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Segregation in Schools of Higher Learning

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join a union which was designed to bring these things about in the field of international copyright protection.

At the present time, an extensive study of international copyright problems is being made by UNESCO's copyright division, an organ created by the United Nations. A conference was held in Paris in October, 1949, at which time questionnaires were sent out to all countries of the world requesting information on present problems and possible solutions thereto in the international protection of copyright.⁴³ The replies to these questions are to be studied by a Committee of Experts which will meet in the fall of 1950 and recommend further steps to be taken on the basis of the government's replies.⁴⁴

The past record and future plans of this organization should be a note of encouragement to those who desire to see the law of international copyright improved.

SEGREGATION IN SCHOOLS OF HIGHER LEARNING

This note is confined principally to those controversies which come about in state controlled schools of higher or graduate learning and does not purport to deal with all problems arising out of segregation of races in all public educational institutions.

There are four problems facing a state which seeks to maintain segregation in schools of higher learning. (1) 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,¹ (2) What constitutes "equal facilities" in such schools, (3) What treatment must be afforded a Negro attending a school with white students, (4) Does a colored person have an absolute right to attend a school which was established for the exclusive use of white students?

(1) In 1938 the United States Supreme Court had the first of these issues squarely before it.² The curators of the State University of Missouri had refused the petitioner, a Negro, admission to the University of Missouri School of Law solely because of his race. As an alternative to admission, the state had given authority to the

43. UNESCO'S COPYRIGHT BULLETIN, Vol. 2, No. 4, p. 16 (1949).

44. *Ibid.*, at p. 20.

1. Such was the issue as stated by Justice Vinson in the recent case of *Sweatt v. Painter*, 94 L. Ed. 783 (1950).

2. *Gaines v. Canada*, 305 U.S. 337 (1938).

curators to arrange for attendance in schools in any adjacent State to pursue any studies not offered at Lincoln University, the Negro school.³ In an opinion delivered by Justice Hughes it was stated that such action by the curators must be regarded as action by the State of Missouri. After determining this, it was further held that a state which did not maintain a law school for Negroes and which excluded Negroes from a State maintained school can be said to have discriminated against Negroes in violation of the Fourteenth Amendment, even though it provides for tuition to schools outside the state.

In 1948 the Supreme Court again had occasion to consider this question.⁴ In this case the applicant had been denied admission to the School of Law of Oklahoma University solely because she was a Negress. In a Per Curiam opinion it was said:

"The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although during the same period many white applicants have been afforded legal education by the state. The state must provide it for her in conformity with the Equal Protection Clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."⁵

The problem was raised again before the Supreme Court in June, 1950.⁶ The State of Texas had established a separate law school for Negroes but the petitioner had refused to enter it claiming the facilities were unequal to those afforded white students in Texas. The Supreme Court, relying heavily on the *Gaines* and *Sipuel* cases after first determining as a matter of fact that the facilities offered to the petitioner were not equal to those offered white students said that the petitioner may claim his full constitutional right which was legal education equivalent to that offered by the State to students of other races. Since such education was not available to him in a separate law school he was allowed to enter the white school.

In the above cases the court has rejected the contention that the limited demand for legal education among Negroes relieves the state from establishing a law school for Negroes,⁷ and the court has also said it is not necessary first to bring an action to have a law

3. The tuition was to be paid until Lincoln University could establish the School of Law for Negroes. However it was in the curators' discretion as to when this was to be done.

4. *Sipuel v. University of Oklahoma*, 332 U.S. 631 (1948).

5. For a criticism of this case see 10 GA. BAR J., 346.

6. See note 1, *supra*.

7. See note 2, *supra*.

school established for members of the colored race before seeking admission in the school reserved for whites.⁸

Therefore, in answering the first question posed, it must be concluded that the state must provide legal education within the state as equally to one race as it does for any other. Should a Negro be refused admission to a school operated solely for whites, he may claim his constitutional right to equal educational facilities and either force the state to establish such a school or compel them to admit him to the white school.

The reasoning and results of the foregoing cases are neither shocking nor are such holdings unexpected. Not only in the field of education have the federal courts said that the Negro must be provided equal facilities or equal privileges, but also it has been held that interstate carriers are bound to provide for colored passengers, holding first class tickets, accommodations precisely equal in all respects to those provided for white passengers holding similar tickets.⁹ The denial to colored citizens of the right and privilege of being empaneled as jurors because of their color, though qualified in all other respects, is prohibited by the Fourteenth Amendment.¹⁰ Other civil rights intended to be protected by the Fourteenth Amendment are the rights to acquire, enjoy, own, and dispose of property. Thus, it is observed that a state statute or local ordinance imposing restrictions based on color or race, on the right to acquire or occupy property violates the Equal Protection Clause.¹¹ The right of Negroes to vote has also been established beyond doubt.¹²

It can no longer be doubted that the Negro is entitled to equal protection of the law and to equal facilities provided for other citizens of the state, *BUT*

WHAT ARE EQUAL FACILITIES?

(2) It has been said that while the state is under no compulsion to establish *any* public schools, yet if such schools are once estab-

8. See note 4, *supra*.

9. *Gray v. Cincinnati Sou. Ry. Co.*, 11 Fed. 683 (1882); *Murphy v. Western & A. R. R.*, 23 Fed. 637 (1885); *Houck v. Sou. Pac. Ry. Co.*, 38 Fed. 226 (1888).

10. See *Strauder v. W. Va.*, 100 U.S. 303, 308 (1879). This decision is followed in many other later cases.

11. See *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948).

12. See *Smith v. Allright*, 321 U.S. 649 (1943); *Elmore v. Rice*, 72 Fed. Supp. 516, *aff'd* 165 Fed. 2d 387 (1947). It must be remembered that the Constitution does not give the right to vote but only prevents the state from denying the person the right to vote because of "race, color or previous condition of servitude".

lished, the rights of whites and Negroes alike are measured by the test of equality in privileges and opportunities.¹³

The size of the school building has been held to be of little consequence. Yet, it has been held that the constitutional provision had been violated where the value of the colored school was one-ninth that of the white school, even though it accommodated one-third more students. From these cases¹⁴ it seems that equal facilities are provided if there is a reasonable proportion between the size of the white and colored school in relation to the number of students to be provided for.

Other cases have held the length of terms, number and qualification of teachers, and the course of study available are factors which must be considered in determining if equal facilities have been provided.¹⁵

The opinion of the courts has been that remoteness or inaccessibility of colored schools has not alone constituted discrimination.¹⁶ However, it has been held that, where the colored school was located in a dangerous vicinity and students were imperiled by having to cross railway tracks and had to endure other hardships to go to and from school, there had not been equal facilities provided by the state.¹⁷

In the recent *Sweatt* case, in determining whether or not equal facilities had been provided for the petitioner, the court considered equality in the size of the faculty, variety of courses, opportunity for specialization, size of the student body, scope of library, availability of law review, and similar activities. What was more important (the Court said) was that the law school provided for the white students possessed to a greater degree those qualities which made for greater law schools, to wit, reputation of faculty, experience of administration, position and influence of alumni, standing in the community, traditions and prestige. Moreover, it was said that should the petitioner be denied admission he would be excluded from a substantial segment of society with which he would be working in later years and would thus be deprived of equal facilities.

The Court has thus stated the tests to be met in providing substantially equal facilities and determined that not only must the phy-

13. *Ward v. Flood*, 48 Cal. 36 (1874).

14. *Reynolds v. Board of Education*, 66 Kan. 672, 72 Pac. 274 (1903); *Lowery v. School Trustees*, 140 N.C. 33, 52 S.E. 267 (1905); *Jones v. Board of Education*, 90 Okla. 233, 216 Pac. 896 (1923). All these cases dealt with lower grade, public schools.

15. See 103 A.L.R. 713 for a collection of cases on these points.

16. *Lehew v. Burmell*, 103 Mo. 546, 15 S.W. 765 (1890); *Lewis v. Board of Education*, 7 Ohio Dec. Reprint 129, (1876); *Wright v. Board of education*, 129 Kan. 852, 284 Pac. 363 (1930).

17. *Williams v. Board of Education*, 79 Kan. 202, 99 Pac. 216 (1908).

sical make up or plant be equal, but that all the intangible qualities connected with a graduate school must likewise be equal.

Even with the limitation that there be substantial equality it is difficult to see how a state may establish separate schools for Negroes and maintain the standards of equality as promulgated by the doctrine in the *Sweatt* case. Theoretically it may sound as if it could be reached, but actually it is impossible. Traditions and prestige are time-honored and are a product of age. The reputation of a faculty is not measured so much by the caliber of the present professors but by their position of years past. If a student of the law must associate, while in school, with those persons with whom he will come in contact later in life, he could only do it within the same school. It is true that the Supreme Court has now said what constitutes equal facilities, but in the opinion of the writer the test laid down in the *Sweatt* case can never be satisfied and that there can never be even substantial equal facilities in two separate schools. It must be remembered, however, that the Supreme Court has *never* held "equality of facilities" to mean "identity of facilities".

Assuming then, that such conditions cannot be met and a Negro compels the state to admit him to a school exclusively reserved theretofore for the use of white students, the state is then faced with the third problem.

WHAT TREATMENT MUST THE STATE AFFORD A COLORED PERSON ATTENDING A WHITE SCHOOL?

(3) In the recent *McLaurin* case¹⁸ the Supreme Court answered this question. In this case the statutes of Oklahoma had been amended to allow Negroes to attend graduate schools with white students on a "segregated basis" in certain instances. McLaurin's admission was made subject to such rules and regulations, as to segregation, as the President of the University considered necessary in order to afford him substantially equal educational opportunities as the other students.

McLaurin was compelled to sit apart from other students, both in classes and in the library, to eat at a different time, etc. The Supreme Court in deciding the case said that this action by the school which produced inequalities was state action which denied petitioner the right to equal education. Although the Court could not prevent any individual student or a group of students from ostracising or discriminating against McLaurin, the Court removed the restric-

18. *McLaurin v. University of Oklahoma*, 94 L. Ed. 787 (1950). This decision was handed down on the same date as the *Sweatt* case.

tions imposed by the State of Oklahoma and hence allowed him the opportunity to commingle with the white students and secure their acceptance on his own merits.

Thus, it may be concluded that once a Negro is admitted to a white school the state cannot set up rules which would deprive him of the opportunity to mingle with other students and to share equally the facilities of the school at the same time and place.

(4) The last and by far the most serious question squarely presents the issue of segregation. In all of the foregoing cases our Supreme Court has artfully avoided meeting this issue. This issue was made the basis of the arguments in the *Sweatt* case but the Court refused to pass on the question saying they would adhere to the policy of only deciding on those issues necessary to the determination of the case before it.¹⁹ It is doubtful, in the opinion of the writer, if the Court would ever pass on the constitutionality of segregation so long as they are able to decide all such cases on the basis of whether or not equal facilities have been provided. By applying the tests of the *Sweatt* case, the Court could easily enforce non-segregation without specifically saying so.

Assuming that a Negro petitioned for admission to a white law school and admission was denied, and the state court found as a matter of fact that the facilities offered to the petitioner were equal to those in the white school. If there was no appeal from this finding of fact but the Negro does appeal asserting that as a matter of law he has a right to enter the white school the Supreme Court would have the issue squarely before it and might well result in an opinion on this vital question.

It must be remembered that the Constitution neither prohibits nor sanctions segregation. The cases which the Supreme Court has decided on this point hold that segregation as such is not prohibited so long as equal facilities are provided. The first of these cases was decided in 1896.²⁰ Here it was held that a state statute which provided for separate railway coaches for white and colored passengers and the assignment of passengers to their respective coaches did not deprive a colored passenger of any rights under the Fourteenth Amendment. This same result was reached in 1914²¹ when the Court followed the *Plessy* case holding that it was not an infraction of the Fourteenth Amendment for a state to require separate but equal accommodations for the two races. The question of whether a Chinese citizen is denied equal protection when he is

19. *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947).

20. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

21. *McCabe v. Atkinson T. & S. F. Ry. Co.*, 235 U.S. 151 (1914).

classed among colored races and is denied the right to enter the white school was presented to the Court in 1927.²² It was decided here again that such was not an infringement of the Fourteenth Amendment where the facilities offered were equal to those of the white students. In 1950 the Supreme Court held that a railroad engaged in Interstate Commerce could not subject any particular person to undue or unreasonable prejudice or disadvantage whatsoever.²³ This case concerned the fact that the railway had provided in the diner, only one table for the use of Negroes. Here again the Court did not decide that segregation in itself should be prohibited but only that such service as was rendered by the railway did not constitute equal facilities. It was said in this case that where a dining car is available to passengers holding tickets entitling them to use it, each passenger is equally entitled to its facilities in *accordance with reasonable regulations*. The regulations being imposed in this case were found to deny the Negro of the right to share the facilities equally.

Only the future can reveal if the states will be able to meet the standards of equality as laid down by the Supreme Court, and at the same time continue to follow the dictates of public policy in maintaining separate schools for the two races. The Florida Supreme Court has recently upheld the validity of a state plan to meet this goal.²⁴

In an unanimous decision, the court upheld a plan of the state board of control to enroll all Negro students at the Florida A. and M. College for Negroes and give those desiring courses not offered at the Negro school temporary instruction at the white institutions.

In his decision Justice Sebring stated the present policy of sending Negroes at state expense to out-of-state schools for courses not offered at A. and M. does not provide equal opportunities as required by the federal constitution. He further said the plan to provide temporary instruction at the white institutions until 'adequate and comparable facilities' are offered at the Negro institution meets all requirements of the federal law.²⁵

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22. *Gong Lum v. Rice*, 275 U.S. 78 (1927).

23. *Henderson v. U.S.A.*, 94 L. Ed. 790 (1950).

24. Decided by Florida Supreme Court August 1, 1950.

25. However, in the latter part of July, 1950 the Board of Visitors, of the University of Virginia refused admission to its law graduate school to an applicant, solely because he was a Negro, basing such action on the fact that the Constitution of Virginia prohibited his attendance in such a school.