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Dual Education v. Constitutional Guarantee

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It is submitted that directors should be required to make full disclosure of their conflicting interests and that such information be available to the stockholders and creditors of the corporation, with a statutory penalty for noncompliance.

Another remedy is suggested in the case of *Simonson v. Helburn*,³⁹ where a corporation conducting theatrical plays permitted administrative directors to engage in personal ventures, provided the question of competition with the corporation was first passed on by an umpire. The court held this a valid and commendable device to protect both director and corporation before any harm is done. Conflicting interests should be brought into the open; for it is difficult to perceive the value of secrecy in promoting business efficiency.

Corporation law does not exist in the abstract; the word corporation ". . . has a variable, not a constant, meaning. The rights and obligations that are comprised within the compass of the word [corporation] change not only with time, but with locality."⁴⁰ The corporate form of enterprise is designed to serve the community at large and not a small group of entrepreneurs. The expansion of our economy has produced an entirely new corporate structure,⁴¹ and the law must adjust to the complexities of that economy and the new corporate structure incident thereto to protect the interests of all those involved. Only in this way will it perpetuate the efficiency which is the cornerstone of our material strength.



DUAL EDUCATION V. CONSTITUTIONAL GUARANTEE

Introduction

When Chief Justice Taney wrote his celebrated opinion in the famous *Dred Scott* decision,¹ he argued that the foundation of the American State had not included the Negro as a participating element or as a beneficiary of its privileges.² Union victory in the Civil War and the subsequent adoption of constitutional amendments purporting to give the Negro equal status with the whites have destroyed the legal efficacy of that ruling,³ but in our southern states,

³⁹ 198 Misc. 430, 97 N. Y. S. 2d 406 (Sup. Ct. 1950).

⁴⁰ *Farmers' Loan & Trust Co. v. Pierson*, 130 Misc. 110, 119, 222 N. Y. Supp. 532, 544 (Sup. Ct. 1927).

⁴¹ For a detailed analysis of the economic aspects of this problem, see BERLE & MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1933).

¹ *Scott v. Sandford*, 19 How. 393 (U. S. 1856).

² *Id.* at 407; BOND, *EDUCATION OF THE NEGRO IN THE AMERICAN SOCIAL ORDER* 3 (1934).

³ This is not to imply that the *Dred Scott* decision no longer has value as a legal precedent. See MOTT, *DUE PROCESS OF LAW* 329 (1926).

its spirit has continued to live.⁴ The equality which those amendments conferred in theory has proved illusory in fact, and so the struggle for equal status continues unabated. When the conflict has reached the courts, it has generally centered about the equal protection and due process clauses of the Fourteenth Amendment.⁵ Most frequently, the disputes have involved one of four specific problems: (1) the validity of real covenants restricting the alienation of land to Negroes;⁶ (2) the right of the Negro to vote in primary elections;⁷ (3) the right of Negroes to be tried by juries from which members of their race have not been systematically excluded;⁸ and (4) the validity of state laws which require segregation of the races in tax-supported schools.⁹

A general examination of each of the enumerated problems, or even a detailed treatment of a particular one of them, is not within the intended scope of this writing. Instead, it is proposed to present

⁴ A good statement of the views of the moderate Southerner is that made by four Southern members of the President's Commission on Higher Education. The majority report of the committee had recommended abolition of segregation in public schools. The Southern members dissented: "The undersigned wish to record their dissent from the Commission's pronouncements on 'segregation,' especially as these pronouncements are related to education in the South. We recognize that many conditions affect adversely the lives of our Negro citizens, and that gross inequality of opportunity, economic and educational, is a fact. We are concerned that as rapidly as possible conditions should be improved, inequalities removed, and greater opportunity provided for all our people. But we believe that efforts towards these ends must, in the South, be made within the established patterns of social relationships, which require separate institutions for whites and Negroes. We believe that pronouncements such as these of the Commission on the question of segregation jeopardize these efforts, impede progress, and threaten tragedy to the people of the South, both white and Negro. We recognize the high purpose and the theoretical idealism of the Commission's recommendations. But a doctrinaire position which ignores the facts of history and the realities of the present is not one that will contribute constructively to the solution of difficult problems of human relationships." 2 PRESIDENT'S COMMISSION ON HIGHER EDUCATION, HIGHER EDUCATION FOR AMERICAN DEMOCRACY 29 (1947), quoted in Note, 1 VAND. L. REV. 403, 405 n. 12 (1948).

⁵ "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. CONST. AMEND. XIV, § 1. (Italics added.)

⁶ See *Shelley v. Kraemer*, 334 U. S. 1 (1948) (covenants are valid, but may not be judicially enforced). Compare *Weiss v. Leaton*, 225 S. W. 2d 127 (Mo. 1949). Cf. *Buchanan v. Warley*, 245 U. S. 60 (1917).

⁷ See *Smith v. Allwright*, 321 U. S. 649 (1944); *Rice v. Elmore*, 165 F. 2d 387 (4th Cir. 1947), cert. denied, 333 U. S. 875 (1948).

⁸ *Strauder v. West Virginia*, 100 U. S. 303 (1879); *Patton v. Mississippi*, 332 U. S. 463 (1947).

⁹ See *McLaurin v. Oklahoma*, 339 U. S. 637 (1950); *Sweatt v. Painter*, 339 U. S. 629 (1950); *Sipuel v. Board of Regents*, 332 U. S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938); *Gong Lum v. Rice*, 275 U. S. 78 (1927); *Cumming v. Board of Education*, 175 U. S. 528 (1899).

a survey and analysis of the principal judicial solutions which have been offered in answer to the challenging constitutional questions posed by the maintenance of segregated schools in our southern states.¹⁰

Importance of the Problem

The education of its citizens has long been recognized as one of the established functions of government. In the United States, responsibility for the proper performance of this function has generally been accepted and traditionally is discharged by the individual states. Thus, state governments have established and maintain educational facilities, which provide training from the elementary through the graduate, and sometimes professional, school levels. Moreover, it is usually required that all citizens, during the greater period of their minority, either attend the public schools or obtain a private education.¹¹

But though the function of education has been assumed by the states, individually, the educational development of its youth is nevertheless a matter of vital concern to the family and the Nation.¹² Also of vital concern, is the practice, prevalent in many southern states, of providing a dual system of schools and a double standard of education predicated upon the race or color of the persons attending.¹³

Formerly, it was held that public education was in the nature of a state bounty and that the state might limit or qualify that bounty at its discretion.¹⁴ But since the adoption of the Fourteenth Amendment, segregation laws have generally been sustained only in those cases where the facilities offered to Negro students were substantially equal to those afforded persons of other races.¹⁵

Separate But Equal Facilities

That segregation, if accompanied by the maintenance of substantially equal facilities for the separate races, is not a violation of the Equal Protection Clause was established by the Supreme Court in

¹⁰ For a general discussion of these problems, see Waite, *The Negro in the Supreme Court*, 30 MINN. L. REV. 219 (1946); Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COL. L. REV. 131 (1950) (excellent historical treatment). See also Notes, 1 VAND. L. REV. 403 (1948), 56 YALE L. J. 1059 (1947).

¹¹ For a table of state compulsory attendance laws, see MARKE, *EDUCATIONAL LAW* 95 (1949).

¹² See REPORT OF BOARD OF OFFICERS UTILIZATION OF NEGRO MANPOWER IN THE POST-WAR ARMY (1946).

¹³ Seventeen states require segregation of the races in schools. In some instances, the requirement is a constitutional one; in others it is statutory, and in many states it is both. MARKE, *op. cit. supra* note 11, at 18.

¹⁴ See *Lewis v. Henley*, 2 Ind. 332 (1850) (by implication).

¹⁵ See note 9 *supra*.

Plessy v. Ferguson.¹⁶ In that case, the Court sustained the validity of a Louisiana statute which called for equal but separate accommodations for the white and colored races on intrastate passenger trains. The Court reasoned that the compulsory segregation of the races did not imply the inferiority of either group to the other,¹⁷ and hence was not violative of the Equal Protection Clause.

Although it did not involve the question, the *Plessy* case has become authority for the proposition that segregation of the races in tax-supported schools is not per se unconstitutional.¹⁸ Applying the principle there laid down that separate but equal facilities will suffice to comply with the mandate of the Fourteenth Amendment, state courts have repeatedly sustained laws which require the separation of Negro and white pupils in public schools.¹⁹ However, where the state has not itself authorized separate schools for colored children, it has been held that a school board has no right to establish them, and exclude such children from the other schools.²⁰

The Supreme Court has never ruled squarely on the constitutionality of segregation in public schools, but by implication, it has given its approval to the application of the "separate but equal" doctrine to such cases. Thus, in *Gong Lum v. Rice*,²¹ the Court sustained a Mississippi school board in its ruling that a child of Chinese ancestry belonged to the "colored" race for purposes of education.²² Although the validity of segregation was not in issue,²³ the Court assumed its constitutionality, and in broad terms, established a precedent which has proved a major stumbling block for the opponents of segregation in education.²⁴ Again, in *Cumming v. Board of Edu-*

¹⁶ 163 U. S. 537 (1896).

¹⁷ "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, . . ." *Id.* at 544. "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.* at 551.

¹⁸ Its authority for this latter application stems from the following dictum appearing in the case: "The most common instance of this [segregation] 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." *Id.* at 544.

¹⁹ The cases are collected in Note, 103 A. L. R. 713 (1936); see also 5 R. C. L. 595 (1914).

²⁰ *People ex rel. Longress v. Board of Education*, 101 Ill. 308 (1882); *Knox v. Board of Education*, 45 Kan. 152, 25 Pac. 616 (1891).

²¹ 275 U. S. 78 (1927).

²² *Rice v. Gong Lum*, 139 Miss. 760, 104 So. 105 (1925).

²³ Indeed, petitioner's counsel argued that race may reasonably be used as a basis for classification for purposes of education. See summary of argument, *Gong Lum v. Rice*, 275 U. S. 78-79 (1927).

²⁴ Consider the language of the federal court for the Eastern District of South Carolina in the recent case of *Briggs v. Elliott*, 98 F. Supp. 529 (E. D. S. C. 1951): "Directly in point and absolutely controlling upon us so long

cation,²⁵ an injunction was denied, where the prayer demanded that school officials be restrained from continuing in operation a high school for whites without reopening a high school for Negroes which had been shut down. In still another case,²⁶ the Court sustained the conviction of an unincorporated private school for the violation of a segregated education statute. Thus, while the Court has never expressly approved the application of the separate but equal doctrine to segregated schools, it has repeatedly ignored opportunities to condemn the practice.

It has been charged that ". . . public schools 'separate but equal' in theory are in fact and in practical administration consistently unequal and discriminatory."²⁷ Assuming for the moment that "separate but equal" facilities in education will suffice to comply with the requirements of the Fourteenth Amendment, the question arises: what is meant by "equal" facilities?

The answer to this question has been pondered by both state and federal courts for over half a century; indeed, the judiciary began the task of defining equal facilities even before the *Plessy* case established such as the criteria for constitutional validity.²⁸

Generally, it has been held that the rule that separate educational facilities must be equal does not require that school buildings be identical in size or value.²⁹ Nor does it matter that attendance at the segregated school will require the Negro child to travel a greater distance than white children.³⁰ But where the school for Negro children is so located that access to it requires the child to travel a difficult or dangerous route, it has been held that substantially equal facilities were not provided.³¹

Ordinarily it is required, in theory at least, that a proportionate number of teachers, possessing substantially the same qualifications, be assigned to instruct in the segregated schools.³² Similarly, it is said that the length of the academic term should be approximately the same in both the schools maintained for colored children and those

as it stands unreversed by the Supreme Court is *Gong Lum v. Rice*. . . . Although attempt is made to distinguish this case, it cannot be distinguished. The question as to the validity of segregation in the public schools on the ground of race was squarely raised, the Fourteenth Amendment was relied upon as forbidding segregation and the issue was squarely met by the Court." *Id.* at 532. See *Brown v. Board of Education*, 98 F. Supp. 797, 799 (D. Kan. 1951).

²⁵ 175 U. S. 528 (1899).

²⁶ *Berea College v. Kentucky*, 211 U. S. 45 (1908).

²⁷ From relator's brief, *Sweatt v. Painter*, 210 S. W. 2d 442, 444 (1948).

²⁸ See *Roberts v. City of Boston*, 5 Cush. 198 (Mass. 1849); *Lehew v. Brummell*, 103 Mo. 546, 15 S. W. 765 (1890).

²⁹ *Reynolds v. Board of Education*, 66 Kan. 672, 72 Pac. 274 (1903).

³⁰ *Wright v. Board of Education*, 129 Kan. 852, 284 Pac. 363 (1930); *Lehew v. Brummell*, 103 Mo. 546, 15 S. W. 765 (1890).

³¹ *Williams v. Board of Education*, 79 Kan. 202, 99 Pac. 216 (1908).

³² See *Lowery v. School Trustees*, 140 N. C. 33, 52 S. E. 267 (1905); *Jones v. Board of Education*, 90 Okla. 233, 217 Pac. 400 (1923).

operated for white students.³³ Again, where a state statute authorized a municipality to levy an *ad valorem* tax for the benefit of the public schools, but directed that the tax collected of white persons be used to support white schools only, and that monies received from Negroes be used to sustain Negro education facilities only, such tax was said to be unconstitutional since its effect was to produce gross inequality of opportunity.³⁴

Many of these cases have arisen when Negroes have sought professional or graduate instruction in state-operated universities.³⁵ What the required standard of equality is in such cases was stated by the Supreme Court in *Missouri ex rel. Gaines v. Canada*³⁶ and in the more recent case of *Sipuel v. Board of Regents*.³⁷ In the *Gaines* case, the Court declared that the state's responsibility to provide all its citizens with equal opportunities for education was not fulfilled by a provision authorizing curators of the state university to arrange scholarships for Negro citizens of Missouri to attend law schools in adjacent states, when a law school for whites was an established part of the state university. In so ruling, the Court declared:

. . . the State was bound to furnish him *within its borders* facilities for legal education substantially equal to those which the state there afforded for persons of the white race, *whether or not* other negroes sought the same opportunity. (Italics supplied.)³⁸

To these requisites, there was added in the *Sipuel* case the requirement that such facilities be made available to Negroes, ". . . as soon as they are made available to applicants of other groups."³⁹

In two cases decided last year, the Supreme Court made substantial alterations in the traditional concept of equal facilities. In the first, *Sweatt v. Painter*,⁴⁰ the petitioner, a Negro, had applied for admission to the School of Law of the University of Texas. Admittedly, he possessed every essential qualification except that of race upon which sole ground his application was denied. In an action for a writ of mandamus to compel his admission, the trial court issued an interlocutory order allowing the State six months in which to establish a law school for Negroes with facilities substantially equal to those afforded whites. When a law school had been made available,⁴¹ the state court denied mandamus on the ground that substan-

³³ *Ibid.*

³⁴ *Claybrook v. Owensboro*, 16 Fed. 297 (D. Ky. 1883).

³⁵ See *McLaurin v. Oklahoma*, 339 U. S. 637 (1950); *Sweatt v. Painter*, 339 U. S. 629 (1950); *Sipuel v. Board of Regents*, 332 U. S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337 (1938).

³⁶ 305 U. S. 337 (1938).

³⁷ 332 U. S. 631 (1948).

³⁸ *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 351 (1938).

³⁹ *Sipuel v. Board of Regents*, 332 U. S. 631, 633 (1948).

⁴⁰ 339 U. S. 629 (1950).

⁴¹ "The University of Texas Law School has 16 full-time professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities,

tially equal facilities had been provided.⁴² The Supreme Court reversed on the ground that the facilities offered were not substantially equivalent. In its opinion, the Court made special reference to the qualities which make for "greatness" in a law school, and pointed out that equality in education demands more than substantially equal buildings, classroom furniture and appliances. It requires as well that there be equality in all the intangibles that come into play in preparing one for meeting life. In the words of the Court:

What is more important, the University of Texas Law School possesses to a far greater degree those qualities which . . . make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas bar. *With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.* (Italics supplied.)⁴³

In the second case, *McLaurin v. Oklahoma*,⁴⁴ a Negro had been admitted to graduate instruction at the University of Oklahoma, subject to such rules and regulations as to segregation as the president of the university should consider to afford him educational opportunities substantially equal to those offered other persons seeking the same education. Pursuant to this qualification, he was required to occupy an assigned seat in a row specified for colored students, and to sit at designated tables in the school library and cafeteria. He contended that this restrictive treatment was discriminatory and violative of the Fourteenth Amendment. The Court sustained his contention, and concluded that the Constitution precludes differences in treatment by the state based upon race. One passage from the Court's opinion is especially significant:

scholarship funds, an Order of the Coif affiliation, many distinguished alumni, and much tradition and prestige. The separate law school for Negroes has five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association and one alumnus admitted to the Texas Bar; . . ."
—*Syllabus*, 339 U. S. 629 (1950).

⁴² *Sweatt v. Painter*, 210 S. W. 2d 442 (1948).

⁴³ *Sweatt v. Painter*, 339 U. S. 629, 634 (1950). See 3 ALA. L. REV. 181 (1950). ". . . the two decisions [*Sweatt* and *McLaurin*] lead one to conclude the Supreme Court considers segregation by the states unconstitutional *per se*." *Id.* at 185.

⁴⁴ 339 U. S. 637 (1950).

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.⁴⁵

Thus, to the components of the formula for "equal facilities" the Court added two new and important ingredients: (1) academic prestige, and (2) freedom from state restrictions which prohibit "intellectual commingling" with the students of other races. Since it is generally recognized that academic prestige is not of any compelling importance on the high school and grammar school levels, the decision in the *Painter* case will probably be of importance only in cases where Negroes are seeking admission to institutions of higher learning.⁴⁶ On the other hand, the rationale of the *McLaurin* case—the assumption that students have a right to unhampered "intellectual commingling"—poses a more vital question—a question which strikes at the very roots of the dual system of education in force throughout the south. Can it logically be maintained that the right to unhampered intellectual association is the exclusive property of students in graduate and professional schools? Or is it a right common to all who study at any level?

Present Status of the "Separate but Equal" Doctrine

These questions, and the more fundamental one of the constitutionality of the "separate but equal" doctrine as applied to dual education remain unanswered. Within recent months, however, the constitutionality of racial segregation in publicly financed grammar and high schools has again been under attack in the federal courts. Three current cases are worthy of note.

In *Briggs v. Elliott*,⁴⁷ decided in the fourth circuit, plaintiffs sought to have declared unconstitutional certain South Carolina statutes which required segregation of the races in public schools.⁴⁸ They also prayed for an injunction prohibiting school officials from continuing such statutes in operation. On trial of the action, defendants admitted that substantial inequalities, prejudicial to plaintiffs, were

⁴⁵ *Id.* at 641.

⁴⁶ But see 8 WASH. & LEE L. REV. 54 (1951). "The implication of this conclusion [*Sweatt* decision] are readily discernible: Any Negro institution which excludes white students, irrespective of its size, facilities, reputation or national standing, is inferior per se; or so the Court seems to say. . . . It is evident . . . that this new interpretation of 'equal' may mean that 'separate' is no longer possible." *Id.* at 59-60. See also 30 B. U. L. REV. 565 (1950); 24 TEMPLE L. Q. 222 (1950); 36 VA. L. REV. 797 (1950).

⁴⁷ 98 F. Supp. 529 (E. D. S. C. 1951).

⁴⁸ S. C. CONST. Art. XI, § 7: "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race." S. C. CODE § 5377 provides: ". . . it shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race."

existent in the school system, but announced a policy and a plan potential for the elimination of such inequalities. The court held, one judge dissenting, that plaintiffs were entitled to a declaration to the effect that substantial inequalities existed, and also to a mandatory injunction compelling school officials to equalize educational facilities. The court concluded, however, that segregation as required by the South Carolina statutes was not per se a denial of equal protection, and reasoned that the constitutional right to unhampered intellectual commingling, which exists on the graduate and professional school levels, is non-existent for grammar and high school pupils.⁴⁹

A contrary result was reached in *Gonzales v. Sheely*.⁵⁰ There the court, pondering the validity of a schoolboard policy which required segregation of pupils of Latin descent from those of other ancestry, found as one fact *inter alia* that Spanish-speaking children were retarded in learning English by lack of exposure to it,⁵¹ and that ". . . commingling of the entire student body instills and develops a common cultural attitude among the children, which is imperative for the perpetuation of American institutions and ideals."⁵² It concluded that "unified school associations, regardless of lineage" were essential ingredients of any formula for educational equality.⁵³

In still another case,⁵⁴ a three-judge court for the District of Kansas, finding all other factors equal, remarked that if the denial of the right to commingle with the majority group in higher institutions of learning is lack of due process, it is difficult to see why such denial would not result in the same lack of due process when practiced on the lower academic planes.⁵⁵ Nevertheless, the court ruled

⁴⁹ "The problem of segregation as applied to graduate and professional education is essentially different from that involved in segregation in education at the lower levels.

". . . At this level, as good education can be afforded in Negro schools as in white schools and the thought of establishing professional contacts does not enter into the picture." *Briggs v. Elliott*, 98 F. Supp. 529, 535 (E. D. S. C. 1951).

⁵⁰ 96 F. Supp. 1004 (D. Ariz. 1951).

⁵¹ *Id.* at 1007.

⁵² *Ibid.*

⁵³ *Id.* at 1009. The court seems to have borrowed the phrase from the earlier case of *Mendez v. Westminster School District*, 64 F. Supp. 544, 549 (S. D. Cal. 1946). In that case, the federal court for the Southern District of California ruled that arbitrary assignment of Mexican children to separate schools was a violation of the Fourteenth Amendment. On appeal, the decision was affirmed, but the affirmation was predicated on the ground that segregation was a violation of California law, and that federal courts have jurisdiction to prevent unequal application of state statutes. The question of whether or not segregation violates the Federal Constitution was not passed upon. *Westminster School District v. Mendez*, 161 F. 2d 774 (9th Cir. 1947).

⁵⁴ *Brown v. Board of Education*, 98 F. Supp. 797 (D. Kan. 1951).

⁵⁵ *Id.* at 800. It would seem that the court here misinterpreted the *Sweatt* and *McLaurin* decisions. "Intellectual Commingling" was classified in those cases as an element of the equality required by the Fourteenth Amendment. Neither the *Sweatt* case nor the *McLaurin* decision considered due process.

that inasmuch as no *tangible* inequalities existed in the schools under examination, their maintenance on a segregated basis offended neither due process nor equal protection of the laws.⁵⁶

Both the latter case and the *Briggs* case are being appealed.⁵⁷ If certiorari is granted in both, the Supreme Court will be faced with the necessity of considering the applicability of the *McLaurin* rationale to elementary and secondary schools, and may even choose to question on the more basic question of the constitutionality of segregation per se. An examination of the relevant issues would seem to be in order.

Separate but Equal—Appraised

It is evident that the case for segregated schools must stand or fall on the correctness of the decisions in *Plessy v. Ferguson*⁵⁸ and *Gong Lum v. Rice*.⁵⁹ The *Plessy* case, as was noted earlier, established the doctrine that separate but equal facilities would suffice to fulfill the requirements of the Fourteenth Amendment. The *Gong Lum* ruling acknowledged the applicability of that doctrine to cases involving the validity of segregated schools.⁶⁰ It can be conceded, therefore, that the established precedents do sustain the constitutionality of segregation in education. Whether or not the established precedents can themselves be sustained is another question.

The decision in the *Plessy* case, and the rulings in all subsequent cases which have upheld the constitutionality of racial segregation, have been predicated upon two interrelated principles, one, of law, and the other, of fact. The legal principle, simply stated, assumes that segregation statutes are a valid exercise of a state's police power, when enacted with reference to the established usages, customs and traditions of the people, and with a view to the preservation of public

⁵⁶ See *Brown v. Board of Education*, 98 F. Supp. 797, 800 (D. Kan. 1951).

⁵⁷ Communication to ST. JOHN'S L. REV. from Mr. Jack Greenberg, Counsel, National Association for the Advancement of Colored People. Some indication that the Supreme Court may yet be unwilling to abandon the doctrine of separate but equal facilities can be found in its recent refusal to grant certiorari in the case of *Bagsby v. Trustees of Pleasant Grove Independent School District*, 20 U. S. L. WEEK 3085 (U. S. Oct. 9, 1951). In that case, it was held that the requirements of the Fourteenth Amendment were satisfied by an arrangement pursuant to which Negro school children were transported three and one-half miles in a free school bus from the school district of their residence to an adjoining school district where they were permitted to attend accredited colored schools whose facilities were equal to those afforded white students within the district where the Negroes resided. For the contentions of counsel, see 20 U. S. L. WEEK 3036 (U. S. July 31, 1951).

⁵⁸ 163 U. S. 537 (1896).

⁵⁹ 275 U. S. 78 (1927).

⁶⁰ It is frequently argued that the *Gong Lum* case did not sustain the validity of segregation per se. True, it can be distinguished, but the decision is pregnant with the implication that the separate but equal doctrine is applicable to education.

peace and good order.⁶¹ The fact principle, as noted previously, consists in the assumption that enforced separation of the races does not imply the inferiority of either race to the other.⁶²

In essence, the legal argument is that segregation statutes are necessary to maintain peace and good order. It is reasoned that any judicial razing of the state-erected barriers, which now separate the races, would so offend the mores of the southern community that violence and race conflict would result.⁶³ Since a state may properly act to preserve the peace, it is contended that segregation statutes are nothing more than a valid exercise of that right.

It is true that the enactment of the Fourteenth Amendment did not divest the states of their right to make regulations for the promotion of health, peace, and good order.⁶⁴ But this power must be exercised in subordination to the provisions of the Federal Constitution.⁶⁵

It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.⁶⁶

It is not sufficient that police action should meet the test of due process. The Constitution demands more. A police regulation, like any other state action, is subject to the equal protection of the laws.⁶⁷ Therefore, the validity of segregation legislation is not alone dependent upon its reasonableness in the light of established custom.⁶⁸ It must qualify under the test of equal protection, *i.e.*, it must be non-discriminatory both in its operation and in its effect.⁶⁹

Do segregated school statutes qualify under this test? It is submitted that they do not. The basic premise of the Supreme Court

⁶¹ See *Plessy v. Ferguson*, 163 U. S. 537, 550 (1896); *Briggs v. Elliott*, 98 F. Supp. 529, 532 (1951). *But see Carr v. Corning*, 182 F. 2d 14, 33 (dissenting opinion of Edgerton, J.): "It is sometimes suggested that due process of law cannot require what law cannot enforce. No such suggestion is relevant here. When United States courts order integration of District of Columbia schools they will be integrated. It has been too long forgotten that the District of Columbia is not a provisional community but the cosmopolitan capital of a nation that professes democracy." Judge Edgerton's words could well be applied to the whole judicial attitude toward the South and segregation. It has been too long argued that segregation should not be abolished, because the Southern community would neither tolerate nor accept the abolition. But this argument is without validity; the question is not one of judicial power or political expediency. It is a question of constitutional right.

⁶² See note 17 *supra*.

⁶³ See note 4 *supra*.

⁶⁴ *Nebbia v. New York*, 291 U. S. 502 (1934).

⁶⁵ *Panhandle Eastern Pipe Line Co. v. State Highway Comm.*, 294 U. S. 613 (1935).

⁶⁶ *Buchanan v. Warley*, 245 U. S. 60, 81 (1917).

⁶⁷ See *Atchison, Topeka and Santa Fe Ry. v. Vosburg*, 238 U. S. 56, 59 (1915).

⁶⁸ See *Yick Wo v. Hopkins*, 118 U. S. 356, 369 (1886); *Barbier v. Connolly*, 113 U. S. 27, 31 (1885).

⁶⁹ See *Shelley v. Kraemer*, 334 U. S. 1, 23 (1948).

in *Plessy v. Ferguson* was erroneous. Enforced segregation does imply inferiority.⁷⁰ Indeed, it would seem that it is intended to do so.⁷¹ That it succeeds of its purpose has been attested to by sociologists,⁷² psychiatrists,⁷³ and even judicial finding:

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 retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a social integrated school system. (Italics added.)⁷⁴

So viewed, it would seem that the *Plessy* case was wrongly decided, and should be overruled.⁷⁵ However, the Court need not necessarily make its decision at this time. None of the three recent cases discussed *supra* squarely puts in issue the validity of the "separate but equal" doctrine.⁷⁶ The Court, if it chooses, may avoid the constitutional question, and correctly dispose of each case without disturbing the *Plessy* precedent.

Briggs v. Elliott,⁷⁷ the first of the noted cases, could quite properly be decided on the basis of the *Sipuel* case. The petitioners are entitled to equal facilities *now*. At present, the State of South Carolina offers only a promise of future equality, and promises cannot constitutionally be substituted for present rights.⁷⁸

Gonzales v. Sheely,⁷⁹ if appealed, might well be sustained on a simple application of the "separate but equal" doctrine. There, in addition to the findings noted earlier (academic retardation occasioned by lack of exposure to English language; necessity of socially integrated education for the preservation of American ideals and institutions), there was also evidence of distinct inequalities in the physical facilities offered to the children of Mexican descent.

Brown v. Board of Education,⁸⁰ however, would seem to present

⁷⁰ See Note, 56 YALE L. J. 1059 (1947); MYRDAL, AN AMERICAN DILEMMA 643 (1944).

⁷¹ *Briggs v. Elliott*, 98 F. Supp. 529, 542 (1951) (dissenting opinion of Waring, J.).

⁷² See authorities collected in Note, 56 YALE L. J. 1059 (1947).

⁷³ *Ibid.*

⁷⁴ Finding of fact No. VIII, *Brown v. Board of Education*, CIVIL ACTION No. T-316 (D. Kan. 1951). This finding does not appear in the published report of the case, which appears in 98 F. Supp. 797 (1951).

⁷⁵ *Accord*, Note, 56 YALE L. J. 1059 (1947).

⁷⁶ For a contrary view, see 11 LAW. GUILD REV. 151, 155 (1951). The writer there takes the position that the *Briggs* case squarely raises the issue of the validity of segregation *per se*. For another discussion of the *Briggs* case, see 4 SO. CAROLINA L. Q. 177 (1951).

⁷⁷ 98 F. Supp. 529 (E. D. S. C. 1951).

⁷⁸ *Sipuel v. Board of Regents*, 332 U. S. 631 (1948).

⁷⁹ 96 F. Supp. 1004 (D. Ariz. 1951).

⁸⁰ 98 F. Supp. 797 (D. Kan. 1951).

a new question for the Court. There, there was a distinct finding of equality in physical facilities, coupled with a finding that segregation has a detrimental effect upon Negro children since "... separating the races is usually interpreted as denoting the inferiority of the Negro group."⁸¹ This finding is apparently in direct conflict with the basic fact principle of the "separate but equal" doctrine. Nevertheless, if the Court chooses, it may escape the necessity of a direct ruling on the validity of segregation per se, and decide the issues on the rationale of the *McLaurin* decision. The right of "intellectual commingling" which was there said to be an element of equality on the graduate school level, can logically, and should properly, be extended to education on the lower academic planes.

Perhaps, however, the Court will choose to rule directly on the applicability of the "separate but equal" doctrine. There is some evidence that it is not yet willing to go that far.⁸² It would seem, however, that it cannot avoid the issues altogether. The District Court has found as a fact that the effects of enforced segregation are detrimental and hence discriminatory. It has nevertheless refused to restrain the discrimination. If, as was said in *Yick Wo v. Hopkins*,⁸³ "... the equal protection of the laws is a pledge of the protection of equal laws . . .,"⁸⁴ the Supreme Court cannot acquiesce in the inconsistency.



JUS TERTII UNDER COMMON LAW AND THE N.I.L.

Introduction

A *jus tertii* situation arises when the defendant has no defense of his own but wishes to defeat the plaintiff's action by alleging a defect in the plaintiff's title or the fact that the plaintiff has no title at all. The defendant, in substance, admits that he owes the debt sued on, but denies that he owes it to this plaintiff because of some outstanding right in a third person. When such a situation occurs many problems manifest themselves. The purpose of this article is to present the basic fact situations in which these problems arise and to attempt to clarify the status of the law in this respect through an analysis both of judicial opinions and relevant sections of the Negotiable Instruments Law.

Some sections of the New York Negotiable Instruments Law specifically forbid the use of *jus tertii*. For example, Section 41

⁸¹ See note 74 *supra*.

⁸² See note 57 *supra*.

⁸³ 118 U. S. 356 (1886).

⁸⁴ *Id.* at 369.