SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 436

OLIVER BROWN, MRS RICHARD LAWTON, MRS. SADIE EMMANUEL, ET AL.,

Appellants,

vs.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

STATEMENT AS TO JURISDICTION

CHARLES E. BLEDSOE,
CHARLES SCOTT,
JOHN SCOTT,
JACK GREENBERG,
THURGOOD MARSHALL,
ROBERT L. CARTER,
Counsel for Appellants.

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STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the district court entered in this cause.

Opinion Below

The opinion of the United States District Court for the District of Kansas is not yet reported. A copy of the

opinion, findings of fact, conclusions of law and final decree are attached hereto as Appendix A.

Jurisdiction

The judgment of the district court was entered on August 3, 1951. A petition for appeal is presented to the District Court herewith, to wit, on September 28, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *McLaurin* v. *Board of Regents,* 339 U. S. 637; *Wilson* v. *Board of Supervisors,* — U. S. —, 94 L. ed. (Ad. Op.) 200.

Questions Presented

1. Whether Chapter 72-1724 of the General Statutes of Kansas, 1949, is unconstitutional in that it gives to defendants-appellees the power to organize and maintain separate public elementary schools for the education of white and colored children in the City of Topeka, Kansas.

2. Whether after having shown that the maintenance of racially segregated elementary schools in Topeka, pursuant to Chapter 72-1724 of the General Statutes of Kansas, 1949, is harmful and deprives them of the benefits they would receive under a racially integrated school system, plaintiffs-appellants are necessarily entitled to the relief prayed for in their complaint.

Statutes Involved

Chapter 72-1724 of the General Statutes of Kansas, 1949, as set forth in Appendix B attached hereto.

Statement

Appellants are here seeking to enjoin appellees from maintaining separate public elementary schools for Negro

and white pupils in the City of Topeka, pursuant to authority conferred by Chapter 72-1724 of the General Statutes of Kansas, 1949. The asserted right to injunctive relief is based upon the unconstitutionality of Chapter 72-1724, in that the Fourteenth Amendment to the United States Constitution strips the state of power to either authorize or require the maintenance of racially segregated public schools. A district court of three judges was convened, as provided in Title 28, United States Code, Sections 2281 and 2284, and on June 25, 26, 1951 a hearing on the merits took place.

The evidence there presented disclosed that the City of Topeka is divided into eighteen territories for school purposes. One elementary school is maintained by appellees in each of these eighteen territories for the exclusive use of white children, and in addition four separate elementary schools are maintained for the exclusive use of Negro children. Negro children must attend one of the four segregated schools maintained for them, even though they may live considerably closer to one of the schools maintained for white children. Segregation is enforced only in elementary schools which in Topeka ends with the completion of the sixth grade. After the sixth grade a student enters junior high school, which along with senior high schools, is operated as part of a racially integrated school system.

With respect to teacher qualifications, class size, teacher-pupil load and courses prescribed, there is little material difference between the eighteen schools for white children and the four schools for colored children. Appellants introduced evidence to show, however, that on the average the Negro schools were older, of lower insured value per classroom and had inferior library holdings. Evidence was also introduced to show that Negro children, who lived close to Gage, State Street and Oakland schools, which were new,

luxurious, modern educational plants maintained for white children, were required, nonetheless, to travel a considerable distance in order to attend one of the Negro schools which were inferior to these in terms of physical facilities. Forty-five percent of the white children attended schools which were newer than the newest Negro school, and only 14% attended schools older than the oldest Negro school. These differences in physical facilities were brought out in the testimony of Dr. Hugh Speer and Dr. James Buchanan who had made a survey of the schools on behalf of appellants.

Seven additional expert witnesses testified on behalf of appellants. In substance their testimony was that racial segregation for school purposes is unreasonable and arbitrary; that Negro children are relegated to an inferior status by virtue of being required to attend segregated schools, are confused and made personally insecure, and that the legally enforced isolation of Negro children in segregated public schools made it impossible for them to receive educational opportunities equal to those presently available to all other students.

Although the court below, in its findings of fact, found no material difference between the Negro and white schools with respect to physical facilities, it found that the segregation complained of has a detrimental effect upon colored children and that the "impact is greater when it has the sanction of 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 retard the educational and mental development of Negro children, and to deprive them of some of the benefits they would receive in a racially integrated school system."

The district court, on August 3, 1951, entered a final order and decree denying appellants' injunctive relief on the

grounds that *Plessy* v. *Ferguson,* 163 U. S. 537 and *Gong Lum* v. *Rice,* 275 U. S. 78 upheld the constitutionality of the statute in question and that these cases had not been overruled by *McLaurin* v. *Board of Regents,* 339 U. S. 637 and *Sweatt* v. *Painter,* 339 U. S. 629. Appellants on direct appeal are now seeking a review of this judgment by the Supreme Court of the United States.

The Questions Are Substantial

The issues involved in this appeal are similar to those raised in *Sweatt* v. *Painter,* 339 U. S. 629; *McLaurin* v. *Board of Regents,* 339 U. S. 637 and in *Briggs* v. *Elliott,* now pending before the United States Supreme Court on direct appeal from the United States District Court for the Eastern District of South Carolina. The issues are of vital importance especially at this time because the preservation of strong democratic institutions necessarily depends upon the intelligence and enlightenment of our citizenry. When the educational and mental development of a portion of our population is retarded by state practices which violate the Constitution, it becomes impossible to fully muster the capabilities and energies of the country to meet whatever crises lie ahead.

1. We are here concerned with state power to impose racial segregation in the broad field of public education at the elementary school level. In the *McLaurin* and *Sweatt* cases the United States Supreme Court dealt with the permissible limits of such state power at the professional and graduate school level. The issues in this appeal, however, raise questions of a greater importance and of more basic concern then the question of racial segregation in graduate and professional schools.

The *sine qua non* of education in a democratic society is the teaching of a belief in and loyalty to democratic ideals.

It is at the elementary or primary educational level that children, along with their acquisition of facts and figures, integrate and formulate basic ideas and attitudes about the society in which they live. When these early attitudes are born and fashioned within a segregated educational framework, students of both the majority and minority groups are not only limited in a full and complete interchange of ideas and responses, but are confronted and influenced by value judgments, sanctioned by their society which establishes qualitative distinctions on the basis of race. Education cannot be separated from the social environment in which the child lives. He cannot attend separate schools and learn the meaning of equality.[1]

One eminent authority in the field of educational segregration has summed up the role of the separate Negro school as follows:

> "The separate school is an instrument of social policy and a symbol of inferior status."[2]

Segregated education, particularly at the elementary level, where the emotional aspects of learning are inextricably tied up with the learning process itself, must and does have a definite and deleterious effect upon the Negro child.[3] It is particularly true that when segregation exists

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[1] *The Main Types and Causes of Discrimination* (Memorandum submitted by the Secretary-General, United Nations-Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Lake Success, New York, p. 50.

[2] Charles H. Thompson, "Post War Prospects of Equitable Educational Opportunities for Negroes" in *Race Relations and Human Relations,* Fisk Univ. 1945, p. 86.

[3] Max Deutscher and Isidor Chein, "The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion," Journal of Psychology, 1948; 26; 259-287; David Krech and Richard S. Crutchfield, *Theory and Problems of Social Psychology,* New York, McGraw-Hill, 1948, Chapters XII and XIII; M. Radke "New Trends in the Investigation of Prejudice," Annals of the American Academy of Political Science, 1946, p. 244.

at the elementary level it is hard to distinguish between fact and fiction—the fiction, in this instance, being an arbitrary classification on the basis of race. A recent study of the development of attitudes towards Negroes concludes that prejudice *begins early in the life span* and develops gradually, and that "attitudes towards Negroes are now chiefly determined not by contact with Negroes, but by contact with prevalent attitudes toward Negroes."[4]

Appellants have demonstrated to the satisfaction of the court below that segregation at the elementary school level prejudices the Negro child in his pursuit of knowledge. It is common knowledge that the number of persons attending public elementary schools is far greater than that attending public graduate and professional schools. It logically follows, therefore, that the injuries which segregation causes in the elementary grades is more far reaching and devastating and affects more people than is the case with respect to graduate and professional education. It affects young children by creating prejudicial attitudes which by virtue of their extreme youth they can in no way identify.[5] Since elementary education is absorbed during the formative years of a child's life, it assumes a peculiar and more important role than education at any other level. It is true that most professions and occupational fields require skills and information that can only be acquired through higher and professional education, but it is not the skill or professional knowledge *alone* that makes a good doctor, lawyer, engineer, or teacher.[6] It is an integrated, intelligent and open-minded personality

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[4] Eugene Horowitiz, "Development of Attitudes Towards Negroes," in *Readings in Social Psychology,* Holt, 1947, pp. 561, 517.

[5] op. cit.

[6] Young B. Smith, *Harlan Fiske Stone: Teacher Scholar and Dean,* Col. Law Review, Vol. XLVI, Sept. 1946.

that can best benefit from education at any level. It is hard, if not impossible, to build a durable building on a weak framework. The educational process is cumulative in nature, a person's "knowledge" or "education" can never be separated from the total personality. If a young student can learn in a democracy and at the same time learn the significance of democracy, he must be able to do so freely—unhampered by such arbitrary and limiting factors as distinctions on the basis of race.[7] Negro children cannot be afforded the opportunity to develop fully their intelligence and their mental capabilities if their training is circumscribed and their development stunted by state practices which, at the very outset of their search for education, places them at a disadvantage with children belonging to other racial groups.

2. Having established that racial segregation in the public elementary schools of Topeka had a detrimental effect upon appellants and other Negro students, affected their motivation to learn, their educational and mental development, and deprived them of benefits which would have been forthcoming in a racially integrated school system, appellants were entitled to the relief prayed for in their complaint under the rationale of the *Sweatt* and *McLaurin* cases. In those cases the United States Supreme Court found that equal educational opportunities in law and in graduate training could not be obtained in a racially segregated educational system.

One of the chief considerations, which led the court to conclude that equal educational opportunities were not offered at the segregated Negro law school in the *Sweatt* case, was that members of racial groups comprising 85%

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[7] Gunnar Myrdal, *An American Dilemma,* Hayes, New York, 1944 (passim).

of the population of Texas were excluded from its student body. The court said, at page 634:

> ". . . With such a substantial and significant segment of the population excluded, we cannot conclude that the education offered petitioner is substantially equal to that he would receive if admitted to the University of Texas law school."

Thus, without regard to physical facilities, the opinion in the *Sweatt* case means that equal educational opportunities in law cannot be afforded a Negro applicant where he is required to take his training in isolation from law students who are representative of a "substantial and significant segment of the population." It must have been felt in that case, we submit, that a student who obtains an education under circumstances such as to require daily contact and competition with members of racial groups comprising the dominant and more advantaged majority would necessarily receive a better education than a student who must get his training under conditions which would limit him to daily contact and competition from members of a single racial group comprising the state's most disadvantaged minority.

In the *McLaurin* case, although no question of the inequality in physical facilities could have been raised, the court found the state, in requiring McLaurin to sit apart from other students in the classrooms, cafeteria and library solely because of race, handicapped him in his pursuit of effective graduate instruction. "Such restrictions," said the court at page 641, "impair and inhibit his ability to study, to engage in discussions and to exchange views with other students and, in general, to learn his profession."

We take these two decisions to mean that any form of state imposed racial segregation at the graduate and professional school levels of state universities contravenes

the Fourteenth Amendment because such restrictions handicap the applicant in his pursuit of knowledge and necessarily deprive him of equal educational opportunities. This analysis is confirmed by *Wilson* v. *Board of Supervisors,* supra, and *McKissick* v. *Carmichael,* 187 F. 2d 949 (CCA 4th 1951) cert. den. — U.S. —, June 4, 1951.

In the *McLaurin* case, moreover, the court recognized that not only would their decision affect McLaurin personally but that the quality of his education had more far-reaching implications. The court said, at page 641, that as a trainer of others,

> "[t]hose 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."

Thus the court was not only concerned with the question of McLaurin's personal right to equal educational opportunities but was aware that his inferior training would necessarily mean inferior training for his students. Now, in this case, we are directly confronted with the question with which the Court was indirectly concerned in the *McLaurin* case.

At the outset of the opinion in the *Sweatt* case, at page 631, it was made clear that the court was deciding only the question of the power of the state to distinguish between students of different races in professional and graduate education of state universities. This statement meant no more than that the court was deciding the constitutional question within the narrowest limits essential to the disposition of the case at hand. This is not new but normal Supreme Court procedure, *Rescue Army* v. *Municipal Court,* 331 U. S. 549, 568-575, and cases cited. The assertion by the Court that it was following this practice and hence deciding

only the constitutionality of state-imposed segregation at the graduate and professional school levels cannot properly be interpreted to mean that segregation at the elementary school level is thereby validated. Nor did the Court's refusal to reexamine *Plessy* v. *Ferguson* infer that the "separate but equal" doctrine of that case was approved as the yardstick to determine constitutionality of racial segregation in areas other than professional and graduate education. We take this refusal to mean merely that the Court had found segregation unconstitutional at the graduate and professional school levels and, therefore, deemed it unnecessary to meet the question of whether *Plessy* v. *Ferguson* had general application. The Court, without first having facts before it, was in no position to say that segregation in areas other than graduate and professional education was a denial of equal protection of the laws. Where the facts show such denial, the Court, we submit, would strike down segregation as was done in the *McLaurin* and *Sweatt* cases.

Attention is directed to *Rice* v. *Arnold,* 340 U. S. 848, dec. Oct. 17, 1950. That case was reversed and remanded to the Supreme Court of Florida for reexamination in the light of the *Sweatt* and *McLaurin* cases. It is true that this case may not necessarily mean that racial segregation on public golf courses is considered by the Supreme Court as a denial of equal protection of the laws. *Rice* v. *Arnold* does conclusively indicate, we submit, that the Court's statement in the *Sweatt* case with respect to *Plessy* v. *Ferguson* was not intended to imply that the "separate but equal" formula was to be used to dispose of questions involving racial seggation except for graduate and professional schools. Moreover, *Rice* v. *Arnold* indicates that the constitutionality of state sanctioned racial segregation must now be determined by the courts on the basis of an inquiry into its actual effect as was done in the *McLaurin* and *Sweatt* cases. Here the district court made such an inquiry and concluded that

the effect of racial segregation in this case was as pernicious as it had been found to be in the *McLaurin* and *Sweatt* cases. Having determined, in fact, that equal educational opportunities were not afforded in the segregated schools of Topeka, the court, in the light of the *McLaurin* and *Sweatt* cases was obligated to hold that Chapter 72-1724 was unconstitutional and that appellees could not continue to maintain separate elementary schools for Negroes and whites.

3. Chapter 72-1724 of General Statutes of Kansas, 1949, is clearly an arbitrary and unreasonable exercise of state power in violation of the guarantees of the Fourteenth Amendment for the following reasons:

A. This statute authorizes governmental classifications and distinctions based upon race for school purposes. In order for such classifications and distinctions to conform with the requirements of the Federal Constitution, they must be based upon a real or substantial difference which has pertinence to a legitimate legislative objective. *Dominion Hotel* v. *Arizona,* 294 U. S. 265; *Skinner* v. *Oklahoma,* 316 U. S. 535. This statute cannot be sustained under this constitutional yardstick. Certainly, the statute cannot be sustained if based upon race alone. See *Hirabayashi* v. *United States,* 320 U. S. 81, 100; *Korematsu* v. *United States,* 323 U. S. 214, 216; *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410, 420; *Oyama* v. *California,* 332 U. S. 633, 640; *Shelley* v. *Kraemer,* 334 U. S. 1, 21, 23.

There is no difference between Negro children and white chilren with respect to ability to learn or to absorb knowledge based upon the racial factor alone. Whatever differences exist in this regard are individual and not racial. This is an uncontroverted scientific fact. See: Testimony of Horace B. English. See also: Rose, *America Divided: Minority Group Relations in the United States* (1948);

Montague, *Man's Most Dangerous Myth—The Black & White of Rejections for Military Service,* 5 (1944) at 29; Klineberg, *Race Differences,* 343 (1935). Thus, the statute cannot be sustained if based upon a mistaken assumption that such racial differences do in fact exist.

This statute authorizes racial segregation in the elementary grades only. In Topeka, elementary school ends with completion of the sixth grade. Thereafter, at the junior and senior high school level, the Topeka school system is racially integrated. Moreover, the segregation authorized can only be imposed in cities of the first class. Thus, whatever the basis for the classification, about which appellants can only wildly speculate, if not based upon race or ability to learn and absorb knowledge, it must be some factor which is: (1) present in the first six grades of public schools in Kansas, but not present thereafter, and (2) it must be present in some communities in Kansas, but not in others. This is impossible. In short, the statute cannot be sustained under the constitutional formula, as being based on a real and substantial difference which has pertinence to a legitimate legislative objective to which state classifications and distinctions must adhere.

B. This statute cannot be said to sustain an important state interest particularly in view of the fact that Kansas has a history of freedom and equality, and legally enforced segregation is contrary to its deep-rooted traditions and customs.

The General Statutes of Kansas, Annotated, (Corrick) 1949, outlaw discrimination in a wide variety of circumstances.[8] Section 76-307, which applies to schools of arts, engineering, pharmacy, law and medicine, states:

> "No person shall be debarred from membership of the university on account of age, race, sex, or religion."

[8] The statutes cited herein are set forth in Appendix B hereto.

Section 12-713, dealing with planning, zoning and city planning commissions, provided:

> "Nothing herein contained shall be construed as authorizing the governing body to discriminate against any person by reason of race or color."

Section 21-2424 makes it a misdemeanor punishable by a fine of $10 to $10,000 and makes the misdemeanant liable to a suit for damages, for any person to make a distinction on account of race, color or previous condition of servitude in a state university, college or other school of public instruction; in a hotel, boarding house, place of entertainment or amusement for which a license is required by municipal authorities of the state; or in a steamboat, railroad, stagecoach, omnibus, streetcar, or other means of public carriage.

Section 21-2461 provides that no citizen of the United States shall be refused employment in any capacity on the ground of race or color nor be discriminated against in any manner in connection with any public work by or on behalf of the state or any governmental subdivision thereof.

Section 21-2462 provides that the act of which Section 21-2461 is a part shall be included in all contracts made by governmental subdivisions which involve the employment of laborers and shall apply to all contractors and subcontractors.

Section 21-2463 provides that any officer violating the latter two sections shall be punishable by a fine of $50-$1,000 and by imprisonment of not more than six months or both.

House Joint Resolution No. 1 of the House of Representatives of the State of Kansas [L. 1949, Ch. 289, p. 253] states that:

> ". . . The state of Kansas is traditionally and historically opposed to discrimination against any of its citizens in employment; and
>
> ". . . It is the public policy of this state that all of the citizens of this state are entitled to work without restrictions or limitations based on race, religion, creed or national origin; . . ."

The final and most telling statutory provision in the laws of the State of Kansas is the very statute here under attack, which, by its very terms, recognizes that the distinction herein practiced is what the Fourteenth Amendment was designed to destroy: discrimination. That statute states:

> "No discrimination on account of color shall be made in high schools except as provided herein."

By plain meaning and context, it is clear that this statute recognized that segregation is discrimination.

Conclusion

The importance of the issues raised, the mistaken notion of the district court that *Plessy* v. *Ferguson* and *Gong Lum* v. *Rice* required them to sustain the constitutionality of Chapter 72-1724 of the General Statutes of Kansas, 1949, in spite of their own findings that segregated schools in Topeka were detrimental to appellants and to Negro children generally, the arbitrary and unreasonable nature of the statute and the utter lack of any real state interest in maintaining racially segregated elementary schools in Kansas where legally enforced racial segregation is an anomaly, all present compelling reasons which warrant review of this judgment on appeal by the United States Supreme Court.

Respectfully submitted,

CHARLES E. BLEDSOE,
CHARLES SCOTT,
JOHN SCOTT,
JACK GREENBERG,
THURGOOD MARSHALL,
(Signed) ROBERT L. CARTER,
20 West 40th Street,
New York 18, New York,
Counsel for Plaintiffs-Appellants.

APPENDIX "A"

OPINION OF THE COURT

HUXMAN, Circuit Judge, delivered the opinion of the Court.

Chapter 72-1724 of the General Statutes of Kansas, 1949, relating to public schools in cities of the first class, so far as material, authorizes such cities to organize and maintain separate schools for the education of white and colored children in the grades below the high school grades. Pursuant to this authority, the City of Topeka, Kansas, a city of the first class, has established and maintains a segregated system of schools for the first six grades. It has established and maintains in the Topeka School District eighteen schools for white students and four schools for colored students.

The adult plaintiffs instituted this action for themselves, their minor children plaintiffs, and all other persons similarly situated for an interlocutory injunction, a permanent injunction, restraining the enforcement, operation and execution of the state statute and the segregation instituted thereunder by the school authorities of the City of Topeka and for a declaratory judgment declaring unconstitutional the state statute and the segregation set up thereunder by the school authorities of the City of Topeka.

As against the school district of Topeka they contend that the opportunities provided for the infant plaintiffs in the separate all negro schools are inferior to those provided white children in the all white schools; that the respects in which these opportunities are inferior include the physical facilities, curricula, teaching resources, student personnel services as well as all other services. As against both the state and the school district, they contend that apart from all other factors segregation in itself constitutes an inferiority in educational opportunities offered to negroes and that all of this is in violation of due process guaranteed them by the Fourteenth Amendment to the United States Constitution. In their answer both the state and the school district defend the constitutionality of the state law and in addition

the school district defends the segregation in its schools instituted thereunder.

We have found as a fact that the physical facilities, the curricula, courses of study, qualification of and quality of teachers, as well as other educational facilities in the two sets of schools are comparable. It is obvious that absolute equality of physical facilities is impossible of attainment in buildings that are erected at different times. So also absolute equality of subjects taught is impossible of maintenance when teachers are permitted to select books of their own choosing to use in teaching in addition to the prescribed courses of study. It is without dispute that the prescribed courses of study are identical in all of the Topeka Schools and that there is no discrimination in this respect. It is also clear in the record that the educational qualifications of the teachers in the colored schools are equal to those in the white schools and that in all other respects the educational facilities and services are comparable. It is obvious from the fact that there are only four colored schools as against eighteen white schools in the Topeka School District, that colored children in many instances are required to travel much greater distances than they would be required to travel could they attend a white school, and are required to travel much greater distances than white children are required to travel. The evidence, however, establishes that the school district transports colored children to and from school free of charge. No such service is furnished to white children. We conclude that in the maintenance and operation of the schools there is no willful, intentional or substantial discrimination in the matters referred to above between the colored and white schools. In fact, while plaintiffs' attorneys have not abandoned this contention, they did not give it great emphasis in their presentation before the court. They relied primarily upon the contention that segregation in and of itself without more violates their rights guaranteed by the Fourteenth Amendment.

This contention poses a question not free from difficulty. As a subordinate court in the federal judicial system, we seek the answer to this constitutional question in the decisions of the Supreme Court when it has spoken on the sub-

ject and do not substitute our own views for the declared law by the Supreme Court. The difficult question as always is to analyze the decisions and seek to ascertain the trend as revealed by the later decisions.

There are a great number of cases, both federal and state, that have dealt with the many phases of segregation. Since the question involves a construction and interpretation of the federal Constitution and the pronouncements of the Supreme Court, we will consider only those cases by the Supreme Court with respect to segregation in the schools. In the early case of Plessy v. Ferguson, 163 U. S. 537, the Supreme Court said:

> "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 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."

It is true as contended by plaintiffs that the Plessy case involved transportation and that the above quoted statement relating to schools was not essential to the decision of the question before the court and was therefore somewhat in the nature of dicta. But that the statement is considered more than dicta is evidenced by the treatment accorded it by those seeking to strike down segregation as well as by statements in subsequent decisions of the Supreme Court. On numerous occasions the Supreme Court has been asked

to overrule the Plessy case. This the Supreme Court has refused to do, on the sole ground that a decision of the question was not necessary to a disposal of the controversy presented. In the late case of Sweatt v. Painter, 339 U. S. 629, the Supreme Court again refused to review the Plessy case. The Court said:

> "Nor need we reach petitioner's contention that Plessy v. Ferguson should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation."

Gong Lum v. Rice, 275 U. S. 78, was a grade school segregation case. It involved the segregation law of Mississippi. Gong Lum was a Chinese child and, because of color, was required to attend the separate schools provided for colored children. The opinion of the court assumes that the educational facilities in the colored schools were adequate and equal to those of the white schools. Thus the court said: "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." In addition to numerous state decisions on the subject, the Supreme Court in support of its conclusions cited Plessy v. Ferguson, supra. The Court also pointed out that the question was the same no matter what the color of the class that was required to attend separate schools. Thus the Court said: Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we cannot think that the question is any different or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow race." The court held that the question of segregation was within the discretion of the state in regulating its public schools and did not conflict with the Fourteenth Amendment.

It is vigorously argued and not without some basis therefor that the later decisions of the Supreme Court in Mc-

Laurin v. Oklahoma, 339 U. S. 637, and Sweatt v. Painter, 339 U. S. 629, show a trend away from the Plessy and Lum cases. McLaurin v. Oklahoma arose under the segregation laws of Oklahoma. McLaurin, a colored student, applied for admission to the University of Oklahoma in order to pursue studies leading to a doctorate degree in education. He was denied admission solely because he was a negro. After litigation in the courts, which need not be reviewed herein, the legislature amended the statute permitting the admission of colored students to institutions of higher learning attended by white students, but providing that such instruction should be given on a segregated basis; that the instruction be given in separate class rooms or at separate times. In compliance with this statute McLaurin was admitted to the university but was required to sit at a separate desk in the ante room adjoining the class room; to sit at a designated desk on the mezzanine floor of the library; and to sit at a designated table and eat at a different time from the other students in the school cafeteria. These restrictions were held to violate his rights under the federal Constitution. The Supreme Court held that such treatment handicapped the student in his pursuit of effective graduate instruction.[9]

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[9] The court said: "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 received. 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 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. * * * 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."

In Sweatt v. Painter, 339 U.S. 629, petitioner, a colored student, filed an application for admission to the University of Texas Law School. His application was rejected solely on the ground that he was a negro. In its opinion the Supreme Court stressed the educational benefits from commingling with white students. The court concluded by stating: "We cannot conclude that the education offered petitioner in a separate school is substantially equal to that which he would receive if admitted to the University of Texas Law School." If segregation within a school as in the McLaurin case is a denial of due process, it is difficult to see why segregation in separate schools would not result in the same denial. Or if the denial of the right to commingle with the majority group in higher institutions of learning as in the Sweatt case and gain the educational advantages resulting therefrom, is lack of due process, it is difficult to see why such denial would not result in the same lack of due process if practiced in the lower grades.

It must however be remembered that in both of these cases the Supreme Court made it clear that it was confining itself to answering the one specific question, namely: "To what extent does the equal protection clause limit the power of a state to distinguish between students of different races in professional and graduate education in a state university?", and that the Supreme Court refused to review the Plessy case because that question was not essential to a decision of the controversy in the case.

We are accordingly of the view that the Plessy and Lum cases, supra, have not been overruled and that they still presently are authority for the maintenance of a segregated school system in the lower grades.

The prayer for relief will be denied and judgment will be entered for defendants for costs.

Entered August 3, 1951.

Findings of Fact

I

This is a class action in which plaintiffs seek a decree, declaring Section 72-1724 of the General Statutes of Kansas 1949 to be unconstitutional, insofar as it empowers the Board of Education of the City of Topeka "to organize and maintain separate schools for the education of white and colored children" and an injunction restraining the enforcement, operation and execution of that portion of the statute and of the segregation instituted thereunder by the School Board.

II

This suit arises under the Constitution of the United States and involves more than $3,000 exclusive of interest and costs. It is also a civil action to redress an alleged deprivation, under color of State law, of a right, privilege or immunity secured by the Constitution of the United States providing for equal rights of citizens and to have the court declare the rights and other legal relations of the interested parties. The Court has jurisdiction of the subject matter and of the parties to the action.

III

Pursuant to statutory authority contained in Section 72-1724 of the General Statutes of Kansas 1949, the City of Topeka, Kansas, a city of the first class, has established and maintains a segregated system for the first six grades. It has established and maintains in the Topeka School District, eighteen schools for white children and four for colored children, the latter being located in neighborhoods where the population is predominantly colored. The City of Topeka is one school district. The colored children may attend any one of the four schools established for them, the choice being made either by the children or by their parents.

IV

There is no material difference in the physical facilities in the colored schools and in the white schools and such facilities in the colored schools are not inferior in any material respect to those in the white schools.

V

The educational qualifications of the teachers and the quality of instruction in the colored schools are not inferior to and are comparable to those of the white schools.

VI

The courses of study prescribed by the State law are taught in both the colored schools and in the white schools. The prescribed courses of study are identical in both classes of schools.

VII

Transportation to and from school is furnished colored children in the segregated schools without cost to the children or to their parents. No such transportation is furnished to the white children in the segregated schools.

VIII

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.

IX

The court finds as facts the stipulated facts and those agreed upon by counsel at the pre-trial and during the course of the trial.

Conclusions of Law

I

This court has jurisdiction of the subject matter and of the parties to the action.[10]

II

We conclude that no discrimination is practiced against plaintiffs in the colored schools set apart for them because of the nature of the physical characteristics of the buildings, the equipment, the curricula, quality of instructors and instruction or school services furnished and that they are denied no constitutional rights or privileges by reason of any of these matters.

III

Plessy v. Ferguson, 163 U.S. 537, and Gong Lum v. Rice, 275 U.S. 78, upholds the constitutionality of a legally segregated school system in the lower grades and no denial of due process results from the maintenance of such a segregated system of schools absent discrimination in the maintenance of the segregated schools. We conclude that the above cited cases have not been overruled by the later cases of McLaurin v. Oklahoma, 339 U.S. 637, and Sweatt v. Painter, 339 U.S. 629.

IV

The only question in the case under the record is whether legal segregation in and of itself without more constitutes denial of due process. We are of the view that under the above decisions of the Supreme Court the answer must be in the negative. We accordingly conclude that plaintiffs have suffered no denial of due process by virtue of the manner in which the segregated school system of Topeka, Kan-

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[10] Title 28 U.S.C. § 1331; idem §1343; idem Ch. 151. Title 8 U.S.C. Ch. 3. Title 28 U.S.C. Ch. 155.

sas, is being operated. The relief sought is therefore denied. Judgment will be entered for defendants for costs.

WALTER A. HUXMAN,
Circuit Judge;
ARTHUR J. MELLOTT,
Chief District Judge;
DELMAS C. HILL,
District Judge.

Entered August 3, 1951.

Decree

Now, on this 3rd day of August, 1951 this cause comes regularly on for hearing before the undersigned Judges, constituting a three-judge court duly convened pursuant to the provisions of Title 28 U.S.C. 2281 and 2284.

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.

NOW, THEREFORE, IT IS BY THE COURT, considered, ordered, adjudged and decreed that judgment be and it hereby is entered in favor of the defendants.

WALTER A. HUXMAN,
Circuit Judge;
ARTHUR J. MELLOTT,
Chief District Judge;
DELMAS C. HILL,
District Judge.

Entered August 3, 1951.

APPENDIX "B"

General Statutes of Kansas, 1949

72-1724—Public Schools in Cities of First Class.—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, Kan.; 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.''

76-307—Tuition and fees; persons not debarred on account of age, race, sex or religion.— . . . No person shall be debarred from membership of the university on account of age, race, sex, or religion.

12-713—Race discriminations.—Nothing herein contained shall be construed as authorizing the governing body to discriminate against any person by reason of race or color.

21-2424—Denying civil rights on account of race or color; penalty—That if any of the regents or trustees of any state university, college, or other school of public instruction, or the state superintendent, or the owner or owners, agents, trustees or managers in charge of any inn, hotel or boarding house, or any place of entertainment or amusement for which a license is required by any of the municipal authorities of this state, or the owner or owners or person or persons in charge of any steamboat, railroad, stage coach, omnibus, streetcar, or any other means of public carriage for persons or freight within the state, shall make any distinction on account of race, color, or previous condition of servitude, the person so offending shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction shall be fined in any sum not less than ten ($10.00) nor more than one thousand ($1,000.00) dollars, and shall also be liable to damages in any court of competent jurisdiction to the person or persons injured thereby.

21-2461—Denying public work employment on account of race or color.—No person a citizen in the United States

shall be refused or denied employment in any capacity on the ground of race or color, nor be discriminated against in any manner by reason thereof, in connection with any public work, or with the contracting for or the performance of any work, labor or service of any kind on any public work by or on behalf of the state of Kansas, or of any department, bureau, commission, board or official thereof, or by or on behalf of any county, city, township, school district or other municipality of said state.

21-2462—The provisions of this act shall apply to and become a part of any contract hereafter made by or on behalf of the state, or of any department, bureau, commission, board or official thereof, or by or on behalf of any county, city, township, school district, or other municipality of said state, with any corporation, association or person or persons, which may involve the employment of laborers, workmen, or mechanics on any public work; and shall apply to contractors, sub-contractors, or other persons doing or contracting to do the whole or a part of any public work contemplated by said contract.

21-2463—Any officer of the state of Kansas or of any county, city, township, school district, or other municipality, or any person acting under or for such officer, or any contractor, sub-contractor, or other person violating the provisions of this act shall for each offense be punished by fine of not less than fifty ($50.00) dollars nor more than one thousand ($1,000.00) dollars, or by imprisonment of not more than six (6) months or by both fine and imprisonment.

House Joint Resolution No. 1—Approved April 5, 1949

A joint Resolution creating a temporary commission to study and make a report on acts of employment discrimination against citizens because of race, creed, color, religion or national origin, prescribing its powers and duties and making appropriations therefor.

Whereas, It has been brought to the attention of the legislature of the State of Kansas that probable cause exists for the belief that acts of discrimination in employment are

being perpetrated against some of the citizens of the United States because of race, creed, color, religion or national origin; and

Whereas, The state of Kansas is traditionally and historically opposed to discrimination against any of its citizens in employment; and

Whereas, It is the public policy of this state that all of the citizens of this state are entitled to work without restrictions or limitations based on race, religion, creed or national origin; and

Whereas,The legislature does not have sufficient information upon which to enact adequate and proper laws and there is a difference of opinion as to whether the alleged discriminatory employment conditions actually exist: Now, therefore

Be it resolved by the House of Representatives of the State of Kansas, the Senate agreeing thereto:

§ 1. There is hereby created a temporary commission, hereinafter referred to as the commission, to be known as the "Kansas commission against employment discrimination" consisting of five (5) members to be appointed by the governor.

§ 2. The commission shall organize and elect a chairman, vice-chairman and secretary on or before June 1, 1949, and is hereby authorized to hold such meeting at such times and places within this state as may be necessary to carry out the provisions of this resolution. The commission shall complete its duties as speedily as possible and shall submit its report to the governor and to the members of the Kansas legislative council on or before October 15, 1940.

§ 3. The commission shall have full power and authority to receive and investigate complaints and to hold hearings relative to alleged discrimination in employment of persons because of race, creed, color or national origin.

§ 4. The commission is hereby authorized to employ such clerical and other assistants as may be necessary to enable

it to properly carry out the provisions of this resolution and to fix their compensation.

§ 5. The members of the commission shall receive as compensation for their services the sum of fifteen dollars ($15) per diem and their actual and necessary expenses for time actually spent in carrying out the provisions of this resolution: *Provided,* That in no case shall any member receive more than a total of five hundred dollars ($500) as per diem allowance.

§ 6. The commission shall have all the powers of the legislative committee as provided by law, and shall have power to do all things necessary to carry out the intent and purposes of this resolution and the preamble thereto.

§ 7. There is hereby appropriated to the Kansas commission against discrimination, out of any moneys in the state treasury not otherwise appropriated, the sum of five hundred dollars ($500) for the fiscal year ending June 30, 1949, and the sum of three thousand five hundred dollars ($3,500) for the fiscal year ending June 30, 1950, for the purpose of carrying out the provisions of this resolution: *Provided,* That any unexpended and unencumbered balances of said appropriations as of June 30, 1949, and June 30, 1950, respectively, are hereby reappropriated for the same purposes for the next succeeding fiscal year.

§ 8. The auditor of state shall draw his warrants upon the state treasurer for the purposes provided for in this resolution upon duly itemized vouchers, executed as now or may hereafter be provided for by law, assigned in his office and approved by the chairman of the Kansas commission against discrimination.

§ 9. This act shall take effect and be in force from and after its publication in the official state paper.

Filed October 1, 1951.