No. 164.
Supp. Bf. of Miller for D. in E.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 164.

J. W. CUMMING, JAS. S. HARPER, AND JOHN C. LADEVEZE, PLAINTIFFS IN ERROR,

vs.

THE COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA.

IN ERROR TO THE SUPERIOR COURT OF RICHMOND COUNTY, STATE OF GEORGIA.

SUPPLEMENTARY BRIEF OF FRANK H. MILLER FOR THE DEFENDANT IN ERROR.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-26-'99

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The brief of counsel for plaintiffs in error was filed after that of the defendant in error, and this is intended to call attention of the court to errors in the plaintiffs' brief.

First. This brief states, point 5, page 16: "In respect of "the contention stated in the brief of the other side that

"Bohler, the tax collector, should have been made a party "to this writ of error, it is sufficient to say that the petition "as to him was dismissed by the superior court at the hear- "ing (Record, p. 38), and that no appeal was taken by the "petitioners."

This contention is not an "imaginary technicality." The facts are that Bohler, the tax collector, was the person sought to be enjoined from collecting the tax levied for the support of high schools (Record, p. 4). The court sustained his demurrer as cause shown against the rule (Record, p. 7), but immediately upon rendering its decision, and at the same time the same was actually filed, December 22, 1897, by order, the court suspended this decision until a decision by the supreme court should be rendered upon the bill of exceptions to be sued out by the board of education. The case therefore stood suspended in every particular without further action until decided by the supreme court, when it was dismissed in conformity to its opinion and upon the receipt of its mandate (Record, pp. 38 and 39).

The case which was so suspended in the superior court would not have been heard by the supreme court of Georgia unless the tax collector had been made a party, and he was so made (Supplemental Record, p. 32). (See Inman Smith & Co. *vs.* Estes, 104 Ga. Reports, 645; White *et al. vs.* Bleckley *et al.*, 105 Ga. Reports, 173.)

It therefore appears that Bohler was a party to the proceeding until the final termination of the suspension by the order dismissing the entire cause (Record, pp. 38 and 39). The plaintiffs in error have elected in suing out the writ of error to the superior court of the county to omit the tax collector, which deprives this court from rendering any de-

cision that would have any effect upon the question of taxation raised in the record, it being noted, however, that there was filed in the superior court the assignments of error, with a copy of the decision of the supreme court of the State of Georgia (Record, pp. 40 and 59).

Again, there is really no constitutional question before this court, because none has really been decided adversely to the plaintiffs in error. When they filed their petition they relied on a violation of the fourteenth amendment. The superior court decided in their favor, ignoring the constitutional question and putting its decision entirely upon the construction of the State statute. From this decision the board of education sued out a writ of error to the supreme court of the State as to what was decided adversely to it, and the decision of the court below was reversed by the supreme court mainly upon the construction of the State statute, no argument being presented to the court by the plaintiffs in error asserting specifically a right under the fourteenth amendment. The plaintiffs in error never sued out any cross-bill of exceptions to the refusal to decide their case for them upon the constitutional grounds, but were satisfied with accepting the decision of the superior court upon the construction of the State statute. This construction having been reversed by the supreme court, the State superior court obeyed the reversal, and dismissed the petition in equity.

In this connection it will be noted that the supreme court of Georgia in their opinion (Printed Record, p. 53, copied in Defendant's Original Brief, p. 3), speaking of the claim of the petitioners that the action of the defendant was contrary to the fourteenth amendment, say:

"This point in the case was not argued before us by the learned counsel for the plaintiffs in error, either orally or by brief."

It is therefore insisted that the constitutional questions raised were never specifically passed on by the superior court, to which the writ of error in this case from this court was taken, and were practically waived and abandoned in the supreme court of Georgia.

Second. The learned counsel for the plaintiffs in error, undertaking to comply with rule 21, section 2, paragraph 3, and annex the statutes of the State cited, prints the provisions of the constitution of 1877. The board of education came into existence under the constitution of 1868 and the legislative acts passed pursuant thereto, all of which were of force and operative prior to the constitution of 1877, and held constitutional by the supreme court of Georgia in 72 Georgia Reports, 546. Therefore the provision of the constitution of 1877, annexed to the brief of the plaintiffs in error, has no application whatsoever, unless it may be the fifth section of paragraph 18, which ordains that existing local school systems shall not be affected. The sections of the constitution of 1868 upon which the defendant in error relies are set out in the original brief of the defendant in error, page 4, and these provide, as a constitutional right, only for a general system of education, under which alone have plaintiffs any right to be heard.

Respectfully submitted.

FRANK H. MILLER,
Solicitor for Defendant in Error.