

Parker, Circuit Judge:

This is an appeal in a suit instituted by Melvin O.

Alston, a Negro school teacher of Norfolk, Va., and the Norfolk Teachers' Association, an association composed of the Negro school teachers of that city, against the School Board and the Superintendent of Schools of the city. The purpose of the suit is to obtain a declaratory judgment, to the effect that the policy of defendants in maintaining a salary schedule which fixes the salaries of Negro teachers at a lower rate than that paid to white teachers of equal qualifications and experience, and performing the same duties and services, on the sole basis of race and color, is violative of the due process and equal protection clauses of the 14th amendment, and also to obtain an injunction restraining defendants from making any distinction on the ground of race or color in fixing the salaries of public school teachers in Norfolk. The suit was dismissed by the court below on the ground that Alston and the School Board were the only necessary parties to the cause and that Alston had waived such constitutional rights as he was seeking to enforce by having entered into a written contract with the School Board to teach for a year at the price fixed in the contract. On the appeal presented by the plaintiffs three questions arise: (1) whether upon the face of the complaint an unconstitutional discrimination is shown in the fixing of school teachers' salaries by the defendants; (2) whether rights of plaintiffs are infringed by such discrimination; and (3) whether plaintiffs have waived their right to complain of the discrimination by entering into contracts with the School Board for the current year.

On the first question, there can be no doubt but that the fixing of salary schedules for the teachers is action by the state which is subject to the limitations prescribed by the 14th Amendment.

The Constitution of Virginia provides that the General Assembly shall establish and maintain an efficient system of public free schools throughout the state. Article IX, sec. 129. The General Assembly has established such a system. Virginia Code of 1936, chs. 33 and 35. The public schools of the City of Norfolk are under the direct control and supervision of the defendants, whose duty it is to employ teachers and provide for the payment of teachers' salaries. Virginia Code, ch. 33, secs. 656, 660, and ch. 35, sec. 786. While provision is made in the law for separate schools for white and colored persons