G. W. McLAURIN, Appellant

34 v.

OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION, BOARD OF REGENTS OF UNIVERSITY OF OKLAHOMA, ET AL.

HEMAN MARION SWEATT, Petitioner

44 v.

THEOPHILUS SCHICKEL PAINTER, ET AL.

On Appeal from the United States District Court for the Western District of Oklahoma

On Writ of Certiorari to the Supreme Court of the State of Texas

[April ___, 1950]

MEMORANDUM TO THE CONFERENCE FROM MR. JUSTICE CLARK

Since these cases arise in "my" part of the country it is proper and I hope helpful for me to express some views concerning them:

1. The "horribles" following reversal of the cases pictured by the States, excepting Oklahoma, are highly exaggerated. There would be no "incidents", in my opinion, if the cases are limited to their facts, i.e., graduate schools. Oklahoma was frank enough to admit this. Its concern was the extension of the doctrine to the "common" schools. Certainly this is not required now. I would be opposed to such extension at this time and would vote against taking a case involving same. Perhaps at a later date our judicial discretion will lead us to hear such a case.

2. The issue of Plessy v. Ferguson's application to these cases must be met. The only way to avoid it in Sweatt is to remand for findings re the new law school; and that would really be deciding against petitioner's contention that however similar the two schools may be, they can't be "equal" when segregated.

I think these judgments should be reversed.

As to Sweatt, there are two courses:

(a) Overrule Plessy v. Ferguson, which would carry with it subsequent cases based on that doctrine. I am opposed to this course.

(b) Hold Plessy not applicable because it does not involve education; and state that the cases cited therein are not apposite to the Sweatt case. Distinguish Gaines as holding the State cannot avoid its obligation by furnishing funds for its Negro citizens to attend out-of-state institutions. Gong Lum involved "common" schools, merely holding the State was not obliged to furnish separate facilities for each race. Fisher and its companion Sipuel are not controlling for the question of "separate but equal" was excepted in the Fisher opinion. 1/

There are good reasons for us not to extend the Plessy doctrine to graduate schools. I am opposed to such an extension. Limitation to graduate schools ignores, of course, the influence of segregation upon children's minds when they are four or five years old; but I see no reason why we should not concern ourselves here with the equality of education in a narrow sense rather than equality at large. These are, after all, education cases. And it is entirely possible that Negroes in segregated grammar schools being taught arithmetic, spelling, geography, etc., would receive skills in these elementary subjects equivalent to those of segregated white students, assuming equality in the texts, teachers, and facilities.

But it is obvious to me that the same would not apply to graduate schools. There are many reasons: (1) white schools have higher standing in the community as well as nationally, which means much to the graduate professional man; (2) the older and larger college has more alumni, which gives the graduate more professional opportunities;

1/. "The petition for certiorari in Sipuel v. Board of Regents 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." Fisher v. Hurst, 333 U.S. 147, 150.

(3) the larger and older school attracts better professors; (4) competition among schools is much keener in the older and more established school, thus affording a wider professional competition; (5) the larger and older institution attracts a cross section of the entire State in its student body — affords a wider exchange of ideas — and, in the combat of ideas, furnishes a greater variety of minds, backgrounds and opinions which is most important in the professions; (6) it takes years and years to establish a professional school of top rank, affording law reviews, competitions, medals, societies, etc., which a Negro school would never attain; (7) acquaintance is important in the professions and segregation prevents it, thus depriving the Negro of many state-wide opportunities. These and other reasons are those which I am sure have led all but nine of the States to abandon the "separate but equal" doctrine at the graduate level.

McLaurin can, I think, be handled rather summarily. Some of the reasons for reversing Sweatt — particularly the seventh listed above — apply to McLaurin. Besides, once a Negro has been admitted he is obviously handicapped psychologically by being subject to all sorts of restriction. Discrimination in the cafeteria, library and class room would certainly hurt one's ability to concentrate on the business at hand. Alternatively, reversal could be placed upon the ground that there is no evidence of the reasonableness of the classification based on race — there is no contention that any disturbance would result if the rules were not abrogated. This latter ground would, of course, leave the door open to contentions by other States that disorders would result — and perhaps even encourage the staging of those disorders.

I join with those who would reverse these cases upon the ground that segregated graduate education denies equal protection of the laws. I would

follow the lead of the Congress in the only graduate school which it supports in the District of Columbia, Howard University, which is not segregated. As to the elementary schools in the District, I leave them to the Congress and the Fifth Amendment, at least for the present.

If some say this undermines Plessy then let it fall, as have many Nineteenth Century oracles.