NO. A-1695

IN THE

SUPREME COURT OF TEXAS

HEMAN MARION SWEATT,
Petitioner

Vs.

T. S. PAINTER, ET AL,
Respondents

BRIEF OF RESPONDENTS

PRICE DANIEL
ATTORNEY GENERAL OF TEXAS

JOE H. REYNOLDS
ASSISTANT ATTORNEY GENERAL

JOE R. GREENHILL
EXECUTIVE ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR RESPONDENTS

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* * * *

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* * * *

BRIEF FOR RESPONDENTS

* * * *

TO THE HONORABLE SUPREME COURT OF TEXAS:

Now comes T. S. Painter, President of The University of Texas, and others, respondents, and make this answer in the above-styled cause.[1]

STATEMENT OF THE CASE

The case is correctly stated by the Court of Civil Appeals. Its opinion has not yet been published. So, for the convenience of the Court, the opinion is set out herein as an appendix.

A brief statement of the case is here made so that the Court may have appropriate reference to the page numbers in the Statement of Facts.

This action is one of mandamus to compel the respondents to admit Heman Marion Sweatt, a Negro, to the School of Law of The University of Texas. His admission was denied be-

[1] The numbers in parentheses throughout refer to page numbers in the Statement of Facts unless otherwise indicated. Emphasis throughout is added.

cause of the provisions of the Constitution and laws of Texas which provide that separate schools shall be provided for the colored and the white.[2] (70, 265)

The State Legislature, by Senate Bill 140,[3] provided for the mandatory establishment of The Texas State University for Negroes, to be located at Houston, and for the immediate establishment of one of its branches, the School of Law, to be located at Austin until the university at Houston is ready to assume the responsibility. The statute states that:

> "It is the purpose of this Act to establish an entirely separate and equivalent university of the first class for Negroes with full rights to the use of tax money and the general revenue fund for establishment, maintenance, erection of buildings, and operation. . ."

Two million dollars was appropriated for the acquisition of land and other property for the Texas State University for Negroes, and five hundred thousand dollars was appropriated for its operation and maintenance for each year of the next biennium.

With reference to the Negro School of Law at Austin, the Act provides:

> "Upon demand heretofore or hereafter made by any qualified applicant for instruction in law at The University of Texas, the Board of Regents of The University of Texas is authorized and required to forthwith organize and establish a separate School of Law at Austin for Negroes, to be known as the 'School of Law of The Texas State University for Negroes' and therein provide instruction in law equivalent to the same instruction being offered in law at The University of Texas. * * * There is hereby appropriated, as an emergency appropriation, the sum of One Hundred Thousand ($100,000.00) Dollars, or so much thereof as may be necessary, to be expended by the Board of

[2] Sec. 7 of Art. VII; see also Sec. 14 of Art. VII with regard to the overall policy of separation at the collegiate level.

[3] Acts 50th Leg., Ch. 29, p. 36, carried as Art. 2643(b), V.A.C.S.

> Regents of The University of Texas in order to establish and operate the separate Law School."

Such Law School was and is established.[4]

On March 3, 1947, the Registrar wrote Sweatt in Houston that the School of Law of The Texas State University for Negroes would be open March 10, 1947, in Austin, Texas, and that Sweatt's application heretofore made (to The University of Texas) and his qualifications would entitle him to enter. (261; Exhibit 13, S.F. 614)

The letter informed Sweatt that his instructors would be the same professors who were and are teaching at the School of Law of The University of Texas; that the courses, texts, collateral reading, standards of instruction, and standards of scholarship would be identical with those prevailing at the School of Law of The University of Texas; that a library was being installed, and that full use of the library of the Supreme Court of Texas was available prior to the delivery of a complete new library then on order; and that the new library would include all books required to meet the standards of the American Association of Law Schools and the American Bar Association. (614-616)

Although Sweatt received the letter, he did not answer it. (286) Without coming to Austin to talk to the Dean, the Registrar (287), or any of his prospective professors (303), and without making any personal investigation of the courses, faculty, or physical plant, he decided not to make application to attend. (289, 303) He decided before he had inspected the school that he would not attend it. (285) Instead he took a train to Dallas to see his

[4] S. F. 63, 68, 73, and 143.

lawyer. (287) The lawyer likewise did not come to Austin to make any personal check on the school, nor did he send anyone down to make an investigation. (341) The lawyer asked one Maceo Smith (342), who was not a lawyer (348), to make him a report, which was made by telephone (343). Sweatt did not register for the school (143, 262). Nevertheless, the school was ready to receive and instruct him. (143)

At the outset, the Court's attention is invited to the testimony of Sweatt set out on page 306 S. F. He there testified that even if the new Negro Law School was absolutely equivalent to The University of Texas Law School, but was a separate school, he would not attend it.[5]

The trial court found in its judgment:

> "That from his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages and opportunities for the study of law equal to those furnished by the State to the white students of the Law School of The University of Texas. . . ." (Tr. 63)

Obviously, if Sweatt would not attend the School of Law of the Texas State University for Negroes, even if it were the absolute equivalent of The University of Texas School of Law, and he so stated under oath, the fact question of such equality is wholly academic. Sweatt, as a matter of fact, has not even assigned error in this court that the trial court's findings of fact, including the equality of opportunity and facilities, are not supported by evidence.

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[5]By deposition of June 15, 1946, Sweatt testified that it was not true that he would not attend Prairie View University if equal legal training were offered there. He testified, "I will attend Prairie View or a first-class law school equal to The University of Texas." (292) (Prairie View is a separate Negro college. Art. 2638). Sweatt changed his mind before this trial. (297)

The sole question in this appeal is the State's power under its own Constitution, duly adopted by the people of Texas, to provide separate publicly supported colleges and universities for its Negro and white students. That fact was recognized by counsel for Sweatt when he stated to the trial court:

> "May it please the Court, this case has narrowed down to one issue. . . if there can be any doubt as to our position in the case, in the fourth paragraph in the same pleading. . . we state, 'So far as the Constitution and laws of Texas relied on by respondents prohibited Relator from attending Law School of The University of Texas because of his race and color, such constitutional and statutory provisions of the State of Texas as applied to Relator are in direct violation of the Fourteenth Amendment to the Constitution of the United States.' * * *
>
> "So I think that the lines are drawn in this case, and the direct attack has been made that the statutes requiring segregation. . . are unconstitutional." (308-311)

It will be the purpose of this brief to show that it is the uniform rule of the United States Supreme Court and of the State Courts that where equivalent opportunities and facilities are offered, the State may provide separate facilities for its Negro and white students. The petitioner does not and cannot cite any case to the contrary.

But assuming for the sake of argument the materiality of the evidence on the equality of the educational opportunities offered Sweatt at The School of Law of the Texas State University for Negroes, as compared with that offered white students at The School of Law of The University of Texas, the respondents will show herein that there is evidence to support the following express finding of the trial court in its judgment:

> ". . . this Court is of the opinion and finds from the evidence that during the appeal of this cause and before the present hearing, the Respondents herein, pursuant to the provisions of Senate Bill 140, Acts of the 50th Legislature, 1947, have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas; that Relator, although duly notified that he was eligible and would be admitted to said law school March 10, 1947, declined to register; . . ." (Tr. 62)

The Court of Civil Appeals found that there was sufficient evidence to support the findings of fact. On motion for rehearing it wrote that had its jurisdiction been involved on the matter, it would have held that the evidence preponderated in favor of the judgment "if in fact it does not conclusively do so as a matter of law."

RESPONDENTS' POINTS

POINT I

Article VII, Section 7 of the Texas Constitution, and other related constitutional and statutory provisions, providing that the State shall separately educate its Negro and white youth, are constitutional; and the trial court correctly so held. Hence the trial court correctly denied the mandamus sought in this case (Answering Points 4, 5, 6, 8 & 9, Brief for Petitioner)

POINT II

As a matter of law, it is established that petitioner was offered equal facilities and opportunities for the study of law as compared with those offered white students at The University of Texas. The Court of Civil Appeals found that this

and other findings of fact made by the trial court were supported by sufficient evidence and that the weight of the evidence preponderated in favor of the judgment. No assignment of error was made as to such fact findings in Petitioner's Motion for Rehearing in the Court of Civil Appeals. There is no assignment in this Court that there is no evidence to support such findings. (Answering Petitioner's Point 7)

POINT III

Because this is an individual suit by Sweatt to compel his entrance to the School of Law of The University of Texas, wherein the mandamus is opposed on the ground that equivalent opportunities and facilities were and are tendered him at The School of Law of the Texas State School for Negroes, and the question of the issuance of that mandamus is the only ultimate issue in the case, the trial court correctly excluded pleadings and evidence relating to facilities in other educational institutions. (Answering Petitioner's Points 1, 2 & 3)

POINT I RESTATED

Article VII, Section 7 of the Texas Constitution, and other related constitutional and statutory provisions, providing that the State shall separately educate its colored and white youth, are constitutional and the trial court correctly so held. Hence the trial court correctly denied the mandamus sought in this case.

STATEMENT

The Court is respectfully referred to the facts submitted beginning on page 1 of this brief under the heading,

"Statement of the Case."

Briefly stated, the people of Texas, by their adoption of Section 7 of Art. VII and other related provisions and statutes, have elected to provide separate educational facilities for Negro and white students.

Sweatt's application to attend the School of Law of The University of Texas was refused pursuant to the Constitution and laws of the State providing for separate education of colored and white students.

A separate School of Law has been established, pursuant to S. B. 140, hereinafter quoted (63, 68, 73, 143). Sweatt was duly notified of the opening of the school. Without any personal investigation on his part or any personal investigation on his lawyer's part, upon whose advice Sweatt acted, Sweatt did not enroll for such training. His action is to compel his entrance to the School of Law of The University of Texas, with the assertion that he would not attend the Negro school, no matter how equal it might be.

Petitioner's Points 4, 5, 6, 8 & 9 are reduced to the contention that a separate law school for Negroes, no matter how equal it might be, does not and can not give the equal protection of the laws guaranteed under the Fourteenth Amendment.

Senate Bill 140

Pertinent portions of S. B. 140 (Acts 50th Leg., 1947, p. 36) are:

> "Sec. 2. To provide instruction, training, and higher education for colored people, there is hereby established a university of the first class in two divisions: the first, styled 'The Texas State University for Negroes' to be located at Houston, Harris County,

Texas, to be governed by a Board of Directors as provided in Section 3 hereof; the second, to be styled 'The Prairie View Agricultural and Mechanical College of Texas' at Prairie View, Waller County, Texas, formerly known as Prairie View University, originally established in 1876, which shall remain under the control and supervision of the Board of Directors of The Agricultural and Mechanical College of Texas. At the Prairie View Agricultural and Mechanical College shall be offered courses in agriculture, the mechanic arts, engineering, and the natural sciences connected therewith, together with any other courses authorized at Prairie View at the time of the passage of this Act, all of which shall be equivalent to those offered at The Agricultural and Mechanical College of Texas. The Texas State University for Negroes shall offer all other courses of higher learning, including, but without limitation, (other than as to those professional courses designated for The Prairie View Agricultural and Mechanical College), arts and sciences, literature, law, medicine, pharmacy, dentistry, journalism, education, and other professional courses, all of which shall be equivalent to those offered at The University of Texas. Upon demand being made by any qualified applicant for any present or future course of instruction offered at The University of Texas, or its branches, such course shall be established or added to the curriculum of the appropriate division of the schools hereby established in order that the separate universities for Negroes shall at all times offer equal educational opportunities and training as that available to other persons of this state. . .

"Sec. 9. There is hereby appropriated out of the State Treasury from any moneys not otherwise appropriated, the sum of Two Million ($2,000,000.00) Dollars or so much thereof as may be necessary, to be expended in the acquisition of land and other property as a site for and in the establishment of the Texas State University for Negroes and for the construction, erection, acquisition, and equipping of buildings and other permanent improvements. There is further appropriated the sum of Five Hundred Thousand ($500,000.00) Dollars or so much thereof as may be necessary, for the support, operation, and maintenance of such institution, including the payment of salaries of its officers and employees, for each of the fiscal years of the biennium ending August 31, 1949.

"Sec. 11. In the interim between the effective date of this Act and the organization, establishment and operation of the Texas State University for Negroes at Houston, upon demand heretofore or hereafter made by any qualified applicant for instruction in law at the University of Texas, the Board of Regents of The University of Texas is authorized and required to forthwith organize and establish a separate school of law at Austin for Negroes to be known as the 'School of Law of the Texas State University for Negroes'

and therein provide instruction in law equivalent to the same instruction being offered in law at the University of Texas. The Board of Regents of The University of Texas shall act and the governing board of such separate law school until such time as it is transferred to the control of the Board of Directors of the Texas State University for Negroes.

"There is hereby appropriated, as an emergency appropriation, the sum of One Hundred Thousand ($100,000.00) Dollars, or so much thereof as may be necessary, to be expended by the Board of Regents of The University of Texas in order to establish and operate the separate law school.. . .

"Sec. 14. The fact that the people of Texas desire that the state meet its obligation of equal educational opportunities for its Negro citizens from state supported institutions, . . . and the fact that interim courses must be established immediately by existing schools for the education of Negroes prior to the establishment and operation of said separate university of the first class for Negroes, creates an emergency and imperative public necessity that the Constitutional Rule requiring bills to be read on three separate days in each House be, and the same is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted."

ARGUMENT AND AUTHORITIES

Section 7 of Article VII of the Constitution of Texas provides "separate schools shall be provided for white and colored children, and impartial provision shall be made for both." Evidencing the mandate to provide for separation at the collegiate level, the people also adopted Sec. 14 of Art. VII, which provides: "The Legislature shall also when deemed practicable, establish and provide for the maintenance of a college or branch university for the instruction of colored youths of the State.. . ." Various statutes provide for the education of colored and white students at separate establishments.[6] These articles of the Constitution and statutory law demonstrate that the Legislature, and the people of Texas

[6] Article 2638, R.C.S. (providing for a separate Negro college at Prairie View); and Arts. 2691, 2695, 2900, 2755, 2719, 2817, 2819, and 3221, R.C.S.

themselves, have elected to provide for the education of colored and white youths at separate establishments. The constitutionality of such action is clearly demonstrated by the following authorities.

UNITED STATES SUPREME COURT CASES

The decisions of the United States Supreme Court are uniform in their holding that States may provide separate establishments for the education of their colored and white students, provided each group receives substantially equal facilities and opportunities. Related to the education cases are transportation cases. These transportation cases are cited, not for their holdings with reference to interstate commerce, but for their holdings on the "equal protection clause" of the Fourteenth Amendment. In transportation cases dealing with intrastate, as distinguished from interstate problems, the matter has been left to the determination of the State, so long as the "equal protection clause" is satisfied.

Because these cases are cited by the courts interchangeably, and because the doctrine of stare decisis has had an important part in the development of this line of cases, the decisions are here presented in chronological order.

Hall v. DeCuir, 95 U.S. 485 (1877). Immediately following the War Between the States, the Louisiana Legislature enacted a law prohibiting common carriers from making rules which discriminated among passengers on account of race or color; i.e., it provided for enforced commingling of the races. The master of a steamboat, operating in interstate commerce between Mississippi and Louisiana, was arrested for having

denied a Negro woman the right to remain in cabins reserved for whites. In reversing the master's conviction, the Court held that the Louisiana statute was an interference with interstate commerce, notwithstanding the fact that Congress had not enacted legislation on the subject. Congressional inaction left the ship's master free to adopt such rule as seemed best for all concerned. Said the Court:

> "We think this (Louisiana) statute, to the extent that it requires those engaged in transportation of passengers among the states to carry colored passengers in Louisiana in the same cabin with whites, is unconstitutional."

Justice Clifford, concurring, said:

> ". . . Substantial equality of right is the law of the State and of the United States; but equality does not mean identity, as in the nature of things identity in the accommodation afforded to passengers, whether colored or white, is impossible. . . ."

Reasoning by analogy to the education case, it was said:

> ". . . and it is settled law there that the (school) board may assign a particular school for colored children, and exclude them from schools assigned for white children, and that such a regulation is not in violation of the Fourteenth Amendment."

Plessy v. Ferguson, 163 U. S. 537 (1896). A later Louisiana statute required that colored and white passengers be furnished separate accommodations on common carriers. Plessy, a Negro, was arrested and convicted for refusing to occupy the portion of a passenger car set aside for his race. The railroad in question operated only within Louisiana; i.e., it did not operate in interstate commerce. It was contended by Plessy that the state law, as applied to him, violated the 14th Amendment. In overruling

the contention, the Supreme Court wrote:

> "The object of the (14th) Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. . . .
>
> "The distinction between laws interfering with the political equality of the Negro and those requiring the separation of the two races in schools, . . . and railway carriages has been frequently drawn by this court. . . .
>
> "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. . . . The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. . . . 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement

> and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed.'"

There was a dissent by Justice Harlan.

Cummings v. Board of Education, 175 U.S. 262 (1899). An injunction to compel a Board of Education to withhold all assistance from a white high school was held not to be the proper procedure to remedy the failure of a school board to provide a high school for colored students. No attack was there made on the State's right to provide separate facilities. Nevertheless, Justice Harlan (the same Justice who dissented in the Plessy case) wrote the following often-quoted language:

> ". . . We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective states, and any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land. . . ."

McCabe v. A. T. & S. F. Ry. Co., 235 U.S. 151 (1914). Action by five Negro citizens to enjoin enforcement of an Oklahoma statute requiring separation of white and colored citizens on trains and in waiting rooms because (1) such statute violated the 14th Amendment, and (2) the statute constituted a burden on interstate commerce. The actual holding of the case was that since none of the Negroes had been denied transportation or had been otherwise injured, they were not entitled to maintain the suit, and it was accordingly dismissed.

With reference to the 14th Amendment (as distinguished from the interstate commerce clause), the U.S. Supreme Court expressly approved the holding of the Circuit Court:

> "That it had been decided by this court, so that the question could no longer be considered an open one, that it was not an infraction of the 14th Amendment for a State to require separate, but equal, accommodations for the races."

In these transportation cases, it must again be emphasized that there is a distinction between complaints based on the "Equal Protection" clause of the 14th Amendment and the portion of the Federal Constitution dealing with interstate commerce. The McCabe Case, above, is here cited with reference to its holding as to the 14th Amendment. That case expressly reserves the question of interstate commerce; and the case of Morgan v. Virginia, to be later discussed herein, is expressly based wholly on the interstate commerce clause, as distinguished from the 14th Amendment.

Gong Lum, et al v. Rice, 275 U.S. 78 (1927). A Mississippi statute provided that children should be divided into white and colored for school purposes. The word "colored," under that statute, referred to any other race than white. A Chinese girl was denied admission to a white school. A suit which was brought by her parents made a direct attack on the separation of the children for schooling purposes, the contention being made that such was a violation of the 14th Amendment.

Chief Justice Taft stated:

> "The case then reduces itself to the question whether a state can be said to afford a child of Chinese ancestry born in this country, and a citizen of the United States, equal protection of the laws by giving

> her the opportunity for a common school education in a school which receives only colored children of the brown, yellow or black races.
>
> "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. * * *
>
> "The question here is whether a Chinese citizen of the United States is denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow or black. Were this a new question, it would call for very full argument and consideration, but we think that it is the same question which has been many times decided to be within the constitutional power of the state legislature to settle without intervention of the federal courts under the Federal Constitution. . . ."

Chief Justice Taft then adopted the following language from Plessy v. Ferguson, supra:

> " '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.' "

He concluded:

> "Most of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils, but we can not 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 races. The decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment. The judgment of the Supreme Court of Mississippi is affirmed."

Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938), hereinafter referred to as "the Gaines case." Action was brought by Gaines,

a Negro, against officials of the University of Missouri to compel them to admit him to the School of Law of the State University. Upon a finding that there was no established school of law for Negroes, and that there was no mandatory duty upon any official to establish such a school, it was held that "in the absence of other and proper provisions for his legal training within the State," Gaines would be entitled to enter the University of Missouri Law School. The case, however, was remanded to the Supreme Court of Missouri.[7]

Chief Justice Hughes wrote:

> ". . . The state constitution provides that separate free public schools shall be established for the education of children of African descent. * * *
>
> "In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide Negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. * * *
>
> "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and 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."

[7] The subsequent decision of the Supreme Court of Missouri will be hereinafter set out on page 20. The Supreme Court of Missouri recognized that the Missouri Legislature had subsequently enacted a statute making it mandatory that equal educational opportunities be afforded colored students. It therefore remanded the cause to the trial court for a finding on such equality by the opening of the next school year.

The Court then pointed out how the State of Missouri had failed to provide substantially equal educational opportunities:

> ". . . it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough. The provision for legal education at Lincoln is at present entirely lacking. . . . We do not read the opinion of the Supreme Court as construing the state statute to impose such a 'mandatory duty' as the argument seems to assert. . . .
>
> "The state court has not held that it would have been the duty of the curators to establish a law school at Lincoln University for the petitioner on his application. Their duty, as the court defined it, would have been either to supply a law school at Lincoln University as provided in Section 9618 or to furnish him the opportunity to obtain his legal training in another State as provided in Section 9622. Thus the law left the curators free to adopt the latter course. . . .
>
> ". . . The basic consideration is not as to what sort of opportunities, other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. . . . By the operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race. The white resident is afforded legal education within the State; the Negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination."

Even from the holding of the Gaines Case, two members of the Supreme Court, Justices McReynolds and Butler, dissented,

using the following language:

> "The State has offered to provide the Negro petitioner opportunity for study of the law -- if perchance that is the thing really desired -- by paying his tuition at some nearby school of good standing. This is far from unmistakable disregard of his rights and in the circumstances is enough to satisfy any reasonable demand for specialized training. . . .
>
> "The problem presented obviously is a difficult and highly practical one. A fair effort to solve it has been made by offering adequate opportunity for study when sought in good faith. The State should not be unduly hampered through theorization inadequately restrained by experience."

Sipuel v. Board of Regents (1948), 68 S. Ct. 299, 92 L. Ed. 256. Mandamus by a Negro to compel her admission to the Oklahoma law school. The relief was denied by the State court principally on the ground that Sipuel had not made proper demand or given proper notice for the establishment of a separate law school. The brief holding of the U. S. Supreme Court was:

> "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. Missouri ex rel. Gaines v. Canada, 305 US 337, 83 L ed 208, 59 S Ct 232 (1938)."

In denying a mandamus to compel compliance with its mandate, the Court in a second opinion,[8] explained the holding:

> "The Oklahoma Supreme Court upheld the refusal to admit petitioner on the ground that she had failed to demand establishment of a separate school and admission to it. . . . our decision (was) that the equal protection clause permits no such defense."

[8] Fisher v. Hurst, 68 S. Ct. 389, 92 L. Ed. 420 (Feb. 16, 1948).

The court, in this second opinion, stated that "The petition for certiorari . . . did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes." Nevertheless, the main (first) opinion cites with approval the Gaines case which expressly followed the long line of decisions which hold that separate facilities may be provided. Further, the dissent by Rutledge to the second opinion indicates that the requirement of the Fourteenth Amendment is equality of educational opportunity. The courts have consistently held that such an opportunity may be provided at separate establishments.

The Sipuel Case, citing the Gaines Case with approval and as authority, therefore, simply continued the long established holding that separate schools may be provided so long as the facilities are equivalent. It added an additional requirement that the opportunities must be provided for the Negro as soon as it is made available to whites. In this Sweatt case, the School of Law of the Texas State University for Negroes was available to Sweatt at the time of this trial and is still available to him.

OTHER FEDERAL AND STATE COURT CASES

State ex rel. Gaines v. Canada (Mo. Sup. 1939), 131 S.W. 2d 217. This is a decision of the Missouri Supreme Court in the same Gaines case subsequent to the decision of the U. S. Supreme Court. The Court took judicial notice of a statute enacted after the U. S. Supreme Court's decision, which provided that the State's Negro University (Lincoln U.) was authorized and required to furnish

the legal education to Gaines and to other Negro students in law and in other subjects. The Missouri Court remanded the cause to the trial court with the following instructions:

> "If the facilities at Lincoln University, to be available at the commencement of the next school term, which is in September, are in fact substantially equivalent to those afforded at Missouri University, the writ should be denied; otherwise it must issue, as a denial under those circumstances would amount to an arbitrary exercise of discretion.. . ."

There was no further appeal in this case.

The following cases hold that the States have the right to furnish education at the collegiate level at separate colleges:

Bluford v. Canada, 32 F. Supp. 707 (1940) appeal dism'd. 119 F. (2d) 779. A Negro was denied damages for the refusal of her admission to the University of Missouri School of Journalism. Following the Gaines case, the Federal District Court said: "The State has the constitutional right to furnish equal facilities in separate schools if it so desires.. . ."

State (Bluford) v. Canada (Mo. Sup. 1941), 153 S.W. (2d) 12, following the Gaines case, denied a mandamus to compel the admission of a Negro to Missouri University.

State (Michael) v. Witham (Tenn. Sup. 1942), 165 S.W. (2d) 378. Following the Gaines case, denied a mandamus to compel the admittance of a Negro to the graduate school at Tennessee U.

Wrighten v. Board of Trustees, 72 F. Supp. 948 (1947), held that the State had the power to provide a separate law school for a Negro student provided it was "substantially equivalent," and provided the separate school was opened by September, 1947.

CASES DECIDED OUTSIDE THE SOUTHERN STATES

Many of the strongest decisions upholding the constitutionality of separation of the races for educational and certain other purposes have come from the courts outside the Southern States.[9] In Roberts v. Boston, 5 Cushing 198 (Mass. 1849), a Negro was denied admission to the white grade school of Boston, Massachusetts,

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[9] The Court's attention is invited to pages 88-91 of the National Survey of Higher Education of Negroes, "General Studies of Colleges for Negroes" (Vol. II, No. 6), prepared by the U.S. Office of Education, printed 1942 by the U.S. Gov. Printing Office (Exhibit C). Excerpts from that publication are as follows:

> "Whereas very few southern Negroes were attending these eight northern universities in 1939-40, in the year preceding nearly 4,000 northern Negroes attended Negro colleges. Almost 3,000 of this number attended colleges in Southern States. The majority of these Negro students were residents of eight Northern States which rank high in economic resources. Thus instead of the Northern States carrying an undue burden in the higher education of Negroes, it appears that the Southern States, which have the least wealth, are providing educational facilities for Negro residents from economically more favored regions. . .
>
> "It is not possible, of course, to know how much of this southward migration is due to conditions within the northern institutions which make the Negro student feel that he does not secure a well-rounded college life in a mixed university, and how much is due to the positive advantages he feels are offered him in the Negro college.
>
> ". . . Some students said frankly that the Negro college offered a more normal social life.
>
> ". . . Thus the lack of opportunity for full participation in campus activities in the North adds attraction to the opportunity for leadership in such activities on a Southern Negro college campus.
>
> "A common reason given for the choice of the Negro college was the desire for a more normal social life. The Negroes in northern institutions seldom live on the campus and seldom participate freely in the social activities of the university. Outside of college the Negro's social life is largely limited to association with his own people. Although southern Negro colleges operate in an area in

even though the white school was nearer the Negro's home than the Negro school. In a suit to compel admission of the Negro, attorneys made (at page 203) some arguments here made:

9 (cont'd.)
which the total life of Negroes is restricted, the college campus itself is a small world in which the Negro student is relatively secure and in which he can achieve status among his own people. . .

". . . Negro students in northern universities do not, as a rule, participate fully and freely in the life of the institution. . .

"There is no uniform policy in northern institutions with respect to Negro students. The limitations to which the Negro student is subject are not mentioned in the published rules and regulations of the institutions concerned. Theoretically, in most institutions, discrimination does not exist. In practice, however, Negro students find themselves handicapped in many ways, though not to the same degree in all institutions. There are, for example, certain dormitories in which Negroes may not live. In some institutions no Negroes lived on the campus; in other cases, certain dormitories were open to a limited number of Negro students while in others none were admitted. In one institution a large number of Negro students belonged to colored fraternities and sororities which provided houses for their members. On some campuses the public eating places were open to all students alike; on other campuses only certain places were open; on one campus separate booths or tables were set aside for Negro students.

"In some institutions all campus activities were reported to be open to Negro students, in other cases there were restrictions on intercollegiate sports, notably basketball. Swimming pools were sometimes closed to Negro students or open to them only at special times. There were other campus activities in which Negroes did not feel that they were wanted.

"When the reports of university administrators, alumni, and students were considered it seemed clear that in the institutions studied Negro students as a whole did not feel that they 'belonged' in the same way that white students feel themselves a part of campus life. Some administrators felt that the Negro students kept to themselves from choice. . ."

See also the conclusions of the report of the Bi-racial Conference on Education for Negroes in Texas, called "The Senior Colleges for Negroes in Texas" (1944), which is Respondent's Ex-

> "It is not in fact an equivalent . . ., although the matters taught in the two schools may be precisely the same, a school exclusively devoted to one class must differ essentially in its spirit and character, from that public school known to the law, where all classes meet equally together. . . . Admitting that it is an equivalent, still the colored children cannot be compelled to take it."

The highest Massachusetts Court held that the School Board had the power to provide separate, equal facilities. It then said:

> "Conceding . . . that colored persons. . . are entitled by law . . . to equal rights, constitutional and political, civil and social, the question then arises whether (the provision for) separate schools . . . is a violation of any of these rights."

The Court held that separate schools violated none of these rights. It reasoned that the school authorities had general power to separate pupils as to age, sex, financial condition (i.e., poor, orphaned, or neglected), scholastic ability, geographic location, or into any other reasonable classification, including the separation of colored and white students.

> "Whether . . . distinction and prejudice, existing in the opinion and feeling of the community, would not be as effectually fostered by compelling colored

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9 (cont'd.)
hibit 16. At page 83, the committee states:

> "Admission of Negroes to existing state universities for whites is not acceptable as a solution of the problem of providing an opportunity for graduate and professional study for Negroes, on two counts: (1) public opinion would not permit such institutions to be open to Negroes at the present time; and (2) even if Negroes were admitted they would not be happy in the conditions in which they would find themselves."

The Encyclopaedia Britannica states that eighty-five per cent (85%) of the Negroes in the United States with college degrees have received them from "colleges specifically for Negroes in the South." Vol. 16, p. 196.

> children and white children to associate together in the same schools, may well be doubted; at all events, it is a fair and proper question for the committee to consider . . . having in mind the interest of both classes . . . and we cannot say that their decision upon it is not founded on just grounds or reason and experience, and is the result of a discriminating and honest judgment."

Similarly, in People v. School Board of Borough of Queens, (1900), 56 N.E. 81, by the highest court of New York, the only question was "whether the borough of Queens is authorized to maintain separate schools for the education of colored children within the borough." In upholding such action, the Court declared:

> "The most that the constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated, -- not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the constitution to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained . . . "

In a similar case, the New York Court in People v. Gallagher, 93 N.Y. 438, wrote:[10]

> "The attempt to force social intimacy and intercourse between the races, by legal enactments, would probably tend only to embitter the prejudices, if such there are, which exist between them, and produce an evil instead of a good result. . . .

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[10]The Legislature of New York in 1909 enacted a statute which prohibited separation of the races in schools. (Thompson's Laws of N.Y., Acts 1909, Ch. 14, sec. 40, p. 250.) The enactment of such statute is fully within the power of the State, just as laws requiring separation. This statute does not change the holding of the Courts where the statutes permit or require separation.

> "When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized. . . .
>
> "We cannot see why the establishment of separate institutions for the education and benefit of different races should be held any more to imply the inferiority of one race than that of the other, and no ground for such an implication exists in the act of discrimination itself. If it could be shown that the accommodations afforded to one race were inferior to those enjoyed by another, some advance might be made in the argument, but until that is established, no basis is laid for a claim that the privileges of the respective races are not equal. Institutions of this kind are founded every day in the different States under the law for the exclusive benefit of particular races and classes of citizens, and are generally regarded as favors to the races designated instead of marks of inferiority. . . .
>
> "A natural distinction exists between these races which was not created neither can it be abrogated by law, and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race can in no just sense be called a discrimination against such race or an abridgement of its civil rights. . . ."

The Ohio Court in State v. McCann, 21 Ohio St. 198, said that separation of white and colored was no more unreasonable than separation on account of sex or grade:

> "It would seem, then, that under the constituion and laws of this State, the right to classify the youth of the state for school purposes, on the basis of color, and to assign them to separate schools for education, both upon well recognized legal principles and the repeated adjudications of this court, is too firmly established to be now judicially disturbed. . . .
>
> "Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substan-

> tially equal school advantages is not prohibited by either the State or federal constitution, nor would it contravene the provisions of either. . ."

In Favors v. Randall, 40 F.S. 743 (Fed. Dist. Ct., Penn., 1941), there was a large public housing project which provided that certain areas and units would be designated for white occupants and other areas and units for colored occupants. It was held that the Philadelphia Housing Authority, in selecting tenants between white and colored races, had acted constitutionally and reasonably. Citing many of the cases hereinbefore set out, the Court concluded:

> "Since it can no longer be doubted therefore that proper segregation, that is the affording of equal facilities to both races thus separated, is not within the inhibition of the Fourteenth Amendment and the legislation enacted pursuant thereto, the only question remaining for decision is whether or not the action of the Philadelphia Housing Authority in certifying tenants in conformity with the neighborhood pattern is a reasonable regulation or a discrimination, arbitrary, illegal and unjust. * * *
>
> "The conduct of a state agency which as here merely implies a legal distinction (basing selection of tenants certified on neighborhood pattern) between the white and colored races, a distinction which is founded on the color of the two races and which must always exist, so long as white men are distinguished from other races by color, has no tendency to destroy the legal equality of the two races. The argument cannot be accepted that equal rights cannot be secured to the Negro, except by an enforced commingling of the two races. Neither the Thirteenth, Fourteenth, nor Fifteenth Amendments to the United States Constitution operate to make the Negro race wards of the nation. In determining the question of reasonableness, the Philadelphia Housing Authority was at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the preservation of public peace and good order as well as a promotion of their comfort, which was the purpose for the creation of the Authority. This it is felt the Philadelphia Housing Authority has carefully done."

Similarly in United States v. Downer, (C.C.A. 2d, 1944), 140 F. 2d 397 (cert. den. as moot, 322 U.S. 756), the selective service procedure in New York was attacked by a Negro because there was a separate Negro and white quota for the selection of men. The inductee brought an action of habeas corpus to test the legality of his induction. The habeas corpus was denied (one judge dissenting), there being no showing that there was any discrimination in the relative number of men called up from each race. The Court said:

> "In interpreting and applying this language (of the Selective Service Act) the Army's history of separate regiments of whites and Negroes must not be overlooked. Indeed, the appellant does not contend, and could not successfully do so, that after selectees are lawfully inducted under the Selective Training and Service Act of 1940 they may not be segregated into white and colored regiments. Since July 28, 1866 federal statutes have made provision for separate Negro regiments.. . .
>
> "If the Congress had intended to prohibit separate white and Negro quotas and calls we believe it would have expressed such intention more definitely than by the general prohibition against discrimination appearing in section 4. Moreover, it is not without significance, we think, that the induction procedure which has been established has never been altered by congressional action, although the Act has been often amended since its original enactment. In our opinion the statutory provisions which the appellant invokes mean no more that that Negroes must be accorded privileges substantially equal to those afforded whites in the matter of volunteering, induction, training and service under the Act; in other words, separate quotas in the requisitions based on relative racial proportions of the men subject to call do not constitute the prohibited 'discrimination.' Compare cases dealing with discrimination claimed to be repugnant to the Fourteenth Amendment. Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256; Gong Lum v. Rice, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172; Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208. Judgment affirmed."

State v. Board of Trustees of Ohio State U. (Ohio Sup., 1933), 185 N.E. 196. Ohio State University, attended by white and colored students, offered a course styled Home Economics 627,

in which female students operated a residence wherein they lived for a prescribed period. The course included cooking, buying, cleaning, etc. A Negress made application to take this course. Her application was refused and an equivalent course giving the same credit was offered her. Upon such refusal she brought a mandamus action. The Ohio Court wrote, in denying the mandamus:

> "'Any classification which preserves substantially equal school advantages is not prohibited by either the state or federal constitution, nor would it contravene the provisions of either,' . . . the respondents had full authority to prescribe regulations that will prove most beneficial to the university and state and will best conserve, promote, and secure the educational advantages of all races. The purely social relations of our citizens cannot be enforced by law; nor were they intended to be regulated by our own laws or by the state and Federal Constitutions.. . . In speaking upon this aspect of the case the learned judge in Plessy v. Ferguson, supra, said: 'The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the Negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in People v. Gallagher, 93 N.Y. 438, 448 (45 Am. Rep. 232): 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically."

OTHER STATE COURT CASES

The opinions of the highest courts of the various States are in accordance with the holdings of the United States Supreme

Court, and are uniform in their holding that the states may, by appropriate legislation, separate the races for educational purposes so long as equivalent facilities are furnished. For the sake of brevity, these cases will be simply cited in the footnote[11]

[11] Ala.: State v. Bd. of School Commissioners (1933), 145 So. 575.
Ark.: State v. Bd. of Directors (1922), 242 S.W. 545, cert. den., 264 U.S. 567.
Black v. Lenderman (1923), 246 S.W. 876.
Maddox v. Neal, 45 Ark. 121.
Ariz.: Burnside v. Douglass School (1928), 261 Pac. 629.
Dameron v. Bayless (1912), 126 Pac. 273.
Dist. of Col.: Wall v. Oyster (1910), 36 App.D.C. 50; 31 L.R.A.(N.S.) 180.
Fla.: State v. Bryan (1905), 39 So. 929.
Ga.: Cummings v. Bd. of Education, 29 S.E. 488, aff'd. 175 U.S. 528.
Ind.: Cory v. Carter (1874), 48 Ind. 327.
Greathouse v. School Bd. (1926) 151 N.E. 411.
State v. Wirt (1931) 177 N.E. 441.
Kan.: Reynolds v. Bd. of Education, 72 Pac. 274.
Ky.: Berea College v. Commonwealth (1908), 211 U.S. 45.
Board of Education v. Brown (1930), 23 S.W.(2d) 948.
Davies Co. Bd. v. Johnson (1918), 200 S.W. 313.
Grady v. Bd. of Education (1912), 147 S.W. 928.
Mullins v. Belcher (1911), 134 S.W. 1151.
La.: Bertonneau v. Bd. of Directors (1878), 3 Woods 177.
Md.: Williams v. Zimmerman, 192 A. 353.
Miss.: Barrett v. Cedar Hill S.D., 85 So. 125.
Bond v. Tij Fung (1927), 114 So. 332.
Bryant v. Barnes (1925), 106 So. 113.
Cresmann v. Town of Brookhaven (1893), 70 Miss. 477.
Mo.: Lehew v. Brummell, 15 S. W. 765.
State v. Cartwright (1907), 99 S.W. 48.
N. Y.: People v. Gallagher (1883), 45 Am.St.Rep. 232.
People v. Queens (1900), 56 N.E. 81.
N. C.: Bonitz v. Trustees (1911), 70 S.E. 735.
Johnson v. School Bd. (1903), 82 S.E. 832.
Lowery v. Sch. Trustees (1905), 52 S.E. 267.
Whitford v. Bd. (1912), 74 S.E. 1014.
Ohio: State v. Bd. of Education (1876), 7 Ohio, Dec. 129.
State v. McCann (1871), 21 Ohio St. 198.
Okla.: Board v. School District (1929), 275 Pac. 292.
State v. Albritton (1924), 224 Pac. 511.
Jumper v. Lyles (1921), 185 Pac. 1084.
S. C.: Tucker v. Blease (1914), 81 S.E. 668.
Tenn.: Greenwood v. Rickman (1921), 235 S. W. 425.
Va.: Eubank v. Boughton (1900), 36 S.E. 529.
W.Va.: Martin v. Bd. of Education, 26 S.E. 348.

PETITIONER'S CASES DISTINGUISHED

A great majority of the cases cited are those involving discrimination (as distinguished from separation) against persons of the Negro race in matters of civil and political rights, such as jury service, voting in primaries, obtaining confessions by duress, and the like. These cases are obviously distinguishable from situations where persons of the Negro race are offered equivalent opportunities for obtaining an education. As said by the U. S. Supreme Court in Plessy v. Ferguson, 163 U.S. 537, "The distinction between laws interfering with political equality of the Negro and those requiring separation of the races in schools. . .has been frequently drawn by this court. . ."

THE CASE OF PEARSON V. MURRAY

In Pearson v. Murray, (Md. Ap., 1936), 182 Atl. 590, the Maryland Court granted a mandamus which directed that a Negro student, Murray, be admitted to the School of Law of the University of Maryland. That State had no separate law school. There were no State officers who were authorized to establish a separate law school. There had been no legislative declaration of purpose to establish one. In the absence of equivalent facilities, Murray was held entitled to enter the University of Maryland.

The opinion, however, recognizes that where equal opportunities are offered, a State may offer education to colored and white students at separate institutions. The decision reads:

> "Equality of treatment does not require that privileges be provided members of the two races in the same place. The state may choose the method by which equality is maintained. 'In the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none

of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense.'"

THE SCHOOL TEACHERS' PAY CASE

Petitioner cites Alston v. School Board, 112 F. (2d) 992, cert. den. 311 U.S. 693. That case, and several others which follow it,[12] hold that where it is shown that there is a studied practice of paying colored school teachers on a lower scale than is paid to white teachers, an injunction will issue to restrain such practice. A more recent case is Morris v. Williams (C.C.A. 8th, 1945), 149 F. (2d) 703, where it was shown that school salaries in Little Rock discriminated against Negro teachers, as a matter of policy, custom, and usage.[13] With regard to the separation of the races in the public schools, however, the Court ruled that "The validity of this method of separation has been sustained by the Supreme Court when the advantages and facilities afforded by the classes are substantially equal." The two lines of cases are thereby distinguished.

THE CIVIL AND POLITICAL RIGHTS CASES

There are several cases which hold that under the 14th Amendment, that policies of states which prevent Negroes from serving on juries are unconstitutional. The case of Strauder v. West Virginia, 100 U.S. 303, simply holds that where a colored man is convicted of murder, upon an indictment by a grand jury upon which no colored man

[12] McMillon v. Iberville School Board, D.C.La., opinion rendered Nov. 7, 1947, unreported yet; Mills v. Board of Education (D.C.Md., 1939), 30 F.S. 245; McDaniel v. Bd. of Public Instruction (D.C.Fla.,1941), 39 F.S. 638; Thomas v. Hibbitts (D.C.Tenn., 1942), 46 F.S. 368; Davis v. Cook (D.C.Ga., 1944), 55 F.S. 1004.

[13] This general holding has been recognized by the Attorney General of Texas. In an opinion No. V-388 dated Sept. 25, 1947, it was recognized that there must be no distinction in the salary scales in the public schools of Texas based solely on race and color.

was eligible to serve, the conviction will be reversed. In West Virginia at that time, because of statutory enactments, no colored person was eligible to be a member of the grand or petit jury. The case is one of discrimination because of race, and not one of separation of the races with equivalent facilities. Other cases involving jury service, with the same holding, are Carter v. Texas, 177 U.S. 442 (grand jury); Pierre v. Louisiana, 306 U.S. 354 (grand jury); Smith v. Texas, 311 U.S. 128 (grand jury); Hill v. Texas, 316 U.S. 400 (grand jury); Patton v. Mississippi (1947), 68 S.Ct. 184 (grand jury); Brunson v. North Carolina (March, 1948), 68 S.Ct. 634, 92 L.Ed. 626 (grand jury). But see Akins v. Texas (1945), 325 U.S. 398, upholding a Dallas County Grand Jury on which one Negro served, and Moore v. New York (March, 1948), 68 S.Ct. 705, 92 L.Ed. 637, where no Negro served, there being no evidence of racial discrimination.

To the same effect are cases involving voting rights, which are clearly political rights guaranteed by the Federal Constitution, and have nothing to do with the offering of equal facilities for education. These cases, involving the right of Negroes to vote in primaries, are Nixon v. Herndon (1927), 273 U.S. 536; Nixon v. Condon (1932), 286 U.S. 73; Lane v. Wilson (1939), 307 U.S. 268; U.S. v. Classic (1941), 313 U.S. 299; Smith v. Allwright (1944), 321 U.S. 649, overruling Grovey v. Townsend, 295 U.S. 45; Chapman v. King (C.C.A. 5th, 1946), 154 F. (2d) 460, cert. den. 327 U.S. 800; and Rice v. Elmore (C.C.A. 4th, 1947), 165 F.(2d) 386, cert. den. April 1948, 92 L.Ed. 759.

There are several cases which have reversed criminal convictions of Negroes where it was shown that the convictions

were based on confessions which were obtained by duress. These cases are Brown v. Mississippi, 297 U.S. 278; Chambers v. Florida, 309 U.S. 227; White v. Texas, 309 U.S. 631, 310 U.S. 530; Ward v. Texas, 316 U.S. 547 (where the facts showed that the Negro had been beaten, whipped, and burned); and Lee v. Mississippi (1948), 68 S.Ct. 300, 92 L.Ed. 315. But see Lyons v. Oklahoma (1944), 322 U.S. 596, where, among other things, a pan of bones of the deceased was placed in the lap of the Negro to obtain a confession. The test there applied was whether "substantial justice" was done, and the conviction was sustained by the U. S. Supreme Court.

Obviously, these duress cases apply to white as well as Negro citizens. The obtaining of a confession by whipping and burning, whether applied to Negro or white, has nothing to do with the offering of equivalent facilities for education.

Also cited are the recently decided cases holding that enforcement by State Courts of private agreements restricting ownership of property because of race violates the equal protection clause of the 14th Amendment.[14] These cases are likewise based on the line of cases dealing with civil and political rights set out above: the grand and petit jury cases, the duress cases, and the primary voting cases. The opinion states, concerning the 14th Amendment:

> ". . . it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."

[14] Shelley v. Kraemer; McGhee v. Sipes (private covenant in a State); Hurd v. Hodge, and Urciolo v. Hodge (private covenant in the District of Columbia), decided May 3, 1948, 68 S.Ct. 836 & 847; Trustees of Monroe Ave. Church of Christ v. Perkins (corporation of Negro members); and Yin Kim v. Same (restrictive covenants as applied to Koreans), decided May 10, 1948, unreported as yet.

These covenant cases deal with a complete denial of property rights, the right to occupy property otherwise legally purchased, etc. The furnishing of an education by the State is not a property right but a gratuity or privilege extended by the State. Under the cases hereinbefore cited, so long as this privilege is extended equally to the races, it may be provided at separate places. As a matter of fact, the Gaines case is cited with approval in the covenants cases (footnote 29 to the Shelley and McGhee cases). So is McCabe v. A. T. & S. F. Ry. Co., briefed page 14 of this brief, which states that it is not a violation of the 14th Amendment "for a state to require separate, but equal, accommodations for the races."

INTERSTATE COMMERCE CASES MORGAN V. VIRGINIA; BOB-LO EXCURSION CO. V. MICHIGAN

The case of Morgan v. Virginia, 328 U.S. 373, cited by petitioner is based wholly on the interstate commerce clause of the U.S. Constitution. It is not decided on the basis of the 14th Amendment. The Morgan case follows Hall v. DeCuir, cited and briefed on page11 hereof, relative to the power of a state to make rules which would be effective in interstate commerce. In the DeCuir case, a Louisiana statute required commingling of the races. In the Morgan case, commingling was prohibited. Both were struck down as burdens on interstate commerce.

Irene Morgan, a colored woman, boarded an interstate bus in Virginia en route to Maryland via the District of Columbia. A Virginia statute required that colored and white persons sit in separate portions of the bus. The driver was required to separate the races, and was given the power to change the seats of passengers "from time to time as occasions require." Upon her

refusal to move from a seat in the white section, Irene Morgan was arrested and convicted of violating the Virginia law. In her appeal to the United States Supreme Court, it was held that the Virginia statute, as applies to a bus operating in interstate commerce, was unconstitutional. The shifting of passengers as they passed state lines was objectionable as a burden on interstate commerce.

To emphasize the fact that the Morgan case is based wholly on the interstate commerce clause of the Federal Constitution, as opposed to the "equal protection" clause of the 14th Amendment, the following excerpts are here quoted:

> "The Court of Appeals interpreted the Virginia statute as applicable to appellant since the statute 'embraces all motor vehicles and all passengers, both interstate and intrastate.' * * *
>
> "The errors of the Court of Appeals that are assigned and relied upon by appellant are in form only two. The first is that the decision is repugnant to Clause 3, Sec. 8, Article I of the Constitution of the United States, and the second the holding that powers reserved to the states by the Tenth Amendment include the power to require an interstate motor passenger to occupy a seat restricted for the use of his race. Actually, the first question alone needs consideration for if the statute unlawfully burdens interstate commerce, the reserved powers of the state will not validate it. * * *
>
> "This Court frequently must determine the validity of state statutes that are attacked as unconstitutional interferences with the national power over interstate commerce. This appeal presents that question as to a statute that compels racial segregation of interstate passengers in vehicles moving interstate. * * *
>
> "This statute is attacked on t he ground that it imposes undue burdens on interstate commerce....Burdens upon commerce are those actions of a state which directly 'impair the usefulness of its facilities for such traffic.' * * *
>
> "On appellant's journey, this statute required that she sit in designated seats in Virginia. Changes in seat designation might be made 'at any time' during the journey

when 'necessary or proper for the comfort and convenience of passengers.' This occurred in this instance. Upon such change of designation, the statute authorizes the operator of the vehicle to require, as he did here, 'any passenger to change his or her seat as it may be necessary or proper.' An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group. On arrival at the District of Columbia line, the appellant would have had freedom to occupy any available seat and so to the end of her journey.

"Interstate passengers traveling via motors between the north and south or the east and west may pass through Virginia on through lines in the day or in the night. The large buses approach the comfort of pullmans and have seats convenient for rest. On such interstate journeys the enforcement of the requirements for reseating would be disturbing. * * *

"The interferences to interstate commerce which arise from state regulation of racial association on interstate vehicles has long been recognized. Such regulation hampers freedom of choice in selecting accommodations. The recent changes in transportation brought about by the coming of automobiles does not seem of great significance in the problem. People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce. The factual situation set out in preceding paragraphs emphasizes the soundness of this Court's early conclusion in Hall v. DeCuir, 95 U.S. 485, 24 L.Ed. 547. * * *

"As our previous discussion demonstrates, the transportation difficulties arising from a statute that requires commingling of the races, as in the DeCuir case, are increased by one that requires separation, as here. * * *

"It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid. * * *"

Mr. Justice Black concurring:

"The Commerce Clause of the Constitution provides that 'Congress shall have Power * * * To regulate Commerce * * * among the several States.' I have believed, and still believe that this provision means that Congress can regulate commerce and that the courts cannot. * * *

"So long as the Court remains committed to the 'un-

due burden on commerce formula,' I must make decisions under it. * * *"

Mr. Justice Frankfurter concurring:

"My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me Hall v. DeCuir, 95 U.S. 485, 24 L.Ed. 547, is controlling. * * *"

The dissenting opinion was by Justice Burton. He stated:

"It is a fundamental concept of our Constitution that where conditions are diverse the solution of problems arising out of them may well come through the application of diversified treatment matching the diversified needs as determined by our local governments, Uniformity of treatment is appropriate where a substantial uniformity of conditions exists."

Bob-Lo Excursion Co. v. Michigan, ____ U.S. _____, 68 S. Ct. 358, 92 L. Ed. 339 (1948), dealt with the application of the Michigan Civil Rights Act to commerce across the international boundary line. The statute required "full and equal accommodations" to all races. A Detroit entertainment and excursion company owned an island 15 miles up the Detroit river, across the U. S. line. It operated privately owned ships between Detroit and the island to accommodate its patrons. It denied the plaintiff, a Negro, passage to the island. It did not offer separate but equal accommodations; it completely denied passage. The Company was criminally prosecuted for violating the Civil Rights Statute. The Company contended that the State statute was inapplicable to it because it operated in international commerce. The Court, however, went to great length to demonstrate that no international or interstate commerce (of any consequence) was involved. It held that, under the peculiar facts, there was no interference with international commerce; and the conviction was affirmed. It stated that under the peculiar facts, neither the Hall-DeCuir nor the Morgan-Virginia cases were appli-

cable.

The decision is based upon, and restricted to, questions of interstate commerce. The equal protection clause of the 14th Amendment was not involved. Said the Court:

> "We have. . .only to consider the single and narrow question whether the state courts correctly held that the commerce clause. . .does not forbid the Michigan civil rights act to sustain the appellant's conviction."

The case of Plessy v. Ferguson, herein briefed and discussed on pages 12-14, was not cited or discussed and was not overruled in either the Morgan case or the Bob-Lo case. The Plessy case dealt with the state's power to regulate transportation where no interstate commerce was involved. Nor was the case of McCabe v. A. T. & S. F. Ry. Co., supra, page 14, cited or discussed in the Morgan case.

THE LABOR UNION CASES: STEELE v. L. & N. RY. CO.

The case of Steele v. L. & N. Ry. Co. (1944), 323 U.S. 192, is also relied upon (cited below) by appellant. There an Act of Congress made the Brotherhood of Locomotive Firemen and Enginemen exclusive bargaining representative of such employees. There was no authority for a separate union or branch for colored employees. The Union set about to exclude Negroes from the better jobs. The program would have resulted in the loss of positions and seniority by the colored firemen and enginemen. Action was brought by a colored fireman to enjoin enforcement of such an agreement by the Union and the Railway Company. While the Court did not hold that the colored employees must be accepted to membership in the Brotherhood, it did hold that since the Union was the exclusive bargaining

agent for all employees, that it must, in good faith, represent colored employees as well as all others. It was a case, not of separation of the races, but of arbitrary discrimination against a class of employees solely on the grounds of their race and color.

TEXTBOOKS

The foregoing cases are summarized in the following texts:

10 Am. Jur. 904, Civil Rights, Section 11:

> "The principles which preclude a state which has established a system of public schools from denying to any race the privilege of attending the public schools of the state do not preclude the state from enforcing a separation or segregation of races by establishing separate schools with equal advantages for children of different races and prohibiting or excluding the children from one race from attending the schools established for the instruction of another race; legislation of this kind, which commonly requires separation and segregation of white and colored children, does not violate the Federal Constitution but is a legitimate and valid exercise of police powers. Equality of rights does not involve the necessity of educating the children of different races in the same school; in other words, equality of right does not of necessity imply identity of rights. Congress itself has recognized both the propriety and validity of the separation of the races by the passage of acts establishing exclusive schools for the education of the colored race in the District of Columbia. There is nothing in such a law which may be construed as remitting one excluded from a particular school to a condition of slavery or involuntary servitude within the meaning of the Thirteenth Amendment, or as denying him the 'equal protection of the laws' guaranteed by the Fourteenth Amendment. Equality of rights does not mean identity of rights and does not involve the necessity of educating the children of different races in the same school where separate but equally advantageous schools are provided."

5 R.C.L. 596, Civil Rights, Section 20:

> "As the common school system of a state is wholly a creature of state laws, the right of children to attend the public schools, and of parents to send their children

to them, is not a privilege or immunity belonging to a citizen of the United States as such, but is a right created by the state and belonging to its citizens as such. While the state is under no compulsion to establish public schools, yet if such schools are once established, the rights of white and black alike are measured by the test of equality in privileges and opportunities. Under that clause of the amendment which forbids the state to 'deny to any person within its jurisdiction the equal protection of the laws,' where the state affords the opportunity of instruction at public schools to the youth of the state, the advantage and benefit thereby vouchsafed to each child is a legal right as distinctly as the vested right in property, and as such it is entitled to be protected by all the guaranties by which other legal rights are protected and secured to the possessor. The constitutional provision in its effect declares that the law in the states shall be the same for the black as for the white, that all persons, whether colored or white, shall stand equal before the laws of the states; and in regard to the colored race for whose protection it was primarily designed, that no discrimination shall be made against them by law because of their color. Equality, however, does not mean identity of rights, and hence it is that laws providing for a system of public education wherein schools are established for the instruction of colored children separate from those provided for white children are uniformly held to be valid."

Section 21 reads:

"In view of the conclusion reached as to the scope of the Federal Constitution and its amendments, it has been placed beyond question that a state may by constitutional or statutory provisions, establish separate schools of equal advantages for white and for colored children; and where so established it follows that the children of one race may be lawfully excluded from those schools established for the instruction of the other, or that the board or committee in control of a school devoted to one race cannot be compelled to accept children of another race. . . ."

14 C.J.S. 1171, Civil Rights, Section 11:

"In the absence of a provision of the state constitution to the contrary, the classification of students on the basis of race or color and their education in separate schools or their segregation for the purpose of education, involve questions of domestic policy which are within the discretion and control of the state legislature, and do not amount to an exclusion of either class, so long as

the facilities and accommodations provided are substantially equal. . . .

"Where a valid statute so provides, the school authorities may maintain separate schools for colored children. . . ."

Sutherland, Notes on United States Constitution, pp. 702-705:

"State laws which afford equal advantages and privileges for the education of white and colored children, and merely separate them for the purpose of receiving instruction, do not deprive anyone of the privileges or immunities of United States citizenship, but are reasonable regulations for the exercise of such rights. . . ."

See also Brannon, The Fourteenth Amendment, pp. 89-92.

ARGUMENT

The foregoing cases argue themselves. Where the issue has been raised before the United States Supreme Court, it has been uniformly held that the states may provide separate facilities for the education of their Negro and white students, so long as equivalent opportunities and facilities are offered to both. It is said by the United States Supreme Court in Gong Lum v. Rice, 275 U.S. 78: "The right and power of the state to regulate the method of providing for the education of its youth at public expense is clear. * * *The decision (to separate the races) is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment." The latest expression of the United States Supreme Court is its opinion in Missouri ex rel Gaines v. Canada, 305 U.S. 337, wherein Chief Justice Hughes, speaking for the Court recognized the long-established rule to be:

"The state has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions."

The Sipuel case from Oklahoma (1948) cited the Gaines case with approval. And in refusing to issue the mandate to enforce its judgment in the Sipuel case, that is, to compel her admission to Missouri University, the Court by implication, continued to recognize the validity of separate schools so long as they are equal. Otherwise, it would simply have ordered her admitted.

It is therefore respectfully submitted that Article VII, Section 7 of the Texas Constitution and other related constitutional and statutory provisions providing that the State shall separately educate its Negro and white students are constitutional.

POINT II RESTATED

As a matter of law, it is established that Petitioner was offered equal facilities and opportunities for the study of law as compared with those offered white students at The University of Texas. The Court of Civil Appeals found that this and other findings of fact made by the trial court were supported by sufficient evidence and that the weight of the evidence preponderated in favor of the judgment. No assignment of error was made as to such fact findings in Petitioner's motion for rehearing in the Court of Civil Appeals. There is no assignment in this Court that there is no evidence to support such findings.

AUTHORITIES AND ARGUMENT

The trial court found in its judgment that equivalent facilities and opportunities had been provided for Petitioner as compared with those offered white students at The University of Texas.[15]

Findings of fact of a trial court sitting without a jury have the same force and are entitled to the same weight as a verdict of

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[15] The judgment reads in part: ". . . this Court is of the opinion and finds from the evidence that during the appeal of this cause and before the present hearing, the Respondents herein, pursuant to the provisions of Senate Bill 140, Acts of the 50th Legislature, 1947, have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at The University of Texas; . . ." (Tr. 62-63).

a jury. 3 Tex. Jur. 1102 and cases cited therein. Such findings will not be disturbed by an appellate court where there is evidence to support them. Gray v. Luther, 195 S. W. (2d) 434 (1946, writ refused); Highsmith v. Tyler State B. & T. Co., 194 S. W. (2d) 142 (1946, writ refused). Similarly where the testimony is conflicting and such findings are challenged, only the competent evidence in support of the judgment is to be considered. Webb v. Webb, 184 S. W. (2d) 153 (1944, writ refused); Anderson v. Smith, 231 S. W. 142 (1921, writ refused).

Trials in the Supreme Court shall be only upon questions of law. (Rule 476, Tex. Rules Civ. Pro.) Findings on disputed fact issues are binding upon the Supreme Court since it is restricted to questions of law as distinguished from questions of fact. Caller Times Pub. Co. v. Chandler, 134 Tex. 1, 130 S. W. (2d) 853 (1939). Whether there is some evidence is a question of law. And where there is some evidence to support the findings, the Supreme Court will be bound by such fact findings. Sid Katz v. Walsh & Burney Co., 142 Tex. 232, 177 S. W. (2d) 49 (1944); Kimbell Milling Co. v. Greene, 141 Tex. 84, 170 S. W. (2d) 191 (1943). The evidence set out under this Point herein will clearly demonstrate that there is evidence to support the findings.

The Petitioner, however, has not assigned error in his application for writ of error that there is no evidence to support the findings. In that regard, Rule 476 (Tex. Rules Civ. Pro.) provides:

> "Trials in the Supreme Court shall be only upon the questions of law raised by the assignments of error in the application for writ of error. . . ."

Following this rule, Chief Justice Hickman, in Railroad Commission of Texas v. Mackhank Pet. Co., 144 Tex. 393, 190 S. W. (2d) 802 (1945), stated:

> "The Supreme Court is not clothed with supervisory powers over courts of civil appeals, but in cases which reach it by writ of error, its review is limited to questions of law raised by assignments in the application . . . Our review will, therefore, be limited to the question presented by petitioners."

To the same effect is Tips v. Security Life & Accident Co., 144 Tex. 461, 191 S. W. (2d) 470 (1945).

Further, Petitioner did not raise the question of want of evidence to support the fact findings in his motion for rehearing in the Court of Civil Appeals. Under the circumstances, the Supreme Court in Moore v. Dilworth, 142 Tex. 538, 179 S. W. (2d) 538, wrote:

> "A Point of Error in this Court not set out as an assignment of error in the motion for rehearing in the Court of Civil Appeals will not be considered by the Supreme Court. . . . Also, a Point of Error not contained in the application for writ of error will not be considered by this Court . . . It would serve no purpose . . . to permit the application for the writ to be amended . . . because the point was not assigned as error in the motion for rehearing in the Court of Civil Appeals."

It is respectfully submitted that under the above authorities, the fact question of equality of facilities and opportunities has been foreclosed.

However, should the question not be foreclosed, the Court is invited to examine the facts. The evidence will clearly show that the trial court and the Court of Civil Appeals were correct

in their fact determinations.

In this regard, it is not required that the accommodations offered to persons of different races be identical. It is sufficient if they are substantially equal. 16 C.J.S. 1100, Constitutional Law, Sec. 542; 10 Am. Jur. 905, Civil Rights, Sec. 11;[16] McCabe v. A. T. & S. F. Ry., 186 Fed. 966,[17] affirmed 235 U.S. 151;[18] Missouri (Gaines) v. Canada, 305 U.S. 337;[19] Hall v. DeCuir, 95 U.S. 485;[20] L. & N. Ry. v. Commonwealth, 170 S.W. 162.

The evidence in support of the judgment is set out below.

EVIDENCE SUPPORTING FACT FINDINGS OF EQUALITY

Breaking the elements of the School of Law into component parts, the following evidence was deduced.[21]

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16 "Equality of rights does not mean identity of rights. . . ."

17 "Equality of service, however, does not necessarily mean identity of service."

18 ". . . if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."

19 ". . . the state is bound to furnish him within its borders facilities for legal education substantially equal to those which the the state afforded for persons of the white race. . . ."

20 "Substantial equality of right is the law of the State and the United States; but equality does not mean identity. . . ." (Justice Clifford concurring).

21 The evidence hereinafter set out refers only to the Negro School of Law at Austin. The evidence with respect to the main branch of the Texas State University for Negroes at Houston is omitted in the interest of brevity. That institution, for which $2,000,000.00 was appropriated (93) for physical plant, is located on a fifty-three acre tract between Rice Institute and the University of Houston (92). In addition, $1,000,000.00 was appropriated for its operation and maintenance for the next biennium (Sec. 9, S.B. 140). Mr. Woodward testified that a modernly constructed building,

ENTRANCE, EXAMINATION, GRADUATION, AND SIMILAR REQUIREMENTS

The requirements for admission and fees, and regulations relating to classification of students, classwork, examinations, grades and credits, standards of work required, and degrees awarded are exactly the same as those published in the latest published catalogue of The University of Texas and used at such institution. (Ex. 7, S.F. 613; also 137, 190, 264).

THE FACULTY

The instructors at the School of Law of the Texas State University for Negroes were and are the very same professors which had taught or were teaching the same courses at The University of Texas Law School (137, 140, 187-188, 612). They were the same instructors Sweatt would have had if he had enrolled in The University of Texas (187, 188). The instructions from the Board of Regents were to use all of the faculty of the University Law School, so far as necessary, in order to maintain a full curriculum at the Negro Law School until four more full-time professors could be employed for the Negro Law School (201). The budget provided for four professors at $6,000 per year -- the same pay base for professors at The University of Texas (118). Each of the instructors devotes all of his time to teaching -- each a full-time professor. None are engaged in the private law practice (100, 101). With the small enrollment at the Negro Law School, the instructors

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already located on the site, which building was very adaptable for University purposes, would come into the control of the Texas State University for Negroes in the next few days (92). (He had reference to H.B. 780, passed May 23, 1947, and now carried as Art. 2643c, V.A.C.S.)

would be more available to the students for consultation than they would be to students at The University of Texas with its large class of 150 to 175 students (201). The Dean and Registrar of the two law schools were respectively the same persons (613).

CURRICULUM

The curriculum at the Negro Law School and at The University was exactly the same; it was the same as that adopted in the latest University of Texas School of Law Bulletin (136). The courses offered beginning students at the Negro Law School were identical with those offered beginning students at the University: Contracts, Torts, and Legal Bibliography (140). These courses, with the same professors, are set out in Respondent's Exhibit 7 (611-613).

CLASSROOM

The classroom requirements were identical (137). With much smaller classes, the Negro Law School would provide the student with the opportunity to personally participate in classroom recitations and discussions (504). In an average law class at The University of Texas Law School, an average student would be called upon to recite only an average of $1\frac{1}{2}$ times a semester (503). In a smaller class the students would receive better experience and education; they would be called on more frequently, would be more "on their toes" (504). The students would come to class better prepared because their chances of being called upon are much greater; there would be a greater pressure to keep

up their daily work (519). Dean McCormick testified that "in the Negro Law School he (Sweatt) would have gotten a good deal more personal attention from the faculty than he would have had he been in the large entering class in The University of Texas." (194).

LIBRARY

At the time of trial, there were on hand in the School of Law of the Texas State University for Negroes books customarily used by the first-year class of the University, and other books which Miss Helen Hargrave, Librarian of the University Law School, thought would be useful (218). There were about 200 of these books (39). There were also available for transfer to the Negro Law School between 500 and 600 books from the University (242), plus gifts of between 900 and 950 books (243). In addition, the entire library of the Supreme Court of Texas was specificially made available to the Negro Law School by Section 11 of H.B. 240, Acts 50th Legislature (also S.F. 78). The Supreme Court Library is located in the State Capitol Building on the second floor (14). The Capitol grounds are some 20 feet from the Negro Law School, and the entrance is only about 300 feet from that School (65, 133).

The Supreme Court Library contains approximately 42,000 volumes (221), which number is far in excess of the 7,500-book minimum requirement of the American Bar Association (14). Excluding duplicates, The University of Texas Law Library contains 30,000 to 35,000 books. Counting duplicates, it contains

around 65,000 (220). These books serve 850 law students of The University of Texas (243).

In some respects the Supreme Court Library is stronger than that of the University. Being a Governmental Depository, the Supreme Court Library automatically receives many reports, such as those of administrative bodies. It is the strongest library in the South on State Session Laws. It contains Attorney General's Opinions, Tax Board Opinions, Workmen's Compensation Reports, and other items not carried by the University (219-220). The Supreme Court Library is more spacious for a student body of ten students than are the facilities at The University of Texas Law School Library, which are exceedingly crowded (133). There is no more confusion, and in most instances, less confusion in the Supreme Court Library than at the Law Library at the University because of the large number of persons using the latter (241).

On the other hand, the Supreme Court Library does not have as many textbooks, legal periodicals, or English reports as the University Law Library (218). The Court's Library contains the Harvard, Columbia, Yale, and Texas Law Reviews, and the American Bar Association Journal (219). It has the English Reports up to 1932.[22] The Law Library of The University of Texas and that of the Supreme Court are substantially equal except for the texts, legal periodicals, and English Reports (220-222).

However, all of such texts, legal periodicals, and English Reports, not available in the Supreme Court Library, are readily

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22 The evidence showed that first-year law students rarely used the English Reports (242, 245).

available to the Negro Law School on a loan basis from the Law Library of The University of Texas (107, 108).

In addition to the books in the Negro Law School and in the Supreme Court Library, and those available on a loan basis from the Law Library of The University of Texas, a complete law library was, at the time of trial, being procured, consisting of some 10,000 law books, some of which were already available. The rest have been placed for order through the Board of Control for the School of Law of the Texas State University for Negroes (203). The list of the 10,008 books which will constitute the Negro Law School Library is set out in Respondent's Exhibit No. 8. Of such number, 1,281 were immediately available (260), and 8,727 books were already requisitioned (254). Bids had already been requested on the 8,727 books requisitioned (255), and 23 bids were received. Orders had already been placed for 5,702 of the books (257), all deliverable within ten to sixty days (258). Wherever new books were available they were ordered; second-hand books were only ordered where new ones were not available (258). The library requisitioned included 20 Law Reviews, Indices of legal periodicals, Citators, Digests, Restatements, textbooks, statutes, the complete West Publishing Company Reporter System, etc. (See Respondent's Exhibit 8). The undisputed evidence is that the books ordered for the Negro Law School are sufficient to meet the requirements of the American Association of Law Schools (191).

THE PHYSICAL FACILITIES[23]

Whereas The University of Texas Law School has 3 classrooms for 850 students,[24] the School of Law of the Texas State University for Negroes has two classrooms (128), plus a reading room, toilet facilities, and an entrance hall (Ex. 4) for a much smaller student body. The two law schools possess approximately the same facilities for light and ventilation (128) ("There are ample windows and lights." S.F. 147), though most law schools, including The University of Texas, need artificial light in the daytime (147). The Negro Law School, assuming a class of 10 students, has a greater floor space per student.[25] The floor plan is set out as Respondent's Exhibit 4.[26]

The location of the Negro Law School is particularly good. It is directly north of the State Capitol, separated only by a 20-foot street (62). It is within 100 yards of the Supreme Court of Texas, the Court of Civil Appeals, the Attorney General's Office, and the Legislature (110). It is between the business district

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[23] Again, the facilities here referred to do not describe the University for Negroes in Houston, into which this law school will move in August, 1948 (88, 91).

[24] The Law School building at the University of Texas was built in 1907 for 400 students (38), and it now has 850 students (132). The Texas Bar Association has been trying for years to get the building torn down and an adequate one built (38).

[25] The Negro school, first floor, has 1060 square feet, or 106 square feet per student. The University Law School has 46,518 square feet for 886 students, or 53 square feet per student. And this is not taking into account the upper two stories of the Negro School which are available when needed (81).

[26] The plan shows a classroom 12' x 12'8"; a classroom 16'6" x 11'6", a reading room and office 19'10" x 15'7", an entrance hall and toilet facilities.

of Austin and The University of Texas -- 8 blocks south of the University, and hence 8 blocks nearer the business district (65).

The building housing the Negro Law School is a three-story building of brick construction (278, 270). The first floor was occupied by the School at the time of trial (70), but the upper two stories of the building were available as needed (81). Before March 10, 1947, the premises were cleaned up and painted (67). The building has ample space to house the 10,000 volume library and leave sufficient space for classrooms and reading room (272).[27]

Mr. D. A. Simmons, President of the American Judicature Society 1940-1942, and President of the American Bar Association 1944-1945, testified:

> "In my opinion, the facilities, the course of study, with the same professors, would afford an opportunity for a legal education equal or substantially equal to that given the students at The University of Texas Law School." (16)

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[27] There are certain minor features of a law school greatly emphasized by Petitioner. As they would be applicable to Sweatt himself, which is the issue here, the evidence showed:

1. The Law Review. The Texas Law Review is not an official function of the State of Texas or the University. It is a separate legal entity, a private corporation with stock which has been sold (505). It was founded by the lawyers of Texas and financed by their contributions (176, 186). Considerably more than half of the articles (as distinguished from case notes) are written by "outsiders"; i.e., persons who are not University students (505, 506). There is no rule which would prevent the consideration or publication of an article written by a Negro (506). Not all accredited schools have law reviews; for example, the Baylor Law School (506). Finally, neither Sweatt nor any other first-year law student would be eligible to write for the law review (174,520).

2. Scholarships. All the scholarships offered at The University of Texas Law School are contributed from private sources; they do not come from the State (171, 186).

3. The Order of the Coif is a private and not a public organization (172, 185). First-year students are not entitled to admission. Students are eligible only on graduation (185).

Mr. D. K. Woodward, Jr., Chairman of the Board of Regents of The University of Texas, testified:

> "What we set up there was a plant fully adequate to give the very best of legal instruction for the only man of the Negro race who had ever applied for instruction in law at the University in about 63 years of the life of the School." (82)

> "I am talking as a man familiar with what it takes to provide a thorough training in law in the State of Texas; and I stated the facts within my own personal knowledge, that the facilities which the Board of Regents of the University set up in accordance with Senate Bill 140 are such as to provide the Relator in this case the opportunity for the study of law unsurpassed any time elsewhere in the State of Texas, and fully equal to the opportunity and instruction we are offering at the University any day." (73)

Dean Charles T. McCormick, President of the Association of American Law Schools, 1942 (127) testified that the facilities at the Law School for Negro citizens furnished to Negro citizens an equal opportunity for study in law and procedure (142). He further testified that considering the respective use by the respective number of students, the physical facilities offered by the Negro Law School were substantially equal to those offered at The University of Texas Law School (131). He stated that: "I would say . . . the Negro student has at least equal and probably superior facilities for the study of law." (180)

With reference to the membership requirements of the

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4. The Legal Aid Clinic: First-year students are not eligible to assist therein. Practically all the work is done by third-year students (174, 185).

5. Moot Court: No first-year students are entitled or required to participate (185, 170). Any one of the classrooms at the Negro Law School could be used for that purpose (170).

Association of American Law Schools,[28] it was shown that the Negro Law School, at the time of this trial, met the great majority of the 9 requirements:

(1) It is a school not operated as a commercial enterprise, and the compensation of any officer or member of its teaching staff is not dependent on the number of students or the fees received (189).

(2) It satisfies the entrance requirements, i.e., pre-legal training, etc. (189, 190).

(3) The school is a "full-time law school." The school work is arranged so that substantially the full working time of the student is required at the school (190).

(4) The conferring of its degrees is conditioned upon the attainment of a grade of scholarship attained by examinations (190).

(5) No special students are admitted. In this, the School's requirement is stronger than that of the Association (191), which permits such students under certain considerations.

(6) The 10,000 volume library ordered for the School is sufficient to meet the library requirements (191). The selection of the books is such as to conform with the Association's requirements. In addition, the Supreme Court Library of 40,000 volumes is available, plus loan privileges from the Law Library of the University of Texas (191, 108).

(7) The seventh requirement is that the "faculty shall consist of at least four full-time instructors who devote substantially all

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[28] These requirements are set out in Relator's Exhibit 1, copied pages 618-634, S.F.

of their time to the work of the school." The professors in this case are full-time professors in the sense that all of their time is devoted to teaching. However, all of their teaching is not done at the Negro school; they will also be teaching at the University (194).

(8) Provision has been made for keeping a complete and readily accessible individual record of each student (192).

(9) The requirement reads, "It shall be a school which possesses reasonably adequate facilities and which is conducted in accordance with those standards and practices generally recognized by member schools as essential to the maintenance of a sound educational policy." Dean Charles T. McCormick, President of the American Association of Law Schools in 1942 (127), testified that in his opinion the Negro Law School met this requirement (192).

The testimony was that a two-year period is generally required before any law school may be admitted to membership in the Association of American Law Schools. Dean McCormick testified that he knew of no reason why the Negro Law School could not comply with all of those standards within that two-year period -- before any entering student could graduate from the school (195).

The judgment of the trial court reads in part as follows:

"And accordingly, upon this rehearing, having heard the pleadings, evidence and arguments, this Court is of the opinion and finds from the evidence that during the appeal of this cause

and before the present hearing, the Respondents herein, pursuant to the provisions of Senate Bill 140, Acts of the 50th Legislature, 1947, have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and the same courses and the same instructors as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of the law substantially equivalent to those offered by the State to white students at The University of Texas; . . . and the facts in this case showing that Relator would be afforded equal if not better opportunities for the study of law in such separate school, the petition for Writ of Mandamus should be denied." (Tr. 62, 63)

POINT III RESTATED

Because this is an individual suit by Sweatt to compel his entrance to the School of Law of The University of Texas, wherein the mandamus is opposed on the ground that equivalent opportunities and facilities were and are tendered him at The School of Law of the Texas State University for Negroes, and the question of the issuance of that mandamus is the only ultimate issue in the case, the trial court correctly excluded pleadings and evidence relating to facilities in other educational institutions. (Answering Petitioner's Points 1, 2 & 3)

1. The Trial Court correctly excluded Petitioner's allegations as to what did or did not happen at Prairie View in 1937. (Answering Petitioner's Point 1)

Petitioner here seeks admission to The University of Texas School of Law. His application was denied on the ground that the Constitution of Texas provides that there shall be separate education of Negro and white students. The State has established the School of Law of the Texas State University for Negroes in Austin. Although Sweatt has stated under oath that he would not attend that separate school no matter how equal the facilities might otherwise be, the contention is made that such separate School of Law at Austin 1947 did not offer Sweatt equal facilities and opportunities.

The allegations of Petitioner to which a special exception was sustained,[29] deal with facilities of an entirely different

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[29] The trial court in its judgment (Tr. 64) sustained special exception number 2 of Respondent's First Supplemental Answer (Tr. 30) to subparagraph 3 of paragraph III of Relator's Second Supplemental Petition (Tr. 19-20).

institution (Prairie View), ten years before the trial of this case in May, 1947. What happened at Prairie View in 1937 could have no possible bearing on the equality of the Schools of Law of the Texas State University for Negroes and The University of Texas in 1947.

The pleadings of Respondent which mention Prairie View University, and which are seized upon by Petitioner, are set out in the pleading to show the history of this litigation. The following paragraph of the same pleading of Respondents specifically mentions S. B. 140, under which this case was tried. S. B. 140 specifically repeals S.B. 228, which authorized and directed Prairie View to establish a school of law in 1945. A reading of Respondents' First Amended Original Answer (Tr. 22-27), will clearly show that the State is defending this lawsuit, not on what is or is not available at Prairie View University, and certainly not in 1937, but what was available to Sweatt at the time of trial in 1947 at the School of Law of the Texas State University for Negroes.

Wherefore, it is respectfully submitted that the trial court correctly sustained Respondents' special exception to Section III of Relator's Second Supplemental Petition (Tr. 64). The judgment recites that these pleadings are "irrelevant and immaterial to the issues of whether a suitable law school maintained by the State is available to the Relator." (Tr. 64)

2. The court correctly excluded the evidence of Dr. Thompson concerning facilities provided by other State universities and colleges. (Answering Petitioner's Second Point).

As hereinbefore emphasized, the only fact question, if any, is whether substantially equal opportunities and facilities were offered Sweatt at the time of this trial at the Texas State University for Negroes' School of Law. The question was, "Are THOSE facilities substantially equal NOW?" Certainly what happened at any other establishments sometime in the past could and should have no bearing on the case.

Dr. Thompson's testimony is based on what happened years previous, not only in Texas, but throughout the United States. He not only covers the legal profession, but many others. He there discusses undergraduate work, doctor's degrees, dental schools, and how many doctors there are in Texas. All of these facts and conclusions have absolutely nothing to do with what the facts are with reference to the Law Schools of the Texas State University for Negroes and The University of Texas at the time of this trial.

In addition to being wholly irrevelant, the trial court correctly found that it was outside the pleadings of the case (Tr. 64). This is not a class suit to review the history of education for Negroes in the United States, its merits and demerits.[30] The Court correctly limited the testimony to what was THEN available at the Negro Law School in Austin, as compared to what was offered white students at the School of Law of The University of Texas.

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[30] As the U.S. Supreme Court said in the Gaines case, "Here petitioner's right was a personal one. It was as an individual that he would be entitled to equal protection of the laws and the State was bound to furnish him . . . 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.

3. The Court correctly excluded the testimony of Donald Murray as to what happened at the University of Maryland in 1929-1932. (Answering Petitioner's Point 3).

For the same reasons, what happened to another individual at the University of Maryland in 1929-1932, has no bearing upon the fact issue, if any, of the equivalence of the two law schools in question, or upon the power of the State to furnish facilities at separate institutions.

With reference to Murray's testimony being retendered to rebut certain evidence of Dean Pittinger, the trial court stated, "I am not going to consider either of those bits of testimony myself." (560) If the trial court, sitting without a jury, did not consider the evidence of Dean Pittinger, certainly it was not error for him to exclude rebuttal to such unconsidered testimony. Certainly it was not harmful. Furthermore, the evidence of Dean Pittinger cited by appellant in his Third Point, and which appellant sought to rebut by retendering Murray's testimony, was introduced only after the following statement to the court:

> ". . . the next question (to be asked is) simply in rebuttal of the testimony developed by the Relator. It is our understanding that we did object to this line of testimony, but since it has been put in, we want to ask this question in reply to those statements of Relator's witnesses. . ." (534)

CONCLUSION AND PRAYER

The proposition is well established that the State, by its Constitution or statutory law, may provide for the separate education of its Negro and white students, so long as substantially equal facilities and opportunities are offered both groups. Such

action does not violate the equal protection clause of the 14th Amendment.

There is substantial evidence to show that an equivalent Negro Law School has been authorized by law and established. The Court of Civil Appeals found that there was sufficient evidence to support the fact findings and that the weight of the evidence preponderated in favor of the judgment. There is no assignment of error in the motion for rehearing in the Court of Civil Appeals or in the application for writ of error attacking the existence or sufficiency of the evidence to support such fact findings.

WHEREFORE, it is respectfully prayed that the application for writ of error be refused. If the application is granted, it is prayed that the judgments of the District Court and the Court of Civil Appeals be in all things affirmed, and that Respondents recover their costs.

Respectfully submitted,

Price Daniel
Attorney General of Texas

Joe H. Reynolds
Assistant Attorney General

By Joe R. Greenhill
Joe R. Greenhill
Executive Assistant Attorney General

Attorneys for Respondents

Three copies of this brief have been mailed to attorneys for Petitioner.

APPENDIX

OPINION OF THE COURT OF CIVIL APPEALS

No. 9684

HEMAN MARION SWEATT, APPELLANT,

vs.

THEOPHILUS SHICKEL PAINTER ET AL., APPELLEES.

APPEAL FROM 126TH DISTRICT COURT, TRAVIS COUNTY.

February 26, 1946, Heman Marion Sweatt, a Negro, applied for admission to the School of Law of the University of Texas, as a first year student. Admittedly, he possessed every essential qualification for admission, except that of race, upon which ground alone his application was denied, under Sec. 7 of Art. 7 of the Texas Constitution, which reads:

> "Separate schools shall be provided for white and colored children, and impartial provision shall be made for both."

May 16, 1946, he filed this suit, as Relator, for a writ of mandamus, against the President, members of the Board of Regents, Dean of the School of Law, and Registrar of the University of Texas, as Respondents, to compel his admission, upon the ground that its denial constituted an infringement of rights guaranteed to him under the equal protection clause of the fourteenth amendment to the Federal Constitution. In a trial to the court the sought relief was denied and Relator has appealed.

At the outset it should be borne in mind that the validity of

APPENDIX

OPINION OF THE COURT OF CIVIL APPEALS

state laws which require segregation of races in state supported schools, as being, on the ground of segregation alone, a denial of due process, is not now an open question. The ultimate repository of authority to construe the Federal Constitution is the Federal Supreme Court. We cite chronologically, in a note below, the unbroken line of decisions of that tribunal recognizing or upholding the validity of such segregation as against such attack.[1]

The gist of these decisions is embodied in the following excerpts from the opinion in Plessy v. Ferguson (Mr. Justice Brown[2] writing):

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races

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Note 1.

(1878) Hall v. DeCuir, 95 U.S. 485, 24 L. Ed. 547;
(1896) Plessy v. Ferguson, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256;
(1899) Cumming v. County Board of Education, 175 U.S. 528, 20 S. Ct., 197, 44 L. Ed. 262;
(1914) McCabe v. A T & S F R Co., 235 U.S. 151, 35 S. Ct. 69, 59 L. Ed. 169;
(1927) Gong Lum v. Rice, 275 U.S. 78, 48 S. Ct. 91, 72 L. Ed. 172;
(1938) Missouri v. Canada, 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208;
(1948) Sipuel v. Oklahoma, _____ U.S. _____, _____ S. Ct. _____ 92 L. Ed. 256;

A like uniformity is to be found in decisions of other Federal and State Courts. Their citation is not of importance here.

Note 2.

Mr. Justice Henry Billings Brown was born in Lee, Massachusetts, March 2, 1836. His academic education was at

before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have 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.

* * *

"The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages, has been frequently drawn by the courts."

This holding had the express approval of Mr. Justice Harlan in the Cumming case, of Mr. Justice Taft in the Gong Lum case, and of Mr. Chief Justice Hughes in the Canada case. Its

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Note 2 (Cont'd)

Yale, and among his fellow students were Chauncey M. Depew and his later associates on the Supreme bench, Mr. Justice Brewer and Mr. Justice Shiras. His education in law was obtained at Yale and Harvard. In 1859 he moved to Michigan, where he practiced law until 1861. He then served as Deputy U. S. Marshal and Assistant District Attorney until 1868, when he became Judge of the Wayne County Circuit Court. In 1875 he was appointed U.S. District Judge by President Grant, and in 1890 Associate Justice of the U.S. Supreme Court by President Benjamin Harrison.

approval is implicit in the latest enunciation of that court on the subject (January 12, 1948) in the Sipuel case.

Relator's brief asserts:

> "The record in the instant case for the first time presents testimony and documentary evidence clearly establishing that:
>
> "(1) There is no rational basis for racial classification for school purposes.
>
> "(2) Public schools, 'separate but equal' in theory are in fact and in practical administration consistently unequal and discriminatory.
>
> "(3) It is impossible to have the equality required by the Fourteenth Amendment in a public school system which relegates citizens of a disadvantaged racial minority group to separate schools."

And further:

> "The doctrine of racially 'separate but equal' public facilities is merely a constitutional hypothesis which has no application where racial segregation is shown to be inconsistent with equality."
>
> * * *
>
> "Although separate school laws have been enforced by several states, an examination of the cases in the United States Supreme Court and lower courts will demonstrate that these statutes have never been seriously challenged nor their validity examined and tested upon a record adequately presenting the critical and decisive issues such as are presented by the record in this case:
>
> "(1) Whether there is a rational basis for racial classification for school purposes.
>
> "(2) Whether public schools, 'separate but equal' in theory are in fact and practical administration

consistently unequal and discriminatory.

"(3) Whether it is possible to have the equality required by the Fourteenth Amendment in a public school system which relegates citizens of a disadvantaged racial minority group to separate schools."

Implicit in these quotations is the assertion that race segregation in public schools, at least in the higher and professional fields, inherently is discriminatory within the meaning of the fourteenth amendment, and cannot be made otherwise.

This assertion in effect impeaches the soundness of the various decisions of the Federal Supreme Court which hold to the contrary, as being predicated upon a purely abstract and theoretical hypothesis, wholly unrelated to reality. To so hold would convict the great jurists who rendered those decisions of being so far removed from the actualities involved in the race problems of our American life as to render them incapable of evaluating the known facts of contemporaneous and precedent history as they relate to those problems.

It is of course of the very essence of the validity of segregation laws that they provide for each segregated group or class facilities and opportunities the equivalent, or (as often stated) substantial equivalent of those provided for the other group or class. Our constitution (quoted above) so provides. The brief asserts that there can be no "substantial equality," the two words being in themselves incompatible. This is of course true in pure,

as distinguished from applied, mathematics. "Equality" like all abstract nouns must be defined and construed according to the context or setting in which it is employed. Pure mathematics deals with abstract relations, predicated upon units of value which it defines or assumes as equal. Its equations are therefore exact. But in this sense there are no equations in nature; at least not demonstrably so. Equations in nature are manifestly only approximations (working hypotheses); their accuracy depending upon a proper evaluation of their units or standards of value as applied to the subject matter involved and the objectives in view. It is in this sense that the decisions upholding the power of segregation in public schools as not violative of the fourteenth amendment, employ the expressions "equal" and "substantially equal" and as synonymous. The framers of the Texas constitution of 1876 recognized the necessity (both inherent and under the 14th amendment) of "equal protection" in the must (shall) requirement (Art. 7, Sec. 7) of "impartial provision" for "both" races. The question, and we think the controlling one, which this appeal presents is whether under the record showing in this case the State at the time of the trial had provided and made available to Relator a course of instruction in law as a first year student, the equivalent or substantial equivalent in its advantage to him of that which the State was then providing in the University of Texas Law School. We are not dealing here with

abstractions but with realities.

In the latter portion of Relator's brief the following proposition is asserted:

> "The expert testimony introduced at the trial establishes that there is no rational justification for segregation in professional education and that substantial discrimination is a necessary consequence of any separation of professional students on the basis of color."

The supporting evidence deals generally with the subject of race segregation in professional and other schools from biological and other viewpoints, giving conclusions of scientists, educators and other experts in the several fields, and data compiled and conclusions reached in reports of surveys, etc. In so far as this evidence is directed against the policy of segregation the subject dealt with is outside the judicial function. The people of Texas, through their constitutional and legislative enactments, have determined that policy, the factual bases of which are not subjects of judicial review. See Watts v. Mann, 187 SW 2d 917, error ref.; 11 Am. Jur., §§ 142-144, pp. 82, et seq. The only appropriate judicial inquiry here is whether the facilities furnished and made available by the State to Relator as an applicant for a first year law course meet the test of due process under the fourteenth amendment.

Nor are we concerned here with whether the State has discharged its obligations under that amendment in other segregated

fields or branches of education.

For these reasons we hold that the trial court correctly excluded: 1) Relator's pleadings as to what happened at Prairie View in 1937 (Relator's first point);(2) evidence of Dr. Thompson regarding facilities at other state institutions and colleges (Relator's second point); and 3) evidence of Donald Murray regarding what happened at the University of Maryland in 1929-32 (Relator's third point).

The record shows that this cause was called for trial June 17, 1946, and after a hearing the court passed an interlocutory order, which, after reciting the (below) 1945 Act, provided that, if by December 17, 1946, " a course for legal instruction substantially equivalent to that offered at the University of Texas is established and made available to the relator within the State of Texas in an educational institution supported by the State, the writ of mandamus sought herein will be denied, but if such a course of legal instruction is not so established and made available, the writ of mandamus will issue." The cause was ordered held on the docket until December 17, 1946, on which date final judgment was entered denying the writ, upon a showing by Respondents that the A & M (Texas Agricultural and Mechanical College) Board had provided for a first year law school at Houston to open with the February 1947 semester, as a branch of Prairie View University. This judgment was set aside by this court March 26, 1947, and

the cause remanded generally, without prejudice to the rights of either party, upon agreement of counsel in open court. Thereafter (May 17-June 17, 1947) the cause was again tried, the judgment denying the writ, upon the specific finding by the court that in compliance with the Act of 1947 (noted below) the Respondents:

> "* * * have established the School of Law of the Texas State University for Negroes in Austin, Texas, with substantially equal facilities and with the same entrance, classroom study, and graduation requirements, and with the same courses and the same instructors as the School of Law of The University of Texas; that such new law school offered to Relator privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas; that Relator, although duly notified that he was eligible and would be admitted to said law school March 10, 1947, declined to register; that from his own testimony, Relator would not register in a separate law school no matter how equal it might be and not even if the separate school affords him identical advantages and opportunities for the study of law equal to those furnished by the State to the white students of the Law School of the University of Texas; and the constitutional right of the State to provide equal educational opportunities in separate schools being well established and long recognized by the highest State and Federal Courts, and the facts in this case showing that Relator would be afforded equal if not better opportunities for the study of law in such separate school, the petition for Writ of Mandamus should be denied."

The sufficiency of the evidence to support these findings and conclusions to the extent that the stated facilities provided by the State meet the requirements of due process, constitutes the controlling question in the case; upon which issue the record shows: Relator's application was the first ever made by a Negro for ad-

mission to the University of Texas Law School. It also appears to have been the first application of any Negro for admission to any other department or school of the University of Texas. The Prairie View Normal and Industrial School for Negroes was established in the 1870's, and was operated under the governing board of the A. & M. Neither Prairie View nor any other state supported school for Negroes offered any courses in law. The name of Prairie View was changed by the Act of June 1, 1945, to Prairie View University; and it was provided:

> "Whenever there is any demand for same, the Board of Directors of the Agricultural and Mechanical College, in addition to the courses of study now authorized for said institution, is authorized to provide for the establishment of courses in law, medicine, engineering, pharmacy, journalism, or any other generally recognized college course taught at the University of Texas, in said Prairie View University, which courses shall be substantially equivalent to those offered at the University of Texas." (Acts 49th Leg., Ch. 308, p. 506.)

The Act of 1947 (S.B. 40, Ch. 29, Acts 50th Leg.) was passed and became effective March 3, 1947. It provided (inter alia) for the establishment of "The Texas State University for Negroes" to be located at Houston, with a governing board of nine "to consist of both white and negro citizens of this State," and appropriated $2,000,000 for land, buildings and equipment, and $500,000 per annum for maintenance for the biennium ending August 31, 1949. And that:

> "The Texas State University for Negroes shall offer

> all other courses of higher learning, including, but without limitation, (other than as to those professional courses designated for The Prairie View Agricultural and Mechanical College), arts and sciences, literature, law, medicine, pharmacy, dentistry, journalism, education, and other professional courses, all of which shall be equivalent to those offered at the University of Texas. Upon demand being made by any qualified applicant for any present or future course of instruction offered at the University of Texas, or its branches, such course shall be established or added to the curriculum of the appropriate division of the schools hereby established in order that the separate universities for Negroes shall at all times offer equal educational opportunities and training as that available to other persons of this State."

And further:

> "Sec. 11. In the interim between the effective date of this Act and the organization, establishment and operation of the Texas State University for Negroes at Houston, upon demand heretofore or hereafter made by any qualified applicant for instruction in law at the University of Texas, the Board of Regents of the University of Texas is authorized and required to forthwith organize and establish a separate school of law at Austin for negroes to be known as the 'School of Law of the Texas State University for Negroes' and therein provide instruction in law equivalent to the same instruction being offered in law at the University of Texas. The Board of Regents of the University of Texas shall act as the governing board of such separate law school until such time as it is transferred to the control of the Board of Directors of the Texas State University for Negroes."

For this latter purpose $100,000 was appropriated.

Pursuant to this Act the school for first year Negro law students was established at Austin. Relator was notified amply in advance of its opening on March 10, 1947, but did not and has not at-

tended. A resume of the evidence showing the facilities, opportunities and advantages afforded by this school and a comparison thereof with those afforded by the University of Texas School of Law is set forth in an appendix to this opinion, copied in the main from Respondents' brief, and approved and adopted by us as a fair statement of the evidence in this respect.

The evidence shows, on the part of the State of Texas, an enormous outlay both in funds and in carefully and conscientiously planned and executed endeavor, in a sincere and earnest bona fide effort to afford every reasonable and adequate facility and opportunity guaranteed to Relator under the fourteenth amendment, within the State's settled policy (constitutional and statutory) of race segregation in its public schools. We hold that the State has effectually accomplished that objective.

The trial court's judgment is affirmed.

(Signed) James W. McClendon
Chief Justice

Affirmed.

Filed: Feburary 25, 1948

APPENDIX

Breaking the elements of the School of Law into component parts, the following evidence was deduced.

ENTRANCE, EXAMINATION, GRADUATION, AND SIMILAR REQUIREMENTS.

The requirements for admission and fees, and regulations re-

lating to classification of students, classwork, examinations, grades and credits, standards of work required, and degrees rewarded are exactly the same as those published in the latest published catalogue of The University of Texas and used at such institution.

FACULTY

The instructors at the School of Law of the Texas State University for Negroes were and are the very same professors which had taught or were teaching the same courses at The University of Texas Law School. They were the same instructors Sweatt would have had if he had been enrolled in The University of Texas. The instructions from the Board of Regents were to use all of the faculty of the University Law School, so far as necessary, in order to maintain a full curriculum at the Negro Law School until four more full-time professors could be employed for the Negro Law School. The budget provided for four professors at $6,000 per year -- the same pay base for professors at The University of Texas. Each of the instructors devotes all of his time to teaching -- each a full-time professor. None are engaged in the private law practice. With the small enrollment at the Negro Law School, the instructors would be more available to the students for consultation than they would be to students at The University of Texas with its large class of 150 to 175 students. The Dean and Registrar of the two law schools were respectively the same persons.

CURRICULUM

The curriculum at the Negro Law School and at The University was exactly the same; it was the same as that adopted in the latest University of Texas School of Law Bulletin. The courses offered beginning students at the Negro Law School were identical with those offered beginning students at the University: Contracts, Torts, and Legal Bibliography. These courses, with the same professors, are set out in Respondent's Exhibit 7.

CLASSROOM

The classroom requirements were identical. With much smaller classes, the Negro Law School would provide the student with the opportunity to personally participate in classroom recitations and discussions. In an average law class at The University of Texas Law School, an average student would be called upon to recite only an average of $1\frac{1}{2}$ times a semester. In a smaller class the students would receive better experience and education; they would be

called on more frequently, would be more "on their toes." The students would come to class better prepared because their chances of being called upon are much greater; there would be a greater pressure to keep up their daily work. Dean McCormick testified that "in the Negro Law School he (Sweatt) would have gotten a good deal more personal attention from the faculty than he would have had he been in the large entering class in The University of Texas.

LIBRARY

At the time of trial, there were on hand in the School of Law of the Texas State University for Negroes books customarily used by the first-year class of The University, and other books which Miss Helen Hargrave, Librarian of the University Law School, thought would be useful. There were about 200 of these books. There were also available for transfer to the Negro Law School between 500 and 600 books from the University, plus gifts of between 900 and 950 books. In addition, the entire library of the Supreme Court of Texas was specifically made available to the Negro Law School by Section 11 of H.B. 240, Acts 50th Legislature. The Supreme Court Library is located in the State Capitol Building on the second floor. The Capitol grounds are some 20 feet from the Negro Law School, and the entrance is only about 300 feet from that School.

The Supreme Court Library contains approximately 42,000 volumes, which number is far in excess of the 7,500-book minimum requirement of the American Bar Association. Excluding duplicates, The University of Texas Law Library contains 30,000 to 35,000 books. Counting duplicates, it contains around 65,000. These books serve 850 law students of The University of Texas.

In some respects the Supreme Court Library is stronger than that of the University. Being a Governmental Depository, the Supreme Court Library automatically receives many reports, such as those of administrative bodies. It is the strongest library in the South on State Session Laws. It contains Attorney General's Opinions, Tax Board Opinions, Workmen's Compensation Reports, and other items not carried by the University. The Supreme Court Library is more spacious for a student body of ten students than are the facilities at The University of Texas Law School Library, which are exceedingly crowded. There is no more confusion, and in most instances, less confusion in the Supreme Court Library than at the Law Library at the University because of the large number of persons using the latter.

On the other hand, the Supreme Court Library does not have as many textbooks, legal periodicals, or English reports as the University Law Library. The Court's Library contains the Harvard, Columbia, Yale and Texas Law Reviews, and the American Bar Association Journal. It has the English Reports up to 1932. The Law Library of The University of Texas and that of the Supreme Court are substantially equal except for the texts, legal periodicals, and English Reports.

However, all of such texts, legal periodicals, and English Reports, not available in the Supreme Court Library, are readily available to the Negro Law School on a loan basis from the Law Library of The University of Texas.

In addition to the books in the Negro Law School and in the Supreme Court Library, and those available on a loan basis from the Law Library of The University of Texas, a complete law library is being procured, consisting of some 10,000 law books, some of which are already available. The rest have been placed for order through the Board of Control for the School of Law of the Texas State University for Negroes. The list of the 10,008 books which will constitute the Negro Law School Library is set out in Respondent's Exhibit No. 8. Of such number, 1281 are immediately available, and 8,727 books were already requisitioned. Bids had already been requested on the 8,727 books requisitioned, and 23 bids were received. Orders have already been placed for 5,702 of the books, all deliverable within ten to sixty days. Wherever new books were available, they were ordered; second-hand books were only ordered where new ones were not available. The library requisitioned included 20 Law Reviews, Indices of legal periodicals, Citators, Digests, Restatements, textbooks, statutes, the complete West Publishing Company Reporter System, etc. The undisputed evidence is that the books ordered for the Negro Law School are sufficient to meet the requirements of the American Association of Law Schools.

THE PHYSICAL FACILITIES

Whereas The University of Texas Law School has 3 classrooms for 850 students, the School of Law of the Texas State University of Negroes has two classrooms, plus a reading room, toilet facilities, and an entrance hall, for a much smaller student body. The two law schools possess approximately the same facilities for light and ventilation, ("There are ample windows and lights.") though most law schools, including The University of Texas, need artificial light in the daytime. The Negro Law School, assuming a class of 10 students, has a greater floor space per student.

APPENDIX

OPINION OF THE COURT OF CIVIL APPEALS

The location of the Negro Law School is particularly good. It is directly north of the State Capitol, separated only by a 20-foot street. It is within 100 yards of the Supreme Court of Texas, the Court of Civil Appeals, the Attorney General's Office, and the Legislature. It is between the business district of Austin and The University of Texas -- 8 blocks south of the University, and hence 8 blocks nearer the business district.

The building housing the Negro Law School is a three-story building of brick construction. The first floor was occupied by the School at the time of trial, but the upper two stories of the building were available as needed. Before March 10, 1947, the premises were cleaned up and painted. The building has ample space to house the 10,000 volume library and leave sufficient space for classrooms and reading room.

Hon. D. A. Simmons, President of the Texas Bar Association, 1937-38; President of the American Judicature Society 1940-1942; and President of the American Bar Association 1944-1945, testified:

> "In my opinion, the facilities, the course of study, with the same professors, would afford an opportunity for a legal education equal or substantially equal to that given the students at The University of Texas Law School."

Hon. D. K. Woodward, Jr., Chairman of the Board of Regents of The University of Texas, testified:

> "What we set up there was a plant fully adequate to give the very best legal instruction for the only man of the Negro race who had ever applied for instruction in law at the University in about 63 years of the life of the School."
>
> * * *
>
> "I am talking as a man familiar with what it takes to provide a thorough training in law in the State of Texas, and I stated the facts within my own personal knowledge, that the facilities which the Board of Regents of the University set up in accordance with Senate Bill 140 are such as to provide the Relator in this case the opportunity for the study of law unsurpassed any time elsewhere in the State of Texas, and fully equal to the opportunity and in-

struction we are offering at the University any day."

Hon. Charles T. McCormick, Dean of the University of Texas Law School and President of the Association of American Law Schools, 1942, testified that the facilities at the Law School for Negro citizens furnished to Negro citizens an equal opportunity for study in law and procedure; that considering the respective use by the respective number of students, the physical facilities offered by the Negro Law School were substantially equal to those offered at The University of Texas Law School; and that "I would say * * * the Negro student has at least equal and probably superior facilities for the study of law."

With reference to the membership requirements of the Association of American Law Schools, it was shown that the Negro Law School, at the time of this trial, met the great majority of the 9 requirements:

(1) It is a school not operated as a commercial enterprise, and the compensation of any officer or member of its teaching staff is not dependent on the number of students or the fees received.

(2) It satisfies the entrance requirements, i.e., pre-legal training, etc.

(3) The school is a "full-time law school." The school work is arranged so that substantially the full working time of the student is required at the school.

(4) The conferring of its degrees is conditioned upon the attainment of a grade of scholarship attained by examinations.

(5) No special students are admitted. In this, the School's requirement is stronger than that of the Association, which permits such students under certain considerations.

(6) The 10,000 volume library ordered for the School is sufficient to meet the library requirements. The selection of the books is such as to conform with the Association's requirements. In addition, the Supreme Court Library of 40,000 volumes is available, plus loan privileges from the Law Library of the University of Texas.

(7) The seventh requirement is that the "faculty shall consist of at least four full-time instructors who devote substantially all of their time to the work of the school." The professors in this case are full-time professors in the sense that all of their time is

devoted to teaching. However, all of their teaching is not done at the Negro school; they will also be teaching at the University.

(8) Provision has been made for keeping a complete and readily accessible individual record of each student.

(9) The requirement reads, "It shall be a school which possesses reasonably adequate facilities and which is conducted in accordance with those standards and practices generally recognized by member schools as essential to the maintenance of a sound educational policy." Dean McCormick testified that in his opinion the Negro Law School met this requirement.

The testimony was that a two-year period is generally required before any law school may be admitted to membership in the Association of American Law Schools. Dean McCormick testified that he knew of no reason why the Negro Law School could not comply with all of those standards within that two-year period -- before any entering student could graduate from the school.

No. 9684

Motion No. 10,502

HEMAN MARION SWEATT, APPELLANT,

VS.

THEOPHILUS SHICKEL PAINTER ET AL., APPELLEES.

ON APPELLANT'S MOTION FOR REHEARING

Point VII in the motion complains that this court "erred in ignoring testimony introduced by appellant and merely adopting appellees' interpretation of the evidence by attaching to its opinion, an appendix copied in the main from appellees' brief, and based its opinion and judgment on said appellees' brief,

without making an independent evaluation of the record as to the comparative values of the two law schools as a basis for its opinion and judgment."

Implicit in the statement in our opinion that the resume of evidence set forth in the appendix was "approved and adopted by us as a fair statement of the evidence" in the stated respect, was the assertion (which we now make explicit) that we had made "an independent evaluation of the record as to the comparative values of the two law schools as a basis for its (our) opinion and judgment," and that from this "independent evaluation" we reached the conclusion and so held that the statement in the appendix contained a fair resume of the pertinent evidence, which we approved and adopted as our own.

It should always be held in mind that the members of this court are not the triers of fact. That is the function of the trial court. This court is one of review only. Where there is no evidence of sufficient probative value to support a judgment, we have the power to set it aside and render the judgment which the trial court should have rendered. We also have the power (when our jurisdiction in that regard is properly invoked) to set aside a judgment and order a new trial on the facts, where the evidence so greatly preponderates against the judgment as, in our opinion, to require that it be set aside in the interest of justice. Our jurisdiction in this latter regard was not invoked in this case. See

APPENDIX

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Wisdom v. Smith, _____ SW 2d _____, 17 Sup. Ct. Reporter, 239; Hall Music Co. v. Robertson, 117 Texas 261, 1 SW 2d 857; Phillips v. Anderson, 93 SW 2d 171. However, we have carefully considered the evidence from that viewpoint as well as from that of its sufficiency as a matter of law; and were our jurisdiction in that regard properly invoked we would be constrained to hold that its preponderance and overwhelming weight support the trial court's judgment and the specific fact findings therein which are quoted in our original opinion; if in fact it does not conclusively do so, as a matter of law.

The motion is overruled.

(s) James W. McClendon
Chief Justice

Overruled.

Filed: March 17, 1948.