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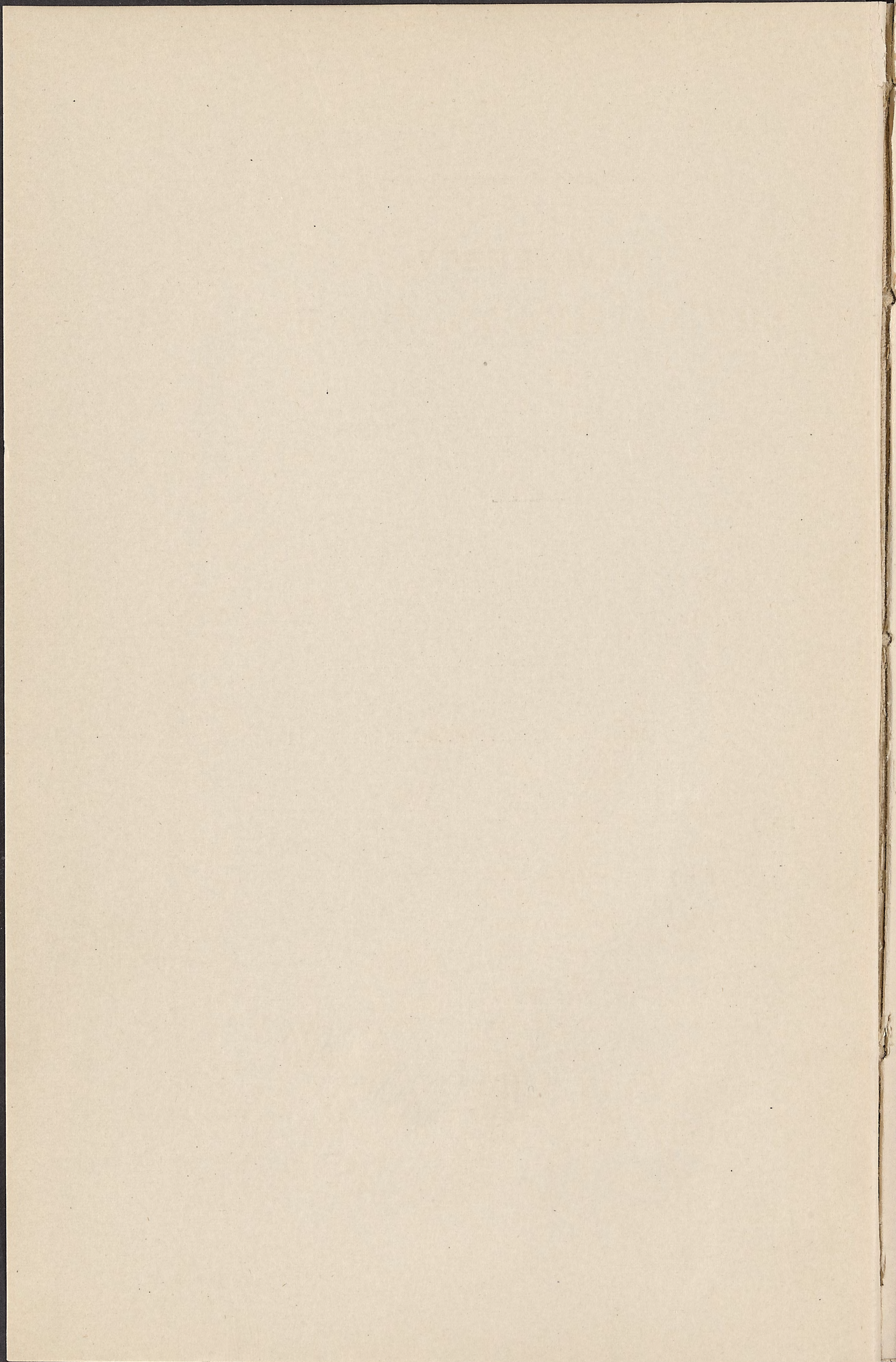

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NEW JERSEY
Court of Errors and Appeals

New Jersey Supreme Court

Chester W. Patterson,
Relator,

vs.

The Board of Education of the City of Trenton, Mercer County,
Respondent.

Notice of Appeal.

NOTICE OF APPEAL

(*Filed, May* 9, 1933.)

10

To: Robert S. Hartgrove, Esq.,
Attorney for Chester W. Patterson.

The Board of Education of the City of Trenton hereby appeals to the Court of Errors and Appeals of this State from the judgment of the Supreme Court entered in the above cause on or about April 29, 1933.

Aaron V. Dawes,
Attorney of Board of Education of the City of Trenton, Mercer County, Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS

CHESTER W. PATTERSON,
Respondent,
vs.
THE BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Appellant.

On Appeal from the Judgment of the Supreme Court.

GROUNDS OF APPEAL

10 (*Filed, May* 9, 1933.)

The appellant hereby sets down the following grounds for reversing the judgment entered in the Supreme Court in the above cause:

1. The court erred in giving judgment in favor of the respondent and against the appellant on the demurrer filed in the above cause upon the ground that the return to the said Writ of Mandamus was sufficient in law to constrain the court below to dis-
20 miss the Alternative Writ of Mandamus and give judgment in favor of the appellant.

AARON V. DAWES,
Attorney for Appellant.

New Jersey Supreme Court

Chester W. Patterson, *Relator,* vs. The Board of Education of the City of Trenton, Mercer County, *Respondent.*	Judgment Record. On Mandamus. On Demurrer to Return to Alternative Writ. Judgment for Relator.

ALTERNATIVE WRIT

(*Filed, April* 5, 1933) 10

New Jersey, ss.

[seal]

The State of New Jersey to:

The Board of Education of the City of Trenton, Mercer County,

Greeting:

Whereas, Chester W. Patterson, a member of the colored race and a resident of the City of Trenton, County of Mercer and State of New Jersey, is the father of Thaddeus Patterson, also a member of 20 the colored race and a regularly enrolled pupil of the Central High School of Trenton, a public school located in the City of Trenton, county and state aforesaid;

Whereas, The said Central High School of Trenton is attended by pupils of both white and colored races, said pupils being also of different nationalities and creeds;

Whereas, The colored pupils regularly enrolled 30 in the said Central High School of Trenton are members of different classes and grades thereof,

the said Thaddeus Patterson being a member of the junior class;

WHEREAS, The colored pupils regularly enrolled in the said High School have attended in conjunction with the white pupils the different school classes or grades in pursuit of the various subjects of study, with full and equal accommodations, advantages, facilities and privileges provided by the school curriculum and without any limitation, conditions, distinctions or restrictions based upon color or racial connections, excepting, however, the classes for swimming instructions, which form a part of the educational system of the said High School;

WHEREAS, All pupils in the said High School are assigned as individuals to the various classes of study, elective or compulsory, as to hour, room and teacher, as the individual abilities of each pupil might determine, the classification and determination being general and applicable to all alike;

WHEREAS, The various physical training classes for gymnasium exercise in said High School, and of which the swimming course is an adjunct, are composed of and attended by white and colored pupils together, and without any distinction, limitation or condition based upon color or racial connection;

WHEREAS, The said Thaddeus Patterson and other colored pupils in the said High School, electing to take swimming instructions, regardless of their grade or year of attendance in said High School are not permitted to take swimming instruction in conjunction with white pupils of the said High School but are separated and confined to a period for instructions fixed exclusively for colored pupils by the Board of Education of the City of Trenton, Mercer County, respondent herein;

WHEREAS, All pupils electing to take the swimming course receive their instructions from the same instructor, use the same pool and have the use of the same pool facilities, the entire body of water used in the said pool being seldom changed more than two or three times during the school year, and only as hygienic conditions might require;

WHEREAS, After the assignment of the said Thaddeus Patterson and other colored pupils of the said High School to a designated hour and day for their swimming instructions, the said relator, Chester W. Patterson on or about the 4th day of February, 1932, appealed to the respondent Board of Education of the City of Trenton, Mercer County, because of the conditions above set forth and was informed by the members of the said Board of Education that colored pupils would not be permitted to take swimming instructions in the said High School in conjunction with white pupils;

WHEREAS, The relator, Chester W. Patterson, thereafter appealed to the State Board of Education of New Jersey, on account of the classification and assignment of Thaddeus Patterson and other colored pupils electing to take the swimming course, in the manner as above set forth, and was informed by the said State Board of Education that the conditions complained of were in the custody, control and direction of the said respondent, the Board of Education of the City of Trenton, Mercer County;

Chester W. Patterson, the said relator, charges and insists that the rules and regulations of the said respondent Board of Education of the City of Trenton, Mercer County, in so far as they purport to prevent Thaddeus Patterson and other colored pupils of the said Central High School of Trenton from receiving swimming instructions in the swimming pool of the said Central High School of Tren-

ton at the same time and in conjunction with the white pupils of the said school, because of their color or racial connections are illegal and contrary to the laws of New Jersey in that the restrictions and limitations of the said Thaddeus Patterson and other colored pupils of the said Central High School of Trenton to a fixed period for swimming instructions and separate and apart from white pupils of the said Central High School of Trenton
10 are discriminatory; that the limitations and restrictions are not designed to promote safety, general welfare and health of the pupils of said Central High School of Trenton; that the effect of enforcing the said rules and regulations so as to prevent colored pupils of the said Central High School of Trenton from receiving swimming instructions under rules and regulations applicable to all pupils alike regardless of color, nationality or creed would be to deprive the said Thaddeus Patterson
20 and other colored pupils of the said Central High School of Trenton of the right to enter the said Central High School under the same terms and conditions applicable alike to all pupils of the said Central High School of Trenton, and would compel the said Thaddeus Patterson and other colored pupils of the said Central High School of Trenton to pursue their swimming instructions under conditions and limitations not established by the laws of New Jersey, and would be in violation of section
30 125 of the School Act of New Jersey, Compiled Statutes of New Jersey, Volume 4, page 4767, and in violation of section one of the Civil Rights Act of New Jersey, as amended, Public Laws of New Jersey, 1921, Chapter 174, page 468; and would likewise be in violation of the right accorded to the said Thaddeus Patterson by the Fourteenth Amendment of the Constitution of the United States in that it would deprive the said Thaddeus

Patterson of the equal protection of the law and would abridge his privileges and immunities, in that the said limitation, restrictions and classification are arbitrary and unreasonable and are for other reasons illegal and invalid.

We, therefore, being willing that due and speedy justice should be done in this behalf, command and strictly enjoin you that immediately after the receipt of this writ you do permit and allow, by your rules and regulations, the said Thaddeus Patterson 10 to take and pursue his swimming instructions in the Central High School of Trenton upon the same terms and conditions as are applicable to all other pupils of the said Central High School of Trenton and without any discrimination, restrictions, conditions or limitations, on account of his color or racial connections; or cause to use on the contrary signify, lest in your default complaint come to us repeated; and how you shall execute this, our command, certify to our Justices of our Supreme Court 20 of Judicature at Trenton, on the 18th day of April, 1933, together with this our writ, and this in nowise omit at your peril.

Witness, Luther A. Campbell, Esquire, Chief Justice of our Supreme Court at Trenton, the 29th day of March, 1933.

FRED L. BLOODGOOD,
Clerk.

ROBERT S. HARTGROVE,
Attorney. 30

I allow this writ; let it be sealed.

....
Chief Justice of the Supreme Court.

RETURN TO WRIT

(*Filed, April* 18, 1933.)

To the Honorable, the Chief Justice and Justices of the Supreme Court of the State of New Jersey:

The Board of Education of the City of Trenton, the Respondent herein, hereby makes return to the Alternative Writ of Mandamus to it directed, together with the said Writ.

I

10 The Respondent is the School Board of the City of Trenton, a body corporate, vested with power under the laws and constitution of the State of New Jersey to conduct the public schools of the City of Trenton for the equal benefit of all the people of the said city, and in discharging its said duty it has made reasonable rules and regulations with respect to the imparting of instruction in the elective swimming course, and has not, in so doing, discriminated against the colored pupils as in the 20 said Alernative Writ is supposed and the said Board has not denied to the colored pupils in this school the full and equal accommodations, advantages, facilities and privileges of the said school.

The said Board adopted a regulation that the white and the colored pupils should receive instruction in the swimming pool elective course from the same instructor, with the same facilities and instructions as the white pupils enjoyed, but that the colored pupils should receive their instruction by 30 themselves at a different period from that of the white pupils. The Respondent was induced to make such regulation by the general sentiment of the community and to promote the peace and good order of the said Trenton Central High School, but this Respondent secured for each pupil therein

equal opportunities for improvement and progress and performed all the functions toward each pupil which the laws of the United States and of the State of New Jersey has secured to each of its citizens in the said school.

II

The said Board further making return to the said Writ admits paragraphs 1, 2, 3, 5, 7, 8, 9, and 10 and denies paragraph 11 of the said Writ. It admits paragraph 4, with the exception that the impression therein sought to be conveyed is untrue that the separation of the races was not a reasonable regulation and deprived the relator of the full and equal accommodations, advantages, facilities and privileges in the said school with the white pupils. The Respondent further admits paragraph 6, with the exception that it denies that the swimming course is an adjunct of the gymnasium exercises but upon the contrary, Respondent says that the course of swimming instruction was introduced as an elective course and was taken when elective in substitution of such period as would have to be taken in the gymnasium exercise under the course of physical instruction.

The Board therefore submits that the assigning of the white and colored pupils to different periods under the circumstances above detailed is reasonable and justifiable under the laws of the State of New Jersey.

All of which is respectfully signified as the cause for the action of the Board in enacting the regulation separating the white and colored pupils in imparting to them instruction in the elective swimming course in the said school.

All of which is hereby certified to by the Board of Education of the City of Trenton under its cor-

porate seal and signed by its president and attested by its secretary, this eighteenth day of April, nineteen hundred and thirty-three.

THE BOARD OF EDUCATION,
OF THE CITY OF TRENTON,
WM. A. COOLEY, *Pres.*

[SEAL]
Attest:
ROBT. C. BELVILLE,
10 *Secretary.*

DEMURRER

(*Filed, April* 20, 1933.)

Chester W. Patterson, the relator, by Robert S. Hartgrove, Esquire, his attorney, comes and says that the said writ should not be dismissed for that:

The return to said writ by the said respondent, and the matters set forth therein, are as the same set forth, not sufficient in law, and wherefore he 20 prays that a peremptory writ do issue directed to the Board of Education of the City of Trenton, Mercer County, in conformity with the terms of the alternative writ, heretofore issued.

ROBERT S. HARTGROVE,
Attorney of Relator.

ANSWER

(*Filed, April* 21, 1933.)

And the said respondent saith that the return to the said writ and the matters therein set forth are sufficient in law in manner and form as the same are pleaded and set forth in the said return to bar and preclude the said relator from having or maintaining his aforesaid action and this the said respondent is ready to verify and prove the same when, where and in such manner as the said court shall direct and award; wherefor in as much as the said relator hath not denied or in any manner answered the said return and the matters and things therein contained, the said respondent prays judgment and that the said relator may be barred from having or maintaining his aforesaid action against the said respondent.

10

A. V. Dawes,
Attorney of Respondent.

JUDGMENT

20

(*Filed, May* 19, 1933.)

And now, at this day to wit, the second day of May, A. D. nineteen hundred and thirty-three, before the Justices of the Supreme Court of New Jersey at Trenton aforesaid, comes as well the said Chester W. Patterson, relator, as the said The Board of Education of the City of Trenton, Mercer County, respondent, by their attorneys aforesaid, whereupon all and singular the premises aforesaid being seen and by the court now fully understood and mature deliberation thereupon had, it appears to the court here that the said return to the said Alternative Writ of Mandamus presented by the respondent and demurred to by relator is not good

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and sufficient in law and that the demurrer thereto is well taken and is sustained.

Whereupon it is adjudged that said demurrer to said return be sustained and that a peremptory writ of mandamus issue out of and under the seal of this court directed to the said Board of Education of the City of Trenton, Mercer County, commanding and strictly enjoining it that immediately after the receipt of said writ, the said Board of
10 Education of the City of Trenton, Mercer County, do permit and allow, by its rules and regulations, the said Thaddeus Patterson to take and pursue his swimming instructions in the Central High School of Trenton upon the same terms and conditions as are applicable to all other pupils of the said Central High School of Trenton and without any discrimination, restrictions, conditions or limitations, on account of his color or racial connections.

And it is further adjudged that the relator, Ches-
20 ter W. Patterson, do recover of the said respondent, the Board of Education of the city of Trenton, Mercer County, the sum of ....for his costs and charges by him in and about his suit in this behalf expended.

Costs, $.......

Judgment signed and entered May 2, 1933.

Thomas J. Brogan,
Chief Justice.

I, Fred L. Bloodgood, Clerk of the Supreme
30 Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above-stated cause as the same remains on file and of record in my office.

[seal] In testimony whereof I have set my hand and the seal of said court at Trenton, this eleventh day of May, A. D. nineteen hundred and thirty-three.

Fred L. Bloodgood,
Clerk.

OPINION OF THE SUPREME COURT

Civil rights:

Prohibiting colored youth from taking swimming lessons in high school except with those of their own race *held* unlawful discrimination.

Mandamus by Chester W. Patterson against the Board of Education of the City of Trenton, Mercer County.

Writ allowed.

Argued October Term, 1932, before Bodine and Donges, JJ. 10

Robert S. Hartgrove, of Jersey City, for relator.

Aaron V. Dawes, of Trenton, for respondent.

Per Curiam

It appears that the Trenton board of education provides a course in swimming in the new Central High School. Although there is no discrimination between races in the classroom or the gymnasium, the colored youth are not permitted to take swim- 20 ming lessons, except with those of their own race. Such action is discrimination. Boys or girls enrolled in a class in the public schools of this state are entitled to receive instructions, without any discrimination, predicated upon race. To say to a lad: You may study with your classmates, you may attend the gymnasium with them, but you may not have swimming with them because of your color, is unlawful discrimination.

The writ will be allowed.

42 OCT. 1 1933

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Chester W. Patterson, *Relator-Appellee,* *vs.* The Board of Education of the City of Trenton, Mercer County, *Respondent-Appellant.*	*On Mandamus.* *On Appeal.*

BRIEF OF RELATOR.

Statement of Facts.

This case was argued before the New Jersey Supreme Court upon an agreed state of facts. These facts showed that the Central High School of the City of Trenton was attended by pupils of the colored and white races, and of different nationalities and creeds. These pupils attended the different classes of study in conjunction with each other and without any distinction, restrictions or segregation based on racial connections or creeds; excepting, however, the classes for swimming. The swimming course is elective and is an adjunct of the physical training course. Colored pupils electing to take swimming instructions are segregated and confined to a period for instructions fixed exclusively for colored pupils by the appellant Board of Education. They attend, however, gymnasium classes in conjunction with white pupils and without any racial discrimination.

Pupils electing to take the swimming course receive their instructions from the same instructor and have the same use of the facilities

under the system employed in the swimming course. The entire body of water used in the tank for swimming is seldom changed more than two or three times during the entire year, and only as hygienic conditions might require.

After argument before the Supreme Court, and for a peremptory writ, the writ was allowed. Thereafter the appellant, on written notice, moved before the Supreme Court for the allowance of an alternative writ of mandamus, that an appeal might be taken to the Court of Errors and Appeals.

This notice does not appear in the printed State of Case here on appeal. Notice of this fact was given to the appellant by the relator.

After argument under the aforesaid notice, an order was made on March 27, 1933 by the New Jersey Supreme Court, allowing an alternative writ of mandamus. This order does not appear in the said State of the Case. Notice of this fact was given to the appellant by the relator.

The answer filed to the alternative writ of mandamus by the appellant attempts to inject a new situation into the case, not argued before the Supreme Court, and which does not appear in the said agreed state of facts, in that the segregation of colored pupils in the Central High School as aforesaid is justified "by the general sentiment of the community and to promote the peace and good order of the said Trenton Central High School."

Upon a demurrer to the aforesaid answer, an order was made by the New Jersey Supreme Court, dated April 29, 1933, sustaining the demurrer, and ordering that judgment be entered for the relator. This order does not appear in

the said State of the Case here on appeal. Notice of this fact was given to the appellant by the relator.

This last-mentioned order shows the cause for the granting of the alternative writ of mandamus.

Thereafter an appeal was taken from the so-called judgment entered in the Supreme Court on or about April 29, 1933. This was the date of the order directing the entry of judgment for the relator.

Judgment final, however, was entered on the said order of April 29, 1933 on the 2nd day of May 1933, and from which no appeal was taken.

ARGUMENT.

POINT I.

The printed record of the State of the Case is incomplete and will not sustain the appeal, since,

(a) After the opinion was rendered by the Supreme Court allowing the writ, which opinion was silent as to a permission for the moulding of pleadings for an appeal, the appellant on written notice of an application to the Supreme Court for the granting of an alternative writ of mandamus was allowed to take an appeal to this Court. Leave was granted by an order made on May 10, 1933 which allowed the alternative writ of mandamus.

This notice and order served as allocatur and neither one is printed in the said State of the Case.

See State of the Case pages 3 and 11.

In the absence of a rule or allocatur no valid writ of mandamus can issue.

See

Advance Development Corp. v. *Mayor and Aldermen of Jersey City, et al.,* 105 N. J. L. p. 234.

(b) After a demurrer had been filed to the return to the alternative writ of mandamus a rule dated April 29, 1933, and sustaining the said demurrer was made by Justice J. L. Bodine for the Supreme Court. This rule directed that judgment be entered in favor of the relator, and clearly shows that the alternative writ of mandamus issued, "to permit the moulding of the pleadings upon a state of facts heretofore presented to the Court and for the purpose of an appeal by the said respondent" (appellant).

As a basis for review it is necessary to make up a record consisting of an alternative writ, return and pleadings to a judgment.

See

State of the Case p. 11;

Advance Development Corp. v. *Mayor and Aldermen of Jersey City, supra;*

Trinkle v. *Donnelly,* 98 N. J. L. p. 298;

Mayor and Aldermen of Jersey City v. *Davis,* 80 N. J. L. p. 609.

The notice of appeal filed May 9, 1933 is directed to a so-called judgment of the Supreme Court made on or about April 29, 1933. There is no such judgment. This is the date of the rule ordering the entry of judgment upon the demurrer to the alternative writ of mandamus. The judgment for the relator was actually signed

and entered on the 2nd day of May, 1933 and filed on the 19th day of May, 1933.

See State of the Case pp. 1 and 11.

The notice of appeal was not from the final judgment of May 2, 1933, and was premature and without effect.

See:

Denholtz, et al. v. *Donner, Denholtz, Inc., et al.*, 96 N. J. L. 545;

Gottfried v. *Gottfried*, 106 N. J. L. p. 115;

Comp. Stat. of N. J., Vol. 3, Tit.: "Mandamus," p. 3214, Sec. 4;

Kearney v. *Hudspeth*, 59 N. J. L. p. 504;

Practice Act, P. L. 1912, Rule 26.

POINT II.

The maintenance of separate schools for colored and white pupils is repugnant to and in violation of the established law of our State, since,

(a) The School Law of the State of New Jersey does not specifically provide for such a condition.

(b) The purpose of the Legislature to render the school system of New Jersey inviolate to racial discrimination is clearly and indubitably manifested by the penal clause rendering all acts of segregation of colored and white children in our schools a criminal offense.

The Supreme Court of New Jersey adhered to the legislative intent as expressed in the School Act when it granted an alternative writ of mandamus in a decided case directing the respondent school board to receive colored children into one

of the public schools on the same terms and conditions as other pupils are received.

See:

Comp. Stat. of N. J., Vol. 4, Tit.: Schools, Sections 116 and 125;

Raison v. *Bd. of Education of Berkeley Tp.*, 103 N. J. L. p. 547.

POINT III.

The intentions of the Legislature that all pupils should attend public schools upon the same terms and without any discrimination within the school on account of color is manifest, since,

(a) The separation of pupils within a school building on account of color or creed can be creative of two distinct and separate schools as fully as if two distinct buildings existed for the two races.

(b) The right of the appellant Board of Education to create two or more distinct schools within one school building would be a right of appellant to violate, and by indirection, the Laws of New Jersey.

(c) The right, as claimed, of the appellant Board of Education to separate pupils within a school building on account of color would, if the same existed, justifies the appellant to separate pupils on account of creed or nationality.

(d) If the appellant has the right as claimed to separate pupils in the swimming pool on account of color then it would logically follow that the appellant has the right to separate pupils in the school building on account of their color in any and all classes of study.

It is not consonant with reason or good judgment that the Legislature intended that any school board could, by its rules and regulations nullify a statutory enactment or that the Legislature intended to delegate to any school board its law-making powers.

Regulations of a School Board must not contravene or be incompatible with the existing Laws of the United States or of the State.

See:

Pierce v. *Union District School Trustees,* 46 N. J. L., p. 76.

The Court will adopt, if possible, a construction that will make a legislative enactment effective. It will seek the necessity of the law, the mischief felt and the remedy in view, in giving a construction to the legislative intent.

See:

Clarkson v. *Ely,* 106 N. J. L., p. 380;

Commercial Trust Co. of N. J. v. *Hudson County Board of Taxation,* 86 N. J. L., p. 424, affirm. 87 N. J. L., p. 179;

Morris Canal Banking Co. v. *C. R. R. Co.,* 16 N. J. E., p. 419;

In re Merrill, 88 N. J. E., p. 261;

Smith v. *Washington Casualty Co.,* 110 N. J. E., p. 122.

It is evident that the Legislature sought by an elimination of separate schools to destroy class distinction based upon ephemeral and specious differences of color and creed. It sought to establish equality before the law as well as a desire for that equality through a commonality of opportunities in the school house — the bulwark of our liberty and established institutions—and upon common terms and conditions. It

sought to destroy race hatreds, and class antagonisms. It sought to sow seeds of good and stable government at its very cradle, to wit, the school house.

Separation of pupils within a school building because of color or creed is more pernicious and provocative of the evil sought to be remedied than the establishment of distinct schools for distinct races or nationalities.

POINT IV.

The separation of the colored pupils from the white pupils in the swimming class is a distinct violation of Relator's civil rights, since,

(a) The Legislature has declared the policy of our State in respect to the advantages, privileges, facilities and accommodations to be accorded to all persons attending public institutions of learning.

See:

Comp. Stat. of N. J., Cumulative Supplements, Vol. 1, Tit: Civil Rights, p. 573.

The Legislature interpreted a place of public accommodation as embracing a high school; and it has been laid down as the law that where there is specific legislation against separate schools the fact that equal advantages and facilities are accorded to the pupils will not permit of a discrimination based upon race, color or creed.

See:

People, ex rel. v. *Board of Education*, 101 Ill., p. 46.

POINT V.

The assignment of colored and white pupils for swimming instructions is an arbitrary classification, since,

(a) The classification is along racial lines.

(b) The classification is capricious, and as such, unreasonable and contrary to the principles of public policy.

See:

People v. *Gordon*, 274 Ill., p. 462;
Middleton v. *Middleton*, 54 N. J. E., p. 692.

(c) The classification abridges and restricts the scholastic privileges and advantages of each colored pupil to his particular racial group.

See:

Board of Education v. *Tinnon*, 26 Kans., p. 1.

In this case the Court used the following language,

> "The tendency of the present age is not to make distinctions with regard to school children except to classify them with reference to their studies and place them in the classes in which they properly belong. All kinds of children are usually allowed to go to the same schools and all kinds of children are usually placed in the same classes. Boys and girls are allowed to go not only to the same schools, but are also placed in the same classes and even colleges are now opening their doors for the education of both sexes. And is it not better for the grand aggregate of human society, as well as for individuals, that all children should mingle together and learn to know each other? At the common school where both sexes and all kinds of children mingle together we have a

great world in miniature; there they may learn human nature in all its phases, with all of its emotions, passions and feelings, its loves and hatreds, its hopes and fears, its impulses and sensibilities; there they may learn the secret springs of human action and the attractions and repulsions which lead with irresistible force to all lines of conduct. On the other hand persons by isolation may become strangers even in their own country; and by being strangers will be of little benefit either to themselves or to society. As a rule people can not afford to be ignorant of the society which surrounds them; and as all kinds of people must live together in the same society it would seem better that all should be taught in the same school."

See:

People ex rel. v. *Board of Education,* 101 Ill., p. 46;

Cline v. *Stevenson,* 71 Ill., p. 383.

In the case of *Cline* v. *Stevenson, supra,* the Court uses this language: "While the directors may properly have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, they have no power to make class distinctions."

(d) The classification is special and not along general lines.

"The adoption by an administrative board of an unreasonable classification not prescribed by a statute is void as in excess of the conditional authority of the board adopting it."

See:

12 *Corpus Juris,* Tit.: Constitutional Law, p. 1130.

There is no suggestion in the facts that the classification rests upon disability or any circumstance as would render the colored pupils

proper subjects for the operation of special rules of the respondent except sentimental reasons. The very fact that colored and white pupils attend all other classes for study together and in association one with another is proof of the non-existence of any circumstances or conditions demanding special classification.

POINT VI.

The Respondent by its acts of classification has arrogated to itself a power superior to those possessed by the Legislature, since,

(a) If the Legislature had passed a statute arbitrarily discriminatory against colored pupils in the classroom it would not have been constitutional.

''Accepted authorities in treating of constitutional limitations have laid it down that 'a statute would not be constitutional which would select individuals from a class and subject them to peculiar rules or impose upon them special obligations or burdens from which others in the same class are exempt.' '' The regulation of the respondent subjects colored pupils to ''peculiar rules'' and imposes upon them special burdens in that colored pupils will not be permitted to have any scholastic advantages of association except such as arises from their own racial group. Each colored pupil is subjected to a position of racial inferiority as well as the burdens of racial distinctions predicated upon the artificialities of color rather than worth.

See:

Middleton v. *Middleton, supra;*
In re Van Horne, 74 N. J. E. p. 600;

Weimar Storage Co. v. *Dill, Commissioner,* 143 Atl. Rep. p. 438 (not officially reported).

The fact that the swimming course is elective, or that the same swimming tank is used by both white and colored pupils, or that the same instructions are given to all pupils is not dispositive of the question at issue; at most it postpones elucidation, and is but a subtle method of respondent to avoid the solemn mandate of the law.

See:

People, ex rel. v. *Board of Education, supra.*

POINT VII.

The Return of the Appellant to the Alternative Writ of Mandamus, justifying its acts of separation of the colored and white pupils in the swimming tank by reason of the "general sentiment of the community and to promote the peace and good order of the said Trenton Central High School," contravenes the permission given to the Appellant by the Supreme Court to appeal its decision, and is otherwise without avail, since,

(a) The pleadings were to be moulded for an appeal and upon an agreed state of facts as presented and argued before the New Jersey Supreme Court.

See:

State of the Case, p. 8;

Also, N. J. Supreme Court Order of April 29, 1933 (filed but not printed).

(b) The demurrer to the return to the alternative writ of mandamus admits facts well pleaded, and not conclusions.

No facts were pleaded to show the character or nature of the sentiment of the community, if any, or to show how the conclusion is derived that the alleged sentiment is general.

No facts are pleaded to show how the peace and good order are promoted in the said Trenton Central High School by the separations of the colored and white pupils in the swimming tank, when such a necessity does not exist while these same pupils are attending the gymnasium classes and without racial discrimination. At most the allegation of the promotion of peace and good order is but an indictment against respondent and the faculty of the said Trenton Central High School to regulate, discipline and preserve the order of the school without committing an infraction of the established law.

(c) The School Law is enforcible throughout the State, and cannot be set at naught by a segment thereof.

(d) Repeal of established law under constituted authority is by legislative enactment, and not by concerted acts of violations, motivated by colorless pretenses.

(e) A regulation that classifies must conform to the law and it must operate equally and uniformly upon all persons in similar circumstances. Hence, the classification like a statutory enactment "must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed. The classification must be reasonable and not arbitrary and must rest upon distinctions having a fair and substantial relation to the object sought to be accomplished by the Legislature."

See:

Weimar Storage Co. v. *Dill, supra;*

Atchison, etc. Ry. v. *Vosburg,* 238 U. S. 56, at page 59;

Power Co. v. *Saunders,* 274 U. S. 490;

Quaker City Cab Co. v. *Pennsylvania,* 48 S. Ct. 553, 72 L. Ed. 927.

Conclusion.

The decision of the lower court brought to this Court for review upon an agreed state of facts should be sustained and the appeal dismissed.

Respectfully submitted,

ROBERT S. HARTGROVE,
Counsel for Relator-Appellee.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

CHESTER W. PATTERSON,

Relator,

vs.

THE BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

BRIEF FOR THE BOARD OF EDUCATION OF THE CITY OF TRENTON

An alternative writ of mandamus was allowed the relator requiring the Board of Education of the City of Trenton to show cause why an alternative writ of mandamus should not issue requiring the Board to allow Thaddeus Patterson to take and pursue his swimming instructions in the High School of Trenton without any discrimination, restrictions, conditions or limitations on account of his color or racial connections or cause be shown to the contrary. The Board answered that the rules and regulations of the Board of Education permitted that the white and colored pupils should receive their instructions in the swimming pool elective course with the same facilities and instructions

as the white pupils enjoyed but that the colored pupils should receive their instructions at a different period from that of the white pupils.

The relator claimed that these requirements fixing different periods for swimming pool instructions were violative of section 125 of the School Act of New Jersey, Compiled Statutes, 4th Vol., 4767, and the civil rights act of New Jersey as amended in 1921, Chap. 174, p. 468, and was in violation of the Fourteenth Amendment of the Constitution of the United States in that it deprived the relator of the equal protection of the law and would abridge his privilege and immunities in that the said limitations, restrictions, and classifications were arbitrary and unreasonable.

The respondent in its return averred that it was induced to make such regulations by the general sentiment of the community and to promote the peace and good order of the Trenton High School.

The relator demurred to the return, which was sustained by the Court below, and the question is whether or not assigning white and colored pupils to separate periods of instruction violates the said statutes of New Jersey or the provisions of the Fourteenth Amendment of the constitution of the United States.

I

The Supreme Court of the United States in decisions which are recited herein, has decided that it is not violative of the Fourteenth Amendment to furnish separate accommodations provided there is equality of facilities and opportunities.

In *Chiles* vs. *Chesapeake & Ohio Railway,* 218 U. S. 71, Mr. Justice McKenna said at 77 (respecting the grounds upon which racial distinctions may be allowed):

"In *Plessy* vs. *Ferguson,* 163 U. S., 540, a statute of Louisiana which required railroad companies to provide separate accommodations for the white and colored races was considered. The statute was attacked on the ground that it violated the Thirteenth and Fourteenth Amendments of the Constitution of the United States. The opinion of the Court, which was by Mr. Justice Brown, reviewed prior cases, and not only sustained the law but justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true the power of Legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, 'the established usages, customs and traditions of the people' and the 'promotion of their comfort and the preservation of the public peace and good order', this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable. See also *Chesapeake & Ohio Ry. Company* vs. *Kentucky,* 179 U. S. 388."

"The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it. We may refer to Mr. Justice Clifford's concurring opinion in *Hall* vs. *DeCuir* for a review of the cases. They are also cited in *Plessy* vs. *Ferguson* at p. 550."

The writ challenges the power of the School Board to separate the white and colored pupils in imparting instruction in the swimming pool course as a violation of the Fourteenth Amendment. The Federal decisions hold firmly to the proposition that in a school maintained by the State it is no violation of any Federal right to separate the white and colored pupils so long as each receives equal opportunities to an education.

Mr. Chief Justice Taft said in *Gong Lum* vs. *Rice,* 275 U. S., 78 at 85:

> "The education of the people in the schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of Federal authority with the management of such schools can not be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

This case just cited is the latest expression of the Supreme Court of the United States that the government of schools is within the discretion of the State, and Federal authority can only be justified where fundamental rights of the children are violated. The question in that case was whether a Chinese citizen was denied the equal protection of the laws when he was classed among the colored race and furnished facilities for education equal to all, whether white, brown, yellow or black.

The court cited *Plessy* vs. *Ferguson, infra* 163 U. S., 537, etc., upholding the validity of a statute requiring the separation of the white and colored races in Louisiana in railway coaches, and decided that the Federal Courts could not interfere with the management of schools by the several states unless a Federal right was violated.

Plessy vs. *Ferguson,* 163 U. S. 537, is the leading case cited frequently and approvingly in decisions in Federal and State Courts. Mr. Justice Brown said at p. 544:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, *but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.* Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of the police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."
>
> "*Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia* Rev. Stat. D. C. 281, 282, 283, 310, 319, *as well as by the legislatures of many of the states,* and have been generally, if not uniformly, sustained by the courts.
>
> *State* vs. *McCann,* 21 Ohio St. 198; *Lehew* vs. *Brummell,* 15 S. W. Rep. 765; *Ward* vs. *Flood,* 48 California, 36; *Bertonneau*

vs. *School Directors,* 3 Woods, 177; *People* vs. *Gallagher,* 93 N. Y. 438; *Cory* vs. *Carter,* 48 Indiana 327; *Dawson* vs. *Lee,* 83 Kentucky, 49."

"Laws forbidding the intermarriage of two races may be said in a technical sense to interfere with the freedom of contact, and yet have been universally recognized as within the police power of the State. *State* vs. *Gibson,* 36 Indiana, 389."

And at p. 550 the Court further stated:

"In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."

(And at p. 551 the Court continued as follows):

"*We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.* If this be so, it is not by reason of anything found in the act, but solely because

the colored race chooses to put that construction upon it. *The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals.*''

''When the government, therefore, as the Court of Appeals of New York said in *People* vs. *Gallagher,* 93 N. Y. 438, 444, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed. Legislation is powerless to eradicate racial instincts or to abolish distinction based upon physical differences and attempt to do so can only result in accentuating the difficulties of the present situation.''

The case just cited was argued by a distinguished Senator from the State of Vermont, George F. Edmunds, who had played an important part in the enactment of the Civil War amendments of the Constitution. And in arguing the case of *Cumming* vs. *Board of Education,* 175 U. S. 528 at 540, Senator Edmunds in his brief referred to *Plessy* vs. *Ferguson* and said

''that that case determined that a State law requiring separate railway carriages was valid if provision were made for equal accommodations for both races, and the case stood upon

> the solid ground that neither race was discriminated against."

These decisions follow *Plessy* vs. *Ferguson* and uphold the validity of separate schools for white and colored children.

Decisions of the several States:

Massachusetts was the first State to declare the public policy in respect to separate public schools based on racial lines. The question was argued by Charles Sumner and Chief Justice Shaw read the decision in *Roberts* vs. *City of Boston,* 5 Cush., 198. The Court first determined that the general school committee of Boston had power to make provision for the education of the colored children in schools separate from the white. The Chief Justice said:

> "The great principle advanced by the learned and eloquent advocate for the plaintiff (Mr. Charles Sumner) is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

It was held that the powers of the committee extended to the establishment of separate schools for

children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools.

"Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia Rev. Stat. D. C. 281, 282, 283, 310, 319, as well as by the Legislatures of many of the States, and have been generally, if not uniformly, sustained by the Courts."

The Decisions of New York:

In *People* vs. *Gallagher,* 93 N. Y. 438, 448, the Court of Appeals declared:

> "When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all the functions respecting social advantages with which it is endowed. Legislation is powerless to eradicate racial instincts or to abolish distinction based upon physical differences and attempt to do so can only result in accentuating the difficulties of the present situation."

People vs. *School Board of Queens,* 161 N. Y., 598, decided the question whether separate schools could be established when there was another statute making it a criminal offense to deny equal rights to colored citizens. The Court of Appeals said:

> "It is equal school facilities and accommodations that are required to be furnished and not equal social opportunities. The most that the constitution requires the legislature to do

is to furnish a system of common schools where each and every child may be educated, not that all must be educated in any one school, but that it shall provide or furnish a school where each and all shall have the advantages guaranteed by the constitution. If the legislature determine that it was wise for one class of pupils to be educated by themselves, there is nothing in the Constitution to deprive it of the rights so to decide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, not that it should provide them with any particular class of associates, while such education was being obtained. The legislature may exercise its discretion as to the best method of educating different classes of children, whether it relates to separate classes as determined by ability, nationality or color so long as it provides for all alike in the character and extent of the education which it furnishes and the facilities for all exist."

In *West Chester R. R. Co.* vs. *Miles,* 55 Penn., 209, 93 Amer. Dec. 747, it is said:

> "When, therefore, we declare a right to maintain separate relations as far as is reasonably practical, but in a spirit of kindness and charity and with a due regard to equality of rights, it is not prejudice nor caste nor injustice of any kind but simply to suffer men to follow the law of races established by the Creator himself and not compel them to intermingle contrary to their instincts. The natural separation of races is, therefore, an undeniable fact, etc. But to assert separateness is not to declare inferiority in either; it is not to declare one as slave and the other a freeman."

In *State* vs. *McCann,* 21 Ohio St., 198, it is said that:

> "Colored children not admitted into the schools for white children suffer no substantial unequality of school privileges between the children of the two classes; that equality of right does not involve the necessity of educating white and colored children in the same school; that any classification which preserves substantially equal school advantages is not prohibited by either State or Federal Constitution."

In *Borea College* vs. *Commonwealth,* 94 S. W., 623, it declares as follows:

> "As the outcome of discussion, of agitation, of too frequent conflicts, of violent turbulence that set the law at defiance in some localities and in times of great popular excitement this species of legislation has been evolved as tending to a solution of the trouble by removing as far as is possible its cause. Observation and study at close hand in both the theory and practical workings of this problem of social existence and the collaboration of the two races so different as the white and black are in the same state upon a plane of legal equality where the government is by the people and for the people, it has been found, so the legislative department declares, as evidenced by the public policy indicated by the statute discussed in this opinion that at the very bottom of all this racial antipathy tends to the destruction of its own identity. A separation of the races under certain conditions is, therefore, enforced when it is believed that their commingling would tend to produce the very condition which is found to lie at the base of the trouble."

II

The relator contends that the Appellant Board violates section 125 of the School Law of New Jersey, 4 C. S., p. 4767, which provides that:

> "No child between the age of four and twenty years shall be excluded from any public school on account of his or her religion, nationality or color."

This statute was construed in *Pierce* vs. *Union District School Trustees,* 46 N. J. L., 76 at 77:

> "The Constitution of the State declares that the Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years. Our school law (Rev., p. 1070, 94) provides that all public schools in this State shall be free to all persons over five and under eighteen years of age, residing within the school district. The city of Burlington contains four public schools, but constitutes a single school district under the government of the rsepondents. Hence, there can be no doubt of the legal right of these children to enter one of those schools for free instruction. *So, too, I think it is equally clear that the respondents may make reasonable by-laws, not incompatible with the laws of the United States or of this State and not in conflict with the general regulations of the State Board of Education for determining into which of the two schools these children shall be admitted."*

The above case has no relevancy to the questions involved herein except in so far as it interprets the laws of this State as investing the School Board with the power to make by-laws, etc.

The School Board of the City of Trenton has the power to make reasonable rules and regulations under the case just cited and in making those reasonable rules and regulations, as Mr. Justice Holmes said in *Interstate Ry. Co.* vs. *Massachusetts*, 207 U. S., 79, as to the boundary lines of the Fourteenth Amendment, particularly as to when the State does not encroach upon Federal rights:

> "If the Fourteenth Amendment is not to be a great hamper upon the established practices of the State in common with other governments, then I think they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that amendment was passed. Education is one of the purposes for which what is called police power may be exercised."

He said in *Noble State Bank* vs. *Haskell*, 219 U. S., 104, that:

> "It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to public welfare."

As to the Civil Rights Act. That act is found in First Cum. Supp., p. 573, Laws 1884, p. 339, entitled "An act to protect all citizens in their civil and legal rights."

The statute provides that:

> "All persons within the jurisdiction of the State of New Jersey shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable alike to all persons."

A civil right has been defined as a right to participate in all the advantages of organized society. This gives proper liberty and insures against unjust discrimination. Cooley on Torts, p. 33, Mr. Justice Dixon in *Percey* vs. *Powers,* 51 N. J. L., 432 at 433, says:

> "Civil rights are those rights which the municipal law will enforce at the instance of private individuals for the purpose of securing to them the enjoyment of their means of happiness."

The learned Justice quoted from *Strauder* vs. *West Virginia,* 100 U. S., 303, which held that the Fourteenth Amendment to the Federal constitution was intended to secure to the colored race all the *civil rights* which the white race enjoy, and quoting further from *Ex parte Virginia,* 100 U. S., 339, that the equality of the protection secured by the Fourteenth Amendment extends only to *civil rights* as distinguished from those which are political or arise from the form of government and the mode of its administration.

The Supreme Court of the United States held (*Chiles* vs. *Chesapeake & Ohio Railway,* 218 U. S., 71) that:

> "In the absence of a statute, a railroad company has the right to establish rules and regulations which require white and colored passengers, even though they be interstate, to occupy separate apartments upon the train provided there is no discrimination in the accommodations and that the inaction of Congress in that regard is equivalent to the declaration that carriers can by reasonable regulation separate white and colored passengers."

Chief Justice Waite was quoted therein as saying that:

> "This power of regulation may be exercised without legislation as well as with it and that by refraining from action, Congress, in effect, adopts as its own regulations those which the common law or civil law where that prevails prescribe for the government of such business."

In *People* vs. *School Board,* 161 N. Y., 598 at 600, cited, *supra,* it was claimed that a statute which made it a misdemeanor to exclude any citizen from the equal enjoyment of any accommodations or privileges in effect conferred upon colored children the right to attend any school and that the Board had no authority to establish separate schools. The Court of Appeals denied the claim, provided the facilities and accommodations which were furnished in the separate schools were equal to those furnished in the other schools. The Court said:

> "It is equal school facilities and accommodations that are required and not equal social opportunities."

I submit that this decision authorizes the rules and regulations of the respondent unless there be statutes of this State to the contrary.

The public policy of the United States and the State of New Jersey manifested in statutes providing for the separation of the colored and white races.

Legislation in the United States and the several States also attests that the colored race suffers no detriment in separate schools by themselves. Our Legislature recognized in 1932 as the public policy of having colored battalions and separate schools, see P. L. 1932, p. 267, that "payment of army drill of officers and enlisted men of companies organized as colored battalion shall be made."

In the annual appropriation act of 1932, P. L. 1932, p. 372, $196,891.16 were appropriated for the Bordentown School for "salaries and wages, and for maintenance of the Manual Training and Industrial School for Colored Youth, on the basis of 425 students." Article XXI of our School Act, 4 Comp. Stats., p. 4791, provides for "Manual Training and Industrial School for Colored Youth."

Federal legislation is equally explicit and generous in dealing with colored schools. In Code of U. S., p. 113, sec. 323, that "no money shall be paid out for the support or maintenance of a college where a distinction of race or color is made in the admission of students. But the establishment and maintenance of such college separately for white and colored students shall be held to be a compliance with the provisions of the act, if the funds received be equitably divided as provided by law." It is also provided by the Federal Law, see Code, p. 178, sec. 253, that "enlisted men of two regiments of cavalry shall be colored men" and at p. 179, sec. 282, "that enlisted men of two regiments shall be colored men." The School Board, Art. 6, 4 Comp.

Stats., p. 4735, at 4741, sec. 50, "that every such Board shall have the supervision, control and management of the public schools and public school property, and shall make regulations and by-laws not inconsistent with the School Act and with the rules and regulations of the State Board for the transaction of business and for the government and management of the public schools, etc."

In a case decided shortly after the Supreme Court decided this case, the Supreme Court of Ohio rendered a decision in the *State ex rel. Weaver* vs. *Board of Trustees of Ohio State University, et al.*, Vol. 185 N. E., p. 196, the facts and the conclusions are well stated in the opinion.

> We come now to the instant case. The relator asks for a writ of mandamus commanding the respondents to admit her "to residence in the home management house as the same is usually conducted, and to make all the advantages, facilities and privileges thereof available to her without discrimination against her in any respect on account of her race and color." The substantial facts presented by the pleadings are not in dispute. Upon the university campus there is a double building providing the housing of students pursuing the course of Home Economics. This building is under a single roof, divided into two halls or compartments separated by a partition, each hall being similarly and equally well equipped and furnished; each compartment accommodates six girls and a supervisor. The house is so managed that its student residents "buy, cook and dine together as a common enterprise." The respondents' answer alleges: "In such hall the young women usually live two in a room with roommates of their own selection and have a

common bathroom and toilet facilities." They also allege that "in such houses the students arrange among themselves concerning the cooking and serving of meals, buying of food and carrying on all of the activities of a family circle, under the supervision of a supervisor from the faculty of the university." The answer further alleges, and it is not denied, that the respondents have offered the relator quarters and opportunity to pursue her residence service in such house in one of its compartments which is "furnished and equipped in an equivalent and similar manner as to quality and quantity of furnishings as is the other compartment of the building," in which the relator may perform the necessary laboratory work, dwell and entertain her friends and associates in a similar manner and under like circumstances permitted other students enrolled in the course.

The relator has been denied no educational advantages or privileges that are not similarly used and enjoyed by other students; nor has she been denied the privilege of taking her degree, should she consent to occupy available space in the Home Economics' house. She has only been denied the social privilege of residing with white girl students and partaking in their family or communal life; of rooming, dining and sharing their common bathroom and toilet facilities.

On page 211, in the Ohio case, *Garnes* vs. *McCann, supra,* the learned judge said: "Any classification which preserves substantially equal school advantages is not prohibited by either the State or Federal Constitution, nor would it contravene the provisions of either." The relief that the relator seeks in this suit is

such as to compel the respondents to grant her, not equal school advantages, but the same social intercourse. Under the provisions of section 7948, General Code, the respondents had full authority to prescribe regulations that will prove most beneficial to the university and State and will best conserve, promote and secure the educational advantages of all races. The purely social relations of our citizens cannot be enforced by law; nor were they intended to be regulated by our own laws or by the State and Federal Constitutions. *Plessy* vs. *Ferguson,* 163 U. S. 537, 551, 16 S. Ct. 1138, 1143, 41 L. Ed. 256; *People ex rel. King* vs. *Gallagher,* 93 N. Y. 438, 448, 45 Am. Rep. 232; *Roberts* vs. *City of Boston,* 59 Mass. (5 Cush.) 198, 209; The Civil Rights Bill, 1 Hughes, 541 Fed. Cas. No. 18,258; *Ward* vs. *Flood,* 48 Cal. 36, 56, 17 Am. Rep. 405; *Lehew* vs. *Brummell,* 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895; *Martin vs. Board of Education,* 42 W. Va. 514, 516, 26 S. E. 348. In speaking upon this aspect of the case the learned judge in *Plessy* vs. *Ferguson, supra,* said: "The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* vs. *Gallagher,* 93 N. Y. 438, 448 (45 Am. Rep. 232):

"This end can neither be accomplished nor promoted by laws which conflict with the gene-

ral sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.'' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically.'' Were the case reversed and had a white girl student, under the same circumstances, sought to compel social relations with a group of girls of another color, we would feel compelled to deny her relief. The cases relied on by counsel for relator therein sought was in no wise connected with the social status or with the social relations of pupils. The motion of the respondents for judgment upon the pleadings will be sustained. The writ of mandamus will be denied and the petition dismissed. Writ denied.

I feel that the record in this case fully justifies my saying that the Board of Education of the City of Trenton, the respondent in this case, has conducted the schools with a full sense of the obligation resting upon the American people to treat both races impartially and that the Board is fully acquainted with the conditions in this city respecting the sentiments of the parents of the pupils respecting the swimming pool course and that the Board has risen to the height of the occasion in re-

moving the antagonisms which arose from the intermingling of the races in this particular course and the Board plucked the cause which gave offense, that they acted in accordance with the opinions and sentiments of thoughtful people is shown in a few of the utterances of the leaders of today among our people, which are quoted herein.

The question is: Shall the Board of Education be mandamused to associate the white and the colored pupils together in the swimming instruction classes and in the use of the pool or has the Board of Education the right and the discretion in the discharge of its duties to separate the pupils racially? Each race has certain inherent characteristics, natural qualities and disposition and it has been abundantly established that races prosper in their own groups and rise to higher heights under the emulation impulse than they would otherwise. The colored race is prone to worship in separate churches with pastors of their own race. With less than seventy years separated from slavery, the colored race has shown amazing results in the schools conducted separately from the whites. The recent report of the administrator of the Phelps Stokes Fund for colored pupils for the last decade credit the aspirations, initiative and progress of the colored people to the colored people themselves for the gain they made in that period.

The New York papers recently stated that 5,000 colored Catholics assembled in St. Patrick's Cathedral in New York and were addressed by the Bishop. The Bishop said, "Negroes, like every other race, have to fight their way from darkness to light. Artistically, musically, intellectually, morally and spiritually, the negro has done much to improve the welfare of the world."

President Roosevelt the First said, in an article upon the Japanese laborers in "Fear God and Take

Your Own Part'', at p. 302, that exclusion of the Japanese laborers from this country ''does not mean that either side is inferior; it means that they are different.'' He further said that ''Time, and Time alone, rendered possible the close association of the people.''

The record of two races in America far exceeds what seemed possible 70 years ago. Sir Harry Johnson, who had long experience as administrator over the Negro race in Africa, serving in various British protectorates, has written an interesting book on ''The Negro in the New World,'' and gave his final judgment as follows: ''Yet, with all these imperfections in the social acceptance of the colored people of the United States—imperfections which with time and patience and according to the merits of the Neo-Negro will disappear—the main fact was evident to me after a tour through the eastern and south states of North America, that nowhere else in the world, certainly not in Africa, has the Negro been given such a chance of mental and physical development as in the United States. Also that nowhere else has the Negro so greatly availed himself of his opportunities. Intellectually, and perhaps physically, he has attained his highest degrees of advancement as yet in the United States. Politically he is freer there, socially he is happier than in any other part of the world.''

There is glory enough for both races in the United States, and the enlightened policy of the School Board, the respondent in this case, as set out in the statement of facts, is one to stir the pride of the citizenry of Trenton and to manifest that the respondent is doing its part ''to do all which may achieve and cherish a just and lasting peace with ourselves and with all nations.''

Respectfully submitted,

Aaron V. Dawes,

Of Counsel with Respondent.