SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952

No. ~~191~~ 3

DOROTHY E. DAVIS, BERTHA M. DAVIS AND INEZ D. DAVIS, INFANTS, BY JOHN DAVIS, THEIR FATHER AND NEXT FRIEND, ET AL., *Appellants,*

vs.

COUNTY SCHOOL BOARD OF PRINCE EDWARD COUNTY, VIRGINIA, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION

STATEMENT OF APPELLEES OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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I

Motion

The appellees, pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States, move to dismiss the appeal or, in the alternative, to affirm the

decree of the District Court on the ground that the questions on which the decision of the cause depends have been settled by previous rulings of the Supreme Court and are now so unsubstantial as not to need further argument.

II

The Nature of the Case and the Statutes Involved

This case involves the separation of white and colored students in the three public high schools of Prince Edward County, Virginia. Two of these schools, the Worsham High School and the Farmville High School, are for white children. The Robert R. Moton High School is for Negro children. A large number of the Negro students from the Moton School and their parents and guardians instituted the present proceeding to restrain and enjoin the county school board and the county school superintendent from enforcing the provision of the Virginia Constitution and its statutory counterpart prohibiting the teaching of white and colored children in the same school. Article IX, Section 140, of the Constitution of the Commonwealth of Virginia provides:

> "White and colored children shall not be taught in the same school."

Similarly, Section 22-221 of the Code of Virginia, 1950, reads:

> "White and colored persons shall not be taught in the same school, but shall be taught in separate schools, under the same general regulations as to management, usefulness and efficiency."

Appellants (plaintiffs below) allege that the foregoing constitutional and statutory provisions are invalid and unenforceable because, under their contention, the mere act

of separation amounts to discrimination *per se,* and is prohibited by the Fourteenth Amendment to the Constitution of the United States. Appellants asked for a declaratory judgment to this effect. In the alternative, appellants requested the court to correct many alleged inequalities between the white and colored schools.

In their answer, appellees denied that either the Virginia constitutional provision or the state legislation was within the prohibitive ambit of the Fourteenth Amendment. Appellees further denied all inequalities charged except in regard to physical facilities, and in this connection stated that "a building program is underway and that the physical facilities are now being equalized as rapidly as can be done."

Due to the nature of the questions involved, the Commonwealth of Virginia, through its Attorney General, intervened as a party defendant pursuant to Rule 24 of the Federal Rules of Civil Procedure.

The case was heard February 25-29, 1952, by a specially constituted District Court of three judges convened in compliance with Title 28, United States Code, Sections 2281 and 2284. On March 7, 1952, final decree was entered in accordance with a unanimous opinion by the District Court on the same date. The opinion of the District Court is reported at 103 F. Supp. 337.

The District Court overruled appellants' chief contention that the constitutional and statutory provisions of the Commonwealth of Virginia requiring separate schools for the two races are unconstitutional under the Fourteenth Amendment. On appellants' contention of inequalities in facilities, opportunities and advantages, the court found that inequalities existed in physical facilities, curricula and bus transportation. The court immediately restrained the continuance of inequalities in curricula and

bus transportation. On the question of unequal physical facilities, the court ruled (103 F. Supp. 340-341):

> "We will order the defedant[s] to pursue with diligence and dispatch their present program, now afoot and progressing, to replace the Moton buildings with a new building and new equipment, or otherwise remove the inequality in them."

Commenting further on the defendants' building program, the court said (p. 341):

> "Through the activities of the school board and the division superintendent, defendants here, $840,000.00 has been obtained, the land acquired, and plans completed, for a new high school and necessary facilities for the Negroes. Both local and State authorities are moving with speed to complete the new program. An injunction could accomplish no more."

III

The Questions Involved

The main question presented is whether the constitutional and statutory provisions of the Commonwealth of Virginia requiring separation of white and colored children in public high schools are invalid under the Fourteenth Amendment to the Constitution of the United States. As a secondary issue, appellants allege that even if the segregation laws of Virginia are valid, the court below should have ordered appellees to ignore such laws until all existing inequalities are removed.

IV

Argument

The basic question has been settled many times by previous rulings of this Court and merits no further consid-

eration. Indeed it would be difficult to find from any field of law a legal principle more repeatedly and conclusively decided than the one sought to be raised by appellants. This Court, both prior and subsequent to adoption of the Fourteenth Amendment, has consistently held valid state constitutional and statutory provisions requiring separate public schools for the white and the colored races.

Roberts v. *City of Boston,* 5 Cush. 198 (1849).
Plessy v. *Ferguson,* 163 U.S. 537 (1896).
Cumming v. *County Board of Educators,* 175 U. S. 528 (1899).
Gong Lum v. *Rice,* 275 U. S. 78 (1927).
Missouri ex rel Gaines v. *Canada,* 305 U. S. 337 (1938).

Perhaps the most pertinent language in considering whether appellants' contention merits further argument in this Court is the statement by Mr. Chief Justice Taft in *Gong Lum* v. *Rice, supra,* where, speaking for the entire Court on the identical question, he stated (pp. 85, 86, 87):

> "Were this a new question, it would call for a 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. *Roberts* v. *City of Boston,* 5 Cush. (Mass.) 198, 206, 208, 209; *State ex rel. Garnes* v. *McCann,* 21 Oh. St. 198, 210; *People ex rel. King* v. *Gallagher,* 93 N.Y. 438; *People ex rel. Cisco* v. *School Board,* 161 N.Y. 598; *Ward* v. *Flood,* 48 Cal. 36; *Wysinger* v. *Crookshank,* 82 Cal. 588, 590; *Reynolds* v. *Board of Education,* 66 Kans. 672; *McMillan* v. *School Committee,* 107 N.C. 609; *Cory* v. *Carter,* 48 Ind. 327; *Lehew* v. *Brummell,* 103 Mo. 546; *Dameron* v. *Bayless,* 14 Ariz. 180; *State ex rel. Stoutmeyer* v. *Duffy,* 7 Nev. 342, 348, 355; *Bertonneau* v. *Board,* 3 Woods, 177 s.c. 3 Fed. Cases, 294, Case No.

1,361; *United States* v. *Buntin,* 10 Fed. 730, 735; *Wong Him* v. *Callahan,* 119 Fed. 381.

In *Plessy* v. *Ferguson,* 163 U. S. 537, 544, 545, in upholding the validity under the Fourteenth Amendment of a statute of Louisiana requiring the separation of the white and colored races in railway coaches, a more difficult question than this, the Court, speaking of permitted race separation, said:

'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 decision is within the discretion of the state in regulating its public schools and does not conflict with the Fourteenth Amendment.''

Thus this Court in language too clear to misconstrue and too direct to evade has held appellants' contention so unsubstantial as not to need further argument.[1]

The court below not only followed the ''apt and able precedent'' of the decided cases, but further found as a matter of fact that appellants failed to prove that equal educational opportunities and advantages for both races could not be achieved in a segregated school system. Though witnesses for the appellants testified to this effect, eminent educators, anthropologists, psychologists and psychiatrists testifying for the appellees refuted such testimony. On this conflict of fact, the District Court held the

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[1] The cases cited by appellants in support of their position deal with professional schools and are not in point, as was demonstrated in *Briggs* v. *Elliott,* 98 F. Supp. 529 (1951).

appellants had not carried their burden of proof. The Court stated (103 F. Supp. 339, 340):

> "On this fact issue the Court cannot say that the plaintiffs' evidence overbalances the defendants."
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> * * * * * * *
>
> "Maintenance of the separated systems in Virginia has not been social despotism, the testimony points out, and suggests that whatever its demerits in theory, in practice it has begotten greater opportunities for the Negro. Virginia alone employs as many Negro teachers in her public schools, according to undenied testimony, as are employed in all of the thirty-one non-segregated States. Likewise it was shown that in 29 of the even hundred counties in Virginia, the schools and facilities for the colored are equal to the white schools, in 17 more they are now superior, and upon completion of work authorized or in progress, another 5 will be superior. Of the twenty-seven cities, 5 have Negro schools and facilities equal to the white and 8 more have better Negro schools than white."
>
> * * * * * * *
>
> "We have found no hurt or harm to either race."

On the secondary issue, appellants contend that even if the segregation laws of Virginia are valid the court below should have ordered appellees to disregard and violate such laws until all existing inequalities are removed. Actually, of the three inequalities found, the Court ordered the appellees to equalize immediately the curricula and bus transportation in the colored school. On the third inequality, building facilities, the court ordered appellees to proceed with their present building program as rapidly as possible. The record is void of any showing that appellees have not carried out the court's decree fully and in good faith. Under these circumstances, should the court below have permitted and required colored students to attend the white schools? Clearly it should not. The identical

question was raised and decided in *Briggs* v. *Elliott, supra,* where Judge Parker, speaking for a majority of the three judge court, stated (98 F. Supp. 537):

> "It is argued that, because the school facilities furnished Negroes in District No. 22 are inferior to those furnished white persons, we should enjoin segregation rather than direct the equalizing of conditions. In as much as we think that the law requiring segregation is valid, however, and that the inequality suffered by plaintiffs results, not from the law, but from the way it has been administered, we think that our injunction should be directed to removing the inequalities resulting from administration within the framework of the law rather than to nullifying the law itself. As a court of equity, we should exercise our power to assure to plaintiffs the equality of treatment to which they are entitled with due regard to the legislative policy of the state. In directing that the school facilities afforded Negroes within the district be equalized promptly with those afforded white persons, we are giving plaintiffs all the relief that they can reasonably ask and the relief that is ordinarily granted in cases of this sort. See Carter *v.* County School Board of Arlington County, Virginia, 4 Cir., 182 F. 2d 531. The court should not use its power to abolish segregation in a state where it is required by law if the equality demanded by the Constitution can be attained otherwise. This much is demanded by the spirit of comity which must prevail in the relationship between the agencies of the federal government and the states if our constitutional system is to endure."

When the case was remanded by this Court [2] for further findings in view of supplemental reports, the District Court of South Carolina in a unanimous opinion [3] again set forth the above-quoted portion of its former opinion and added:

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[2] 242 U.S. 350.

[3] — F. Supp. —, not yet reported.

> "Plaintiffs contend that because they [building facilities] are not now equal we should enter a decree abolishing segregation and opening all the schools of the district at once to white persons and Negroes. A sufficient answer is that the defendants have complied with the decree of this court to equalize conditions as rapidly as humanly possible, that conditions will be equalized by the beginning of the next school year and that no good would be accomplished for anyone by an order disrupting the organization of the schools so near the end of the scholastic year."

The remaining arguments advanced by appellants in their Statement as to Jurisdiction are mere arguments upon facts which have been determined upon conflicting testimony. Such arguments are not warranted on the basis of the record in this case where all issues of fact were decided against appellants except upon the three inequalities heretofore mentioned. Furthermore, such arguments are "for the legislatures and not for the courts." *Briggs* v. *Elliott, supra,* p. 537.

There can be no doubt that appellants' contention that segregation is discrimination *per se* is a question of nation-wide importance, but for appeal purposes all semblance of importance is lost in view of the fact that the identical question has for generations been decided consistently against the contention of appellants. The finality with which this question has been settled is nowhere better stated than by Judge Parker when he wrote:

> "To this we may add that, when seventeen states and the Congress of the United States have for more than three-quarters of a century required segregation of the races in the public schools and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States at a time when that court included Chief Justice Taft and Jus-

tices Stone, Holmes and Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to suppose that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been throughout this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics." *Briggs* v. *Elliott, supra,* p. 537.

V

Conclusion

Wherefore appellees move the Court to dismiss this appeal or, in the alternative, to affirm the decree entered in this case by the United States District Court for the Eastern District of Virginia, Richmond Division.

Respectfully submitted,

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