No. 164.

Brief of Ganahl for B. E.

Filed Oct. [illegible]

Supreme Court of the United States.

OCTOBER TERM, 1899.

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J. W. CUMMING, et al.

vs.

THE BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA.

ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, GEORGIA.

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THE BOARD OF EDUCATION OF RICHMOND COUNTY, GEORGIA.

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STATEMENT.

The return shows:

The Board, which under the Act of 1872, had been organized since January, 1873, had never established any *system* of pay High Schools—conceiving that it was neither made its duty nor had it authority to establish such system. Its power in this regard was limited to establishing such pay High Schools in the county as the interest and convenience of the people may require. Act 1872, Sec. 10, p. 460.

In pursuance of this authority, this Board has always exercised the power of establishing and suspending and abolishing pay High Schools, according to its means, and as in its deliberative and judicial discretion, the interest and wants of the people might require. At one time and another it has had five High Schools, to wit: A boy High School at the Richmond Academy, the Tubman High School for girls, the Hephzibah High School for boys and girls, and the Summerville High School for boys and girls, and the Ware High School for colored boys and girls.

The school in Summerville was abolished June 1, 1878, when the trustees of the Summerville Academy received the income of a fund devised under the will of William Robertson for the support of teachers in that village. The trustees of the Richmond Academy having resumed full control of that institution (July 1, 1878) the high school under this Board was discontinued and never re-established.

In pursuance of the authority delegated to the Board by the 10th Section of Act of 1872, p. , the Board, on the day of , established the Tubman High School in the city of Augusta. The late Mrs. Emily H. Tubman, having presented to the Board a large lot and building for the purpose of affording a higher education to the young women of the county, and the Richmond Academy affording this advantage and benefit to the male sex, this Board deemed it wise and proper, and responsive to the public want, to institute this school, each pupil from the county to be charged $15 per annum, non-residents to pay $20, these being the sums charged by the Richmond Academy for boys.

The property was donated upon express condition that in the event the Board should fail to use the Academy for a high school the same was to enure instantly to the Richmond Academy and Augusta Free School. The value of this property, with fixtures, is now not less than $30,000.

Thereafter, in 1875, the Board thought it expedient and proper to give its assistance to the Hephzibah High School, being a school conducted and controlled by the Hephzibah Baptist Association, in the village to Hephzibah, in the southeastern portion of the county, charging for each pupil the sum of $15 per annum.

Thereafter, in 1880, there being no high school for the colored race, and the funds of this defendant justifying it, and other schools of lower grades being established by the local trustees in the city of Augusta, sufficient to accommodate the colored children, the Board deemed it wise and proper to establish the Ware High School, charging for each pupil taught therein ten dollars per annum.

At a meeting of the Board in June, 1888, a special committee was appointed to investigate the status of the high schools with instructions to report to the July meeting of the Board, and submit such recommendations as in its judgment might be proper and necessary.

This committee held divers meetings and made a thorough investigation as instructed, and duly reported to the July meeting.

Touching the Ware High School, its friends and the colored patrons thereof were called before the committee, and were heard by the committee with every respect and consideration. They were told the reasons which controlled the committee in its intention to recommend the discontinuance of the school. These reasons were: Because four hundred or more negro children were being turned away from the schools of primary grade, unable to be provided with seats and teachers. Because the same means and the same buildings which were used to accomodate sixty pupils of high school grade, would accomodate two hundred pupils in the rudiments of education. Because the Board, at this time were not financially able to erect buildings and employ additional teachers for the large numbers of colored children, who were in need of primary education. And because there were in the city of Augusta at this time, three colored public high schools, to wit:

The Haines' Industrial School (Presbyterian), had an income of $3,500. The Walker Baptist Institute (Baptist), an income of $2,598. The Payne Institute (Methodist), an income of $7,344. (Total $13,442).

The reports of the committee were as follows:

REPORT OF COMMITTEE ON TUBMAN HIGH SCHOOL.

AUGUSTA, GA., July 10th, 1897.

To the Board of Education:

The Committee appointed to investigate the condition of the High Schools and to make such recommendations as they deem wise, beg leave to make the following report on the Tubman High School:

This building is the generous gift of Mrs. Emily Tubman made to the Board of Education over twenty years ago for the purpose of af-

fording an higher education to the young ladies of our city. The building has been very much enlarged and improved at the expense of the Board. The school has grown in numbers every year until now about 200 pupils are on the roll. Mr. John Neely is the principal of the school and is assisted by Miss Mary A. Coffin, Miss A. B. Coffin, Miss Zoe Barclay, Miss Elizabeth Vannerson; in addition there is a department of French by Madame Esmery, of Stenography and Typewriting by Miss DeHay. Music and Penmanship are taught in the School by the regular directors of those branches of the City Schools.

It is not amiss for your Committee to say that they recognize the necessity of a High School for girls to be operated by the Board of Education, because there is no other sufficient institution of this kind in the city. The Richmond Academy in our city is a High School where the boys of our schools can attend. There are High Schools for the accommodation of the negro boys and girls. And so the necessity of providing for the education of the white girls of the city is the one need that the Board of Education cannot escape. This is a sufficient reason for maintaining the Tubman High School.

Your Committee bears cheerful testimony to the faithful performance to all duties devolving upon the principal and his assistants. They have been devoted to the work, and the popularity of the School is a sufficient evidence of efficiency. Your Committee unanimously reports that the status of the Tubman High School is satisfactory and that the present management be continued.

Respectfully submitted,

JOS. GANAHL, Chairman,
and others Committee.

REPORT OF COMMITTEE ON HEPHZIBAH HIGH SCHOOL.

Report: The committee to whom was referred the investigation of the status of the High Schools under this Board, and their relation thereto, with instruction to report to the July meeting of the Board, and submit such recommendations as in its judgment may be proper or necessary, make the following report:

HEPHZIBAH HIGH SCHOOL.

Your committee find that the Board of Education of Richmond County, commenced relations with this school in 1876, when Mr. James Carswell was the principal thereof. It was theretofore from 1860, when first instituted, exclusively, conducted and controlled by the Hephibah Baptist Association.

Mr. Carswell informs your Committee, no minute of the matter appearing in the records of this Board, that it was agreed between the Board and the Association that the latter should select and nominate a teacher for the School and the Board should, if the nominee were satisfactory, elect him to the position. That this teacher should be paid six

hundred dollars per annum from the funds of the Board; that tuition fees of $15 per annum should be collected by the teacher from the pupil, which sums were to be credited to the six hundred dollars. In this way the expense of the High School to the Board would be reduced to about $300 per annum. The principal was allowed to charge full tuition fees for pupils residing outside of Richmond County, without accounting for the same to the Board.

Since that time this Board has agreed to pay to a teacher of vocal music the sum of $20 per month for nine months, or a total of $180 per annum.

This contractual relation has continued on and exists to this day. Mr. Carswell was succeeded by Mr. Ellington, and Mr. Ellington by Mr. C. H. L. Jackson, the present incumbent, who has held the position for twelve years past.

The Association owns the building in which the school is conducted. This Board owns the school furniture, pays insurance on furniture and building, keeps the building in repair and pays salary of Janitor.

Besides these the Principal receives from the Local Trustees of Hephzibah Village $540.00 per annum; from 121st District $400.00; from 124 District $61.00; making a total of $1,601.00, which when added to insurance, $25.00; janitor, $72 and music, $180.00, makes a grand total of $1,878.00, which this Board and the Local Trustees pay annually towards the support of this School.

The principal is nominated to this Board by the Local Trustees of Hephzibah District. He appoints his own corps of assistants with the approval of these Local Trustees. This corps at present consists of R. E. Cobb, Musical Director; Miss Sarah A. Kilpatrick, Primary Department; Miss Clara M. Seago and Miss Baker, Intermediate Department; Miss Sarling, Elocution; Miss Hattie E. Carswell, Art Department.

The assistants do not derive any qualification from examinations and certificates demanded by this Board of other of its teachers.

The School is a large one. From the report made to Hepzibah Baptist Association in October last, we find the enrollment reached in 1896 to the number of 299 pupils.

After a searching inquiry your Committe have reached the conclusion that the School in all its grades is excellent; conducted with great fidelity in all of its departments; giving with intellectual development, exemplary moral training and religious example; and that the cause of education is advanced to the full value of the money paid out by this Board.

The situation is anomalous and is hardly consistent with the scheme upon which the Public School System of Richmond County was instituted by Act of 1873 and subsequent amendments.

The scheme was for this Board and the Local Trustees thereof, to conduct and maintain their own Schools *exclusively*; not to support private or other Educational Institutions of the County.

It is easy to discover errors; it is difficult to provide a remedy; for it so happens that the remedy often is worse than the disease.

To withdraw our pecuniary support from the Hepzibah High School, at a time we are not financially competent to provide another of

equal value to the cause of education would work greater wrong than to allow the anomaly to continue.

Your committee, therefore, advise that for the present no action changing the present status and relation of the Hephzibah High School towards this Board be taken.

They opine, however, that the school should come more strictly under discipline and superintendence of this Board.

To this end your committee recommends that the assistants of the school be required to undergo due examination and obtain the certificates required of other schools under our system; that the curriculum of its departments and the text books used be submitted to the Secretary of this Board and our Text Book Committee, and that the corps of teachers be submitted to this Board for election, as is the Principal of the school.

Respectfully, &c.,

JOS. GANAHL, Chairman, and others Committee.

REPORT OF COMMITTEE ON WARE HIGH SCHOOL.

AUGUSTA, GA., July 10th, 1897.

To the Board of Education:

The committee appointed to investigate the status of the High Schools of the city and county, to ascertain the relation they sustain to the Board of Education, and to make such recommendation thereon as in their judgment seem wise and necessary, beg leave to make the following report and recommendations regarding the negro high school known as the Ware High School:

This school has been in operation under the Board of Education for the past fifteen or sixteen years. It was first under the charge of one teacher, Richard R. Wright, and was located on upper Reynolds street. When Wright resigned, four or five years ago, he was succeeded by Henry L. Walker, the present incumbent, and the school was moved to the corner of Twiggs and Walton streets. The number of pupils increased to about sixty, and an additional teacher was added as an assistant to the Principal. The school has been in a very prosperous condition, and the Principal and his assistants have done faithful and satisfactory work, so far as their teaching is concerned. The Principal of the school is paid $807.50 and the assistant $340; the janitor is paid $45; incidental expenses about $100, making a grand total of expense of $1,292.50. The tuition fees amount to ten dollars a year for each pupil. The amount collected this year has been about $450. This makes a net cost of the school of $842.50.

Your committee has been informed that four or five hundred negro children are annually turned away from the primary grades of the city schools because they are unable to find seats. The Board of Education is not able to erect additional buildings and employ additional teachers for the accommodation of this large number of negro children who desire to obtain the rudiments of an English education. A very natural in-

quiry suggesting itself to your committee is, whether it would not be best to take the $842.50, which represents the net cost of running the negro high school for the benefit of about sixty pupils who desire to study the higher branches, and with it employ four primary teachers, who would teach about 250 pupils the rudiments of an education? It certainly seems wise to give as many negro children the advantage of a primary education as possible, and teach them all to read and write and calculate, rather than advance a few of them through the high schools. If the Ware High School be abolished by the Board of Education, the same money that it now costs will accommodate 250 more children in the primary schools.

Your committee observes the fact that there is no lack of high schools for negro children in the city. There is the Haine Industrial School, the Walker Baptist High School and the Payne Institute, all designed for the higher education of negro boys and girls. While these are denominational schools, yet the fees they charge are moderate, and is not in evidence that their teaching is sectarian. Your committee believes that all of the students now attending the negro high schools can be accommodated in these schools, without additional expense to them, thus leaving the Board to divert its funds to the primary education of the race.

Your committee believes that the Board of Education is not able to maintain the negro High School and also extend the negro primary schools. The lack of funds forbids this, as we are confronted with the question of the best disposition of the money in hand. Having heard from the Principal of the school and other members of the colored race, and having carefully considered the question in all its bearings, your committee makes the following recommendations:

1st. That the High School for negro children known as the Ware High School be discontinued by this Board. This is not to be considered as a reflection upon the ability or faithfulness or character of the work done by the teachers in charge, but is for purely economic reasons in the education of the negro race.

2nd. That the City Conference Board be requested to open four primary schools in the same building at a cost of about $200 apiece for the accommodation of those negro children who are annually denied admittance to the schools.

Respectfully submitted,

Jos. GANAHL, Chairman, and others Committee.

These reports were duly made to the July meeting and upon full consideration were adopted.

At the same time when the vote was taken on the report on the Ware High School it was unanimously "resolved that the Board reinstate the said school whenever the Board could afford it."

Subsequently to the Boards' temporary suspension of the Ware High School, a number of colored people petitioned the Board for a recision of this action, among whom were the complainants herein. A full Board was called and convened on the [redacted]th day of August, 1897, and the petitioners were heard. Their petition and the reasons given, were

fully considered. The Board, after a session and deliberation of over two hours, refused to rescind.

GENERAL INFORMATION

CONCERNING THE PUBLIC SCHOOL SYSTEM OF RICHMOND COUNTY, FOR THE INSTRUCTION OF TEACHERS AND THE BENEFIT OF THE PUBLIC.

The Board of Education consists of thirty-six members, three from each of the five city wards, five country districts, two incorporated villages, and the Ordinary of the County, ex-officio. Members must be freeholders and residents of the county. The term of office is three years and an election occurs every November to fill the vacancies on the Board, the term of one-third of the members expiring annually. The Board meets regularly on the second Saturday in each month, and the President is chosen from among its members. The Secretary, who is also the County School Commissioner, is chosen annually at the meeting in January.

The schools in each district and village in the county are under the entire control of the local trustees. The teachers are chosen by them, the length of the term is regulated by them, and all matters pertaining to the schools are referred to them, under regulations of the Board of Education. In the city the schools are under the charge of the Conference Board of City Trustees, which consists of all the members from the five wards, of which the President is chairman.

The school fund at the disposal of the Board is annually divided according to the school population among the city wards, the five country districts and the two villages, after reserving a fund for the general expenses of the Board and for the High Schools. By this means each set of local trustees can see the amount at their disposal and can regulate their school accordingly. They have few or many teachers, a long or a short term, build and repair just as they please and as their funds permit.

Each district, village and the city wards run a separate set of schools, and yet the whole system is controlled by one Board of Education, and the actions of the various local trustees are under the supervision of suitable committees from the General Board.

The Secretary and County School Commissioner is in general charge of the whole. The teachers in the High Schools are chosen by the entire Board of Education. Those in the City Schools are chosen by the Conference Board of the City Trustees, which consists of the twelve members from the four wards. Those in the Country Districts are chosen by the Local Trustees in which the district is situated.

ARGUMENT.

The Board, on full consideration, in the exercise of its administrative powers, legislative and judicial, temporarily suspended the Ware High School. Because: 1st. There was no want of the people for the same

in view of the fact that three other High Schools were in full operation for the colored race. 2nd. There was need for primary schools for the colored race, and the same money and building which carried on tuition for sixty pupils in the High School was competent to conduct the teaching of 200 children in primary schools. 3d. The funds of the Board being insufficient at the present rate of taxation to conduct both, the Board discriminated between the blacks who asked for a High School and the blacks who asked for primary education. The former amounted to 60, the latter to 200.

The Board has not taken from their colored friends any benefit, nor denied them any protection, nor destroyed any quality that heretofore belonged to them.

This is the sin of the Board of Education—that it temporarily suspended a school which, in their judgment, the people did not need, to supply schools the people did need.

Is their action illegal and void for want of authority?

The injunction order enjoins the Board from conducting the Tubman High School, and giving assistance to the Hepzibah High School, by restraining and forbidding it from using any of their funds in support of these schools, until the Board shall establish a High School for the colored people.

POINTS.

I. The petition is without equity for injunction.

(a). It is not equity to destroy one thing to create another. If the complainants were deprived of a legal right to have a High School for their children, let that right be asserted and obtained. But to obtain it by depriving others of a like right is to remedy one wrong by the perpetration of another.

Because John's hat has been wrongly taken from him, does not justify John in demanding that Jim's hat be taken from him also.

This is not the language of equity, but of spite.

(b). The right to a High School for complainants' children is not a *clear* right. It is nowhere denied that in suspending the Ware High School the Board exercised a legislative power in good faith, and as it conceived for the benefit of the whole people. Nor is it denied that this act did enure to the public benefit, and to the substantial benefit of the colored race?

To pronounce this formal act done on full consideration by the Board in its legislative capacity (meeting of July), and its judicial capacity (meeting of August), as unconstitutional, or what is the same thing as unwarranted by the statute of 1872, will not be done, save in a case of undoubted usurpation or misapprehension.

Construction to be in favor constitutionality.

The repugnance must be beyond reasonable doubt.

Adams vs. Howe, 7 Am. D., 216; 25 Am. Dec., 677.

"It has become a maxim that a statute cannot be declared unconsti-
"tutional unless it is plainly shown to offend some specific provision or

"necessarily implied prohibition, and that to doubt is to sustain the "act."

Endlich, Sec. 525, p. 738.
Cooley, Cons. L., 208.
Cooley, Cons. L., 192, 222.

To same effect: Turman vs. Cargil & Daniel, 54 Ga., 663.

To declare the power of the legislature illegally exercised is a solemn matter and needs be weighed with careful consideration.

Gunn vs. Hendry, 43 Ga., 559.

Even if the law is against natural justice, the Court cannot pronounce it unconstitutional for this reason.

Macon & A. Railroad vs. Little, 45 Ga., 371, 388.

To same effect are decisions in U. S. Supreme Court.

"Whether the legislative department has transcended the limits of its "constitutional powers is at all times a question of much delicacy, which "ought seldom, if ever to be decided in the affirmative in a doubtful "case. * * * The opposition between the law should be such that "the Judge feels a clear and strong conviction of their incompatability "with each other."

Fletcher vs. Peck, 6 Cr., 128.

"Every possible presumption is in favor of the validity of the statute, "and this continues until the contrary is shown beyond a rational "doubt." * * *

"One branch of the government cannot encroach on the domain of another without danger.

"The safety of our institutions depends in no small degree on a strict observance of this salutory rule.

(Chief Justice Waite) Sinking Fund Cases, 99 U. S., 718.

(c) The right of complainant's children to a High School is not clear, because the terms of Section 9 of Act, 1872, refer to and apply to primary schools only, and do not apply to pay High Schools authorized to be conducted by the Board exclusively under Section 10 of Act, 1872, and amended by Acts of 1877.

The schools, primary and high, are of different grades and class. The 9th Section refers to trustee schools, such as in the 6th Section are referred to (last sentence in the Section) which declares: "The trus- "tees in each school district shall have exclusive authority to establish "such schools within their jurisdiction as in their judgment may be ex- "pedient."

The 9th Section provides that these schools are to be managed by the Board under the advice and assistance of the Trustees in each ward that the white and colored youth shall be taught in separate schools, and "the same facilities for each as regards school houses and fixtures, "attainments and abilities of teachers, length of term, time and all other "matters appertaining to education, but in no case shall white and "colored children be taught together in the same school."

The next Section 10th, refers to High Schools and by Act of 1877, Pay High Schools. They are called schools of Higher Grade, which the Board of Education *may* establish at such points in the county as the interests and convenience of the people may require. They are to

be under the special management of the Board at large, who ...ll have full power over them.

The schools referred to in Section 9, are not only of a different class and of lower grade from those spoken of in Section, 10th, but a different rule is given for their institution and conduct. The latter are to be established, not in each ward, village and district of the county, not for each race, but as the interests and convenience of the people may require.

It follows that the language in the 9th Section requiring equal facilities for each race and enumerating the duties imposed here has no application to Pay High Schools provided for in the 10th Section and the general language in the 9th Section, "all other matters pertaining to education" does not refer to Pay High Schools.

It is a rule of interpretation that general words closing an enumeration of particulars do not extend to particulars that are of higher grade and rank than any of those contained in the enumeration.

Perkins vs. Perkins, 21 Ga., 16.

White vs. Ivey, 34 Ga., 199; Torrance vs. McDougal, 12 Ga., 526.

(d) The right is not clear, because the Board as a Court and governmental agency of this state, has decided from its earliest to organization, that it may establish High Schools in its discretion, guided only by the consideration of the public wants, and not on any other line. So it established a white High School for boys in the city of Augusta and then abolished it. It established a High School for white boys and girls in the village of Summerville and abolished it. It established Tubman High School for girls, because of the geeat want of such a school, and of the benefaction by Mrs. Tubman. It assisted the Hepzibah High School because of the large returns in the way of education. It established the Ware High School for colored boys and girls when there was a want for this school, and discriminated in favor of the race by charging $10 tuition instead of $15 per annum. It suspended the Ware School when it found three other High Schools for the race, with building, apparatus and endowment of $13,000 per annum, because in the judgment of the Board, the want which it supplied was filled by equal facilities from other sources, and at a less cost.

The construction of a statute by the officers who execute it ought to have the force of a judicial decision.

Bruce vs. Schuyler (Illinois, 1847), Am. Dec., Sec. 447.

In case cited the Court say:

"In the case of Boyden vs. Brookline, 8 Vt., 286, and Schaffer vs. "Bloomfield; Id., 478, the Court decided that a construction of a statute "by the officers to whom its execution is entrusted, ought to have the "force of judicial decision.

"It has also been decided that a contemporaneous is generally the "best construction of the law. It gives the sense of the community of "the terms made use of by the legislature. 17 Mass., 143; 2 Mass., 477.

"After the Judges of the Supreme Court of the United States had "held Circuit Courts for little more than half the period that this law "has been acquiesced in under the law of congress, they unanimously

"determined that it was too late to inquire into the law—that practice "and acquiesence under it for such a length of time had fixed its con- "struction.

"The present is a stronger one of contemporaneous construction, and "justifies a resort to the maxim—*Communis error facit jus.*"

46 Am. Dec., 450. The Court, speaking of a construction of a statute given it by the usage of conveyancers at the time of its passage says:

"It has for its support the usage of the skillful conveyancers contem- "poraneous with the statute, and this is a consideration of great force "and one that should control and in no case be departed from without "most cogent reasons."

Chestnut vs. Shore's Lepee, 16 Ohio, 47 Am. Dec., 390.

"Courts feel themselves constrained to uphold, where it is possible "contemporaneous interpretation of statutes."

In re will of Warfield, 22 Cal., 51; 83 Am. Dec., 49-58. In construing statutes applicable to public corporations, Courts will attach no slight weight to the practice under them if this practice has continued for a considerable period of time.

French vs. Cowan (Me.), 4 New England R., 682-686, cited in Endlich, §357.

See Endlich, Ch. XIII., usage and contemporaneous construction of statutes, §357, §363.

(e) There is no injury done to complainants. The bill does not aver or the evidence show that complainants' children would not receive equal facilities of education at the other High Schools in the city of Augusta, and for a less sum of tuition money and at school houses equally accessible.

The only excuse here is that these schools are sectarian. They do not show that they teach Presbyterian Latin, Methodist Geometry or Baptist Rhetoric. There is no creed, says Bacon, in learning and science.

The Court says, they should not count because they are independent of the Board. They are not independent, they are allies in the great cause for which the Board was instituted.

(f) Injunction will not issue when it does more harm to others than it will do good to the complainants.

The white youth have done complainants no harm. They at least are innocent of wrong; yet the Court would, in the midst of their studies, shuts up their schools and leaves them without shelter. They have not, as complainants' children have, other schools of like grade and less cost to receive them within their fold.

If it be a sin to have abolished the Ware High School, to abolish the white school would be an outrage.

(g) Complainants do not represent a class, much less the race to which they belong. They represent their special injuries only.

"Injunction is applicable only to special injuries in violation of pri-
"vate right. Individuals are not authorized to redress public griev-
"ances at their own suit."

Del. & Md. R. R. Co., vs. Stump, 8 Gill & Johnson, 479; S. C., 29 Am. Dec., 561.

This seems to be the radical error which beset the Court. He argues all the time as if the colored people were before him as a class aggrieved. The complainants are not even in sympathy with a large majority of their race. These comprise the great number who are too poor to afford a High School, and the great number who prefer the High Schools of Lucy Lane, of Haines Institute, and the Walker Baptist.

(h) The small set in sympathy with the complainants do not represent the race, but misapprehend their wants as a people.

The Board, planted by the legislature, and elected by the people from year to year, represent the people—people of all grades and classes, conditions, color and sex.

If their conduct in this behalf is in good faith and without fraud, it cannot be impeached.

(i) Complainants rights have not been infringed by suspension of the Ware High School.

The purpose of education by taxation is the prevention of crime and the amelioration of the human race. On no other theory can taxation for this purpose be defended.

The educational tax fund is used best when it is used for the widest and most thorough dissemination of education.

The private benefit which an individual may receive from this fund (as from any other fund raised by taxation), is incidental. The objective point is the general improvement of the state by the education of its children.

Every individual has an interest in the distribution of this fund. But it is a public and not a private interest. That is, a right to see that the fund is used for the best interests of education, not a right necessarily to participate in the direct benefits incidental to such use.

Many taxpayers (possibly a majority of them), can receive no direct benefit; either because they have no children of school age or for any other reason.

It follows from this that the action of the Board in abandoning a field of education already amply and satisfactorily covered by institutions, and confining their efforts to those fields which are otherwise insufficiently covered, thus securing the widest and most thorough dissemination of knowledge possible with the means at hand, have not infringed the rights of anyone.

II. THE FOURTEENTH AMENDMENT.

(a). The action of the Board is not unconstitutional as running counter to that clause of XIV Amendment which forbids a state, "to deny to any person within its jurisdiction the equal protection of the laws."

There is nothing new in this provision. It is old as "Magna-Charta." As Macauley beautifully says: "This great charter of human rights embodied principles so great and potent, that their evolution through many ages has brought about the state of things under which we now prosper; where no man is above the majesty, and no man below the equal protection of the law. It is expressed in the constitution of every free state in emphatic terms."

"Protection," says the Constitution of our State, "to person and property is the paramount duty of every government, and it shall be impartial and complete. Code, §5699.

And again it is reiterated, in the forbidding of class legislation. Code, Sections 5732, 5715.

The Supreme Court of the United States has conservatively construed this clause of the Fourteenth Amendment. It means only that certain children of the state must not be discriminated against on *account* of color, race or previous condition of servitude. If the rule that excludes be other than the color line—be conditions and limitations applicable alike to both races—the amendment does not apply.

The acts forbidden are those of discriminations against the negro on account of race and color only—discrimination against the negro, because he is a negro.

Slaughter Houuse Cases, 16 How., 36.
Strauder Case, 100 U. S., 303.
Virginia vs. Rives, 100 U. S., 313.
Ex parte Virginia, 100 U. S., 339.
Neal vs. Delaware, 103 U. S., 370.
Bush vs. Kentucky, 107 U. S., 110.
Yick Ho vs. Hopkins, 118 U. S., 356.
Gibson vs. Mississippi, 162 U. S., 565.
Plessy vs. Ferguson, 163 U. S., 537.

In the case of the *State ex rel. Clark vs. Maryland Inst. for Promotion of Mechanic Arts,* decided by the Court of Appleals of Maryland, June 28, 1898, reported in 41st Atlantic Reporter, 126, being a Mandamus to compel admission into a private school established by the State of a colored pupil, averring the refusal to be a violation of the 14th amendment to the Constitution of the United States, the Court refused to sanction the writ, stating in his opinion, page 129, as follows:

"Enlightened legislation is not enacted on the narrow-minded principle that a benefit conferred on one object is necessarily something unjustly withheld from another. Let us suppose, for the sake of illustration, that there was a school of great merit, conducted exclusively for the instruction of colored pupils in branches of learning not taught in the public schools, and that the legislature saw fit to appropriate

money for the tuition of a number of colored pupils. It is not probable that such action would be assailed as forbidden by the Fourteenth Amendment, because of an unjust discrimination against the whites. But it cannot be doubted that the legislature has ample power to make appropriations to special objects, whenever in its judgment, the public good would be thereby promoted. It has constantly exercised this power from the beginning of the state government. The legislature may make donations without regard to class, creed, color or previous condition of servitude. The only condition limiting this exercise of this power is that it must in some way promote the the public interest. The state has never surrendered this power to the general government, and never can surrender it without stripping itself of the means of providing for the good order, happiness, and general welfare of society. The benefits conferred in this way are matters of grace and favor which the state bestows on its own citizens for worthy public reasons. They certainly cannot properly be described, in the language of the Fourteenth Amendment, as "privileges or immunities of citizens of the United States." If they were such they could be demanded by any citizen of the United States, whether resident in Maryland or Oregon. And in that event, and only in that event, they would be comprehended within the scope of the Fourteenth Amendment. Slaughter House Case, 16 Wall, 36. It is needless to say that the legislature is not limited by the state constitution in the particular mentioned."

(b). LEGISLATIVE CONSTRUCTION OF FOURTEENTH AMENDMENT—DISCRIMINATION ON ACCOUNT OF COLOR A CRIME.

"Every person who under color of any law, statute, ordinance, regu-"lation or custom, subjects or causes to be subjected any inhabitant of "any state or territory, to the deprivation of any rights, privileges or "immunities secured or protected by the Constitution of the United "States." * * * On account of such inhabitant being an alien, or by reason of his color or race shall be punished by fine of not more than $1,000, or by imprisonment not more than one year, or by both.

Act 31st May, 1870.

Rev. Statutes, §5570.

Apply to this Board of Education the terms of this statute:

1. It has deprived the complainants of a right to a High School.

2. This deprivation is on account of complainants' race and color.

3. This deprivation is made under a rule and regulation, which is a mere color, cover and pretence to the true design.

This statute was intended to secure the colored race the full benefit of the Fourteenth Amendment, and to assure them of the equal protection of the laws. It was written by Mr. Sumner, with the amendments before him, and was designed to meet its demands.

The provisions are a test of whether the amendment has been disobeyed.

It follows if the amendment has been disobeyed by the Board in its action touching the Ware High School, the misdemeanor may be punished on the criminal side of the Court, but a Court of Equity has no place in the premises.

III. GOVERNMENT BY INJUNCTION.

Even in a clear and imperative case, the Court might pronounce the action of the Board in suspending the Ware High School as beyond the powers given to it by the organic act of 1872, it does not follow that the Court may remedy the wrong, by suspending other High Schools established by the Board. The right to establish, dissolve and suspend High Schools is given by the legislature to this Board, and to no other person, least of all to a judicial officer, since this is a legislative act. Therefore, when the Court undertakes to suspend a High School, duly established it becomes a clear case of judicial legislation, and when this honorable judicatory attempts to enforce this legislation, by process of injunction, we have a fresh case of that modern anomaly. "Government by Injunction."

And worse, what is this but converting a beneficient instrument of preventive justice—the peculiar property of a tribunal founded on conscience and conservatism, and justly proud of the title of equity—into an engine of punishment?

Torture by injunction is substituted for the rack and thumbscrew of inquisition. The fairest temple of our law is transformed into a penal court, where sentence is pronounced without jury, and methods obtain which recall the Star Chamber of the Stuarts.

This is not the language of exaggeration.

The case remains open "until the further order of the Court," until, that is, the Court shall have established a high school for negroes, which is in his judgment of equal facilities with the white school.

A Court of Equity has taken control of a political government of public officers and administers their exclusive duties.

The Court has treated the powers and functions of a legislature as so much property. It seizes and administers them as it would seize and administer an estate for the benefit of creditors.

The complainants, Cumming, et al., have an interest and vested right in this property and the concern is held up in order to secure their claim.

The assumption of one department powers belonging to another, all history and experience shows is inconsistant with free institutions. It is the feature then distinguishes personal government from government by law.

If the complainants have rights they are not to be obtained by recourse to despotism.

Let us pursue this thought to its logical conclusions:

Should the case go back to the Superior Court by a mandate from this Court, the Board will apply, say, for time to enable it to establish the school for complainant's children. It will be necessary to borrow

the money, provide a building, appoint teachers and effect other details for the new institution. The Court will in good conscience grant a reasonable delay. When the Board shall report that it has obeyed the order of the Court, its repert will in due course be examined and inquiry made if the new school be of equal educational facilities, to that of the Tubman High School; and the complainants be heard to show cause why the defendant be not discharged; complainants for cause shows that the new school is not equal to the Tubman School in many particulars; that the building is not as good, that French is not taught therein, that the teachers are not as numerous nor as competent. Thereupon the Court will order these discrepancies to be remedied. When finally this shall be accomplished, and the Court is satisfied that the school for Cumming, et al, has been made of equal facilities with the Tubman, the case is concluded and Board asks for discharge.

But as the Board has heretofore, in the exercise of its discretion, suspended the Ware High School, and so soon as discharged hence, may do the same thing with the Cumming school, it is but equitable to the complainants that by the decree of the Court they be protected from this wrong. Whereupon an order issues that the Board be enjoined from abolishing or suspending or in any wise altering the equal facilities quality of the Cumming school, and be discharged hence with costs.

With this halter round its neck the Board is discharged, subject to be brought up for disobedience of the Court's order whenever in complainants judgment the equal facilities of the new school quality shall be impaired.

To this complexion do we reach when a Court assumes to take charge of and administer the functions of a public and political corporation, as it would a money fund for the benefit of creditors, and govern the people by the process of injunction.

MOTION TO DISMISS.

The judgment of the Supreme Court of Georgia here to be reviewed is in the following language:

"This case came before this Court upon a writ of error from the "Superior Court of Richmond County, and after argument heard it, "is considered and adjudged that the judgment of the Court below be "reversed, because the Court erred in granting an injunction, all the "justices concurring."

Printed Record 39.

The judgment of the Superior Court of Richmond County on the remitter from the Supreme Court is as follows:

"The remitter from the Supreme Court, reversing the judgment of "this Court, because the Court erred in granting an injunction, it is "ordered:"

"1. That the same be entered on the minutes of this Court, and the judgment of the Court be reversed on the ground stated."

"2. That the plaintiffs in the case be and they are hereby refused all the relief prayed for, and the petition dismissed at their costs."

Printed Record 38–39.

The judgment denying and refusing the writ of injunction to the complainants rests essentially on ten grounds, each of them broad enough to support the same without reference to the 14th Amendment or other Federal questions. There are;

That the right of injunction is not shown. Because

1. It is not equity to destroy one thing in order to create another.
2. The right of injunction is not clear nor the case urgent.

Code of Georgia, §4902.

3. Under Section 10 of Act 1872 as amended by Act of 1877, the Board may establish pay high schools in the county *as the interest and convenience of the people* may require, and it is nowhere shown that the interest and convenience of the people was in any way counter to their action.

4. The Board has always exercised the right to establish and abolish high schools for pay in the county independently of any other consideration than that of the interest and convenience of the whole people, and this action and construction of their powers and duties has been of 25 years duration, and has the force of a judicial decision.

5. No injury has been done to complainants. Other schools of high grade being open to their children with equal facilities of education, for less tuition money, and of equal acceptability.

6. Injunction will do harm to others, while of no benefit to complainants.

7. Complainants have no right to represent a class nor the race to which they belong.

8. Complainants do not represent the wants or interests of their race. These interests are represented by the Board.

9. No rights of the complainants have been infringed, since the action of the board in suspending one field of education amply covered by other institutions and confining their efforts to those fields insufficiently covered, and thus securing the widest and most thorough dissemination of knowledge possible with their means at hand, have not infringed the rights of any one.

10. A Court has no power in equity to enjoin a pay high school established by the Board. To do so would be to usurp legislative powers and institute a despotism.

If the judgment refusing injunction *could* have been rendered outside of and independently of a Federal question, this Court will decline jurisdiction, and dismisses the writ of error.

Eustis vs. Bolles, 150 U. S., 362.

Affirmed in Harrison vs. Morton, 171 U. S., 38.

All the assignments of error are defective and demurrable for insufficiency.

The thing forbidden by the provisions of the 14th Amendment is discrimination against the negro race, *on account* of his color and race or previous condition of servitude.

If discrimination have arisen on any other line of cause or reason than the line of color and race the amendment has no application.

It follows that the assignments shall not only aver differences but must aver them to be discriminations by the white race in favor of the white race, and against the colored race, because of the latters color and race and not because of any other cause and reason.

We proceed to the assignments severally.

First Assignment—"That the statute of the State of Georgia giv-"ing a discretion to the County Board of Education to establish and "maintain higher schools for white persons and to discontinue and "refuse to maintain higher schools for persons of the negro race was "and is contrary to the Constitution of the United States, and espec-"ially to the 14th Amendment thereof."—Answer. The record shows the existence of no such statute. The act of 1872 as amended by act of 1877, does not give any such discretion. The power of the board, and its discretion was limited to the establishing such pay high schools as the interest and convenience of the people might require.

Second Assignment—"The Court decided and held that the Con-"stitution of the United States was not violated by the action of the "said board in establishing and maintaining high schools for the edu-"cation of white persons and in refusing to establish and maintain "high schools for the education of persons of the negro race." The record shows no such decision or finding. What the Court did decide and find was that the board might without violating the Constitution of the United States in the exercise of its discretion suspend a pay high school for persons of the negro race, when there were three other high schools in full operation for the colored race in the community; when there was need for primary schools for persons of the colored race and the same money and building which carried on the tuition of sixty pupils in the pay high school was competent to conduct the teaching of 200 children in the primary schools; and when the funds of the Board were insufficient to maintain both.

Third Assignment—"In deciding and holding that persons of the "negro race could consistently with the Constitution of the United "States be, by the laws of Georgia, taxed and the money derived from "their taxation be appropriated to the establishment and maintenance

"of high schools for white persons, while pursuant to the same law "the said Board refused to establish and maintain high schools for the "education of the negro race."

The error in this assignment lies in the fact, that taxation is a mere incident of the right of the Board in its discretion to suspend one of its high schools when the interest and convenience of the people do not require it.

If the Ware High Lchool could be suspended without a violation of the 14th Amendment, it is clear that any change in the disposition of the taxes consequent thereon is no violation of the amendment.

But the record shows that there has been no change in the taxation of the negro, arising from the suspension of the Ware High School. The same moneys that supported the Ware High School for colored persons, has been appropriated to the support of primary schools for the colored people.

Fourth Assignment—This is an *omnibus* clause, and we suppose not seriously delivered by the distinguished counsel for the plaintiff in error.