THE *PEOPLE v. BOARD OF EDUCATION OF DETROIT.*

CAMPBELL J.: (Dissent)

The claim of the relator in this case is, that the board of education of Detroit cannot lawfully maintain the separate schools for colored children, which have ever since its organization been maintained, and are now kept up in the city, and require them to attend there.

If there is any ground of complaint, the relator is the proper person to bring the case before the court. No one can be more interested than the father of a child in obtaining his school privileges.

The question involved is purely one of law, and cannot properly be allowed to become involved in any complications of policy. If the board of education have the control over the arrangement and classification of the schools, which they have heretofore exercised, their action cannot be judicially revised. If they have exceeded their powers, the excess can be restrained, and the writ applied for is the proper process.

The counsel for relator did not claim upon the argument, that the law of 1867 was applicable to city schools, and we have not, therefore, had the benefit of any full discussion *upon the relation which the city system bears to the general legislation concerning schools in the ordinary districts, so far as it is affected by this statute.

It seems to me that section 28 of the statute of 1867 is foreign to the inquiry. It is inserted in the middle of that part of the primary school law which relates entirely to the organization of the ordinary districts, and the powers and duties of their officers. The fact that it purports to be an amendment of a section that has not been in existence since 1859 might perhaps bear upon its validity; but it is inserted where it naturally belongs, and while going far enough to prevent discrimination in attendance in the general districts, it was needed for other purposes as well, in those districts. As to them, it covered ground upon which there was no clear legislation; while as to the Detroit schools, the whole subject had been either provided for by legislation, or expressly put in the control of the board. The application to this court for a *mandamus* to admit a colored child to a school in an interior city had disclosed to the legislature the remarkable fact, that the rights of attendance on district schools had been left almost entirely to depend upon implications which, while possibly within reasonably plain bounds in many respects, had nevertheless given rise to honest doubts and difficulties. In Detroit the school ages were within narrower limits than the census ages, and on the other hand, the schools were all absolutely free to those within those ages, and the classification and arrangement were left entirely to the board, who were bound to do what they could for every one. The absence of some positive provision raised other difficulties than those relating to colored children, and to age and residence. There was one clause giving non-resident taxpayers, who had no schools at home, the right to send their children into districts where they were taxed, which has tended to make some confusion in the popular mind touching the relative rights of others.

*The arguments which have been urged in this case in this court, as well as propounded elsewhere, upon the rights of taxpayers in the schools, might very well have contributed to the propriety of making some more explicit declaration, for no rule of exclusion could be more odious, and none less likely to be sanctioned, than one which should operate against those who, from poverty, were most in need of public aid, and in whose training and elevation the community are interested as future voters and citizens. There was for many reasons a necessity for some legislation to prevent these doubts, and confer absolute rights on all children. There was no such necessity in Detroit, for provision had been already made for all children, and the board of education had been intrusted with plenary legislative power, in contriving means and regulations, so far as their funds would permit, for best arranging how this should be made effectual. They could do all that the legislature could do in making by-laws and ordinances concerning "anything whatever that may advance the interests of education, the good government and prosperity of the free schools in said city, and the welfare of the public concerning the same."

Upon every usual rule of construction, this 28th section should not be made applicable to any special system where there had been already legislation covering the ground, even if the Detroit school law had in some other respects been dependent on the primary school law. But there is not, so far as I have been able to discover, a single provision of that law, from beginning to end, relating to schools and their regulations, which has any such applicability. Even in regard to the school census, the board makes its own by-laws, and deals with none but county and State officers. This census has nothing to do with the regulation of schools, and is not based on attendance, or used in them at all, as a guide to determine who are admissible. It is made to facilitate the distribution of school moneys *derived from the state under the constitution, and of library penalties, which belong to towns and cities, except where smaller districts have been allowed for library purposes. These provisions are in no way connected with the management of district school matters, and would be quite as appropriate in any other part of the statutes. But as before stated, the Detroit school law puts the board in direct communication with the county authorities, and regulates their rights and doings very differently from those in the other districts. The suggestion that they are connected with the primary school law by the provisions of section 31, as amended, concerning the punishment of disturbances in public schools, does not appear to me to sustain the connection. That section was originally confined to district meetings, and the amendment was only passed in the same statute with section 28, in 1867. If the Detroit schools were not previously organized under the primary school law, neither of these sections could have any tendency to bring them under it. They must both be regarded as applying to schools under the statute of which they are amendments, and can have no wider scope. The Detroit schools could certainly exist without a provision which was not thought of for more than thirty years after the whole state system had been flourishing, and the board of education has power to pass ordinances on the same subject, and the recorder's court has jurisdiction to punish their violation: *School Charter,* §§ *8 and 9.* The offense was also a misdemeanor at common law, according to the best authorities: *1 Bish. C. L., § 982.*

If it should be suggested that it cannot be presumed different provisions would be permitted among different children in different places, it cannot be denied that these differences have been expressly created by law. Until 1869, the school ages were different in and out of the city. When the census was on the basis of a range of ages from four to eighteen, the city schools were confined by law to the ages between five and seventeen. Since the *change was made, in the state at large, to the term between five and twenty, the old city rule remained unchanged until the present year, when it was made to correspond. The origin of the Detroit school system was had under the very discrimination of color which is now complained of. When the charter was revised and consolidated during the past winter, if the rule giving control to the board had been deemed improper, it would have beer rescinded. No one can read the charter, in comparison with the general laws, without seeing that the legislature deemed it wiser to leave a very broad discretion in the board, over the various complications and difficulties incident to a heterogeneous city population, than to require such action as might not be easily undone, should the schools suffer from it. They have given the board a power of local legislation on many school matters entirely exempt from the control of the civil government of the city, and have made them substantially independent of the council in pecuniary matters; one of the last things in which such bodies are usually intrusted with discretionary powers. It cannot be claimed that the legislature could not make or authorize any regulation they should see fit, in regard to the management of different scholars, and it would be impossible to employ language delegating a larger discretion than they have given to this board.

We cannot avoid seeing, and counsel very frankly admitted, that the force of the relator's claim depends much, if not entirely, upon the effect to be given to a changed condition of public affairs, and whatever corresponding change that condition may have wrought upon public opinion concerning the treatment of colored persons. How far the regulations complained of arose out of any less favorable opinion is not very clear. It is claimed that the rule now enforced is founded on very different considerations, and that the original act of 1841, which first required the separation, was meant to be beneficial,

and not invidious. *And I have no doubt such was the fact, although the supposed necessity arose from the state of public sentiment. But whether the policy was, or is, one worthy to be maintained now, is only to be determined by the board, or by the legislature. Public opinion cannot have the force of law, until it is expressed in the forms of law. Courts may or may not appreciate it, but they cannot determine the law by what that opinion is, or by what they suppose it to be. And that the law, which is in this regard unchanged, did originally allow – if it did not require – separate colored schools to be maintained, has never been seriously doubted. In 1841, when the city contained several districts, the inspectors of the city were required to organize a district having no metes and bounds, but composed of all the colored children in the city, within the school ages, and schools were to be kept up separately for their benefit in the city at large. In 1842 the city was made a single district for all purposes; the inspectors were incorporated into a single board, succeeding to the property and liabilities of all the former districts, and given plenary power over the entire management of the schools. The powers given were the same as mentioned in the now existing laws, which are substantial re-enactments, The policy indicated by the legislature of 1841 has been adhered to, and three colored schools have been erected, and are now maintained, in no respect, as the return shows, differing from, or inferior to the other schools. If the law of 1867 repealed and of the former provisions, it might be said that the re-enactment of 1869 restored it; for that is the last enactment. But if the law of 1867 was, as I conceive it to have been, entirely inapplicable, then it had no force one way or the other, and the board of education must act on their own judgement and responsibility in determining how long they should adhere to their present policy; and any change must depend upon their decision.

I think there is no case made for relief.