No. 8

In the Supreme Court of the United States

OCTOBER TERM, 1952

OLIVER BROWN, MRS. RICHARD LAWTON, MRS. SADIE EMMANUEL, *et al.*, *Appellants*,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, *et al.*, *Appellees.*

Appeal from the United States District Court for the District of Kansas

BRIEF FOR APPELLEES

HAROLD R. FATZER, Attorney General,
PAUL E. WILSON, Asst. Attorney General,
Counsel for the State of Kansas,
State House, Topeka, Kansas,
PETER F. CALDWELL, Counsel for the Board of Education of Topeka, Kansas.
512 Capitol Federal Bldg., Topeka, Kansas.

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Appeal from the United States District Court for the District of Kansas

BRIEF FOR APPELLEES

I

PRELIMINARY STATEMENT

The issue presented by this case is whether the Fourteenth Amendment to the Constitution of the United States is violated by a statute which permits boards of education in designated cities to maintain separate elementary school facilities for the education of white and colored children.

At the outset, counsel for the appellees desire to state

that by appearing herein they do not propose to advocate the policy of segregation of any racial group within the public school system. We contend only that policy determinations are matters within the exclusive province of the legislature. We do not express an opinion as to whether the practice of having separate schools of equal facility for the white and colored races is economically expedient or sociologically desirable, or whether it is consistent with sound ethical or religious theory. We do not understand that these extra-legal questions are now before the Court. The only proposition that we desire to urge is that the Kansas statute which permits racial segregation in elementary public schools in certain cities of the state does not violate the Fourteenth Amendment to the Constitution of the United States as that amendment has been interpreted and applied by this Court.

II

OPINION BELOW

The opinion of the three-judge District Court below: (R-238-244) is reported at 98 Fed. Supp. 797.

III
JURISDICTION

The judgment of the court below was entered on August 3, 1951 (R. 247). On October 1, 1951, appellants filed a petition for appeal (R. 248), and an order allowing the appeal was entered (R. 251). Probable jurisdiction was noted on June 9, 1952 (R. 254). Jurisdiction of this Court rests on Title 28 U. S. C. Sec. 1253 and 2201 (b).

IV
QUESTIONS PRESENTED

1. Does a statute which permits but does not require cities of more than 15,000 population to maintain separate school facilities for colored and white students, violate the Fourteenth Amendment to the Constitution of the United States in a situation where a court has specifically found that there is no discrimination or distinction in physical facilities, educational qualifications of teachers, curricula or transportation facilities?

2. Is a general finding of the trial court that segregation is detrimental to colored children and deprives them of some benefits they would receive in a racial integrated school sufficient to entitle the individual colored plaintiffs to an injunction prohibiting the maintenance of an existing system of segregated schools, and to require reversal of a judgment denying such relief?

V

THE STATUTE

The statute under attack in the present litigation is section 72-1724, General Statutes of Kansas of 1949, which is quoted hereafter:

> "*Powers of board; separate schools for white and colored children; manual training.* The board of education shall have power to elect their own officers, make all necessary rules for the government of the schools of such city under its charge and control and of the board, subject to the provisions of this act and the laws of this state; to organize and maintain separate schools for the education of white and colored children, including the high schools in Kansas City, Kansas; no discrimination on account of color shall be made in high schools, except as provided herein; to exercise the sole control over the public schools and school property of such city; and shall have the power to establish a high school or high schools in connection with manual training and instruction or otherwise, and to maintain the same as a part of the public school system of said city."

VI

STATEMENT OF THE CASE

The appellants here, who are plaintiffs below, are Negro citizens of the United States and the State of Kansas, who reside in Topeka, Shawnee County, Kansas. The infant plaintiffs are children of common school age. The defend-

ants below and appellees herein are the duly constituted governing body and certain administrative officers of the public school system of Topeka, Kansas. The State of Kansas has intervened in the District Court to defend the constitutionality of the state statute under attack.

Acting pursuant to the authority conferred by G. S. 1949, 72-1724, *supra,* the appellee, Board of Education, many years ago created within the city of Topeka, which is one school district, eighteen school areas, and now maintains in each of said areas a kindergarten and elementary school for white children only. (R. 24.) At the same time the present Board of Education of Topeka and prior boards of education, acting under same statutory authority, have established and operated in said city four elementary schools in the same grades for Negro children. Negro children may attend any one of said elementary schools that they or their parents may select. It was stipulated in the Court below that the Negro schools are located in neighborhoods in which the population is predominantly Negro. (R. 31.) The stipulation also indicates that at the time the action was brought, the enrollment in the eighteen white schools was 6,019, as compared to 658 students enrolled in the four Negro schools. (R. 37.)

The administration of the entire Topeka school system is under the Board of Education, and the same adminis-

trative regulations govern both the white and Negro schools. The Court found specifically that there is no material difference in the physical facilities in colored and white schools; that the educational qualifications of the teachers and the quality of instruction in the colored schools are not inferior to, but are comparable with those in the white schools; and that the courses of study followed in the two groups of schools are identical, being that prescribed by state law. (R. 245.) Also, it was found that colored students are furnished transportation to the segregated schools without cost to the children or their parents. No such transportation is furnished to the white children in the segregated schools. (R. 246.)

VII

SUMMARY OF ARGUMENT

1. The Kansas statute which permits cities of the first class to maintain separate grade school facilities for colored and white students does not *per se* violate the Fourteenth Amendment to the Constitution of the United States.

The Court below found facilities provided for Negro children in the city of Topeka to be substantially equal to those furnished to white children. The appellants, in their specifications of error and in their brief, do not object to that finding. Under those circumstances and under au-

thority of the decisions of the Supreme Court of the United States, the inferior federal courts, and the courts of last resort in numerous state jurisdictions, and particularly the decisions of the Kansas Supreme Court, the appellants herein are not denied equal protection of the laws by virtue of their being required to attend schools separate from those which white children are required to attend.

The decision of the court below should be affirmed.

2. Irrespective of the question of the constitutionality of the Kansas statute, the trial court's findings of fact are insufficient to establish appellants' right to injunctive relief and to require reversal of the judgment below. The only finding of fact relied upon by appellants is Finding of Fact No. VIII. That finding is couched in general language and in effect simply shows that segregation in the public schools has a detrimental effect upon colored children and a tendency to retain or retard their educational and mental development and to deprive them of some of the benefits they would receive in a racial integrated school system. The finding does not specifically show that any of the appellants have actually and personally suffered by reason of segregation in the public schools of Topeka nor that the mental development of any of the appellants in this case has been retarded; and the finding does not even purport to show discrimination against the appellants and in favor

of any other students in the Topeka school system. It no where discusses the effect of segregation upon children of any race other than colored children. Therefore, the District Court's Finding of Fact No. VIII fails to show either that the appellants have suffered any personal harm, or that they are being deprived of benefits or subjected to detriments which do not equally apply to other students in the Topeka school system. Thus, the appellants have failed to secure findings of fact sufficient to entitle them to injunctive relief or to a reversal of the judgment below.

VIII

ARGUMENT

1

DOES A STATUTE WHICH PERMITS BUT DOES NOT REQUIRE CITIES OF MORE THAN 15,000 POPULATION TO MAINTAIN SEPARATE SCHOOL FACILITIES FOR COLORED AND WHITE STUDENTS VIOLATE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN A SITUATION WHERE A COURT HAS SPECIFICALLY FOUND THAT THERE IS NO DISCRIMINATION OR DISTINCTION IN PHYSICAL FACILITIES, EDUCATIONAL QUALIFICATIONS OF TEACHERS, CURRICULA OR TRANSPORTATION FACILITIES?

Appellees contend that only a negative answer to this question is possible.

BACKGROUND OF SEGREGATION IN KANSAS

A meaningful examination of any statute must necessarily be made in the light of its context. In *Plessy v. Ferguson,* 163 U. S. 357, the Court comments:

> "So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question of whether the statute . . . is a reasonable regulation, and with respect to this, there must necessarily be a large discretion on the part of the legislature. 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."

Therefore, we deem it proper to pause briefly to examine the origins and attitudes of the people of the State of Kansas.

The birth of the State of Kansas was an incident of the intersectional struggle that culminated in the war between the states. Located midway between the north and the south, the territory of Kansas was coveted by both the pro-slavery and free-state elements. The Kansas-Nebraska Act which announced the principle of "squatter sovereignty" formally opened the territory for settlement and resulted in migration of large numbers of people from both the north and the south. In these early settlers were reflected the diverse attitudes and cultures of the regions from which they came. While the free-state elements from the north gained political ascendency, there remained in Kansas people who, in good faith, believed that the welfare of both the colored and the white races required that they live apart from one another. Migration following the war between the states followed the same pattern. While the greatest number came from Illinois, Ohio, Indiana and other northern states, a considerable segment of the population had its origin in Kentucky, Tennessee and Missouri. (Clark & Roberts, People of Kansas, 1936, p. 18.)

The early legislatures were faced with the task of reconciling the divergent attitudes of the settlers from such varied cultural backgrounds.

The Wyandotte Constitution, under which the State of Kansas was admitted to the Union, provided for a system of public education specifically requiring the legislature to "encourage the promotion of intellectual, moral, scientific and agricultural improvement, by establishing a uniform system of common schools and schools of a higher grade, embracing normal, preparatory, collegiate and university departments." (Const., Art. 6, Sec. 1.) It is significant that an effort was made in the Wyandotte convention to obtain a constitutional requirement for the separate education of Negro children. The proposal was defeated, not because of objection to the intrinsic policy of segregation, but because the dominant faction in the constitutional convention believed that the power to govern the public schools and to classify students therein should rest with the legislature. At no time was doubt expressed that the constitutional provision adopted at Wyandotte would preclude classification of students on the basis of color (Wyandotte Constitutional Convention, Proceedings and Debates, 1859, pp. 171 to 174).

As early as 1862 the power to classify students was exercised by the enactment of section 18, article 4, chapter 46,

Compiled Laws of 1862, applying to cities of not less than 7,000 inhabitants. That statute provided:

> "The city council of any city under this act shall make provisions for the appropriation of all taxes for school purposes collected from black or mulatto persons, so that the children of such persons shall receive the benefit of all moneys collected by taxation for school purposes from such persons, in schools separate and apart from the schools hereby authorized for the children of white persons."

Chapter 18, Laws of 1868, entitled "An Act to Incorporate Cities of the First Class" authorized the organization and maintenance of separate schools for the education of white and colored children in cities of over 15,000 population. In 1876 the laws of the state pertaining to the common schools were codified and embodied in one comprehensive statute. (Chapter 122.) Article X of this chapter related to the public schools and cities of the first class, and provided that all cities of more than 15,000 inhabitants shall be governed thereby. The provision of the law of 1868 authorizing the maintenance of separate schools for white and colored children was omitted from that section and was thus deemed to have been repealed by implication. However, in 1879 a statute was passed (Laws of 1879, Chapter 81) amending the law relating to cities of the first class and specifically authorizing the boards of edu-

cation therein to organize and maintain separate elementary schools for the education of white and colored children. The section was again amended by Laws of 1905, Chapter 414, and now appears without further change in G. S. 1949, 72-1724, quoted above.

Two features of the Kansas statute should be emphasized. In the first place, we invite the court's attention to the fact that the statute is permissive only and does not, as may be inferred from appellants' brief, require any board of education to maintain separate schools for colored children.

In the second place, it is again pointed out that the statute applies only to cities of the first class. Cities of the first class in Kansas include those cities having a population of more than 15,000 persons. Presently there are ~~fourteen~~ 12 cities in the state so classified. The special provision affecting only these communities may be accounted for by reference to the fact that the Negro population of Kansas is largely urban. According to the 1950 census, less than four percent of the total population of Kansas belongs to the Negro race. However, more than ninety percent of this colored population lives in cities classified as urban. Sixty percent of the total colored population live in the three largest cities of Kansas City, Wichita and Topeka, and at least thirty-five percent of this total live in Kansas

City alone. Thus, in enacting a school segregation statute applicable only to cities of the first class the Kansas legislature has simply recognized that there are situations where Negroes live in sufficient numbers to create special school problems and has sought to provide a law sufficiently elastic to enable Boards of Education in such communities to handle such problems as they may, in the exercise of their discretion and best judgment, deem most advantageous to their local school system under their local conditions.

THE KANSAS DECISIONS

The Supreme Court of Kansas has uniformly held that the governing bodies of school districts in the state may maintain separate schools for colored children only when expressly authorized by statute. (*Board of Education v. Tinnon,* 26 Kan. 1 (1881); *Knox v. Board of Education,* 45 Kan. 152, 25 Pac. 616 (1891); *Cartwright v. Board of Education,* 73 Kan. 302, 84 Pac. 382 (1906); *Rowles v. Board of Education,* 76 Kan. 361, 91 Pac. 88 (1907); *Woolridge, et al., v. Board of Education,* 98 Kan. 397, 157 Pac. 1184 (1916); *Thurman-Watts v. Board of Education,* 115 Kan. 328, 22 Pac. 123 (1924); *Webb v. School District,* 167 Kan. 395, 206 Pac. 2d 1066 (1949).

The rationale of each of these cases is expressed in *Thurman-Watts v. Board of Education,* supra, as follows:

> "The power and duty of the school board are derived exclusively from the statutes. The school board has no greater power than is conferred on it by the statutes."

It is significant that in each of the cases cited above, the court expressly recognized or conceded that the legislature has power to classify students in the public schools on the basis of color. Illustrative of this attitude is the following statement from *Board of Education v. Tinnon,* supra, appearing on p. 16 of the reported decision:

> "For the purpose of this case we shall assume that the legislature has the power to authorize the board of education of any city or the officers of any school district to establish separate schools for the education of white and colored children, and to exclude the colored children from the white schools notwithstanding the Fourteenth Amendment to the Constitution of the United States;"

In each of the subsequent cases where the power to segregate was denied by reason of the absence of statutory authority, the court specifically recognized that the legislature had such authority to confer. (See cases above cited.)

The question of the constitutionality of a statute, antecedent to but substantially like the one here under attack, was squarely presened to the Supreme Court of Kansas in the case of *Reynolds v. Board of Education,* 66 Kan. 672,

72 Pac. 274. That was a proceeding in the nature of mandamus brought against the board of education of the city of Topeka by a colored resident. In the action he sought to compel the board of education to admit his child to a school maintained for white children only. In an exhaustive opinion the court found that the statute which permitted the policy of racial segregation to be valid and not in violation of the Fourteenth Amendment to the Constitution of the United States. The court relied specifically on the decision of the Supreme Court of the United States in the case of *Plessy v. Ferguson,* supra, and held that where facilities are equal, the mere fact of separation of races within a school system does not constitute a violation of the Fourteenth Amendment to the Constitution of the United States.

Quoting with approval from the New York case of *People, ex rel., Cisco v. School Board,* 161 N. Y. 598, 56 N. E. 81, 48 L. R. A. 115, the Court said:

> "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 or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined 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 right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained."

And the court found merit in the quoted portion of the decision in the Massachusetts case of *Roberts v. City of Boston,* 5 Cush. 198:

> "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence, and we cannot say, that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and honest judgment."

Consistent with its finding that the statute did not violate the equal protection guarantee of the Fourteenth Amendment, the Court said on page 689:

> "The design of the common-school system of this state is to instruct the citizen, and where for this

> purpose they have placed within his reach equal means of acquiring an education with other persons, they have discharged their duty to him, and he has received all that he is entitled to ask of the government with respect to such privileges."

Finally on page 292 the court holds:

> "The act of the legislature of 1879 providing for the education of white and colored children in separate schools in cities of the first class except in the high school is, therefore, in all respects constitutional and valid."

At the same time the Kansas court has always insisted that facilities must be equal for all groups. Particularly significant is the case of *Williams v. Parsons,* 79 Kan. 202, decided in 1908. There objection was made that the school provided for colored children was located in such close proximity to the railroad tracks that such location produced an undue hazard to the children attending the school. The court stated, at page 209:

> "Having power to maintain separate schools in cities of the first class, the duty rests upon the board of education therein to give equal educational facilities to both white and colored children in such schools. This requirement must have a practical interpretation so that it may be reasonably applied to varying circumstances. . . . Where the location of a school is such as to substantially deprive some of the children of the district of any educational facilities, it is manifest that this equality is not maintained and the refusal to furnish such

> privileges, where it is practicable to do so, is an abuse of discretion for which the courts will afford a remedy."

A later expression of the Supreme Court of Kansas is found in *Graham v. Board of Education*, 153 Kan. 840, decided in 1941. There the court said on page 842:

> "The authorities are clear that separate schools may be maintained for the white and colored races if the educational facilities provided for each are equal, unless such separation is in contravention of a specific state law."

Again on p. 846 the court comments with reference to the rule expressed in *Reynolds v. Board of Education*, supra:

> "The defendants cite the case of *Reynolds v. Board of Education*, 66 Kan. 672, 72 Pac. 274. The rules of law set out in that case are sound and are applied in this case."

These cases demonstrate that the Supreme Court of Kansas has never doubted that G. S. 1949, 72-1724, and its antecedent statutes is without the scope of the prohibitions imposed on the legislature by the Fourteenth Amendment to the Constitution of the United States.

THE CONTROLLING PRINCIPLES

The position taken by the Supreme Court of Kansas in the cases cited, *supra,* is sustained by the weight of the decisions of this Court in *Plessy v. Ferguson,* supra, and *Gong Lum v. Rice,* 275 U. S. 78; and in numerous decisions of the inferior federal courts and the appellate courts in other states.

Appellants suggest that the Plessy case is not applicable to the situation before us. Admittedly, the question presented in the Plessy case arose out of segregation of white and colored races in railroad cars and not segregation in the public schools. However, the decision of the Court rises above the specific facts in issue and announces a doctrine applicable to any social situation wherein the two races are brought into contact. In commenting upon the purpose and the limitations of the Fourteenth Amendment the Court makes the following statement:

> "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 their 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 a 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." (p. 554.)

Certainly this language refutes appellants' contention that the Plessy case has no application to these facts.

Appellants further state that *Gong Lum v. Rice* "is irrelevant to the issues in this case." This statement appears to justify a brief examination of the facts in the Gong case. Those facts may be summarized as follows:

The Constitution and statutes of the State of Mississippi provided for two school systems in each county. One system was for "white" children and the other system for "colored" children. Plaintiff sought to have his child who was a citizen of Chinese extraction admitted to the school maintained for white students in the county where she lived. She was refused admission by the school authorities. The Supreme Court of the United States unanimously affirmed the decision of the Supreme Court of Mississippi, refusing to grand a Writ of Mandamus to compel the school authorities to admit the Chinese-American citizen to the white school.

The opinion by Chief Justice Taft includes the following statement (pp. 85-86):

> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question it would call for very full argument and consideration but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution."

To support this proposition the Court cites sixteen cases decided by federal courts and state courts of last resort, including *Plessy v. Ferguson,* supra.

We do not believe that appellants suggest that the rights of the Negro citizens differ from the rights of the Mongolian citizen, Martha Lum. If such an idea is advanced herein, this Court should have no more difficulty in disposing of that contention than it did of that phase of the Gong case where it seemed to be contended that a yellow child had different rights than a Negro child. The Court simply held that children of all races have equal rights but that those rights are not infringed upon when the state provides that the different races shall be educated in separate schools of equal facility.

Appellants further contend that whatever force the Plessy and Gong-Lum cases may have had has been overcome by the recent decisions of *Sweatt v. Painter,* 339 U. S. 629, and *McLaurin v. Oklahoma,* 339 U. S. 637. Appellees concede that if there has been any change in the attitude of this Court as to the constitutionality of the separate but equal doctrines as it affects segregation, it must be found in these two cases. Thus, we have examined them carefully. But we find no statement therein that would cause us to believe the Court intended to reverse or modify its earlier decisions. In the Sweatt case, the Court held that a Negro prospective law student could not be denied admission to the renowned University of Texas Law School — "one of the nation's ranking law schools" (p. 663), and be compelled to accept instruction in a new school of perhaps questionable worth, inferior as to faculty, plant and student body. The McLaurin case only found that a Negro graduate student, who had successfully compelled his admission to the University of Oklahoma to do graduate work in education, was still being denied equal rights when he was segregated inside the university as to his seat in class, in the library and in the dining hall. Unquestionably, these cases sustain the position that equal facilities must be provided. However, that point is not at issue in this case.

We think the Sweatt case has no greater significance than the following expression of the Court's attitude indicates:

> "This case and *McLaurin v. Oklahoma State Regents* . . . present different aspects of this general question: To what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the court." (p. 631.)

Squarely in point is the following statement:

> "We cannot, therefore, agree with respondents that the doctrine of *Plessy v. Ferguson,* 1896, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256, requires affirmance of the judgment below. Nor need we reach the petitioner's contention that *Plessy v. Ferguson* should be re-examined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation. See, *supra,* pg. 631." (pp. 635-636.)

And in the McLaurin case the significance of the special situation is noted by the Court:

> "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of

> that need, for he is attempting to obtain an advanced degree in education, to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.
>
> "It may be argued that appellant will be in no better position when these restrictions are removed, for he may still be set apart by his fellow students. This we think is irrelevant. There is a vast difference — a constitutional difference between restrictions imposed by the state which prohibit the intellectual commingling of students, and the refusal of individuals to commingle where the state presents no such bar . . . Appellant having been admitted to a state-supported graduate school, he must receive the same treatment at the hands of the state as students of other races." (pp. 641, 642.)

In the Sweatt and McLaurin cases the Court specifically refused to consider the issue of constitutionality of racial separation in schools of equal facility in view of contemporary knowledge and held only that where the State did not furnish equal facilities for one race, the students of that race were being denied equal protection of the laws. Appellees contend that this refusal by the Court to review the Plessy and Gong-Lum doctrines in its later decisions

can only be interpreted to support the view that those cases still stand as expressions of the rule established by the Supreme Court upon the question of racial segregation within the public schools.

Notable among decisions since the Sweatt and McLaurin cases are *Carr v. Corning*, 182 F. 2d 14; *Briggs v. Elliott*, 98 F. Supp. 529; and *Davis v. County School Board*, 103 F. Supp. 337, the latter two cases now pending before this Court on appeal. *Carr v. Corning* involved the public school system of the District of Columbia. There the Court noted a fact that we deem most significant with respect to the original meaning and intent of the Fourteenth Amendment. It was pointed out that in the same year that Congress proposed the amendment, federal legislation was enacted providing for segregation of the races in the public schools in the District of Columbia.

> "We are not unmindful of the debates which occurred in Congress relative to the Civil Rights Act of April 9, 1866, the Fourteenth Amendment, and the Civil Rights Act of March 1, 1875. But the actions of Congress, the discussion in the Civil Rights Cases, and the fact that in 1862, 1864, 1866 and 1874 Congress, as we shall point out in a moment, enacted legislation which specifically provided for separation of the races in the schools of the District of Columbia, conclusively support our view of the Amendment and its effect." (p. 17.)

Here we note the parallel situation in the State of Kansas. There the State, through its Legislature, ratified the Fourteenth Amendment in 1867, and only one year later legislation providing for separation of the races in the public schools of first class cities was enacted. (L. 1868, ch. 18.)

An examination of all the cases in American jurisdictions supporting the appellants' position would become repetitious and tedious. Thus, we refrain from an exhaustive survey. We believe the comment of Circuit Judge Parker in *Briggs v. Elliott,* supra, aptly summarizes the law and its justification:

> "One of the great virtues of our constitutional system is that, while the federal government protects the fundamental rights of the individual, it leaves to the several states the solution of local problems. In a country with a great expanse of territory with peoples of widely differing customs and ideas, local self government in local matters is essential to the peace and happiness of the people in the several communities as well as to the strength and unity of the country as a whole. It is universally held, therefore, that each state shall determine for itself, subject to the observance of the fundamental rights and liberties guaranteed by the federal Constitution, how it shall exercise the police power, *i.e.*, the power to legislate with respect to the safety, morals, health and general welfare. And in no field is this right of the several states more clearly recognized than in that of public education." (P. 532.)

Justice Holmes has expressed the following view:

> "I must add one general consideration. There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect. (Holmes, J., dissenting opinion, *Truax v. Corrigan*, 257 U. S. 312, p. 344, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375.)"

It is undoubtedly true that the separate but equal doctrine is susceptible of abuse. In many instances it has resulted in a separate and unequal rule in practice. However, it is the impossibility of equality under such a doctrine, and not the difficulty of administering and applying the same with equality, that would make such a doctrine unconstitutional *per se*. The situation in Topeka is one where substantial equality has been reached. Such was the finding of the Court below (R. 245) and such is apparently conceded by the appellants (Appellants' Brief, p. 5). These facts, under authority of decisions heretofore reviewed, compel an inescapable conclusion: Neither the statute of Kansas nor the action of the appellee, Board of Education, offends the Fourteenth Amendment to the Federal Constitution.

THE PROSPECT

At the outset we suggested that the Kansas statute is permissive and that any Board of Education included in the statute may adopt a policy consistent with local conditions and local attitudes. We believe it is significant that under this statute by a process of evolution the people in Kansas communities are arriving at their own solutions to this problem. Under the statute ~~fourteen~~ 12 cities are authorized to maintain separate schools for colored students. The files of the State Superintendent of Public Instruction indicate that at the present time, only nine cities exercise the power conferred by statute. Wichita, the largest city in the state, has abandoned segregation only recently. The city of Pittsburg abandoned the policy of segregation only two years ago. Lawrence, seat of the state university, is now in the process of ending the operation of segregated schools.

This account of events not in the record is related to illustrate the wisdom which underlies the Kansas statute. Only those cities where local conditions produce special problems making segregation desirable need adopt the expedient of segregation. In the orderly progress of the community, these special problems are either solved or vanish, and when the need for segregation disappears, its practice may be discontinued. This was the method pro-

vided by the legislature of the State of Kansas to achieve the goal of an integrated school system where segregation is not needed. We respectfully suggest to the court that this evolutionary process permitting an autonomous solution in the community is consistent with the purpose and intent of the Fourteenth Amendment.

2

THE DISTRICT COURT'S FINDING OF FACT NO. VIII IS INSUFFICIENT TO ESTABLISH APPELLANTS' RIGHT TO INJUNCTIVE RELIEF AND TO REQUIRE REVERSAL OF THE JUDGMENT BELOW.

(*a*) *Counsel for Appellants have overstated their case.*

Appellant has raised and preserved this issue by its third Assignment of Error, to wit:

> "The District Court erred:
>
> "
>
> . . . . . .
>
> "3. In refusing to enter judgment in favor of plaintiffs, after the court found that plaintiffs suffered serious harm and detriment in being required to attend segregated elementary schools in the City of Topeka, and were deprived thereby of benefits they would have received in a racially integrated school system." (R. 250.)

And by adopting its Assignment of Errors in its Statement of Points to Be Relied Upon (R. 253).

The District Court's Findings of Fact and Conclusions of Law appear at pp. 244 to 247 of the Transcript of the Record.

There is no Finding of Fact which literally and specifically corresponds to the finding mentioned in Appellants' third Assignment of Error.

At page 2 of the Brief for Appellants under the heading *Questions Presented,* appellants state the second issue, as follows:

> "Whether the finding of the court below—that racial segregation in public elementary schools has the detrimental effect of retarding the mental and educational development of colored children and connotes governmental acceptance of the conception of racial inferiority—compels the conclusion that appellants here are deprived of their rights to share equally in educational opportunities in violation of the equal protection clause of the Fourteenth Amendment."

There is no Finding of Fact which literally and specifically corresponds to the finding mentioned in appellants' statement of the second issue.

At page 10 of the Brief for Appellant, counsel state:

> "Applying this yardstick, any restrictions or distinction based upon race or color that places the Negro at a disadvantage in relation to other racial groups in his pursuit of educational opportunities is violative of the equal protection clause.
>
> "In the instant case, the court found as a fact that appellants were placed at such a disadvantage and were denied educational opportunities equal to those available to white students.
>
> "
>
> . . . . . .
>
> "Thus, notwithstanding that it had found inequality in educational opportunity as a fact, the court concluded as a matter of law that such inequality did not constitute a denial of constitutional rights, saying: . . ."

There is no such finding of fact in the Record in this case.

With all respect due to able counsel for appellants we believe that in their zeal for their cause, they have overstated their case. The only existing Finding of Fact which is relied upon by appellants and the only one quoted in their brief is the District Court's Finding of Fact No. VIII, which we quote accurately:

> "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retain the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system."

We call attention to the fact that the foregoing Finding is couched only in broad and general language; it makes no specific or particular reference to any of the appellants, nor to the grade schools in Topeka, nor to racial groups other than Negroes, nor to inequality of educational opportunities between Negroes and other racial groups. The substance of the finding can be summarized in the following statement: "Generally speaking, segregation is detrimental to colored children, and deprives them of some

benefits they would receive in a racial integrated school system."

The Finding of Fact No. VIII cannot be stretched, as counsel for appellants apparently would like to stretch it, into a finding that the appellants in this case have "suffered serious harm in being required to attend segregated elementary schools in Topeka" and that "appellants were placed at such a disadvantage (in relation to other racial groups in [their] pursuit of educational opportunities) and were denied educational opportunities equal to those available to white students."

(*b*) *Elements Necessary to Entitle Appellants to Injunctive Relief and to a Reversal of the Judgment in This Case.*

To establish appellants' right to injunctive relief and to reversal of the judgment in this case, the Findings of Fact No. VIII would have to show:

> (1) That the appellants have actually suffered personal harm as the result of attending segregated schools in Topeka; and,
>
> (2) Either that appellants are being deprived of benefits which other students in the Topeka school system enjoy, or that appellants are being subjected to detriments to which other students in the Topeka school system are not being subjected, by reason of maintenance of a segregated school system.

The mere showing that appellants may be members of a class which is being discriminated against by reason of a statute is not sufficient to entitle them to injunctive relief, unless appellants can also show that they personally are suffering harm. The Fourteenth Amendment protects only personal and individual rights.

The mere showing that appellants can show that they are being deprived of benefits they would receive under a different system of schools is not sufficient to show that they are being deprived of equal protection of the law, unless appellants can also show that under the existing segregate school system there are others who are not deprived of such benefits.

And finally, the mere showing that segregation is detrimental to appellants is not sufficient to show that they are being deprived of equal protection of the laws, unless they also show that segregation is not similarly detrimental to others in the Topeka school system.

McCabe v. A. T. & S. F. Ry. Co., 235 U. S. 151, 59 Law Ed. 149:

> "There is, however, an insuperable obstacle to the granting of the relief sought by this bill. It was filed, as we have seen, by five persons against five railroad corporations to restrain them from complying with the state statute. The suit had been brought before the law went into effect, and this

amended bill was filed very shortly after. It contains some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be 'A multiplicity of suits,' there being at least 'fifty thousand persons of the Negro race in the state of Oklahoma' who will be injured and deprived of their civil rights. But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention." (p. 162.)

Turpin v. Lemon, 187 U. S. 51, 47 Law Ed. 70:

"This is an effort to test the constitutionality of the law, without showing that the plaintiff had been injured by its application, and, in this particular, the case falls without ruling in *Tyler v. Registration Court Judges,* 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206, wherein we held that the plaintiff was bound to show he had personally suffered an injury before he could institute a bill for relief. In short, the case made by the plaintiff is purely academic." (pp. 60, 61.)

Thomas Cusack Co. v. Chicago, 242 U. S. 526, 61 Law Ed. 472:

> "He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property." (p. 530.)

Mallinckrodt Chemical Works v. Missouri ex rel. Jones, 238 U. S. 41, 59 L. ed. 1192:

> "As has been often pointed out, one who seeks to set aside a state statute as repugnant to the Federal Constitution must show that he is within the class with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him." (p. 54.)

(*c*) *Finding of Fact No. VIII Fails to Disclose That Any of the Appellants Have Been Actually and Personally Harmed by Segregation in the Topeka Schools.*

Finding of Fact No. VIII makes no specific reference to the individual appellants. It expresses only in broad generalities the effect of segregation in the public schools upon colored children as a class. There is no specific finding that segregation has had a personal detrimental effect upon any of the appellants. There is no specific finding that any of the appellants personally has interpreted segregation as denoting inferiority of the Negro group, or that the motivation to learn of any of the appellants has been affected

by a sense of inferiority. There is no finding that the educational and mental development of any of the appellants has actually been retained or retarded by reason of segregation in the Topeka schools. In short there is no finding that any of the appellants individually and actually has been harmed by segregation in the Topeka school system.

(*d*) *Finding of Fact No. VIII Fails to Disclose That Appellants Are Being Deprived of Equal Protection of the Laws, or That They Are Being Discriminated Against by Segregation in the Topeka Schools.*

Denial of equal protection of the laws, or discrimination, logically and necessarily involves at least two persons who are being treated differently. Denial of equal protection must mean denial of protection or opportunity equal to that afforded to someone else. There can be no such thing as "unilateral discrimination."

Since the Finding of Fact No. VIII is limited solely to a statement of the effect of segregation on colored children as a group, and nowhere mentions the effect of segregation upon any other race or group, it cannot reasonably or logically show discrimination or a denial of equal protection of the laws.

Nowhere in the finding has the court disclosed any facts upon which it can be claimed to show discrimination in

favor of white children over colored in segregated schools.

It is idle on this appeal to speculate upon what the trial court might have found had it been requested to make additional findings. No request for additional findings was made in the trial court. We therefore refrain from speculating as to whether the court would also have found that segregation was detrimental to white children and impaired their educational and mental development.

(e) The District Court Did Not Intend Nor Consider Its Finding of Fact No. VIII To Be a Finding of Discrimination Against Appellants.

The last sentence in Finding of Fact No. VIII summarizes the entire finding. We quote:

> "Segregation with the sanction of law, therefore, has a tendency to retain the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial integrated school system."

We believe the court intended the finding to mean simply that colored children would be better off in integrated schools than they are in segregated schools. Conceding that that is the meaning of the finding, it does not amount to a finding of actual discrimination against colored children and in favor of white children upon the facts in this case. White children are not permitted to attend inte-

grated schools in Topeka. The mere fact, if it be a fact, that the Topeka school system could be improved so far as education of colored children is concerned, does not prove discrimination against them.

In the opinion of the District Court (R. 238 to 244), 98 F. Supp. 797, no mention is made of Finding of Fact No. VIII. It is clear the District Court did not consider or intend to attach to that finding the same significance which appellants seek to place upon it.

We do not question that if the Finding of Fact No. VIII means everything appellants claim it means, they would be entitled to an injunction and reversal of the judgment, if this court should overrule the "separate but equal doctrine." However, it is clear that the District Court did not intend or consider the finding to mean all the things appellants claim for it. As stated in the Decree of the District Court:

> "The Court has heretofore filed its Findings of Fact and Conclusions of Law together with an opinion and has held as a matter of law that the plaintiffs have failed to prove they are entitled to the relief demanded."

IX

CONCLUSION

In view of the authorities heretofore cited, appellees respectfully submit that the judgment of the court below should be affirmed.

HAROLD R. FATZER, Attorney General,
PAUL E. WILSON, Asst. Attorney General,
Counsel for the State of Kansas,
State House, Topeka, Kansas,
PETER F. CALDWELL, Counsel for the Board
of Education of Topeka, Kansas.
512 Capitol Federal Bldg., Topeka, Kansas.

APPENDIX

THE BOARD OF EDUCATION OF TOPEKA, KANSAS

Counsel for The Board of Education of Topeka, Kansas, had formerly advised the Clerk of the United States Supreme Court that it did not intend to file a brief and to present oral argument in this case. However, after the Court rendered its *per curiam* order of November 24, 1952, The Board of Education, at its next regular meeting held December 1, 1952, determined to join with the State of Kansas in preparing and filing the foregoing brief. We accordingly request leave of the Court to join in the foregoing brief.

The Board of Education in good faith and in reliance upon prior decisions of the Supreme Court of the United States and of The Supreme Court of the State of Kansas, has assumed the validity and constitutionality of G. S. Kansas 1949, 72-1724, and has maintained separate grade schools for white and colored children in the Topeka school district from kindergarten through the sixth grade under authority of said statute.

THE BOARD OF EDUCATION OF TOPEKA, KANSAS,
By PETER F. CALDWELL, *Its Attorney.*

□

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