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Filed February 11, 1898.

STATE OF MARYLAND
Ex Relatione,
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.

APPELLEE'S BRIEF.

The facts in this case are set out in the petition and answer, some errors of the petition being corrected by an agreement (Record, page 18) in advance filed of the demurrer to the answer.

The history of the case, thus conceded, is that the respondent, the appellee, on the 10th of March, 1893, entered into a contract with the Mayor and City Council of Baltimore for the education of pupils in its schools of art and design for a period of eight years, said pupils to be appointed annually by the members of the City

Council, each for a term of four years instruction. Contract and City Ordinance authorizing it. (Record, pages 3 and 4.)

Two colored pupils, Davis and Gross, were appointed by City Councilmen and admitted into the night school of the Institute, in the fall of 1895. This elicited much adverse criticism and so reduced the number of white pupils in the school, that the Board of Managers on the 11th November, 1895, adopted a regulation against the admission of other colored pupils and so notified the members of the City Council and other appointing powers. (Record, page 11.)

On the 21st February, 1896, Dr. J. Marcus Cargill, a member of the City Council, appointed the relator as a pupil in the school, *subject to the rules of the Institute*, of which he had notice. On the 11th March, following, the Board of Managers notified Dr. Cargill of the relator's rejection because of his color and invited the appointment of a white pupil in his stead. No other appointment was made by Dr. Cargill, and the vacancy having been reported to the Mayor of the City, as required by the ordinance and contract, the Mayor on the 10th October, 1896, appointed a white pupil to fill the vacancy who is still in the school.

In September, 1897, Dr. Cargill again appointed the relator as a pupil in the school *subject to the rules of the Institute*, and inasmuch as his disability because of color, was known both to the Board of Managers and Dr. Cargill, said appointment was rejected, and at the close of said month the vacancy was reported to the Mayor, who thereupon appointed another pupil, conforming to the rules of the Institute, who is still in the school.

The petition avers and the answer admits, that under a prior contract with the city, two colored pupils were appointed by a City Councilman and received into the night school of the Institute, and that one of these

remained in the school until graduated. But it is also averred in the answer and admitted by the demurrer, that the admission of these pupils, as also of these colored pupils now in the school, was but tentative and in no wise an admission on the part of the Institute of any contractural obligation. That notwithstanding the earnest efforts of the Board of Managers and Faculty of the school to reconcile the white pupils and their parents to the presence of the few colored pupils in the school, the number of white pupils has decreased from 643 to 403, that the usefulness of the said school has been greatly impaired, and that it is apprehended that the continued admission of colored pupils would break up the school altogether.

The demurrer also admits the averments of the answer, that the overwhelming public sentiment of the citizens of the State, both white and colored, is against the mingling of the races in the schools; that separate schools, both public and private, are maintained throughout the State. That the schools of the Institute were established and have been maintained for white pupils only, and that the contract and ordinance must be construed as applying to white pupils only. That in point of fact this is the construction placed upon it by the city authorities. That after the adoption of said rule of exclusion, and with full knowledge of the rejection of the relator, the Mayor, Comptroller and Register of the city inspected the schools of the Institute, and reported that the contract was being faithfully carried out. That with the same knowledge the City Council ratified the respondent's action in the premises by appropriating, both in the years 1896 and 1897, the annual appropriations of $9,000 each provided by the contract. And that the city's law officer, Mr. Elliott, in response to an enquiry from the chairman of the Committee of Ways and Means of the City Council, construed the contract as if it contained the word "white," and

held that the rejection of the relator because of his color was not a violation of the contract.

The schools of the Institute were established many years ago by private subscription, and the tuition fees of pay pupils, of whom there are many more now in the schools than those appointed under the contracts with city and State. The equipment and endowment of the schools represent an outlay of about $200.000, no part of which was contributed by the city or State, or by taxation, or by contribution from any but white persons.

It is contended on the part of the appellee, that the said by-law or rule of exclusion was valid, and not in violation of said contract or in contravention of the Constitution or Laws of the United States.

ARGUMENT.

I.

THE LEGAL RIGHT.

The petitioner claims by mandamus the right to be received as a pupil in the "Maryland Institute for the Promotion of the Mechanic Arts." As he claims to enforce this right through the remedy of mandamus, it becomes necessary first to state the character of the right which may be enforced through this extraordinary remedy. The whole matter is thus summed up by C. J. Alvey in the case of George's Creek C. & I. Co. vs. Co. Comm., 59 Md. 259: "Mandamus is a most valuable and essential remedy in the administration of justice, but it can only be resorted to to supply the want of some more appropriate ordinary remedy. Its office, as generally used, is to compel corporations, inferior tribunals or public officers to perform their functions, or some particular duty imposed upon them, which, in its nature, is imperative, and to the performance of which the party applying for the writ has a *clear legal right.*

The process is extraordinary, and if the right be doubtful, or the duty discretionary or of a nature to require the exercise of judgment, or if there be any ordinary, adequate, legal remedy, to which the party applying, could have recourse, the writ will not be granted. The application for the writ being made to the sound judicial discretion of the Court, all the circumstances of the case must be considered in determining whether the writ should be granted or not; and it will not be allowed unless the Court is satisfied that it is necessary to secure the ends of justice or to subserve some just or useful purpose."

Nor will it ever be issued to compel the performance of a nugatory Act.

Hardcastle vs. Md. & Del. R. R. Co., 32 Md. 32.

2 Poe, Pldg. & Prac., sec. 709.

The right to be enforced by mandamus must be a legal right; it must be clear, definite and certain, and the circumstances must be such, that the Court can actually accomplish something by the writ.

The question now arises, where does this particular petitioner get the *clear, definite, legal right to be received as a pupil into this particular school?* Unless he can show this positive right, he has no case for a mandamus.

There are so many aspects under which these cases of racial discrimination arise, that it will tend to clarify the case and confine it within its own proper limits if we consider first of all, the circumstances upon which ***this alleged right is not and cannot be founded.***

II.

CIRCUMSTANCES UPON WHICH THE RIGHT IS NOT FOUNDED.

A. ***Not founded upon privilege clause of 14th amendment.***

The 14th amendment of the Constitution of the United States provides that, "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

Ever since the passage of this amendment, strenuous efforts have been made to show that under and by virtue of it *new rights* were conferred upon the citizen. It has, however, been uniformly held that this clause only has application to rights of citizens of the United States as such, and adds nothing to the rights of one citizen against another. As to privileges and immunities belonging to citizens of a State, these must rest for their security and protection where they have always rested—that is, with the State in which the citizen resides.

Short vs. State of Md., 80 Md. 401.
Civil Rights Cases, 109 U. S. 3.
U. S. vs. Cruikshank, 92 U. S. 543.
U. S. vs. Harris, 106 U. S. 629.
Virginia vs. Reeves, 100 U. S. 313.
Slaughter House Cases, 16 Wall. 74.

This construction of the 14th amendment has been uniformly applied to educational rights and advantages. The right of children to attend State schools and of parents to send them there, wherever such right exists, is not a privilege or immunity belonging to a citizen of the United States as such. It is a right created by the State, and belonging to the State as such. The clause in the Constitution providing that no State shall abridge the privileges and immunities of citizens of the United States has no application.

Lehew vs. Brummell, 103 Mo. 546; 11 L. R. A. 829.
People vs. Gallagher, 93 N. Y. 447.
Corey vs. Carter, 48 Ind., 355.
State vs. McCann, 21 Ohio St. 198.
Ward vs. Flood, 48 Cal., 36; 50–1.

Hall vs. De Cuir, 95 U. S. 504–5.
Racial Discrimination, 30 Am. Law Reg., 86–8.

B. *Right not founded on any local civil rights legislation.*

There are many cases among the authorites where colored persons have been allowed certain rights by virtue of State legislation, somewhat similar to the Act of Congress, known as the civil rights bill, which was declared unconstitutional in the Civil Rights Cases, 109 U. S. 3.

Thus in certain States acts have been passed punishing those who refuse colored persons equal advantages in conveyances, hotels, theatres, barber shops, places of amusement, &c. Of this class of cases the following are examples, *all founded upon the local statutes*:

Joseph vs. Bidwell, 28 La. Ann. 382.
U. S. vs. Newcommer, 11 Phila. 519.
Bowlin vs. Lyon, 67 Iowa, 539.
People vs. King, 110 N. Y. 418.
Messenger vs. State, 41 N. W. Rep. 638. (Neb.)
Baylies vs. Curry, 30 Ill. App. 109.
Ferguson vs. Giles, 82 Mich. 364.

We mention these cases simply for the purpose of distinguishing them from the case at bar, and so that the Court may understand that if quoted by the petitioner, they are not authorities for this case, as we have in Maryland no local civil rights statute.

C. *Right not founded upon the general public school law.*

Most of the cases of racial discrimination arise from the attempt to exclude colored persons from the public schools; or, to prevent the mixing of the races in one public school.

As we have seen, the right of children to attend the public schools is a right created by the State. When

the State establishes a public school system by law, every child conforming to the regulations prescribed by the system has a right to attend. This right is founded upon the law of the State, and if he is denied admission, he can show a clear legal right, based upon the State law, which is therefore enforcable by mandamus. In establishing a *public school system* the State has no right to exclude colored persons from its benefits. This is inhibited by the other clause of the 14th amendment, to wit: "no State shall deny to any person within its jurisdiction the equal protection of the law."

Under this section it is not necessary that the races shall be educated together in one school. Mixed schools are not required by the Constitution. It has been quite uniformly held that colored persons may be excluded from white public schools whenever other public schools with equal advantages, are provided for colored persons.

Of this class of cases, the following are examples, all founded upon *general laws creating public schools*:

Lehew vs. Brummell, 103 Mo. 546.
People vs. Gallagher, 93 N. Y. 447.
Corey vs. Carter, 48 Ind. 355.
State vs. McCann, 21 Ohio St. 198.
Ward vs. Flood, 48 Cal. 36.
U. S. vs. Buntin, 10 Fed. Rep. 736. [Note.]

These authorities have no application to the case at bar, for in this case the petitioner does not and cannot found his right to enter the Maryland Institute on any State law; the Institute is not a *public school*, not a part *of the public school* system, and not a *public corporation*, as will be more fully shown hereafter. If the petitioner was founding his right on a general State law, then in the very nature of things, he would not have the exclusive right to enter the Institute, for the right would necessarily be open to all other colored boys of like qualifications. He contends that he has the right to enter the Institute to the exclusion of other colored

boys, and consequently must rely, if he has any right at all, not on a general State law, but on special circumstances peculiar to his individual case.

D. Right not a common law right.

Some of the many cases decided upon this question of race depend upon certain common law rights. Thus every one has the common law right to be conveyed by a common carrier, or to be lodged by an innkeeper. If a colored person is denied the right of carriage or lodging simply on account of his color, he may maintain an action for this denial of his rights, and if a State Court would not protect him in this action, then the State, through its judicial department, would be denying to one of its citizens, the equal protection of the laws.

Evidently the petitioner has no common law right to be educated at the Maryland Institute.

We have thus carefully gone over these various classes of cases, because they explain the exact attitude of the Courts upon racial discrimination, and so that the Court may see that none of them have any real bearing on the question now under discussion. By this process of exclusion also, we can now see in clear light the narrow limits of the present controversy. To come back now to the question with which we started—*"Where does this particular petitioner get the clear definite legal right to be received as a pupil into this particular school?"*

We may now answer negatively, he does not get the right, (1) from the privilege clause of the 14th amendment; (2) nor from any local civil rights statute; nor (3) from any general public school law; nor (4) from any provision of the common law.

Whatever right he has, if he has any, must be founded entirely and exclusively upon the contract between the City of Baltimore and the Maryland Institute. It is of

the utmost importance in this case to apprehend fully that there is no right at all in the petitioner, unless this contract gives it to him, for then the whole case resolves itself into a construction of the contract, and the rights and remedies of the petitioner under it.

III.

THE RIGHT UNDER THE CONTRACT.

On March 7th, 1893, the Mayor and City Council passed an ordinance empowering the Mayor, City Comptroller and City Register, to contract with the Maryland Institute for the education of pupils in its schools of Art and Design, for the period of eight years from the first of September, 1893.

By the terms of the ordinance there was to be appointed annually, before the first of September, one pupil by each member of the First and Second Branches of the City Council, entitled to instruction for a period of four years in said schools, and in case of a vacancy from any cause, the President of the Institute shall forthwith notify the member of the Council representing the ward to which such pupil was accredited, who shall thereupon fill the vacancy.

The president shall annually, in September, report to the Mayor and City Council the names of the pupils so appointed and in attendance upon its schools, together with a list of vacancies, should any exist, and should no appointment be made prior to the first of October by members of the City Council entitled to fill such vacancies, then the Mayor shall appoint pupils to fill said vacancies.

It was further provided that the Mayor, City Comptroller and City Register should annually, or as much oftener as they might deem it expedient, inspect said schools, and the condition and manner in which the terms of said contract are being fulfilled by the Insti-

tute, and thereupon, the Comptroller, upon being satisfied that the contract was being faithfully complied with, was to pay to the Institute annually, in the month of September, the sum of nine thousand dollars in full for the education of said pupils. (Record, pages 3-4.)

It was contended very earnestly in the Court below that the petitioner's right was not founded upon the contract with the city, but upon this ordinance; but this construction is obviously incorrect.

The ordinance does not profess to give any rights to any one to enter the Institute; it professes simply to *authorize* a contract under which, if entered into by the the Institute, certain appointees were to be received as pupils. If the Institute had declined to enter into the contract, manifestly no appointee of the City Council would have any rights as a pupil in these schools. Further than this, if the ordinance did profess to give appointees of the City Council the right to enter the Institute as pupils, it would be entirely ineffective. An ordinance *proprio vigore*, could confer no such rights. As well might the Mayor and City Council direct by ordinance that Mr. Carter and Mr. Gans should receive certain colored boys appointed by it, as law students in their offices. Such control over private individuals or corporations is not only not possessed by the municipal authorities, but is beyond the scope of the authority of any State agency, no matter how great or powerful. The right, therefore, if any, depends exclusively upon the contract.

A.

The Contract of March 10th, 1893.

In accordance with the authority granted by the ordinance of March 7, 1893, a contract was entered into between the city, acting by the Mayor, City Comptroller and City Register, on the one hand, and the Maryland

Institute on the other, in which it was agreed that "for and in consideration of the payment of the sum of nine thousand dollars annually, for a period of eight years from the first day of September, 1893, in the manner provided by said ordinance, the said Institute shall receive into its schools of Art and Design thirty-three pupils for the year beginning September 1, 1893, and thirty-three pupils for each of the years beginning September 1, 1894, 1895, 1896, 1897, 1898, 1899 and 1900, respectively, to be appointed in the manner provided in said ordinance, and shall cause the 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, a copy whereof is hereby annexed and made part of this contract." (Record, pages 4-5.)

The petitioner, a colored boy, was appointed as a pupil in the Institute before September 30th, 1897, by J. Marcus Cargill, member of the First Branch of the City Council from the Eleventh Ward. There are many other facts connected with the appointment and the action of the Institute, which will be referred to presently, but let us examine the question now simply upon this contract of March 10, 1893, and the appointment of petitioner in September, 1897.

The petitioner claims that this contract, properly construed, includes colored as well as white appointees; the Institute, on the contrary, contends that only white appointees are meant, and that the parties to the contract never had any intention of making the Maryland Institute a *mixed school.*

B.

Construction of Contract of March 10, 1893.

Of course, the whole effort of the Court in construing a contract is to reach the real intention of the parties, and in order to do this the surrounding circumstances

must be understood. These circumstances are well stated by Judge Ritchie in his very able opinion deciding the case in the Superior Court. Speaking of the Maryland Institute schools, he says: "From their establishment up to the year 1891, these schools had been exclusively for white pupils, male and female.

In that year one colored pupil was appointed and admitted and he completed the course. In 1892 another colored pupil was appointed and admitted but he left the Institute soon after. In 1895, since the date of the present contract, two more were appointed and admitted, and are now pursuing their studies. The answer however avers and the demurrer admits, that the overwhelming public sentiment, both white and colored, at the time these pupils were admitted, was against mixed schools; that these admissions were but tentative, with the hope that none others would be appointed and in no wise an acknowledgment of any contractual obligation, that notwithstanding the most earnest and zealous efforts of the managers and teachers to overcome the objections of the white pupils and their parents, the presence of those colored pupils was disastrous to the interests of the Institute, largely reduced the number of its pupils, and threatened to destroy the usefulness of these schools." (Opinion Record, pages 20-21. Answer Record, pages 9-10.)

In addition to these circumstances, admitted by the demurrer, the public history of the State, on the question of separate schools, is so well known as to be matter of judicial cognizance. The universal opposition to mixed schools, is not a light, trivial or ordinary matter, but is fundamental and has its origin and growth in the manifest difference in the races.

It is particularly strong in Maryland and in the Southern States, and no contract connected with education, could for a moment be construed without taking into account this universal usage of separate schools, and the

deep and abiding feeling, which has hitherto made mixed schools in this State an impossibility.

Since the Maryland Institute was founded for white pupils only, since it has always been maintained exclusively for white pupils, (with the exception of the few tentative cases mentioned), since the universal usage and custom precludes the mixing of the races in one school, it follows necessarily, that when the contract was made, it must be construed, in the light of these circumstances as applicable to white pupils only. This fact of the universal usage of separate schools for the separate races, is the basic fact which makes the intention of the parties to the contract demonstrable.

It is argued however, that the contract, as thus construed, would be illegal and therefore the construction is inadmissible. We will show presently that the contract construed in this way is not illegal, but just now, for the purpose of the argument, assume that it would be illegal, would that change the construction?

It is perfectly true that when a contract is open to two permissible constructions, one lawful and the other unlawful, the former is adopted, *ut res magis valeat quum pereat.* But this is a subsidary rule of construction for the purpose of arriving at the real intention of the parties. If, however, the Court can see the real intention of the parties, the Court must construe the contract according to that intention, even though thereby the contract becomes illegal. To do otherwise would be to make a new contract for the parties. And it is submitted that the dominant, overruling fact of universal custom and usage as to mixed schools, enables the Court to see that the real intention of the parties was that the Maryland Institute should not be made a mixed school.

C.

Facts Subsequent to Contract of March 10, 1893.

But this is made absolutely conclusive by the facts which followed the contract of March 10, 1893.

In October, 1895, an embittered political discussion as to mixed schools in Maryland grew out of the tentative reception of the few colored boys already mentioned, and, in consequence of the presence of these colored pupils, the pupils in the schools decreased from 643 in 1894-5 to 521 in 1895-6, and to 447 in the following winter, and the discussion produced such an adverse effect upon the schools, that it was a serious question with the Maryland Institute authorities whether the persistance in the demand for colored pupils would not, if yielded to by them, result in the complete destruction of the schools. (Record, page 10.)

On November 11, 1895, the Institute, because of the popular sentiment against mixed schools, and the damage which the reception of a few colored boys, even tentatively, was doing in schools, adopted a rule that—"hereafter only reputable white pupils will be admitted to the schools." (Record, page 11.)

A copy of this rule was sent to each member of the City Council, with a blank form of appointment, by which each appointment is made subject to the rules of the Institute. (Record, page 11.)

Now, with full knowledge of this rule adopted by the Institute, the Mayor and City Council in both 1896 and 1897, passed the appropriation of $9,000 in each year for the Institute.

On February 10, *1897*, the Mayor, Comptroller and Register, who by the very terms of the ordinance, were to inspect the schools, and the condition and manner in which the terms of the contract were being complied with, reported to the City Council favorably as to the manner in which the Institute was fulfilling its contract. (Record, page 13.)

This was after the adoption of the rule limiting appointees to white persons.

On September 20, 1897, the City Solicitor gave an opinion to a member of the special committee having the appropriation in charge, that the contract meant only white appointees. (Record, page 13.)

We have, therefore, the following facts:

1. The Institute refuses to receive any but white pupils.

2. This rule fully brought to the notice of the Mayor and City Council.

3. The legal effect of the rule passed on by the City Solicitor.

4. The annual appropriation of $9,000 for 1897, made with full knowledge of the rule, acquiesced in by the City Solicitor and the Mayor, City Comptroller and Register, who were specially designated by the ordinance to decide whether the Institute was complying with its contract.

Now, it must be borne in mind that the appointment of the petitioner, and his right under the contract to be admitted as a pupil, was in consideration of this very appropriation of 1897, for his appointment was for 1897.

So, whatever opinion may exist with reference to the construction of the contract of 1893, there can be no possible doubt as to what the parties to the contract meant in 1897. There can be no possible doubt but that the appropriation of 1897 was made in consideration of the Institute agreeing to receive *33 white* pupils for that year. The petitioner may argue that the contract was illegal, but he cannot possibly argue, on the facts, that the Institute agreed in 1897 *to take white and colored pupils* in consideration of the appropriation of 1897, when they expressly decline, before the appropriations of 1896 and 1897 are passed, to take colored pupils, to the full knowledge of the Councils which passed these appropriations.

Nor can the petitioner argue that the contract of March 10, 1893, as construed by him, extends through 1897, without the possibility of its being changed by subsequent Councils. The contract of March 10, 1893, was practically a divisible contract, annually renewable at the pleasure of the succeeding Council. In making this contract the City was not acting in its private capacity as a property holder, but in its public capacity as part of the local government. In reference to contracts of this class it is well settled that no Council can bind its successor by an irrevocable contract, but that each succeeding Council has the same jurisdiction and power with respect to the subject-matter as its predecessor. The corporation cannot abridge its own legislative powers.

Lake Roland R. R. Co. vs. M. & C. C. of Balto.
77 *Md.* 352, 370-6.

In 1897 the contract was brought about in this way: The Institution says it will receive only 33 white pupils for 1897. The Mayor and City Council, fortified by the opinion of the City Solicitor, and by the report of the Mayor, Comptroller and Register, say in reply—all right, we will give you $9,000 for 1897, in consideration of your ceiving 33 white pupils in 1897, to be instructed in accordance with the terms of the ordinance of 1893. This is undoubtedly the contract under which alone, the petitioner, who was an appointee for 1897, can have any rights. Now we present this dilemma. His rights, if any, depend solely upon the contract. The contract of 1897 includes only white appointees. If the contract is valid he is excluded by its terms. If it is void and illegal, he cuts from under his feet the only thing upon which he can found his right. In either case his petition must fail.

D

Acts of the parties under the contract.

But beyond all this the parties to the contract, to wit: the City, on the one side, and the Institute, on the other, have acted on the contract, so that it is no longer executory but executed, and there is no room for the petitioner's contention.

On February 21, 1896, Dr. Cargill, member of Council from 11th Ward, appointed the petitioner, Robert W. Clark, Jr., on blank forms, subject to rules of Institute. (Record, page 14.)

On March 11, 1896, the Institute wrote a letter to Cargill refusing Clark on account of his color and asking him to appoint another. In September, the Mayor and City Council, while Cargill was a member, appropriated $9000 to the Institute for 1896. (Record, pages 14-15.)

On October 1, 1896, the Institute certifies under the terms of the ordinance of 1893, the vacancy in the 11th Ward, caused by the refusal of Clark. (Record page 15.)

On October 10, 1896, the Mayor recognizing the vacancy, acts under the ordinance and appoints Miss Carrie E. Keyworth to fill the vacancy. (Record page 15.)

On September 14, 1897, Cargill was notified of vacancy in 11th Ward for 1897, and unless he filled it before September 30, the Mayor would be asked to fill the vacancy. (Record, page 16.)

On September 14, 1897, Cargill appoints Clark on blank form, subject to the rules of the Institute. (Record, page 16.)

On September 30, 1897, the Mayor was advised of the vacancy in 11th Ward. (Record, page 16.)

On October 1, 1897, the Mayor, under the ordinance of 1873, fills the vacancy by the appointment of Samuel C. Martin. (Record, page 17.)

On October 4, 1897, the petitioner presents himself and is refused admission. (Record, page 17.)

Thus it is perceived that the contract has been fully acted on by both parties to it. The place sought by the petitioner is not open, but has been filled, filled too in accordance with the very terms of the ordinance of 1893.

There can be no question, therefore, as to what the contract meant in the minds of the parties to it.

"In the construction of a contract, when the language used by the parties is indefinite or ambiguous, and of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence."

Topliff vs. Topliff, 122 U. S., 121.
Mitchell vs. Wedderburn, 68 Md., 139.

IV.

ALLEGED UNCONSTITUTIONALITY OF EXCLUSION OF COLORED PERSONS.

The petitioner claims that the rule adopted by the Maryland Institute that "only reputable white pupils will be admitted to the schools," (Record, page 11,) is in violation of the Fourteenth Amendment of the Constitution of the United States.

1. The language of the clause of the Fourteenth Amendment is: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

This provision has been uniformly construed to prohibit discrimination by the States. "Its prohibitions refer exclusively to State laws and State action. This State action may be manifested by any one of the departments of its government, or by any one of its officers or agents, or by a municipal corporation acting under legislative authority; but unless the act in question, be done in some way under the authority of the State, it is not within the prohibition of the amendment. The

amendment has no application whatever to the acts of private individuals or private corporations."

Opinion—Judge Richie, Record, page 22.
Civil Rights cases, 109 U. S. 11-17.
Virginia vs. Reeves, 100 U. S. 318.
U. S. vs. Harris, 106 U. S. 638.
U. S. vs. Cruikshank, 92 U. S. 554.

2. The Maryland Institute is a strictly private corporation. There is not a single power exercised by them in their corporate capacity, which they are not competent to exercise as individuals.

Regents vs. Williams, 8 G. & J 397.
Perry vs. House of Refuge, 63 Md. 22.

The precise status of this very corporation as a private corporation has been fixed by the Court of Appeals.

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

3. But it is argued that the contract with the city makes it a municipal agency, and the case of *St. Mary's School vs. Brown, 45 Md. 310*, is relied upon in support of this contention. In that case certain appropriations by the Mayor and City Council to the Maryland Institute and other corporations were declared to be invalid upon the ground that they were not created for the city by the Legislature of the State as instruments of municipal administration. (Page 329.) The Court, however, proceed to say (page 336): "We can perceive no good reason why the city may not arrange and contract for such care and training, * * * and we think the power to make such contracts may well be conceded to exist. Its exercise to be valid must be with the limitation that the subject matter of the contract be kept within the power and control of municipal authority, and complete accountability be provided for; and thus make the institutions contracted with, *pro hac vice*, municipal agencies."

The petitioner relies upon these last sentences to show that the Maryland Institute is, under its contract, a municipal agency, within the meaning of the prohibition of the fourteenth amendment.

But the fourteenth amendment aims only at State action. It is true that the State may operate through a great variety of public agents and officers, and that some of these officers may exercise a very small part of the sovereignty of the State. Yet in no sense can it be said that *the State* is acting, unless the person or corporation acting is, in some way, exercising a part of the State's sovereignty.

The petitioner fails to distinguish between an office, or agency of the State or city, and an employment, and yet the distinction is well settled by the authorities.

"A public office is the right, authority and duty, created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public."

Mechem Public Off. section 1.

"A public office differs in material particulars from a public employment, for as was said by Chief Justice Marshall, although an office is an employment, it does not follow that every employment is an office. A man may certainly be employed under a *contract*, express or implied, to perform a service without becoming an officer."

Mechem, section 2.
U. S. vs. Maurice, 2 Brock, U. S. C. C. 96.

"The term office implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office. * * * An employment has none of those distinguishing features."

Opinion of Judges, 3 Greenlf. (Me.) 481.

"The most important characteristic which distinguishes an office from an employment or contract, is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of the government to be exercised by him for the benefit of the public. Unless the powers conferred are of this nature, the individual is not a public officer."

Mechem, section 4, cases in note 2.
U. S. vs. Hartwell, 6 Wall., 385.

"A public office is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power. Where, therefore, the authority in question was conferred by a contract it must be regarded as an employment and not a public office.'

Hall vs. Wisconsin, 103 U. S. 5.
Mechem, sec. 5.
Sawyer vs. Corse, 17 Gratton, 230.
Olmstead vs. The Mayor, 42 N. Y. Sup. Ct. 481.

The Maryland Institute is, therefore, not a part of the municipal government by virtue of this contract; its management is under the control of its own officers; their duties are not prescribed by law; its teachers are not appointed by the city or under its contract; it is not subject to any of the ordinances relating to the public schools; when the Institute acts, it does not act in the name of the State or city; it exercises no part, even the smallest, of the sovereign power of the State; its acts are not the acts of the city, and its voice is not the city's voice. "The relation between it and the city is simply that of a contracting party, and the contract is just such a one as the Institute might make with any citizen who wished to have instructed thirty-three pupils to be designated in a given manner. The fact that the contract was made with the city instead of with an individual cannot change the corporate status of the respondent, or make this any other than a private con-

tract. It creates no possible official, governmental or political relation between the city and the Institute, without which the respondent cannot be considered a municipal or State agency." (Opinion, Ritchie, Record, page 23.)

The meaning of the expression in 45 Md. 336, "*pro hac vice* municipal agencies"—is that contractors are doing under contract what the city could do through its own municipal agents.

The Institute is no more a municipal agent under this contract than a contractor to build a bridge for the City would be.

The act of discrimination being therefore the act of a private corporation, and not the act of the State or City, the 14th amendment has no application to the case.

4. Nor is the giving of the money to the corporation under such a contract illegal. If the giving of this money under such a contract, by the City, would be contrary to the constitution, then also would the appropriations constantly made by the Legislature, be contrary to the constitution, for the same reason. The Legislature has been appropriating money from time immemorial to institutions which are doing work for the public good, though most of them are for white persons only. Take the act of 1896, chapter 456 as an illustration. In it are found appropriations to Knapp's English and German Institute, The Hebrew Hospital and Asylum Association, The General German Aged People's Home; The Western Maryland College, St. John's College and many others, in which white persons are exclusively received. Are all these to be held void, simply because there are no colored institutions, doing precisely the same work, to which appropriations can also be made?

Is the hand of the State to be stayed until for every white institution, a similar colored institution is created? We submit that the whole argument of the petitioner proceeds upon this misconception. The

State may not *create* public Institutions for white people, and deny colored persons similar advantages, but outside of any general system of public Institutions created by the State, there is no constitutional provision, prohibiting the Legislature from aiding private enterprises doing beneficial public work, or which prohibits the city from having such work done under contract, by existing Institutions.

Chrisman vs. Brookharn, 70 Miss. 481.

V.

PETITIONER'S REMEDY.

1. Even if our whole preceding contention is wrong, the petitioner would have no remedy as he is not a party to the contract.

There are cases where the person for whose benefit a contract is made, may sue on it, though not a party to it, but these cases are exceptions, and are chiefly where assets are placed in the hands of one for the benefit of a third party, from which an implied assumpsit arises, or when the contract is solely for the benefit of the party suing.

Nat. Bank vs. Grand Lodge, 98 U. S. 124.
Cragin vs. Lovell, 109 U. S. 194.
Keller vs. Ashford, 133 U. S. 621.
Jefferson vs. Ash, 25 C. R. A. 257. (Note.)
8 Harvard Law Rev. 93.
Brantly Contracts, 165.

But in this case the contract was made with the city; the city retained entire control over it; under its provisions city officers were to inspect the work from time to time, and determine whether the contract was being carried out. It is not one of those contracts upon which a third party not in privity may bring suit.

2. The right of the petitioner, if he has any, being a right under a contract with a private corporation, cannot be enforced by the action of mandamus.

High, sec. 25.
Rosenfeld vs. Einsten, 46 N. J. L. 481.
Opinion, Judge Ritchie, Record, page 24.

We respectfully submit that the judgment below should be affirmed.

JOHN M. CARTER,
EDGAR H. GANS,
For Appellee.