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THE NEGRO IN THE SUPREME COURT: FIVE YEARS MORE

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FIVE YEARS AGO there were reviewed in these pages all the opinions of the Supreme Court of the United States involving discrimination against Negroes on racial grounds from *Bleyew v. United States*[1] to *Railway Mail Association v. Corsi*,[2] a period of approximately three-quarters of a century. The cases were presented in chronological order and showed slow, but in the main, consistent progress toward liberal interpretations. To the seventy-seven decisions handed down with opinions during the period thus covered, the succeeding five years have added twenty.

Racially Restrictive Covenants

Of these later cases two seem to be of prime importance, *Shelley v. Kraemer*[3] and *Hurd v. Moore*,[4] decided the same day, May 3, 1948. The Chief Justice wrote the opinions and Justices Reed, Jackson and Rutledge took no part. The point involved was the enforceability of racially restrictive covenants for the conveyance or occupancy of real estate. The hotly contested case of *Buchanan v. Warley*[5] had disposed of such discrimination by state law or local ordinance, but the judicial enforcement of private agreements to the same end remained an open question. In the next twenty years one case skirted its edge but did not get over the line.[6] Now, in the *Shelley* case,[7] this point had to be met and

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1. 13 Wall. 581 (U.S. 1872).
2. 326 U. S. 88 (1945).
3. 334 U. S. 1 (1948).
4. 334 U. S. 24 (1948).
5. 245 U. S. 60 (1917).
6. Corrigan v. Buckley, 271 U. S. 323 (1926).
7. Certiorari from Supreme Court of Missouri; heard with McGhee v. Sikes, certiorari from Supreme Court of Michigan.

decided: Conceding that under previous decisions the 14th Amendment "erects no shield against merely private conduct, however discriminatory and wrongful," and that, as had been held repeatedly, racially restrictive agreements are not unconstitutional and invalid for that reason, is their judicial enforcement state action within the prohibition of the amendment? After reviewing the relevant cases, beginning with Ex parte *Virginia*,[8] the six judges sitting in the case unanimously decided this question in the affirmative.

The question of enforceability is approached from a different angle in the *Hurd* case.[9] Since the 14th Amendment does not apply to the District of Columbia the *Shelley* case was not directly decisive, and the decree below was attacked under the 5th Amendment and on other grounds. The Court side-stepped the constitutional question, and found that Revised Statute Section 1978 prohibited the enforcement of racially restrictive covenants. The section provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

This language was found to be derived from Section one of the Civil Rights Act of 1866, which was under discussion in Congress when it was considering the Joint Resolution resulting in the 14th Amendment. In the light of this historical relationship the Court held "that the action of the District Court directed against the Negro purchasers and the white sellers denies rights intended by Congress to be protected by the Civil Rights Act."

The concluding language of the opinion is so far-reaching in its import that it must be quoted:

> "But even in the absence of the statute, there are other considerations which would indicate that enforcement of restrictive covenants in these cases is judicial action contrary to the public policy of the United States, and as such should be corrected by this Court in the exercise of its supervisory powers over the courts of the District of Columbia. The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions of the public policy of the United States as manifested in the Constitution, treaties, federal statutes and applicable legal precedents. We are here concerned with action of the federal courts of such nature that if taken by the courts of a State would violate the prohibitory

8. 100 U. S. 339 (1880).

9. Certiorari from the United States Court of Appeals for the District of Columbia, heard with Urciola v. Hodge, certiorari from the same court.

> provisions of the Fourteenth Amendment. (Citing *Shelley v. Kraemer*). It is not consistent with the public policy of the United States to permit federal courts in the Nation's capital to exercise general equitable powers to compel action denied the state courts where such state action has been held to be violative of the guaranty of the equal protection of the laws. We cannot presume that the public policy of the United States manifests a lesser concern for the protection of such basic rights against discriminatory action of the federal courts than against such action taken by the courts of the States."[10]

Justice Frankfurter filed a brief concurring opinion to the effect that he considered that general equitable principles furnished "a sufficient and conclusive ground for reaching the Court's result."

A review of the decisions in this field shows the cautious but consistent way in which the Court has reached the important step taken in these recent cases. *Buchanan v. Warley* was decided squarely under the 14th Amendment. There could be no doubt that a municipal ordinance was action by the state. The Civil Rights Act of 1866 was referred to only as "giving legislative aid" to constitutional provisions, and was not mentioned in the official syllabus. *Corrigan v. Buckley*[11] was a suit in equity in the District of Columbia to enjoin conveyance of real estate in violation of a racially restrictive covenant. The decision sustaining the injunction decreed by the court below reasserted the well established doctrine that the 14th Amendment prohibited stated action only, which was not involved in the case. It further held that the record showed no claim by appellants for relief under the Civil Rights Acts, and that neither these Acts, nor considerations of public policy urged as invalidating the covenant, brought the case within Section 250 of the Judicial Code allowing an appeal. The case was therefore dismissed for want of jurisdiction. In their brief, counsel for appellants claimed that the covenant was of such discriminatory character that a court of equity ought not lend its aid by enforcing specific performance. This point was held not reviewable under the appeal unless jurisdiction of the case was otherwise obtained.

The *Shelley* case made a great advance in holding that "in granting judicial enforcement of [restrictive covenants involving racial discrimination] the states acted to deny petitioners the equal protection of the laws, contrary to the Fourteenth Amendment."[12]

10. Hurd v. Moore, 334 U. S. 24, 34-36 (1948).
11. 271 U. S. 323 (1926).
12. Shelley v. Kraemer, 334 U, S. 1 (1948) (official syllabus, paragraph (c)).

In *Hurd,* the 14th Amendment not being available the Court resorted to the Civil Rights Act of 1866, and also applied the "public policy" doctrine; while Justice Frankfurter would have reached the same result under general equitable principles.

State Institutions of Professional and Higher Education

In 1948 the *Gaines* case[13] was applied as conclusive authority in a *per curiam* decision involving the admission of a Negro woman student to the Law School of the University of Oklahoma.[14] In 1950 further progress was made in two very important cases, *Sweatt v. Painter*[15] and *McLaurin v. Oklahoma State Board of Regents,*[16] where the Court spoke what it may be hoped is the final word as to "equality" in the field of professional and higher education. In that field the noxious trail of *Pdessy v. Ferguson*[17] seems to have reached an end. In each case the opinion was written by the Chief Justice and the decision was unanimous.

A summarized but sufficient statement of the facts and holding in the *Sweatt* case is found in the syllabus:

> "Petitioner was denied admission to the state-supported University of Texas Law School, solely because he is a Negro and state law forbids the admission of Negroes to that Law School. He was offered, but he refused, enrollment in a separate law school newly established by the State for Negroes. The University of Texas Law School has sixteen full-time and three part-time professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an Order of the Coif affiliation, many distinguished alumni, and much tradition and prestige. The separate law school for Negroes has five full-time professors, 23 students, a library of 16,520 volumes, a practice court, a legal aid association and one alumnus admitted to the Texas Bar; but it excludes from its student body members of racial groups which number 85% of the population of the State and which include most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner would deal as a member of the Texas Bar. *Held*: The legal education offered petitioner is not substantially equal to that which he would receive if admitted to the University of Texas Law School; and the Equal Protection Clause of the Fourteenth Amendment requires that he be admitted to the University of Texas Law School."[18]

13. Gaines v. Canada, 305 U. S. 337 (1938).
14. Sipuel v. Board of Regents, 332 U. S. 631 (1948).
15. 339 U. S. 629 (1950).
16. 339 U. S. 637 (1950).
17. 163 U. S. 537 (1896).
18. The Minnesota Law Review has made available (Vol. 34 at 289)

The *McLaurin* case is full of "human interest," but the writer again contents himself with presenting the syllabus:

> "Appellant, a Negro citizen of Oklahoma possessing a master's degree, was admitted to the Graduate School of the state-supported University of Oklahoma as a candidate for a doctorate in education and was permitted to use the same classroom, library and cafeteria as white students. Pursuant to a requirement of state law that the instruction of Negroes in state institutions of higher education be 'upon a segregated basis,' however, he was assigned to a seat in the classroom in a row specified for Negro students, was assigned to a special table in the library, and though permitted to eat in the cafeteria at the same time as other students, was assigned to a special table there. *Held*: The conditions under which appellant is required to receive his education deprive him of his personal and present right to the equal protection of the laws; and the Fourteenth Amendment precludes such differences in treatment by the State based upon race.
>
> (a) The restrictions imposed upon appellant impair and inhibit his ability to study, to engage in discussion and exchange views with other students, and, in general, to learn his profession.
>
> (b) That appellant may still be set apart by his fellow-students and may be in no better position when these restrictions are removed is irrelevant, for there is a constitutional difference between restrictions imposed by the State, which prohibit the intellectual commingling of students and the refusal of students to commingle where the State presents no such bar.
>
> (c) Having been admitted to a state-supported graduate school, appellant must receive the same treatment at the hands of the State as students of other races."

Forward-looking Americans may well take courage when they find the following paragraph in this unanimous opinion of their highest judicial tribunal:

> "Our society grows increasingly complex, and our need for trained leaders increases correspondingly. Appellant's case represents, perhaps, the epitome of that need, for he is attempting to obtain an advanced degree in education to become, by definition, a leader and trainer of others. Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal

the valuable brief filed on behalf of the Committee of Law Teachers as *amicus curiae* against Segregation in Legal Education. The brief was signed by distinguished members of the faculty of six leading law schools, and urged complete repudiation of the *Plessy* case.

to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained."[19]

Perhaps indicative of the trend is the result in a recent case which arose when the management of a public golf course adopted a rule restricting to one day per week the use of the course by Negro players, and allowing exclusive use by white players on other days. The Supreme Court of Florida denied mandamus to require admission of Negroes at all times when the course was open to other players. In a *per curiam* decision the United States Supreme Court vacated the judgment below and remanded the cause "for consideration in the light of" the *Sweatt* and *McLaurin* cases.[19a]

Racial Discrimination by Carriers of Passengers

Many difficult questions have come before the Supreme Court under the doctrine announced in the first "Jim Crow" case[20] in construing the "commerce clause" of the Constitution—that so long as Congress has not legislated on the subject of racial discrimination in interstate transportation of passengers the states are at liberty to enact, and carriers to adopt, "reasonable rules and regulations for the disposition of passengers." A Louisiana statute (enacted during "Reconstruction" days) forbidding "discrimination on account of race or color" was declared invalid solely on the ground that it imposed "a direct burden," involving "great inconvenience and unnecessary hardship," on interstate commerce. "If the public good requires such legislation," said the Court, "it must come from Congress and not from the States." Later, in the *Civil Rights Cases*[21] the Court took pains to say that it was not then decided "whether Congress, in its power to regulate commerce amongst the several states, might or might not pass a law regulating rights in public conveyances passing from one State to another." Congress took a step in that direction by including in the original Interstate Commerce Law,[22] language which was at once construed by the Interstate Commerce Commission as applicable to inequalities of accommodations and treatment between white and Negro passengers as individuals, and formed the basis of the Court's important decision in the *Mitchell* case[23] in 1941.

19. McLaurin v. Oklahoma State Board of Regents, 339 U. S. 637, 641 (1950).
19a. Rice v. Arnold, 340 U. S. 848 (1950).
20. Hall v. De Cuir, 95 U. S. 3, 19 (1877).
21. 109 U. S. 19, 27 (1883).
22. 24 Stat. 380 (1887).
23. Mitchell v. United States, 313 U. S. 80 (1941).

In May, 1942, a Negro employee of the United States, en route from Washington to Atlanta on a first-class ticket over the Southern Railway, was refused service in the dining car under the rules of the railway company, requiring discrimination on racial grounds alone. He filed a complaint with the Interstate Commerce Commission alleging a violation of the amended Interstate Commerce Act, Section 3(1), which made it unlawful for a railway engaged in interstate commerce "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatever."[24] He won a Pyrrhic victory which did not satisfy him, and kept up the fight through various proceedings for eight years. Modified regulations of the railway company, still discriminatory, were before the Court in *Henderson v. United States.*[25] Justice Burton wrote the opinion; Justice Douglas concurred in the result without opinion; Justice Clark took no part.

A few lines from the opinion will disclose the nature of the discriminations which were attacked and the broad spirit in which they were considered:

> "The right to be free from unreasonable discriminations belongs, under Section 3(1), to each particular person. Where a dining car is available to passengers holding tickets entitling them to use it, each such passenger is equally entitled to its facilities in accordance with reasonable regulations. The denial of dining service to any such passenger by the rules before us subjects him to a prohibited disadvantage. Under the rules, only four Negro passengers may be served at one time and then only at the table reserved for Negroes. Other Negroes who present themselves are compelled to await a vacancy at that table, although there may be many vacancies elsewhere in the diner. The railroad thus refuses to extend to those passengers the use of its existing and unoccupied facilities. . . . The curtains, partitions and signs emphasize the artificiality of a difference in treatment which serves only to call attention to a racial classification of passengers holding identical tickets and using the same public dining facility. . . . They violate Section 3(1)."[26]

While Elmer Henderson was fighting for his rights (and inci-

24. 54 Stat. 902, 49 U. S. C. § 3(1) (1946).
25. 339 U. S. 816 (1950).
26. Henderson v. United States, 339 U. S. 816, 824, 825 (1950). And there is a significant citation of the *McLaurin* case, *supra.* Contrast this standard of "reasonable" discrimination with convenience of the carrier, as in *Hall v. De Cuir, supra,* and later cases; "local usages, traditions and customs," as in the *Plessy* case, *supra,* and later cases, notably Chiles v. C. & O. Ry., 218 U. S. 71 (1910), where the official syllabus declared that—"Regulations which are induced by the general sentiment of the community for whom they are made and *upon whom they operate* cannot be said to be unreasonable." (Italics added.)

dentally those of other Negro travelers) under the Interstate Commerce Act, a Negro woman became involved in an experience under the Virginia Code which again brought the troublesome question of "undue burden on commerce" before the Supreme Court,—this time from a direction precisely opposite to *Hall v. De Cuir*. She was traveling 'bus from a point in Virginia through the District of Columbia to Baltimore, the destination of the 'bus. On her refusal to accede to the request of the driver, made pursuant to the terms of Section 4097, Virginia Code 1942, to move from her seat to a back seat which was already occupied by other Negro passengers, so as to permit the seat she vacated to be used by a white passenger, she was arrested, tried and convicted of a misdemeanor under the section cited. The question considered by the Supreme Court on appeal from the affirmance of the conviction by the Supreme Court of Appeals of Virginia was whether that decision was repugnant to Article I, § 8(3) of the Constitution. The Court held that it was, Justice Reed writing the opinion, reviewing many cases more or less analogous, and finding "a recognized abstract principle that may be taken as a postulate for testing whether particular state legislation in the absence of action by Congress[27] is beyond state power. This is that state legislation is invalid if it unduly burdens that commerce in matters where uniformity is necessary—necessary in the constitutional sense of useful in accomplishing a permitted purpose. Where uniformity is essential for the functioning of commerce, a state may not impose its local regulation."[28] To many readers the Court's discussion of the facts which are held to bring the Virginia law within the prohibited area will seem somewhat labored.[29] The Court concludes:

> "It seems clear to us that seating arrangements for the different races in interstate travel require a single, uniform rule to promote and protect rational travel. Consequently we hold the Virginia statute in controversy invalid."[30]

27. There has been no federal legislation on the subject of racial segregation in travel by common carrier. The provision in the Interstate Commerce Law above referred to was of individual application only.

28. Morgan v. Virginia, 328 U. S. 373, 377 (1946).

29. The items mentioned are that a passenger who has to sit in a designated seat while in Virginia may occupy any available seat after crossing the D. C. line; that this involves inconvenience which may be especially disturbing in night travel; that throughout the United States there are variations in laws respecting separation of the races in interstate travel, some permitting and some forbidding it, reference being specially made in Alabama with a law which might involve change by a through passenger at the Virginia line; that there are differences between the states as to tests for the identification of a person as a Negro. *Id.* at 381-83.

30. *Id.* at 386.

Justice Jackson took no part in the case. Justice Rutledge concurs in the result without opinion. Justice Black repeats his protest, expressed in other cases, against the "undue burden on commerce formula," but acquiesces in the decision in deference to the continued acceptance of the "formula" by the Court. Justice Burton presents a vigorous dissenting opinion, while Justice Frankfurter says: "My brother Burton has stated with great force reasons for not invalidating the Virginia statute. But for me *Hall v. DeCuir* . . . is controlling."

The *Morgan* case[31] was a victory over Jim Crow, but it seems doubtful whether the question of racial discrimination in interstate transportation of passengers can be finally disposed of under the "commerce clause" of the Constitution to which it is historically and ethically wholly alien. The "undue burden on commerce formula" seems to have become an "undue burden" on the Supreme Court. Is Justice Black right in thinking that the question belongs to Congress and not to the states? Or, as Justice Burton holds, do diverse local conditions justify local regulation by the states? Perhaps an open-minded study of some of Justice Harlan's dissenting opinions, in the light of contemporary facts (including the important fact of altered public sentiment), would help to solve the ultimate problem of racial discrimination by common carriers, which may have become obscured in the maze of conflicting interpretations and applications of the Commerce Clause.

In *Bob-Lo Excursion Co. v. Michigan*,[32] the Michigan Civil Rights Act was held to require transportation of a Negro on a round-trip excursion from Detroit to an island lying within Canadian waters. It was conceded that the trip was "foreign commerce," and the decision rested on the exceptional facts of the case. Justices Douglas and Black concurred, but inclined toward a more fundamental ground. Justice Jackson wrote one of his characteristically pungent dissents in which the Chief Justice concurred. The case may perhaps be of future interest in interpretations of the "commerce clause" of the Constitution, but it is not of consequence in a consideration of legal aspects of racial discrimination.

The Negro in Industry

The first of the few appearances in the Supreme Court of the Negro as a factor in modern competitive industry was in 1938,[33]

31. Morgan v. Virginia, 328 U. S. 373 (1946). See text to footnote 28 *supra*.
32. 333 U. S. 28 (1948).
33. New Negro Alliance v. Sanitary Grocery Co., 303 U. S. 552 (1938).

and the second, involving more fundamental rights, in 1944.[34] He came again in 1945,[35] and again in 1949 in *Graham v. Brotherhood of Locomotive Firemen and Enginemen.*[36] In the *Graham* case the facts were parallel with the *Steele* and *Tunstall* cases, and the Court's position was the same, although only points of venue and jurisdiction were directly decided. Justice Jackson wrote the opinion and Justices Douglas and Minton took no part. If there was any doubt before, it may be regarded as settled that "the Railway Labor Act imposes upon the Brotherhood (of Locomotive Firemen and Enginemen) the duty to represent all members of the craft without discrimination and invests a racial minority of the craft with the right to enforce that duty."[37]

In *Hughes v. Superior Court,*[38] a Negro group ran head-on into principles which the Supreme Court had repeatedly employed against racial discrimination. The facts are thus summarized in the syllabus:

> "Petitioners demanded of an employer that it hire Negroes at one of its grocery stores, as white clerks quit or were transferred, until the proportion of Negro clerks to white clerks approximated the proportion of Negro to white customers, which was then about 50 per cent. A California state court enjoined petitioners from picketing the employer's stores to enforce this specific demand for selective hiring on a racial basis. For violation of the injunction petitioners were found guilty of contempt and were sentenced to fine and imprisonment. The policy of California is against discrimination on the basis of color. *Held:* The injunction did not violate petitioners' right to freedom of speech as guaranteed by the Due Process Clause of the Fourteenth Amendment."

In holding that the demand for which the picketing was instituted was unlawful the Court, by Justice Frankfurter[39] quoted with approval as follows from the California Court:

> "It was just such a situation—an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done—which we condemned in the *Marinship* case, (25 Cal. 2d 721, 737, 745 (1944).... Those seeking such discrimination would, to the extent of the fixed proportion, make the right to work for Lucky dependent not on fitness for the work nor on an equal

34. Steele v. L. & N. R. R., 323 U. S. 192 (1944); decided with Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210 (1944).
35. Railway Mail Ass'n v. Corsi, 326 U. S. 88 (1945).
36. 338 U. S. 232 (1949).
37. *Id.* at 239.
38. 339 U. S. 460 (1950).
39. Justice Douglas took no part.

right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race."[40]

The issue in the case was whether peaceful picketing for the purpose recited was within the constitutional right of free speech; but the special interest of Negroes was disclosed by the fact that a brief was filed by counsel for the National Association for the Advancement of Colored People.

Racial Discrimination in Selection of Juries

Discrimination against Negroes in the selection of juries has been a fruitful source of Supreme Court litigation ever since *Strauder v. West Virginia*[41] in 1880. Here the "equal protection" clause of the Fourteenth Amendment was successfully invoked and subsequent decisions have been consistent. *Patton v. Mississippi*,[42] decided in 1947, is of the familiar type. There had been a timely motion to quash the indictment on the ground of racial discrimination in making up the venire list for the grand jury. The Court (by Justice Black) construed the facts and sustained this claim.

Another decision[43] of the same sort, handed down in April, 1950, merits attention because of the conspicuously liberal view of the prevailing opinion of four Justices, presented by Justice Reed, and the dissent of Justice Jackson. The Court expressly repudiated proportional representation as a proper basis, and said:

"Our holding that there was discrimination in the selection of grand jurors in this case, however, is based on another ground. In explaining the fact that no Negroes appeared on this grand-jury list, the commissioners said they knew of none available who qualified; at the same time they said they chose jurymen only from among those people with whom they were personally acquainted. . . . An individual's qualifications for grand-jury service . . . are not hard to ascertain, and with no evidence to the contrary, we must assume that a large proportion of the Negroes of Dallas County met the statutory requirements for jury service. When the Commissioners were appointed as judicial administrative officials, it was their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color. They did not do so here, and the result has been racial discrimination."[44]

Justice Douglas took no part in the case. Justices Frankfurter, Burton and Minton, concurring in an opinion written by Justice

40. Hughes v. Superior Court, 339 U. S. 460, 463 (1950).
41. 100 U. S. 303 (1880).
42. 332 U. S. 463 (1947).
43. Cassell v. Texas, 339 U. S. 282 (1950).
44. *Id.* at 287-89.

Frankfurter, and Justice Clark in still another concurring opinion, rationalized the fact situation a little differently. Justice Jackson, who can be relied on to keep an eye on the practical administration of justice, filed a vigorous dissent, the tenor of which is indicated in the opening sentences:

> "The case before us is that of a Negro convicted of murder by crushing the skull of a sleeping watchman with a piece of iron pipe to carry out a burglary. No question is here as to his guilt. We are asked to order his release from this conviction on the sole ground that Negroes were purposefully discriminated against in selection of the grand jury that indicted him. It is admitted that Negroes were not excluded from the trial jury by which he was convicted. . . . This conviction is reversed for errors that have nothing to do with the defendant's guilt or innocence, or with a fair trial of that issue. This conflicts with another principle important to our law, *viz.*, that no conviction should be set aside for errors not affecting substantial rights of the accused. . . . It is time to examine the basis for the practice."[45]

He concludes:

> "I doubt if any good purpose will be served in the long run by identifying the right of the most worthy Negroes to serve on grand juries with the efforts of the least worthy to escape punishment for crime. I cannot believe that those qualified for grand jury service would fail to return a true bill against a murderer because he is a Negro. But unless they would, this defendant has not been harmed."[46]

"Due Process" in Criminal Cases

The meticulous care which the Supreme Court has quite consistently exercised to secure to Negroes prosecuted from crimes, however heinous, all their constitutional rights is well illustrated by four recent cases which, though important and interesting, are not thought appropriate for comment in this article.[47]

Worthy of special mention is *Shepard v. State of Florida.* The case was decided *per curiam* April 9, 1951, on authority of *Cassell v. Texas.* The Court reversed affirmance by the Supreme Court of Florida of conviction of a Negro for rape of a white woman. Justices Jackson and Frankfurter, in an opinion written by the former concurring in the result, review with open indignation the sur-

45. *Id.* at 298, 299.

46. *Id.* at 304. In Moore v. New York, 333 U. S. 565 (1948), the petitioners for certiorari were Negroes, but the case is not of importance here. The New York "blue ribbon" jury law was involved.

47. Carter v. Illinois, 329 U. S. 173 (1946); Lee v. Mississippi, 332 U. S. 742 (1948); Taylor v. Alabama, 335 U. S. 252 (1948); Harris v. South Carolina, 338 U. S. 68 (1949).

roundings and incidents of the trial. They say: "Prejudicial influences outside the courtroom, becoming all too typical of a highly publicized trial, were brought to bear on this jury with such force that the conclusion is inescapable that these defendants were prejudged as guilty and that the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion which it generated. . . . Under these circumstances, for the Court to reverse on the sole ground that the method of jury selection discriminated against the Negro race, is to stress the trivial and ignore the important. . . . To me the case presents one of the best examples of one of the worst menaces to American justice. It is on that ground that I would reverse."[47a]

The Right to Vote

The direct and indirect violations of the Fifteenth Amendment by some of the states, ever since it went nominally into effect in 1870, have been matters of common knowledge. There has never been an attempt by Congress to remedy them under the power specifically granted by Section two of the Fourteenth Amendment; and the *Reese*[48] and *Cruikshank*[49] decisions, in 1876, tended to support and encourage them. It was not until 1915 in the *Guinn*[50] and *Myers*[51] cases ("grandfather clause"), that the tide began to turn. Since *Smith v. Allwright,*[52] in 1944, there has been no case involving specific denial of suffrage to Negroes, but subversive tricks have not ceased, and one of them came before the Supreme Court in *South v. Peters,*[53] decided April 17, 1950. The facts do not fully appear in the *per curiam* opinion, but are disclosed in the dissenting opinion of Justice Douglas, in which Justice Black concurred. It was an attack under the 14th and 17th Amendments on the "county unit" system of voting in a Georgia primary, providing for the allotment to each county of a certain number of unit votes ranging from six for the eight most populous counties to two for most of the counties. Appellants, residents of the most populous county of the state, contended that their votes had on an average but one-tenth of the weight of those in other counties and brought suit in the United States District Court for the Northern District of Georgia to restrain adherence to the system in a forth-

47a. Shepard v. Florida, 71 Sup. Ct. 549 (1951).
48. United States v. Reese, 92 U. S. 214 (1876).
49. United States v. Cruikshank, 92 U. S. 542 (1876).
50. 238 U. S. 347 (1915).
51. 238 U. S. 368 (1915).
52. 321 U. S. 649 (1944).
53. 339 U. S. 276 (1950).

coming Democratic primary at which candidates for United States Senator, Governor and other state officers were to be chosen. The District Court dismissed the petition and was sustained with only the following comment:

> "Federal courts consistently refuse to exercise their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions."[54]

Justice Douglas says:

> "Plaintiffs show that a vote in one county will be worth over 120 times each of their votes . . . that in 45 counties a vote will be given twenty times the weight of each of theirs. . . . that on a statewide average each vote outside Fulton County will have over 11 times the weight of each vote of the plaintiffs. Population figures show that there is a heavy Negro population in the large cities. There is testimony in the record that only in those areas have Negroes been able to vote in important numbers. Yet the County Unit System heavily disfranchises that urban Negro population. The County Unit System has indeed been called the 'last loophole' around our decisions holding that there must be no discrimination because of race in primary as well as in general elections. . . . The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government. . . . We have here a system of discrimination in primary voting that undermines the advances made in the *Nixon, Classic* and *Allwright* cases.[55] Those decisions are defeated by a device as deeply rooted in discrimination as the practice which keeps a man from a voting booth because of his race, creed or color, or which fails to count his vote after it has been cast."[56]

Conclusion

The *Dred Scott* decision[57] marked the triumph in our highest court of the spirit and policy which strove to dominate the American scene in the first half of the 19th Century. It was soon overruled by marching armies and amendment of the Constitution. In the public mind it still stands as an epochal decision, although its effect as a legal precedent was practically nil. The "bad eminence" of being the Supreme Court case which has done most to hinder progress in the field of human rights does not belong to *Scott v. Sandford* but to *Plessy v. Ferguson.* The specious but convenient

54. *Id.* at 277.
55. Nixon v. Herndon, 273 U. S. 536 (1927); United States v. Classic, 313 U. S. 299 (1941); Smith v. Allwright, 321 U. S. 649 (1944).
56. South v. Peters, 339 U. S. 276, 278, 279, 281 (1950).
57. 19 How. 393 (U.S. 1857).

rule of "separate but equal," and the cynical standard for measuring equality by local prejudice, were so perfectly in accord with the temper of the smug 'Nineties that they took deep root in the law of the land. In his dissenting opinion Justice Harlan predicted that the decision would "prove to be as pernicious as the decision made by this tribunal in the *Dred Scott* case."[58] For more than fifty years it has stood as an authoritative precedent. In the light of the *Sweatt, McLaurin* and *Henderson* decisions may we not hope that the day is not far distant when it will be frankly overruled? When the courts were closed to those who seek to perpetuate racial or religious prejudices by neighborhood taboos; when G. W. McLaurin began to sit where he chose in the classrooms of the University of Oklahoma, and Elmer Henderson no longer hid behind curtains to eat a meal on an interstate dining car, the "separate but equal" sophistry received deadly blows which must in due time end its acceptance if our country is to be in fact what we declare that it is when we pledge allegiance to the Flag—"one nation, indivisible, with liberty and justice for all."

58. Plessy v. Ferguson, 163 U. S. 537, 559 (1896).