



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 30 | Number 2

Article 9

2-1-1952

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Dickson McLean Jr.

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Recommended Citation

Dickson McLean Jr., *Constitutional Law -- "Separate but Equal" Test in Graduate Education*, 30 N.C. L. REV. 153 (1952).

Available at: <http://scholarship.law.unc.edu/nclr/vol30/iss2/9>

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Where a chattel not covered by the conditional sales contract is repossessed along with an automobile, the North Carolina court has found liability.³⁵ And, in South Carolina where the contract authorized the taking of any property in the automobile the court held that that privilege only applied to property not visible and found liability for property that could have been seen.³⁶

The principal case in denying liability in spite of the technical trespass on plaintiff's premises is clearly in accord with the general rule. However, if the same facts arose in North Carolina, the court would probably grant at least nominal damages since a repossessing seller has no right to enter the buyer's premises.³⁷

JAMES R. TROTTER.

Constitutional Law—"Separate but Equal" Test in Graduate Education

In *McKissick v. Carmichael*¹ the court decided that the separate law school furnished Negroes by the State of North Carolina was not substantially equal, as required by the Fourteenth Amendment, to the law school furnished white students at the University of North Carolina. The University law school was ordered to admit qualified Negro applicants. The decision followed by less than a year *Sweatt v. Painter*² and applied the principles first enunciated in that case to a situation approaching much nearer equality between the white and Negro schools.

The constitutions and statutes of the southern states require the segregation of the white and colored races in the public educational system.³ Educational segregation affording equal facilities has been authorized by the federal courts as a proper exercise of state police power since *Plessy v. Ferguson*⁴ in 1896, a case actually involving segregation in interstate carriers. Segregation in public education was specifically held to be constitutional in the later case of *Gong Lum v. Rice*.⁵ While segregation *per se* does not violate the Fourteenth Amendment,

³⁵ *Narron v. Chevrolet Co.*, 205 N. C. 307, 171 S. E. 93 (1933) (Personal belongings left in the glove compartment and on the back seat).

³⁶ *Sanders v. General Motors Acceptance Corp.*, 180 S. C. 38, 185 S. E. 180 (1936).

³⁷ *Parris v. Fischer & Co.*, 221 N. C. 110, 19 S. E. 2d 128 (1942).

¹ 187 F. 2d 949 (4th Cir. 1951), *cert. denied*, 341 U. S. 951 (1951).

² 339 U. S. 629 (1950).

³ "The children of the white race and the colored race shall be taught in separate schools, but there shall be no discrimination in favor of, or to the prejudice of, either race." N. C. Constitution, Art. IX, §2; N. C. GEN. STAT. §115-3 (1943). For provisions in other states see MANGUM, *THE LEGAL STATUS OF THE NEGRO*, 79 *et seq.* (1940).

⁴ 163 U. S. 537 (1896).

⁵ 275 U. S. 78 (1927). The state may impose segregation in private schools. *Berea College v. Kentucky*, 211 U. S. 45 (1908).

the equal protection clause requires that the separate facilities furnished must be equal.⁶

For many years the federal courts ruled that this "separate but equal" rule was satisfied by "substantial" equality.⁷ But with increasing litigation in the field of segregation in education since the 1930's, the federal courts have moved toward a stricter requirement of real equality in fact. In *Missouri ex rel Gaines v. Canada*⁸ it was held that the practice of sending Negro college students out of state for courses not available within the state was a denial of equal protection: the required equal facilities must be furnished within the state. Then, in *Sipuel v. Board of Regents*⁹ it was emphasized that the right to equal facilities is personal and present: the facilities must be furnished regardless of the number of applicants and "as soon as for any other group." *Johnson v. Board of Trustees*¹⁰ held that provision for a white faculty to commute to classes at a Negro college did not afford Negro students equal protection. Further cases brought into question equality in the lower public schools.¹¹

In 1950, *Sweatt v. Painter* threw an entirely new light on the application of the "separate but equal" rule in the field of higher education. The filing of a suit to gain admission for Negroes to the University of Texas law school had prompted Texas to establish, for the first time, a Negro law school. The Supreme Court, in examining the physical facilities of the two schools, found the Negro school unequal to the white school. But more important, the Court compared the "intangible factors" of reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, and traditions and prestige of the two schools. The Court stated that a legal education "cannot be effective in isolation from the individuals and institutions with which the law interacts. The law school to which

⁶ *Gong Lum v. Rice*, 275 U. S. 78 (1927); *McCabe v. Atchison, T. & S. F. Ry.*, 235 U. S. 151 (1914); *McMillan v. School District*, 107 N. C. 609, 12 S. E. 330 (1890). See cases collected in *Briggs v. Elliot*, 98 F. Supp. 521, 531 (E. D. S. C. 1951).

⁷ For example in *United States v. Buntin*, 10 Fed. 730 (C. C., Ohio, 1882), there was held to be no denial of equal protection to Negroes within a school district though no Negro school was provided within the district and Negroes had to go 5 miles to a school outside the district. In *Cummings v. Board of Education*, 175 U. S. 528 (1899), discontinuance of a Negro high school in order to maintain lower Negro schools was allowed "in the interest of the greater number of colored children," though a white high school continued to be maintained. The Court used the language that "Any interference on the part of the Federal authority with the management of state schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land." *Cummings v. Board of Education*, 175 U. S. 528, 545 (1899).

⁸ 305 U. S. 337 (1938); Note, 17 N. C. L. REV. 280 (1939).

⁹ 332 U. S. 631 (1948).

¹⁰ *Johnson v. Board of Trustees of Univ. of Kentucky*, 83 F. Supp. 707 (E. D. Ky. 1949).

¹¹ See p. 158, *infra*, on public schools.

Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85 per cent of the population of the State and include most of the lawyers, witnesses, jurors, judges, and other officials. . . . With such a significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal."¹²

Against this background the case of *McKissick v. Carmichael*¹³ arose to test the equality of the separate legal education given by the State of North Carolina. The fact that the law school for Negroes was not at the time of the suit a hastily set-up school, but one which had been in operation for ten years with a student body of twenty-eight, a faculty of seven, and an annual budget of \$52,000¹⁴ differentiated the case from *Sweatt v. Painter*.

The Court of Appeals found that the case "differed in circumstance but not in principle" from *Sweatt v. Painter*. The court said there were inequalities in those facilities capable of objective measurement—building,¹⁵ libraries,¹⁶ the number of subjects offered,¹⁷ activities such as law review work,¹⁸ and the existence of a summer school at the white law school. The size of classes at the Negro law school was found to permit more personal instruction than at the white school but to be too small for full discussion.¹⁹

Turning to a consideration of the intangible qualities of the two schools, the court found that the faculty of the white law school was superior in teaching experience, scholarly research, reputation, and in work with legislative bodies. With fewer courses to teach, there was

¹² *Sweatt v. Painter*, 339 U. S. 629, 634 (1950). In *McLaurin v. Oklahoma State Regents*, 339 U. S. 637 (1950), decided at the same time as *Sweatt v. Painter*, the Court held that the action of the University of Oklahoma in setting apart a Negro graduate student, once admitted, in the classroom, dining hall, and library, was a denial of equal protection. The Court will not allow embarrassing restrictions to be placed on the use of educational facilities after admission. The Negro student must be free "to study, engage in discussion, to secure acceptance by his fellow students on his own merits, and, in general, to learn his profession." Does this holding apply only to facilities immediately necessary for study, or to any services furnished by the school? For example, see *Time*, Oct. 8, 1951, p. 85, col. 1, and Oct. 22, 1951, p. 92, col. 3, on the problem of student admission to football games.

¹³ 187 F. 2d 949 (4th Cir.), cert. denied, 341 U. S. 951 (1951), reversing 93 F. Supp. 327 (M. D. N. C. 1950).

¹⁴ 73 *SCHOOL AND SOCIETY* 326 (1951).

¹⁵ The white law school building was described as "superior," and at the time was in the process of enlargement. The Negro school was being moved to a remodeled building described as "ample."

¹⁶ The white law library had 64,000 volumes; the Negro law library had 30,000.

¹⁷ The white law school listed 40 courses; the Negro school, 27 courses.

¹⁸ The white law school has a law review which has been published since 1922 and a Chapter of the Order of the Coif; the Negro law school has neither.

¹⁹ Classes at the white school were as large as 80 to 100; those at the Negro school were 8 or 9. Expert opinion gave the ideal number as 25 students.

a greater opportunity for specialization.²⁰ The absence of white students at the Negro school was said to deprive the Negro students of the benefit of a full range of discussion and of an opportunity "to form acquaintances with the persons who will later occupy positions of influence in the profession." "It is a definite handicap to the colored student to confine his association in the law school to people of his own class."²¹ The court concluded that the circumstances at the Negro school of greater personal attention and association with the race from which future clients of the Negro students would come, which the District Court had balanced in finding equality, "do not overcome the deficiencies disclosed."²²

The grounds upon which the *Sweatt* and *McKissick* cases are decided seem to lead to the conclusion that it is not possible for a state to establish a separate law school for Negroes which will be found to afford equal facilities. To attain equality in faculty reputation, administrative experience, alumni, and prestige of the school would appear to be almost impossible for a recently established school (which most of the separate graduate schools are).²³ Beyond these factors lies the requirement of the opportunity to associate and exchange ideas with the white segment of the population. In the *Sweatt* case the court stated that with white students excluded legal education "cannot be effective" and "*we cannot conclude*" [italics added] it to be equal.²⁴ By the use of these phrases the court seems to be saying that segregation is *per se* unconstitutional in legal education.²⁵

To what extent will other graduate schools be affected? By analogy, the "intangible factors" of faculty reputation, administrative experience,

²⁰ "Most of the witnesses did not venture the opinion that the faculties were of equal quality." "The University Law School, its faculty and its Law Review enjoy a fine reputation in legal circles." *McKissick v. Carmichael*, 187 F. 2d 949, 951 (4th Cir. 1951). The District Court had found "ample testimony that the [Negro] faculty is capable and . . . keeps pace with that at the [white] University." *Epps v. Carmichael*, 93 F. Supp. 327, 330 (M.D. N. C. 1950). The District Court did not discuss as such the reputation of the faculty nor the reputation of the school, which the *Sweatt* case had listed as material factors.

²¹ *McKissick v. Carmichael*, 187 F. 2d 949, 952 (4th Cir. 1951). The District Court had recognized that 74% of the population of the state is white; but said there was no evidence to show that any Negro lawyer ever represented a white client, and that therefore advantages of contacts with members of their own race would exceed any advantages of going to the white University. Neither decision makes direct reference to the alumni of the two schools, another factor which the *Sweatt* case held material.

²² *McKissick v. Carmichael*, 187 F. 2d 949, 953 (4th Cir. 1951).

²³ For example, all five of the state-supported Negro law schools in the South were established since 1939: Lincoln University, Missouri, 1939; North Carolina College, 1939; Texas State University, 1947; Southern University (Louisiana), 1947; and South Carolina State College, 1947. 73 SCHOOL AND SOCIETY, 326 (1951).

²⁴ *Sweatt v. Painter*, 339 U. S. 629, 634 (1950).

²⁵ See Roche, *Education, Segregation, and the Supreme Court*, 99 U. OF PA. L. REV. 949 (1951); Note, 39 KY. L. J. 492 (1951); Note, 36 VA. L. REV. 797 (1950).

and standing of the school would probably be held to be material. As a practical matter, this would often determine the question. But would association with white students necessarily be a factor in other graduate education? In fields concerned with some degree of social work, such as education, sociology, and possibly medicine, opportunity to associate with the white population would probably be found to be a necessary part of the education. In other fields more removed from the "human" element, such as most scientific, engineering, and technical studies, there would seem to be less basis for emphasizing this factor of association. At any rate, the high cost of segregation itself²⁶ and the uncertainty of success in attempting to provide separate graduate schools for a small number of students²⁷ has brought about admission of Negroes into graduate schools of white universities, where not otherwise provided, in all but five southern states.²⁸ While the new project of regional

²⁶ For example, the average annual expenditure in 1949-1950 by the state for each white student in the University of North Carolina Law School was \$416; for each Negro student in the North Carolina College school it was \$1460. *McKissick v. Carmichael*, 187 F. 2d 949, 953 (1951). In other Southern state-supported Negro law schools, operational expenses in 1949-50 for each Negro student were: Lincoln University (Mo.), \$1,728; Texas State University, \$2,390; Southern University (La.), \$1,990; and South Carolina State, \$2,775. 73 *SCHOOL AND SOCIETY* 326 (1951). From 1941 to 1943, Missouri spent \$229 per student for 17,010 whites at the University of Missouri and \$697 per student for 1,228 Negroes at Lincoln University. *FRAZIER, THE NEGRO IN THE UNITED STATES* 487 (1949).

²⁷ Cases testing the equality of separate graduate education actually provided, as distinguished from a failure to provide any facilities at all, have all found the separate facilities unequal. *Sweatt v. Painter*, 339 U. S. 629 (1950); *Missouri ex rel Gaines v. Canada*, 305 U. S. 337 (1938); *McKissick v. Carmichael*, 187 F. 2d 949 (4th Cir. 1951); *Wilson v. Board of Supervisors of L. S. U.*, 92 F. Supp. 986 (E. D. La. 1950); *Johnson v. Board of Trustees of U. of Ky.*, 83 F. Supp. 707 (E. D. Ky. 1949); *McReady v. Byrd*, 73 A. 2d 8 (Md. 1950); *Pearson v. Murray*, 169 Md. 478, 182 Atl. 590 (1936).

²⁸ For the school year 1950-51 the estimate is that 300 Negroes attended state-supported Southern white colleges. Including private schools and summer sessions, the figure comes to about 2,000. *The Crisis*, June, 1951, p. 400. Some of the figures for individual schools are: University of Oklahoma, 60; University of Kentucky, 85; University of Louisville, 20; University of Arkansas, 15; University of Texas, 19; University of Missouri, 15; University of Delaware, 3; University of West Virginia, 75; University of Virginia, 1; Louisiana State, 1; Union Theological Seminary, 22; and Berea College, 3. *The Crisis*, August, 1951, p. 458; *The Southern Patriot*, Nov. 1950, p. 2. Baptist schools of theology, and Catholic colleges in the South are now accepting Negroes. *The New Leader*, Sept. 3, 1951, p. 2. On April 4, 1951, the Board of Trustees at the University of North Carolina passed a resolution providing for the admission of Negroes into graduate schools at the University when such schools are not otherwise provided in the state. *Raleigh News and Observer*, April 5, 1951, p. 1, col. 6. As a result of this resolution, there is at present one Negro attending the Medical School at the University, in addition to five in the Law School. On March 9, 1950, Kentucky repealed segregation laws so far as they applied to institutions of higher education, both graduate and undergraduate, private and public. *Konnite, Extent and Character of Segregation*, 20 *JOURNAL OF NEGRO EDUCATION* 425 (1951). Among the five states not admitting Negroes—Alabama, Florida, Georgia, Mississippi, and South Carolina—action is pending against the University of Georgia Law School, *Southern Patriot*, Sept., 1951, p. 1. A Florida decision allowing admission of Negroes on a temporary basis while other separate facilities are provided has been appealed to the Supreme Court. *State v. Board of Control*, 47 So. 2d 608 (Fla. 1951); petition for cert. filed, 20 *Law Week* 3112 (1951).

graduate schools in the South²⁹ points to an improvement in graduate education, it does not seem to be a solution to the desire in the South for segregation. The *Gaines* case requires that equal education be furnished within the state. Consequently, a recent Maryland case³⁰ holds that the offer of graduate education at a regional school outside the state does not meet the equal protection standard.

In undergraduate education, the intangible qualities of faculty, administration, and school standing would probably be held material; though perhaps there would be no definitely ascertainable need for professional contacts. Nor, in most courses, would the opportunity to exchange ideas with white students be so essential as in graduate fields such as law. So far, undergraduate education has come in for little litigation.³¹

Decisions determining the equality of segregated public lower schools have so far not been based on "intangible factors."³² Recent comparisons in high schools have been based on physical plant, location of the school with regard to the students, transportation facilities, recreational facilities, range of courses, teacher salaries, extracurricular activities, and, in one case, the quality of instruction.³³ Comparisons in graded

²⁹ The regional plan was set forth in a compact by the governors of eight Southern states with the purpose of providing regional graduate schools, with enrollment allowed students from any state in the compact. *N. Y. Times*, Feb. 8, 1948, p. 15, col. 1. The plan envisaged the use of four institutions for veterinary medicine, seven for medicine, and six for dentistry. In 1949-50, education under the plan was given 231 Negroes and 233 whites, and expenditures were \$1,736,000. *Survey*, Sept., 1949, p. 476. See Note, 1 *VAND. L. REV.* 403 (1948) for the compact of the Southern states and a discussion of its relationship to the equal protection clause.

³⁰ *McReady v. Byrd*, 73 A. 2d 8 (Md. 1950), *cert. denied*, 340 U. S. 827 (1950). Maryland offered a nursing course at Meharry Medical College in Tennessee, under the regional school project, at a cost, including traveling and living expenses, equal to that in Maryland.

³¹ A recent Delaware case which decided that the state Negro undergraduate college was not the equal of the white university relied chiefly upon a comparison of the physical plant, the range of courses available, and the faculty salary scales. Mentioned but not emphasized were the quality of the two administrations and the lack of distinctions and publications on the part of the Negro faculty. *Parker v. Univ. of Delaware*, 75 A. 2d 230 (Del. Ch. 1950).

³² *Briggs v. Elliot*, 98 F. Supp. 529 (E. D. S. C. 1951), suggests the problem is different at lower school levels for three reasons. First, there is no problem of professional contacts. Second, at the graduate level, mature and less excitable persons are being dealt with. Third, children are taken from parents by compulsion, and therefore more consideration must be given to the wishes of the parent.

³³ *Carter v. School Board of Arlington County, Va.*, 182 F. 2d 531 (4th Cir. 1950) (physical plant, range of courses, extracurricular activities); *Brown v. Ramsey*, 185 F. 2d 225 (8th Cir. 1950) (teacher salaries, quality of instruction); *Corbin v. County School Board of Pulaski County*, 177 F. 2d 924 (4th Cir. 1949) (physical plant, location of school, transportation facilities, range of courses, extracurricular activities); *Brown v. Board of Education of Topeka*, 98 F. Supp. 797 (D. Kan. 1951) (physical plant, location of school, range of courses); *Blue v. Durham Public School District*, 95 F. Supp. 441 (M. D. N. C. 1951) (physical plant, recreational facilities, extra curricular activities); *State v. Board of Education*, 233 S. W. 2d 698 (Mo. 1950) (range of courses).

schools have been principally based on physical facilities³⁴ and teacher salaries and training.³⁵

Some quarters have long contended that any segregation at all in education is unconstitutional.³⁶ Basically, this contention takes the form that the authority supporting segregation in education is based on dicta in *Plessy v. Ferguson* and should not be controlling; and that as psychology shows harmful effects to result upon segregated children, any segregation at all is discrimination. In *Briggs v. Elliot*,³⁷ a case arising from South Carolina, this issue was squarely raised. The majority of the special three-judge federal court recognizes the statements on education in *Plessy v. Ferguson* as dicta, but declares that "directly in point and absolutely controlling upon us so long as it stands unreversed by the Supreme Court is *Gong Lum v. Rice* [which] cannot be distinguished."³⁸ The court quotes from the *Gong Lum* decision:³⁹ "The question [of segregation] has been many times decided to be within the constitutional power of the state legislature to settle. The decision is within the discretion of the state in regulating its public schools, and does not conflict with the Fourteenth Amendment." Final decision in the *Briggs* case,⁴⁰ plus future litigation, will disclose whether the Supreme Court is to maintain the "separate but equal" doctrine in the field of education, abandon it completely, or continue to cut away at its substance by further limitations as in *Sweatt v. Painter*.

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³⁴ *Carr v. Corning*, 182 F. 2d 14 (D. C. Cir. 1950); *Brown v. Board of Education of Topeka*, 98 F. Supp. 797 (D. C. Kan. 1951); *Freeman v. County School Board*, 82 F. Supp. 167 (E. D. Va. 1948).

³⁵ *Brown v. Board of Education of Topeka*, 98 F. Supp. 797 (D. Kan. 1951); *Freeman v. County School Board*, 82 F. Supp. 167 (E. D. Va. 1948).

³⁶ See *amicus curiae* brief for the Committee of Law Teachers against Segregation in Legal Education, filed in *Sweatt v. Painter*, 339 U. S. 629 (1950), reprinted in 34 MINN. L. REV. 289 (1950); Waite, *The Negro in the Supreme Court*, 30 MINN. L. REV. 219 (1946); Note, 56 YALE L. J. 1059 (1947). *Plessy v. Ferguson* itself contained a vigorous dissent by Justice Harlan on the grounds that the purpose and intent of the Fourteenth Amendment was to invalidate segregation laws and that classification by race was unreasonable. *Plessy v. Ferguson*, 163 U. S. 537, 552 (1896); Note, 49 COL. L. REV. 629 (1949). These views were reiterated in a dissenting opinion in *Briggs v. Elliot*, 98 F. Supp. 529, 538 (E. D. S. C. 1951) by Waring, J.

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

³⁸ *Briggs v. Elliot*, 98 F. Supp. 529, 532 (E. D. S. C. 1951). "A decision which the Supreme court has not seen fit to overrule and which it expressly refrained from re-examining, although urged to do so in the very recent case of *Sweatt v. Painter*, may not be disregarded." *Boyer v. Garrett*, 183 F. 2d 582 (4th Cir. 1950).

³⁹ *Gong Lum v. Rice*, 275 U. S. 78, 87 (1927).

⁴⁰ The Supreme Court on appeal has ordered that the case be remanded to the District Court for further action upon the progress report which had been required of the school officials. The Court said it would like to have the "benefit of the views of the District Court" on the report before making final decision. *Raleigh News and Observer*, Jan. 29, 1952, p. 1, col. 4. Appeal has also been filed to test the constitutionality of the Kansas educational segregation statute involved in *Brown v. Board of Education of Topeka*, 98 F. Supp. 797 (D. Kan. 1951), 20 *Law Week* 3136 (1951).