No 9

Filed February 15, 1898.

STATE OF MARYLAND
Ex Relations,
ROBERT H. CLARK, JR.
By his Father and Next Friend,
ROBERT H. CLARK.
vs.
THE MARYLAND INSTITUTE
For the Promotion of the Mechanic Arts.

IN THE
Court of Appeals
OF MARYLAND.

JANUARY TERM, 1898.

GENERAL DOCKET No. 44.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This is a suit to compel by mandamus the admission of the Petitioner into the schools of the Respondent under the following facts:

The Respondent, the Maryland Institute, is a corporation incorporated under the laws of Maryland, Acts 1878, chapter 313, for the promotion of the mechanic arts, and for other educational purposes, among which is the maintenance of cer-

tain Schools of Art and Design in Baltimore City, where elementary and advanced instruction in the Practical and Fine Arts is offered to students.

The city of Baltimore confessedly offers no such instruction in the curriculum of its public schools.

While it is a corporation governed by its own officers, this Institute is endowed by the State of Maryland to the extent of $3,000 per annum, (see charter,) and formerly received an annual appropriation of a large amount from the city of Baltimore, and was assisted by the city in other material ways. This appropriation by the city was annulled by this Court in the case of *St. Mary's Industrial School vs. Brown, 45 Md. 310*, upon the general ground that it was a donation of public money for private purposes, from which the public received no benefit.

Acting on the suggestion of the learned Chief Judge Alvey, for the purpose of obviating the legal objections found in that case, and to give color to municipal aid for Respondent's schools, an ordinance was passed by the municipality of Baltimore, March 7, 1893. (Record, page 3.)

By its first section this ordinance authorized the Mayor, Comptroller and Register to contract with the Respondent for the education of pupils in its said schools for eight years, from September, 1893.

By the second section, as a foundation to sustain the annual appropriation to the Respondent, free instruction in the said schools of the Respondent is provided for certain of the public, in the following manner:

"Section 2. And be it further enacted and ordained, That as soon as may be convenient after the passage of this ordinance, and annually thereafter, before the first day of September, there shall be appointed one pupil by each member of the First and Second Branches of the City Council, who shall be entitled to instruction for the period of four years in said schools. And in case of a vacancy occurring from any cause among said pupils, the President of the Institute shall forth-

with notify the member of the Council representing the ward to which such pupil is credited, who shall thereupon appoint another pupil to fill such vacancy."

By the third section the President is required each September to report to the Mayor and City Council the names of the pupils so appointed, and any existing vacancies; and should the Councilmen not make the appointments to which they were entitled prior to the first of October, the Mayor should fill the vacancies by appointment.

By the fourth section the Mayor, Comptroller and Register are required annually, or oftener if they deem it expedient, to inspect said schools and the condition and manner in which the terms of said contract were being fulfilled, and the City Comptroller, upon being satisfied that it was faithfully complied with, should pay the Respondent $9,000 annually, in full, for the education of said pupils, and said amount so appropriated shall be used for no other purpose whatever.

Section 5 provided for the taking effect of the ordinance. (See Record, pages 3 and 4.)

The Respondent thereupon assented to the terms of said ordinance and became bound thereby by a contract duly entered into March 10, 1893, which, after reciting the ordinance, witnessed, that the Maryland Institute, in consideration of the payment of $9,000 annually *in the manner provided by said ordinance*, agreed to receive into its said Schools of Art and Design 33 pupils for the year beginning September 1, 1893, and 33 pupils for each of the years beginning September 1, 1894, to 1900, *to be appointed in the manner provided in said ordinance*, and should cause said pupils to be instructed in the various branches of art and design taught in said schools, *in accordance with the terms and provisions of the aforesaid ordinance*, which was annexed thereto and made a part thereof. (See Record, page 4.)

This ordinance and contract are the last of a series of similar instruments beginning April 14th, 1881.

Dr. J. Marcus Cargill, a member of the First Branch of the City Council, regularly appointed the Petitioner, Robert H. Clark, Jr., under the said ordinance, as pupil in said schools of Respondent in September, 1896, and again in September, 1897, (Record, pages 5 and 6,) but in both years, when the Petitioner duly presented himself for admission to the said schools, he was refused admission solely on the ground that he was a colored boy, and the Institute had resolved by its trustees not to admit any more colored persons. (Record, pages 5 to 7.) The appointments were treated as nullities, and Cargill making no others, the places were filled by appointments of the Mayor. (Record agreement, page 18.)

Before the said ordinance was passed there were two colored boys being educated as appointees, accepted without question, under a *previous* ordinance, similar to this one; and *after* the ordinance of March 7, 1893, the Respondent received two other colored boys appointed under *this* ordinance, one of whom is now in the school. (Record, page 5.)

The petition for mandamus to compel the Respondent to admit the Petitioner for education in its said schools according to said ordinance and contract, was filed October 16, 1897, and answer of Respondent, filed November 3, 1897. The case was heard in the Superior Court of Baltimore City upon demurrer to the answer November 29, 1897, and by order passed December 10, 1897, the demurrer was overruled and the petition dismissed, from which ruling this appeal lies. The opinion of Judge Ritchie, filed December 10, 1897, is printed in full in the Record, pages 19, etc. The merits of the whole case are fairly presented on the demurrer.

It is respectfully submitted that the learned Court below erred in holding:

1. That the Fourteenth Amendment to the Constitution of the United States has no application to the case, nor to the construction of the ordinance in question.

2. That the ordinance and contract in question constitute merely a private contract; that the petitioner has no rights in

the case other than mere contract rights; that there is no public or legal duty imposed on the Respondent or any other than of a merely private contractual nature, and that this is merely a suit to enforce contract rights of a private character for which mandamus will not lie.

ARGUMENT.

It is submitted on behalf of the Petitioner:

1. That the ordinance, construed with reference to the Fourteenth Amendment, gave him the same right to free education as it gave to white persons;

2. That the Respondent was legally bound by the ordinance to receive him if he was properly appointed, and no objection found against him other than his color; that in refusing him admittance on the ground of his color the Respondent was acting in violation of its legal duty under the ordinance and will be compelled to comply with it by writ of mandamus.

Construction of the Ordinance.

It is the ordinance which is the subject of construction since it alone determines the qualifications of appointees.

The words of the ordinance are: "There shall be appointed one pupil by each member of the First and Second Branches of the City Council, who shall be entitled to instruction for the period of four years in said schools."

By the contract the Institute agreed to receive into its said schools 33 pupils annually, "to be appointed in the manner provided in said ordinance."

There can be no doubt that the prohibition of the XIVth amendment applies to an ordinance of a municipality.

Yick Wo vs. Hopkins, 118 U. S., 356.

If the ordinance had in express terms excluded negroes from the benefits conferred, it would have been unconstitutional and void as prohibited by the XIVth amendment, either:

1. If the benefit conferred is public education as part of the system maintained by the city under legislative authority.

There is no education provided for by the city similar or substantially equal to that offered by this ordinance, (Record, pages 7, 20,) and the exclusion by a State agency of negroes from the education conferred thereby, or the maintenance of a system which gives the blacks inferior privileges, would be unconstitutional. For whenever a system of public schools is maintained by a State or under State authority it must be substantially equal in its benefits to both white and colored of the same class. This is admitted both by the Court below and by the appellee and supported by numerous cases.

Hall vs. DeCuir, 95 U. S., 504-506.
Claybrook vs. Owensboro, 16 Fed. Rep., 297.
United States vs. Buntin, 10 Fed. Rep., 730.
State vs. Duffy, 7 Nev., 342, 348.
State vs. McCann, 21 Ohio St., 198.
People vs. Gaston, 13 Abb. Pr., (N. S.), 160, 164.
Ward vs. Flood, 48 Cal., 36.
People vs. Gallagher, 93 N. Y., 438-451.
Corry vs. Carter, 48 Ind., 327.
Chase vs. Stephenson, 71 Ill., 383.

Or 2, Whatever may be the benefit conferred, it would be a discrimination by a State agency against the negro on the ground of color, and the XIVth Amendment prohibits all attempts directly or indirectly to single out the colored race as an object of discriminating laws.

Strauder vs. West Virginia, 100 U. S., 303.
Virginia vs. Rives, 100 U. S., 313.
Ex parte Virginia, 100 U. S., 339.
Yick Wo vs. Hopkins, 118 U. S., 356.

Hence *the ordinance in question must be construed as not excluding negroes, but extending to them the same rights as to white persons of the same class without discrimination.*

An ordinance of a municipality is construed like an act of Legislature, and will always be construed to be in conformity with the Constitution whenever possible. Every intendment will be made in favor of its constitutionality.

Cooley Const. Lim., 6th Ed., 218, 238.
Matter of Yick Wo, 68 Cal., 294.
Southerland Stat. Constr., section 332.

The words "one pupil," without discrimination, are significant; where no discrimination is expressed none will be implied.

Clark vs. Board, 24 Iowa, 266, 271, 274.
Dallas vs. Fosdick, 40 How. Pr., 253.
People vs. Board, 151 Ill., 314.

The action of the Respondent in refusing Clark admission was clearly in violation of its duty under the ordinance thus construed in accordance with the Constitution.

The Respondent had no discretion in the refusal of appointees under the ordinance, since the validity of the ordinance and contract depends upon the Institute relinquishing all discretion in favor of the city; and such discretion had been expressly waived in the contract, by everything being referred to the ordinance.

St. Mary's Ind. School vs. Brown, 45 Md. 310.

NOTE.—While not necessary to establish the Petitioner's case, yet he contends that the constitutional inhibition in question applies also directly to the Institute itself as a State agency, and prohibits it from making the discrimination complained of. It was practically decided in *St. Mary's Industrial School vs. Brown*, 45 *Md.* 310, *etc.*, that while this Respondent was a private corporation, and as such not capable of receiving municipal aid, yet the appropriation might be validly made, provided the Institute were legally incorporated as part of the public school system. But whatever provision may be made must leave the institution no discretion, and the subject-matter, being a public trust, could not be delegated beyond the power and discretion of the municipality. The validity of the arrangement was held to depend upon that retention of municipal control, and that complete accountability be provided for, thus making the institutions contracted with, *pro hac vice municipal agencies.* (*Ibid, pages* 334-5-6.) The institution is thus embraced *quo ad hoc* as one of the governmental agencies of the city by taking upon itself the execution of a political function of government co-ordinately with the municipality.

The Institute is wholly responsible to the city, and both are responsible to the public, for the education of these pupils. The elements of agency are here. The State is behind them all, and is ultimately the party who is acting as principal.

The prohibitions of the amendment upon States extend to all agencies and instrumentalities employed in the administration of its government, whether superior or subordinate, legislative, executive or judicial.

Ex-parte Virginia, 100 U. S. 339.
Virginia vs. Rives, 100 U. S. 313.
Neal vs. Delaware, 103 U. S. 370.
Ah Kow vs. Nunan, 5 Sawy. 552.
Re Parrott, Fed. Rep. 481.

As to the alleged "construction of the contract by the parties," any change or construction thereof must have been made by *both* parties in order to be effective. But the city could not make any change or arrangement of any kind looking to the exclusion of negroes. Nor could its agents. The action of the city ministerial officers in unequally enforcing or aiding in a discriminating application of an ostensibly fair law, is unconstitutional.

Yick Wo, 118 U. S., 356, 373.
See M. & C. C. vs. Radecke, 49 Md. 217.

But no construction of the contract by the parties as to qualifications of appointees could in any manner alter the terms of the ordinance which established what those qualifications are.

The city cannot by contract bargain away its legislative discretion, nor can such contract control its legislative or governmental authority.

Gale vs. Kalamazoo, 23 Mich. 343.

The effect contended for can only be accomplished by a repeal, altering or re-enactment of the ordinance by the Mayor and City Council, which has confessedly never been done.

1 Dillon on Mun. Corp., section 314.

Looking to existing circumstances at the time the ordinance was passed: while the ordinary public schools of the city were on the "unmixed" plan, yet the schools of the Respondent *were confessedly mixed, i. e.*, white and colored educated together. (Rec., pages 5 and 9.) This must have been in the mind of the City Legislative, and this ordinance was passed with reference to *these* schools and not with reference to any unmixed schools.

The way in which the Respondents viewed this is immaterial, as they agreed to receive pupils "appointed in the manner provided by the ordinance."

Two colored youths were received *before* and two *after* the passage of this ordinance without objection or explanation. The demurrer *does not* admit the statement in the answer that this was no admission of any obligation on the part of the Resdondent. Demurrer only admits facts well pleaded.

Brooks vs. Widdicombe, 39 Md., 386, 400.

THE LEGAL AND PUBLIC DUTY OF THE RESPONDENT.

The respective rights and obligations of the Petitioner and Respondent are not contractual, but arise out of the ordinance, the ordinance being the instrument which fixed the rights, contingent on the assent of the Respondent; the "contract" being the assent of the Respondent to the terms of the ordinance and giving it effect.

The ordinance is not a contract. Municipal contracts are ordinarily made by the interposition of properly authorized agents. The authorizing a contract to be made *under the ordinance* plainly shows the intention of the legislative that the ordinance itself should not operate as a contract.

1 Dillon Mun. Corp., secs. 445, 450.

The *ordinance*, and not the contract, is embraced in the City Code as part of the city regulations concerning public schools.

Baltimore City Code, Art. 44, secs. 53 to 56, page 1398.

The first section of the ordinance is enabling, and under that section the contract was made. The remaining sections of the ordinance are not enabling, but mandatory, and are the valid expression of the legislative will of the city in the form of law.

They are enacted under the authority of the Legislature Acts 1872, chapter 377, giving the city power to establish a system of public schools, and the ordinance and appropriation can be sustained under no other law.

The fact that the ordinance without the contract would have conferred no rights, does not make the rights created "mere contract rights;" *a fortiori* not "mere private contractual rights." This Court has decided that "a valid ordinance may be passed to take effect upon the happening of a future contingent event, *even where that event involves the assent to its provisions by other parties.*"

State ex Rel. M. & C. C. vs. Kirkley, 29 Md. 85, 102.
M. & C. C. vs. Clunet, 23 Md. 468.

The virtue of this "contract" has been exaggerated. The Institute would have been as fully bound by simple assent, or indeed by merely acting under the ordinance, or receiving the appropriation.

The ordinance is on the one hand a municipal law giving free education under legislative authority to a certain defined class of the public; and on the other a grant of public money to a corporation upon conditions and duties subsequent to be performed by the corporation for the benefit of the public.

Indianapolis, Etc., R. Co. vs. State, 37 Ind. 489.

The City Council of Lawrenceburg passed an ordinance which by the first section made it lawful for the Respondent Railroad Company to lay tracks on certain streets of the city, and in the second section made it the duty of the company to keep crossings in repair, construct culverts, drains, etc. The railroad laid tracks according to the ordinance, and mandamus was brought by the city to compel the company to grade

certain streets. The company contended that the ordinance was nothing but a contract, and that hence mandamus did not lie. The Court held the ordinance not to be a contract, but simply a grant of a right of way upon certain conditions and duties subsequent to be performed by the company. That when the company accepted the grant it was its legal duty to grade the streets as required by the ordinance, and it would be enforced by mandamus.

Railroad Company vs. State, 37 Ind. 489.

The Legislature of Tennessee passed a law authorizing counties to subscribe to stock of projected railroads, and to pay for the stock by taxation. The taxpayer was entitled to a tax receipt, which the law provided should be good tender on the railroad in payment for freight or passage. The M. & O. R. R. received a large amount of money from Madison county, issuing stock in return. Wisdom held certain tax receipts and offered to pay them for a ticket to Mobile. The railroad refused. Wisdom brought mandamus to compel them to accept the receipts. The railroad contended *inter alia* that its relations with Wisdom were purely contractual, and that mandamus would not be, but the remedy was to sue for breach of contract. The Court held, however, that the acceptance of public funds raised by taxation imposed on the Respondent all the duties required of them by the act. It consented thereby to the terms on which the tax was collected and paid over, and the company was estopped from denying the statutory obligations imposed upon it.

Mobile & O. R. R. vs. Wisdom 5 Hiesk. (Tenn.,) 125, 155.

The contract, made in pursuance of Section 1 of the ordinance, was merely the assent of the Institute to the ordinance. It introduced nothing, but referred everything to the terms of the ordinance. It subjected the Institute to the authoritative part of the ordinance, and made it a valid law. While the city might not have compelled the Institute, *ea invita*, by an ordinance, to receive certain pupils, yet when the Institute

made the contract and accepted the city appropriation, it undertook the legal duty imposed by the ordinance and became bound thereby. The Institute is estopped from denying the legal obligation imposed upon it.

Mobile and O. R. R. Co. vs. Wisdom, 5 Heisk., 125.
Indianapolis, etc., R. vs. State, 37 Ind., 489.

"The Legislature of a State has, however, no constitutional authority to grant a public bounty except for the purpose of accomplishing some public good. It cannot dispose of the rights or funds of the people to assist a purely private enterprise. A grant of State aid to enable a private corporation to accomplish a purpose of public interest is, therefore, always subject to the implied condition that the company shall assume an obligation to the State to fulfill the purposes of the grant.

"The Legislature would have no power to grant the aid of the State on any other terms. It is immaterial whether the aid be in the form of a direct donation of funds or property by the State, or by a county or municipality, or in a form of a subscription for shares, or of a delegation of the power of eminent domain, or of an exemption from taxation, or of a monopoly. In each instance the acceptance of the grant of the public aid implies an assumption by the grantee of an obligation in favor of the public."

2 Morawetz on Priv. Corp., sec. 1114.

Here the Institute not only accepted the public money, but expressly agreed to be bound by the ordinance, agreeing that everything should be done in accordance with the terms of the ordinance.

Whatever may be the technical aspect of the Respondent's obligations, they are certatnly not private in any sense, but are in the nature of public, political or governmental functions i. e. of public education, in compensation for public money raised by taxation for public schools. And the appropriation would be ultra vires in any other aspect.

Municipal corporations act in a double character:

1. Governmental or public, as a State agency.
2. Proprietary or private, as a distinct corporation.

I Dill. Mun. Corp., section 66.
Cooly Const. Lim., 284.
United States vs. B. and O. R. R., 17 Wall, 322.

This arrangement was effected by the city in its public character.

The education of the public youth is a public, political or governmental function primarily residing in the State for the benefit of the citizens, and delegated to municipalities, townships or trustees to be exercised by them as State agencies acting in a governmental capacity.

In Maryland it is established by the Constitution and includes the system in the city of Baltimore, over which the State Legislature has full control.

Md. Const., Art. VIII.
School Com'r's vs. M. & C. C. of Balto. 26 Md. 505.
1 Dillon Mun. Corp., sec. 23.
Merrill on Mandamus, sec. 115.
Com'r's. vs. Mighels, 7 Ohio St., 109, 119.
Trustees vs. Tatman, 13 Ill., 30.
Louisville vs. Wible, 84 Ky., 290, 294.
Hooper vs. New, 85 Md., 565, 574.

The education provided for in this ordinance is *public education.* It cannot be private. Nothing is better established than that it would be an unwarrantable diversion of public funds to apply them to private purposes as to a private school or for private education.

St. Mary's Ind. Sch. vs. Brown, supra.
Ellesburg vs. Seay, 83 Ala., 614.
Cooley on Taxation, 2d Ed., page 122.

Could the City Councilmen pass an ordinance similar to this and appropriate $9,000 annually expressly for the education of their own sons in the Respondent's schools?

Even this contract cannot be supported as an application of public funds, unless there is some *public benefit* derived from it, giving the public an interest in its performance.

M. & C. C. vs. Clunet, 23 Md. 468.
St. Mary's Ind. Sch. vs. Brown, 45 Md. 335.
Cushing vs. Inhabitants, 10 Metcalf, 508, 520.
Allen vs. Jay, 60 Maine, 124.
Opinion of Court, 58 Maine, 597.
Cooley Const. Lim. 207.
Cooley on Taxation, 2d Ed. pp. 113, 122, etc.
Morawetz Private Corp., sec. 1114, ut supra.

The *public education* provided is the only possible public benefit to be derived. It is made the express consideration for the payment. (See ordinance, sec. 4.) No incidental or consequential advantages to the public will support the payment.

Curtis vs. Whipple, 24 Wis. 350–354.

Mandamus lies to compel a corporation or an individual to perform a public duty, or one imposed by law; and the duty of the Respondent to admit the Petitioner in this case is a public duty and imposed by law.

It is unnecessary here to discuss whether the Respondent is a public or a private corporation, or even whether it is a municipal agency.

Mandamus lies against schools wholly outside the ordinary public school system and governed by their own trustees, to compel the admission of one entitled by law to be admitted.

State vs. White, 82 Ind. 278.
Foltz vs. Hoge, 54 Cal. 28.
Nourse vs. Merriam, 8 Cush. 11.

And against persons or corporations generally to enforce the performace of a legal or public duty.

Merrill on Mandamus, sections 25, 26, 27, 157, etc.
High Legal Rem., sec. 277.
Spelling Extr. Legal Rem., sec. 1521.

If there is a legal obligation and no remedy by action, mandamus is the proper remedy.

In Re Napier, 18 Q. B., 694.
People vs. Mayor, 10 Wend., 395.
High, Legal Rem., section 10.
Commonwealth vs. Select, etc., 34 Pa. St., 509.

Mandamus is the Petitioner's only possible remedy.

The Respondents contend that mandamus is not the proper remedy, but have not as yet suggested what other remedy is open to him. They put the law in the position of giving a legal right, but offering no remedy. Generally, when a certain duty is imposed by a law and no remedy is provided, mandamus is the remedy to resort to.

Tapping on Mandamus, 80.
M. & O. R. R. vs. Wisdom, 5 Heisk., 125.

The very origin and nature of the writ was to give a remedy where there was no adequate remedy by action and where in justice and good government there ought to be one.

Merrill on Mandamus, sec. 10, etc.
High on Leg. Rem., secs. 1, 5, 15.
An. ana Anns. on Corp., sec. 699.
3 Bl. Com., 110, 264.
1 Kent Com., 322.

If the right to the writ is shown under established rules of law, it must issue; there is no arbitrary discretion.

Brooks vs. Widdicombe, 39 Md., 387.

The policy of the law or public sentiment cannot affect the case.

Ward vs. Flood, 48 Cal., 36-52.
Westchester R. R. vs. Miles, 55 Pa., 209.
Mount Moriah Cem. vs. Com., 81 Pa. St., 235, 246.
Dallas vs. Fordick, 40 How. Pr., 249, 257.
People vs. Board, 18 Mich., 400, 414, 418.
Board vs. Timon, 26 Kansas, 1.
People vs. Board, 101 Ill., 308, 317.

The fact that the ordinance is made effective by ageeement or contract, does not make it any the less an ordinance; and the fact that a contract intervenes in the chain of the Petitioner's legal right, is no bar to mandamus. Contracts have been frequently enforced by mandamus when their foundation is a legal obligation, as illustrated by the following cases:

Wren vs. City of Indianapolis, 96 Ind. 206, 219.
State vs. Crete, (Neb.,) 49 N. W. Rep. 272.
Leominster, Etc., vs. Railroad Co., 3 Kay & J. 654, 673.
2 Dillon Mun. Corp. sec. 828.
People vs. Haws, 34 Barb. 69.
Regina vs. Southampton, 1 Ellis B. & S. 5.
Adams vs. London & Blackwall Ry. Co., 6 Railway and Canal Cases, 271, 281.
Mount Moriah Cemetery vs. Com. 81 Pa. St. 235.

Several of the above cases were at the suit of private contractors.

The test is the *legal obligation.* Indeed, Lord Campbell says, "A legal obligation, which is the proper *substratum* of a mandamus, can arise only from common law, from statute, *or from contract.*"

Ex-parte Napier, 18 Q. B. 694.

The case of *Rosenfeld vs. Einstein, 46 N. J. L., 481,* and the cases cited by *High on Legal Remedies, section 25,* quoted by the Court below as authority for refusing the writ, are all cases between *two contractees* involving the enforcement of contracts of *purely private or personal nature,* involving no trust or legal obligation, but resting wholly upon contract. The courts very properly refuse to extend mandamus so as to take the place of specific performance of *purely private or personal contracts.*

But that principle, sound in those cases, has no relevancy in this case. Is this a case resting wholly upon a contract, of purely private or personal nature, between Clark and the Maryland Institute? Assuredly, Clark has *no contract what-*

ever. He would have no specific performance. The contract, as far as there is one, is between the city and the Respondent, and amounts, in effect, merely to the Respondent's assent to the terms of the ordinance. And who can seriously contend that it is a contract involving no trust or legal obligation on the part of the Respondent? The very fact that the contract deals with the exceedingly important and vital subject of public education, a governmental, and not a corporate duty, stamps it with a public character. The contract imposes a *legal* duty. And the fact that the Institute has actually undertaken the office of public instructor in the place of the city, in compensation for which it receives public money, raised by taxation to support the public schools, and by virtue of a city ordinance under legislative authority, reposes upon the Respondent a grave *public trust* for which it is responsible, not only to the municipality of Baltimore, but to the *public*, to whom the municipality itself is ultimately responsible.

St. Mary's Ind. School vs. Brown, supra.

It is not intended to throw doubts on the legality of this ordinance and contract. But it is most earnestly pressed upon the attention of the Court, that in this arrangement we have the utmost limit to which municipal aid to private institutions can be stretched. Should the element of public benefit be eliminated, and this arrangement construed to be of the character attributed to it by the Respondents and the learned Court below, a mere private contract involving no public duty or consequent public benefit, not only would its legality be open to most serious question, but a precedent would be established for appropriating public money for private purposes, which might be the entering wedge for future abuses in the taxing power of municipalities.

But no matter in what light the Constitution is held to apply, the cardinal fact remains that *money raised by taxation is being disbursed in a discriminating manner* with the connivance of and under the direct authority of the city of Baltimore. The Constitution brooks no indirect or sinister means of evading its

provisions. It regards the ultimate result, and brushes aside the means by which this is accomplished.

Claybrook vs. Owensboro, 16 Fed. Rep. 297. Yick Wo, 118 U. S. 356.

"It [the Fourteenth Amendment] ordains that no State shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States; and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color. The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemptions from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

Strauder vs. West Virginia, 100 U. S. 300, 307.

It is sufficient to show that the Constitution of the United States is being violated, and that the City of Baltimore and the Respondent are united in denying to the Petitioner the *equal protection of the law.* The city cannot shift the responsibility on the Respondent, nor can it, in turn, evade performance of manifest duty by attempting to construe a law in the teeth of the constitutional prohibition. The equal protection of the law *is being denied*, and denied by agents of the State. The Respondent is attempting to evade a duty, which, but for the violation of the Constitution, it would confessedly have to perform. The Petitioner's constitutional rights under the law of the city have been denied him, the city laws violated, and its duty thereunder not performed by the Respondent.

The Petitioner has selected the appropriate and only possible remedy to enforce his rights; and the Courts will see to it that he shall not, through inability of the judicial power of the State, be denied what is guaranteed by the Constitution—THE EQUAL PROTECTION OF THE LAW.

It is, therefore, respectfully submitted that the order of the Superior Court of Baltimore City, overruling the demurrer and dismissing the petition, be reversed, with costs, and the writ issued as prayed.

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Attorneys for Petitioner.