taught in one branch, and the other in another branch, provided the two branches are not within twenty-five 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 at different places at the same time, it would not be unlawful. It evidently 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 divine 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 of 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 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 pri-

vate 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.

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 Cantril, Judge, absent.

Judge Barker dissents, except in case 6045."

PUBLIC POLICY OF KENTUCKY.

It is the public policy of the Commonwealth of Kentucky to preserve the identity of each race; maintain the purity of its blood; to prevent an amalgamation, and as a means to this end, the statute in question was adopted This will be seen from the following constitutional and statutory provisions:

Constitution, Sec. 187:

> "In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored children shall be maintained."

Kentucky Statutes, Sec. 4428:

> "In order that all districts may, as soon as practicable, be made to contain not less than forty-five

pupil children, each county superintendent shall, from year to year, as far as practicable, and in accordance with the best educational results, equalize in school population the districts of his county. No district hereafter established shall include less than forty-five pupil children, except in cases of extreme emergency. No district shall include more than one hundred pupils children unless it contains a city, town or village within its limits, or there be established therein a high school, academy or college entitled to a share of the revenue of the common school fund, by virtue of a special charter or of a contract between the trustees of the common school district and the trustees or other legal authorities of such institution. In all such cases the teacher or teachers of such high school, academy or college having charge of the common school pupils shall hold certificates, and be subject to all the provisions of the common school laws. Such contracts shall expressly provide that all children of pupil age residing within the district shall have the privilege of attending the said high school, academy or college for at least five months during the school year without payment of the tuition fees; but nothing in this chapter shall be construed to authorize any white person to attend a common school or other institution of learning established for colored children, or any colored person to attend a common school or other institution of learning established for white children. In all cases where the number of children shall exceed one hundred, or fall below forty-five, the county superintendent shall report the reason thereof to the Superintendent of Public Instruction. The area of

no school district shall be more than sixteen square miles, unless it is necessary to enlarge the same so as to include the minimum number of children. Each schoolhouse hereafter erected shall be located as near the center of the district as practicable."

Kentucky Statutes, Sec. 2111:

"If any authorized person shall knowingly, with or without license, solemnize a marriage such as is herein prohibited, he shall be imprisoned not less than one nor more than twelve months, or fined not exceeding one thousand dollars, or both."

Kentucky Statutes, Sec. 2114:

"Any party to a marriage within the incestuous degree herein prohibited, or between a white person and a negro or mulatto, shall be fined not less than five hundred dollars nor more than five thousand dollars, and if, after conviction, the parties continue to cohabit as man and wife, they, or either of them, shall be imprisoned not less than three nor more than twelve months in the penitentiary."

Kentucky Statutes, Sec. 2097:

"Marriage is prohibited and declared void:

1. With an idiot or lunatic.

2. Between a white person and a negro or mulatto.

3. Where there is a husband or wife living, from whom the person marrying has not been divorced.

4. When not solemnized or contracted in the presence of an authorized person or society.

5. When, at the time of marriage, the male is under fourteen, or the female is under twelve years of age."

Kentucky Statutes, Sec. 2098:

"The issue of an illegal or void marriage shall be legitimate, except that the issue of an incestuous marriage, found such by the conviction or judgment of a court, in the lifetime of the parties, or of a marriage between a white person and a negro or mulatto, shall not be legitimate; and where one of the parties is an idiot or lunatic, the issue shall be legitimate as to both."

Kentucky Statutes, Sec. 795, in part provides:

"Any railroad company or corporation, person or persons, running or otherwise operating railroad cars or coaches by steam or otherwise, on any railroad lines or tracks within this State and all railroad companies, person or persons, doing business in this State, whether upon lines of railroad owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this State; and all foreign corporations, companies, person or persons, organized under charters granted, or that may be hereafter granted, by any other State, who may be now, or may hereafter be, engaged in running or operating any of the railroads of this State, either in part or whole, either in their own name or that of others, are hereby required to furnish

separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart."

SUPPLEMENT TO REVISED STATUTES OF KENTUCKY, PAGE 738.

Act of February 16, 1866.

AN ACT FOR THE BENEFIT OF THE NEGROES AND MULATTOES IN THIS COMMONWEALTH.

Sec. 1. That all the taxes hereafter collected from negroes and mulattoes in this Commonwealth, shall be set apart and constitute a separate fund for their use and benefit, one half, if necessary, to go to the support of their paupers, and the remainder to the education of their children.

Sec. II. In addition to the tax already levied by the laws of this Commonwealth, a tax of two dollars shall be levied on every male negro and mulatto over the age of eighteen years, to be assessed and collected as other taxes, and, when paid into the treasury, shall go into the fund aforesaid.

Sec. III. The commissioners of taxes in each county shall keep a separate book, or a separate column in his

book, for the enlistment of the taxable property of negroes and mulattoes, and in which the names of all the male negroes and mulattoes over the age of eighteen shall be recorded.

Sec. IV. The trustees of each school district in this Commonwealth may cause a separate school to be taught in their district for the education of the negro and mulatto children in said district, to be conducted and reported as other schools are, upon which they shall receive their proportion of the fund set apart in this act for that purpose.

Sec. V. The county court of each county may certify to the auditor of public accounts the number of negro and mulatto paupers kept in each county, and upon such certificate draw their proportion of the fund set apart in this act for that purpose. Said reports shall be made by said courts at their annual court of claims.

Sec. VI. Chapter eighty-eight of the Revised Statutes, and amendments thereto, shall regulate the mode and manner of distributing the school fund realized under this act; but no part of said fund shall ever be drawn or appropriated otherwise than pursuant to this act in aid of common schools for negroes and mulattoes.

Sec. VII. The auditor shall apportion each year the revenue from the fund realized under this act for the benefit of said paupers among the several counties of the state according to the number of said paupers in each county, as shown by the reports of the several county courts.

Sec. VIII. Nothing in this act shall be construed as interfering with the rights of the county courts in levying county taxes.

Sec. IX. This act shall take effect from its passage.

Page 875.

AN ACT TO ESTABLISH A UNIFORM SYSTEM OF COMMON SCHOOLS FOR THE COLORED CHILDREN OF THIS COMMONWEALTH.

§ 1. **Be it enacted by the General Assembly of the Commonwealth of Kentucky,** That there shall be a uniform system of common schools for the education of the colored children of this Commonwealth.

§ 2. That the school fund for this purpose shall be known as the colored school fund, and shall consist of the following provisions, viz.:

1. The present annual revenue tax of twenty-five cents, and twenty cents in addition, on each one hundred dollars in value of the taxable property owned or held by colored persons, which tax shall be devoted to no other purpose whatever.

2. A capitation tax of one dollar on each male colored person above the age of twenty-one years.

3. All taxes levied and collected on dogs owned or kept by colored persons.

4. All State taxes on deeds, suits, or on any license, collected from colored persons.

5. All the fines, penalties, and forfeitures imposed upon and collected from colored persons due the State, except the amount thereof allowed by law to attorneys for the Commonwealth.

6. All sums of money hereafter received by this

Commonwealth under or by virtue of an act of the Congress of the United States Distributing public lands, or the proceeds of the sales thereof: Provided, The pro rata share to each colored pupil child shall not exceed, in any one year, the apportionment made to each white pupil child of this Commonwealth.

7. All sums arising from any donation, gift, grant, or devise, by any person whatsoever, wherein the intent is expressed that the same is designed to aid in the education of the colored children of this Commonwealth, or of any county or school district therein.

§ 3. The revenue arising annually from the resources provided by this act shall constitute the sum to be distributed each year, by the Superintendent of Public Instruction, as now provided by the common school law. It shall be the duty of all clerks or judges of courts wherein such fines, penalties, and forfeitures, or taxes on deeds, suits, and licenses are imposed, to collect and pay the same into the Treasury, by the first day of January in each year, deducting five per cent. thereof for collection.

§ 4. The assessor of each county shall keep a separate column in his book showing the enlistment of capitation and taxable property of all colored persons therein subject to taxation by the provisions of this act.

§ 5. The sheriff of each county, shall be allowed five per cent. of the taxes collected and paid into the Treasury by him for the colored school fund.

§ 6. The sheriff shall appropriate the taxes, or any part thereof, collected from any colored person, to whatever fund said colored person may designate, in all cases where he is not able to pay the entire taxes assessed against him for State, county, school and municipal purposes.

§ 7. The Auditor shall keep a separate account for the colored school fund, which shall constitute a basis for the Superintendent's annual pro rata distribution to the colored children of this Commonwealth.

§ 8. That the number of colored children in each district, between the ages of six and sixteen years, shall be taken and reported at the same time and in the same manner as required by law for taking the census of white children; and the distribution of the colored school fund shall be made at the same time in the same manner as provided by law for the distribution of the school fund for white children.

§ 9. The county school commissioner shall be responsible, on his official bond, for the proper distribution of whatever portion of the colored school fund may come into his possession, and for his compensation shall receive three dollars for each colored common school taught in his county, and vested while in session, and one per cent. on all moneys disbursed by him in the support of the colored common schools of his county.

§ 10. The commissioner shall lay off the county into suitable districts, most convenient to the greatest number of colored children in each county, so that no district shall contain more than one hundred nor less than twenty colored children of pupil age.

§ 11. In counties where there are not a sufficient number of colored children to form various schools, a single school may be organized and taught in the locality where the greatest number of colored children reside, and all the colored children of pupil age in the county shall have the privilege of attending said school.

§ 12. That the commissioner, at the beginning of each school year, shall appoint three colored school trus-

tees to each colored school district. These trustees shall have the management of the colored school of their district, employ a teacher therein, and shall notify the parents of the colored children in the district that it is their privilege to send their children to said school free of charge. They shall also report to the commissioner the length of time said school was taught by a qualified teacher, not less than three months in each year, except where there are not more than sixty colored children in a district, then the school may be taught for two months, with the consent of the commissioner. Appeals from the decision of the trustees, upon the petition of any dissatisfied colored person in the district, may be taken to the county commissioner, whose decision in the case shall be final.

§ 13. That the trustees of each district may obtain a site for a school house, and erect a house thereon, by purchase, gift, devise, or donation, and hold and preserve the same for the use and benefit of said school district.

§ 14. That applicants to teach the schools provided for in this act shall obtain certificates in the same manner as now provided by law for applicants to teach white schools, except that the examination may not be extended beyond spelling, reading, writing, and common arithmetic; and a school taught by a teacher competent to teach these branches shall be a lawful school.

§ 15. That the superintendent, commissioners, and trustees may receive gifts, donations, and devises for the benefit of colored schools in the State, a particular county or district respectively, and shall hold and use the same as requested by donor or devisor.

§ 16. That it shall be unlawful for any colored child

to attend a common school provided for white children, or for a white child to attend a common school provided for colored children.

§ 17. The teacher of each colored common school shall teach at least six hours each day, keep a register of the school, and within ten days after the close of the session report to the commissioner the highest, lowest, and average number of pupils in attendance during the session.

§ 18. No school-house erected for a colored school shall be located nearer than one mile of a school-house erected for white children, except in cities and towns, where it shall not be nearer than six hundred feet.

§ 19. The Superintendent of Public Instruction shall provide and furnish the commissioner of each county with the necessary blanks, and perform all other duties similar to those he performs for the white children under the common school law. He shall be allowed a clerk, who shall be paid a salary of seven hundred dollars a year to assist him in his duties pertaining to colored common schools; and said salary and all other expenses incident to a proper conduct of the colored common school system shall be paid out of the colored school fund.

§ 20. The colored school officers and teachers may organize for themselves a State association and auxilliary county institutes, under similar provisions to those made for the officers and teachers of white schools in chapter eighteen (18) of the General Statutes.

§ 21. The State Board of Education shall prescribe a course of study and adopt rules for the government of the colored common schools.

§ 22. That all the provisions of chapter eighteen (18) of the General Statutes which may be deemed nec-

essary for the government of colored common schools, not in conflict with this act, shall apply to the same, which shall be determined by the State Board of Education; and when said board shall have determined upon the provisions of said chapter essential to the government of colored common schools, and adopted such text-books and regulations as it may deem proper for the interest of said schools, the Superintendent of Public Instruction shall compile and publish them, and shall furnish to the commissioner of each county a sufficient number for the use of the colored school trustees of the same.

§ 23. That all unexpended surplus remaining over at the expiration of the school year shall be returned to the Treasury, and shall be distributed by the Superintendent the ensuing year: Provided, Any portion of it that may not be necessary to make the per capita equal to that of a white pupil child may be invested, by the State Board of Education, for the benefit of colored schools in this Commonwealth, the interest upon which shall be annually distributed.

§ 24. That all laws and parts of laws in conflict with this act are hereby repealed.

§ 25. That this act shall take effect from its passage.

KENTUCKY STATUTES, ARTICLE XVI. PAGE 1588.

(Act of May 22, 1893.)

COLORED PERSONS—NORMAL SCHOOL FOR.

§4527. **Trustees — Appointment — Term of Office — Powers — Vacancies — Treasurer.** The State Normal School for Colored Persons (see sec. 4527a), established

by an act of the General Assembly approved May eighteenth, one thousand eight hundred and eighty-six, shall hereafter be under the control and supervision of a board of trustees, composed of the Superintendent of Public Instruction, who shall be ex-officio chairman of the board, and three intelligent and discreet person, residents of Franklin county, to be appointed by the Governor, subject to the approval of the Senate, who are hereby constituted a body corporate, with power to sue and be sued, plead and be impleaded, and to hold in trust all funds and property now owned by said school, or which may hereafter be provided for it, and shall be known and designated as "The Board of Trustees of the Kentucky State Normal School for Colored Persons." (see sec. 4527a.) The term of office of the three members appointed by the Governor shall begin on the first day of July, one thousand eight hundred and ninety-three, and one member thereof shall retire, as may be determined by lot, at the end of one year thereafter, one in two years, and the other in three years; their successors shall be appointed by the Governor for a term of three years; they shall be subject to removal by the Governor for cause, and he is authorized to fill all vacancies occurring by death, resignation or otherwise. Said board shall adopt such rules for the government of said school, not inconsistent with law, as they deem proper, and shall supervise all its interests, provide for all its wants, confer weekly with the faculty and require formal reports of the actual condition of the school in every regard. They shall, biennially, beginning on the first day of July, 1893, elect some suitable person outside of their own number as treasurer, who before entering on his duty, shall give bond in such a sum as they may prescribe, and they shall

agree with him as to compensation: Provided, That in no case shall such compensation exceed one hundred dollars per annum. (Appropriations for school, see secs. 4534, 4591 a.)

§ 4527-A. **Name of School—President and Powers—Superintendent.** That the name of the State Normal School for Colored Persons is hereby changed to that of "The Kentucky Normal and Industrial Institute for Colored Persons," and its board of trustees shall be known as (The Board of Trustees of the Kentucky Normal and Industrial Institute for Colored Persons). That the presiding officer of the institute, who shall be selected by the board of trustees, shall be styled the "President of the Institute," and shall be the chief administrative officer of the institution, under the control of the board of trustees, and be ex-officio a member of the board of trustees, and hold his office indefinitely, at the will of the said board, but the superintendent shall have no vote in his own election or retention in office. (This section is an act of March 18, 1902.

§ 4528. **Department of Agriculture and Mechanics—Fund For.**—There shall be maintained in said institution a department for the education of colored students in agriculture and the mechanic arts, and for said purpose said board shall be entitled to receive an equitable division of the moneys arising from the sale of public lands, and appropriated to the State of Kentucky by an act of Congress, approved August 30, 1890, entitled "An act to apply a portion of the proceeds of public lands to the more complete endowment and support of the college for the benefit of agriculture and the mechanic arts, established under the provisions of an act of Congress, approved July 2, 1862."

§ 4529. **Trustees—Powers Concerning Studies—Instructors and Teachers.**—Said board shall prescribe the course of study for the said normal school; shall select the instructors and fix their salaries, and shall determine the conditions, subject to the limitations hereinafter specified, on which pupils shall be admitted to the privileges of the school.

§ 4530. **Pupils—Terms of Admission Of.**—Any pupil to gain admission to the privileges of instruction in said normal school shall be at least sixteen years of age, possess good health, satisfactory evidence of good moral character, and sign a written pledge, to be filed with the principal, that said applicant will, as far as practicable, teach in the colored common schools of Kentucky a period equal to twice the time spent as a pupil in said normal school, together with such other conditions as the board may, from time to time, impose. But no such pledge shall be required of pupils who matriculate in the departments of agriculture or mechanics.

§ 4531. **Tuition—When Free to Pupils.**—Tuition in the said normal school shall be free to all colored residents of Kentucky who fulfill the conditions as set forth in the preceding section, and such other conditions as the board may require. The board shall fix the rate of tuition and the conditions on which pupils, who are not residents of Kentucky, may be admitted to the privileges of said normal school.

§ 4532. **Sectarian Teaching Forbidden.**—No religious tenets shall be taught in said normal school, but a high standard of Christian morality shall be observed in its management, and, so far as practicable, shall be inculcated in the minds of the pupils.

§ 4533. **Trustees to Visit School—Reports by to Leg-**

islature.—The board shall, in a body or by a majority of their number, visit said normal school once during each session, witness the exercises, and otherwise inspect the condition of said school, and they shall make a biennial report to the Legislature, setting forth the financial and scholastic condition of said normal school, making such suggestions as in their opinion would improve the same, and in the years in which there is no session of the Legislature they shall make their reports to the Governor.

§ 4534. **Appropriation For—Payment Of.**—The sum of three thousand dollars shall be annually appropriated out of the State Treasury to pay the teachers and defray other necessary expenses in the maintenance of said normal school, which amount, together with the sum received under the provisions of said act of Congress, shall be set apart and be known and held as the colored normal school fund. This fund shall be paid out of the State Treasury only on the warrant of the Auditor, drawn on the order of the board. (See, as to further appropriation for, sec. 4591a.)

§ 4534-A. **Appropriation For—Payment Of.**—That the sum of fifteen thousand dollars is hereby appropriated for the purpose of building a dormitory for the use of the female pupils of the State Normal School for Colored Persons, to be paid by the Auditor of Public Accounts out of any money in the treasury not otherwise appropriated on the written order of the chairman of the board of trustees, as the work progresses. The further sum of five thousand dollars annually is hereby appropriated for the support and conduct of said institution, to be paid by the Auditor of Public Accounts out of any money in the treasury not otherwise appropriated, on the written order of the chairman of the board of trustees at the

same time the other annual appropriation is paid. (This section is an act of March 20, 1902.)

§ 4535. **Certificates and Diplomas May be Granted by Board.**—The board is authorized to grant, from time to time, certificates of proficiency to such pupils as shall have completed the prescribed course of study in any department of the institution, and whose moral character and disciplinary relations to said school shall be satisfactory. And such teachers as shall have completed the prescribed course of study in the normal department, and exhibited satisfactory evidence of ability to instruct and manage a school, shall be entitled to diplomas appropriate to such degrees as the board shall confer upon them, which diplomas shall entitle them to teach in any of the colored common schools of this State.