Lodged

MAR 22 1954

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

CARL HEARD and FRANK HEARD by their next of friends and parents WILLIAM HEARD and EMMA MANOR HEARD, husband and wife; and CYNTHIA WILLIAMS, MYRNA RUTH WILLIAMS, PEARLIE MAE WILLIAMS and FLENOY WILLIAMS, JR., by their next of friends and parents FLENOY WILLIAMS and BEATRICE WILLIAMS, husband and wife,

Plaintiffs,

vs.

HAROLD DAVIS, as President, GEORGE T. MONROE, as Clerk, CALVIN McKNIGHT, as a Member of the Board of Trustees of the Wilson School District, a legally organized public school district in Maricopa County, State of Arizona; and G. S. SKIFF, as Superintendent of the Wilson Schools,

Defendants.

No. 77497

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs respectfully submit that their Motion for Summary Judgment is well taken. In support of their position they submit the following argument and authorities:

I

A DECISION BY A DIVISION OF THE SUPERIOR COURT OF THE STATE OF ARIZONA IS CONTROLLING AND/OR PERSUASIVE AS TO ALL OTHER JUDGES. IT SHOULD BE FOLLOWED HERE.

Initially, plaintiffs would like once more to call to the attention of this Court the decision of Judge Struckmeyer attached to their complaint. It is their contention that under the Constitution of the State of Arizona, Article 6, Section 5, that this Court should follow the decision handed down by Judge Struckmeyer. Thus, Article 6, Section 5, states:

"The judgments, decrees, orders, and proceedings of any session of the Superior

Court held by any one or more of the judges of such court shall be equally effectual as if all the judges of said court had presided at such session."

II

THE LEGISLATIVE AUTHORITY OF THE STATE IS VESTED IN THE LEGISLATURE AND CANNOT BE RELINQUISHED OR DELEGATED. THEREFORE, THAT PORTION OF CHAPTER 138 OF THE 1952 SESSION LAWS OF ARIZONA, AMENDING SECTION 54-416, ARIZONA CODE ANNOTATED 1939, AND THAT PORTION OF SECTION 54-430, ARIZONA CODE ANNOTATED 1939, PROVIDING THAT BOARDS OF TRUSTEES "MAY SEGREGATE GROUPS OF PUPILS" IS AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE POWER IN THAT THESE STATUTES FAIL TO ESTABLISH STANDARDS OR CRITERIA AS TO THE CIRCUMSTANCES WHEN SUCH POWER MAY BE EXERCISED.

Administrative boards cannot legally exercise legislative power unless such power is properly delegated to them by the Legislature (See, Union Bridge Company v. The United States, 204 U. S. 364; A.L.A. Schechter Poultry Company v. The United States, 295 U.S. 495; Holgate Bros. Company v. Bashore, 200 Atl. 672 (Pa.)). Our Supreme Court has uniformly struck down statutes which violate the constitutional prohibition against delegation of legislative powers (See, e.g. State of Arizona v. Marana Plantations Inc., 75 Ariz. 111, 252 P. 2d 87 (1953); Loftus v. Russell, 212 P. 2d 91, 69 Ariz. 245; Hernandez v. Frohmiller, 204 P. 2d 854, 68 Ariz. 242; Tillotsen v. Frohmiller, 271 P. 2d 867, 34 Ariz. 394; Buehman v. Bechtel, 114 P. 2d 227, 57 Ariz. 363; Betts v. Lightning Delivery Company, 22 P. 2d 827, 42 Ariz. 105). The prohibition against the delegation of legislative powers is a necessary outgrowth of our fundamental philosophy of the separation of governmental functions. This separation is common to both our State and Federal Constitutions. Holgate v. Bashore, 200 Atl. 672 (Pa.). The desirability, in a social sense, of particular statutes does not save their constitutionality when they violate the above prohibition. Thus, our Supreme

HERBERT B. FINN
ATTORNEY AT LAW
415 GOODRICH BUILDING
PHOENIX, ARIZONA
ALPINE 2-3513

Court has struck down legislation concerning civil service, health regulations, and even in one instance, invalidated a photographers' code.

Our Supreme Court has adopted the strictest of requirements concerning the criteria and standards with which the legislature must surround its delegation of powers to administrative boards. Its attitude is clearly indicated in Hernandez v. Frohmiller, supra,

> "May the state to accomplish this, transfer to an administrative board the unlimited power to use its judgment and discretion in determining what conditions shall be rectified and how this shall be accomplished? We have no hesitation in saying this is legally impossible. Legislation may pass to administrative boards the right or power to find facts or conditions properly prescribed under which the law has passed will or will not operate, but it may not permit the board to say what the law shall be."

Only recently the Supreme Court has restated its position even more strongly. (See, State of Arizona v. Marana Plantations, Inc., supra):

> "It may be safely said that a statute which gives unlimited regulatory power to a commission or agency with no prescribed restraint nor criteria nor guide to its action offends the constitution as a delegation of legislative power. The Board must be corralled in some reasonable degree and must not be permitted to range at large and determine for itself the conditions under which a law should exist and pass the law it thinks appropriate. To use the apt phraseology of the late Justice Cardozo in Schechter v. U.S., 79 Fed. 1570, 295 U.S. 495, an administrative board cannot be a 'roving commission to inquire into evils and upon discovery correct them' and it must be 'canalized within banks that keep it from overflowing'. It cannot be 'unconfined and vagrant'."

In the case at bar, unlike some of the other statutes which have been considered by this court, we have a statute and practice which at its very best skirts the threshold of denial

of the right and guarantees of citizens. It is true that the United States Supreme Court has tolerated segregation. But that tribunal has not had the question squarely presented to it until the present term. The cases, such as Briggs v. Elliott, 98 Fed. Supp. 529, Brown v. Board of Education of Topeka, 98 Fed Supp. 797, et al, are before the Supreme Court of the United States for a decision as to whether segregation per se, backed by express legislative sanction, and by proper safeguard as to equality of facilities, is constitutional. However, a decision on that point is not necessary or controlling in this case, since in this case there is no express legislative sanction, etc.

National policy with respect to racial discrimination has been clearly indicated by the U. S. Supreme Court. The Court speaks of the "constitutional right to be free from discrimination." See, Steel v. L.N.R. Company, 323 U.S. 192, 208; Henderson v. The United States, 339 U.S. 816; Mitchell v. The United States, 313 U.S. 80, 97; Washington A.N.G. Company v. Brown, 84 U.S. 675. The classic statement of the attitude of the Court is that of Justice Holmes in Strauder v. West Virginia, 100 U.S. 303; 307:

> "What is this but declaring 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 the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race--the right to exemption from unfriendly legislation against them distinctively as colored--exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps toward reducing them to the condition of a subject race."

HERBERT B. FINN
ATTORNEY AT LAW
415 GOODRICH BUILDING
PHOENIX, ARIZONA
ALPINE 2-3513

A long line of decisions by courts in various states have held that segregation of pupils by race without legislative sanction and without the strictest statutory requirements with respect to standards or criteria is invalid (See, Macfarlane v. Goins, 50 S. 493 (Miss.); Knox v. Board of Education, 25 Pac. 616 (Kans.); Woolridge v. Board of Education, 157 Pac. 1184 (Kans.); Thurman-Watt v. Board of Education, 222 Pac 123 (Kans.); Bibb v. Alton, 61 NE 1077 (Ill.)).

III

THE ATTEMPTED CLASSIFICATION OF THE ARIZONA STATUTE DRAWN IN QUESTION HERE IS SO UNREASONABLE, DUE TO VAGUENESS AND UNCERTAINTY, THAT IT OFFENDS CONSTITUTIONAL GUARANTEES.

One of the primary purposes of the Fourteenth Amendment was to prevent classification, which discriminates against an individual, without any reasonable basis (Lindsey v. Natural Carbon Gas Co., 220 U.S. 161; Gossart v. Clearly, 335 U.S. 64).

Essentially school classification in the case at bar rests on the power of the appropriate political subdivisions to classify pupils on the basis of race, and thus require attendance at separate schools. Conceding for the purpose of this discussion that such power does exist, it would reside only in the legislature, and not elsewhere. Thus, where no such classification has been made by the legislature, separate schools may not be established or required (Westminster School District of Orange County v. Mendez, 161 Fed. 2d 774).

The Arizona statute in question attempts a classification through vesting in school boards the authority to segregate "groups of pupils". The school boards, of course, could not exercise the purported authority to segregate "groups of pupils" unless they classified those groups. The classification con-

HERBERT B. FINN
ATTORNEY AT LAW
615 GOODRICH BUILDING
PHOENIX, ARIZONA
ALPINE 2-3513

ceivably could be based on any whim or caprice of the school board. It is settled that without legislative direction, Mexican school children may not be so classified at the whim of the Board (Gonzales v. Sheeley, 96 Fed. Supp. 1004, District Court of United States, District of Arizona).

There is now no Arizona statute in which the legislature has specifically classified or attempted to classify school children on the basis of race. Sections 54-918 and 54-416, formerly making such classification, have been repealed. Plaintiff respectfully asks this court to take judicial notice of the fact that there is no uniformity in classification by Arizona school boards on the basis of race--some boards imposing racial segregation through classification of Negro pupils, and others declining to make such classification.

Distinction or classification should not be lightly made.

> "Distinction between citizens solely because of their ancestry are by their very nature odious to free people whose institutions are founded upon the doctrine of equality." Hirabayashi v. United States, 320 U.S. 81.

For that reason classifications resting, in the final analysis, on race do not come to the court bearing the presumption of constitutionality ordinarily given legislation. Further, classification must be definite and clear.

> "An act is void where its language appears on its face to have a meaning but it is impossible to give it any precise or intelligible application in the circumstances under which it was intended to operate." In re Ditorio, 8 Fed. 2d 279.

It is impossible to give the statute in question any precise or intelligible application in the circumstances under which it was intended to operate. The phrase, "groups of pupils" has no ascertainable meaning in the context in which it is used.

HERBERT B. FINN
ATTORNEY AT LAW
415 GOODRICH BUILDING
PHOENIX, ARIZONA
ALPINE 2-3513

"The requirement that a law be definite and its meaning ascertainable by those whose rights and duties are governed thereby applies not only to penal statutes, but to laws governing fundamental rights and liberties." Perez v. Sharp, 32 Cal. 2d 711, 728.

Measured by the requirement that a law be definite and its meaning ascertainable, the Arizona statute in question does not meet constitutional requirements. Hence it cannot be used as a basis for the segregation of pupils by race.

IV

THE ARIZONA STATUTE IN QUESTION, AS APPLIED TO PLAINTIFFS, ARE UNCONSTITUTIONAL BECAUSE THEY LODGE ARBITRARY POWER IN THE SCHOOL BOARDS TO IMPOSE RACIAL SEGREGATION ON THESE PLAINTIFFS.

This point is closely related to and is the essence and aspect of the preceding point.

Boards of education have no authority to impose racial segregation unless expressly authorized by statute (Westminster School District of Orange County v. Mendez, supra).

Even though the school so established for colored children furnishes educational advantages and facilities, equal or superior to those of schools established for white children, school boards have no authority to segregate in the absence of express statutory authority (Bibb v. Alton, 193 Ill. 290, 61 N.E. 1077).

Where segregation is attempted under legislative authority, the statute must expressly authorize the particular segregation sought to be accomplished (Westminster School District of Orange County v. Mendez, supra).

Section 54-430 of Arizona sets absolutely no standards for the guidance of school boards in its permission to segregate "groups of pupils". Nor does it either direct segregation of

HERBERT B. FINN
ATTORNEY AT LAW
415 GOODRICH BUILDING
PHOENIX, ARIZONA

Negroes or require equality of facilities and accommodations (Harrison v. Riddle, 44 Ariz. 331, 36 P. 2d 984 (1934)).

It is noteworthy that other permissive segregation statutes set standards for boards. See, also, Kansas Revised Statute, 72-1724, extending permission only to cities of the first class; Wyoming Compiled Statute, Section 67-621, requiring the presence of fifteen Negro children in a district before segregation can be accomplished.

Under the statute here in question, it is conceivable that one school board can segregate as to one pupil, while an adjoining board might refuse to impose segregation if there were twenty-five or one hundred Negro pupils in the district. The powers of boards of school districts are only those which are expressly conferred, or implied as necessary, to the carrying out of declared objects or purposes of the school districts. Such powers are, of course, subject to the complete control of the Legislature. 47 Am. Jur. Section 13, p. 307.

V

A STATUTE REQUIRING SEGREGATION OFFENDS THE GUARANTY OF THE EQUAL PROTECTION OF THE LAWS, IF IT DOES NOT, ON ITS FACE, AFFIRMATIVELY PROVIDE FOR EQUAL ACCOMMODATION AND FACILITIES FOR THOSE UPON WHOM SEGREGATION IS IMPOSED.

It is well settled that separate schools cannot be maintained unless authorized by state statute (See, Westminster School District of Orange County v. Mendez, 161 Fed. 2d 774; Gonzales v. Sheely, supra; Wysinger v. Crookshank, 82 Cal. 588, 23 Pac. 54; Knox v. Board of Education, 45 Kansas 152, 25 Pac. 616).

Statutes and constitutional provisions providing for separate schools fall into two categories. They either require two separate school systems or impose segregation on Negro

HERBERT B. FINN
ATTORNEY AT LAW
415 GOODRICH BUILDING
PHOENIX, ARIZONA
ALPINE 2-3513

pupils. Statutes or constitutional provisions in the first category import a quality of facilities by implication. Examples of statutes in the first category are illustrated by Alabama, whose constitution provides:

> "* * * separate schools shall be provided for white and colored children."

See, also, Section 80-509, Arkansas Code, providing:

> "Boards of school directors which * * * establish separate schools for white and colored children."

Georgia Constitution, Article 8, Section 1 (6676), paragraph I:

> "The provision of an adequate school education for the citizens shall be a primary obligation of the state * * * Separate schools shall be provided for the white and colored races."

See, also, like provisions: Louisiana Constitution, Article 12, Section 1; Maryland Annotated Code, Article 77, Section 111, Sections 192, 193; Missouri Constitution Article 9, Section 1; Oklahoma Constitution, Article 13, Section 3; South Carolina Constitution, Article 11, Section 7; Texas Constitution, Article 7, Section 7.

Statutes of the second category or constitutional provisions which impose segregation, specifically provide for the equality of facilities. This is so because much statutes are in essence exclusionary; and the exclusion cannot meet constitutional standards unless it is coupled with a direct command for equality of facilities and accommodations.

Statutes and constitutional provisions in the category are illustrated by North Carolina, which provides:

> "* * * and the children of the white race and the children of the colored race shall be taught in separate public schools; and there shall be no discrimination in favor of, or to the prejudice, of either race." North Carolina Constitution, Article 9, Section 27.

HERBERT B. FINN
ATTORNEY AT LAW
415 GOODRICH BUILDING
PHOENIX, ARIZONA
ALPINE 2-3513

See, also, New Mexico Statutes (41 Annotations, Section 55-1201):

> " * * * that separate rooms be provided for the teaching of pupils of African descent, * * * provided further that such rooms set aside for the teaching of such pupils of African descent shall be as good and well kept as those used by pupils of Caucasian or other descent, and teaching therein shall be as efficient."

Virginia Constitution, Section 140:

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

Codes of Virginia, Section 22 221:

> "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."

See, also, West Virginia Constitution, Article 7, paragraph 8; West Virginia Code 1943, Sections 1775, 1777.

New York also formerly permitted segregation and also permitted separate schools (New York Correlated Laws, Cahill 1930, Chapter 41, Section 921) and its statute specifically enjoined equality.

The Arizona statute drawn in question here provides:

"They may segregate groups of pupils."

It does not enjoin equality of facilities, or accommodations, nor does it provide for separate schools. It would seem that, as in other examples given, a statute which imposes segregation without a requirement for separate schools, and without commanding equality of facilities and accommodations, offends constitutional guarantees. That is especially so where power is delegated to the boards of school trustees without other safeguards or standards. It is noteworthy that Section 56-918 of the Arizona Code, repealed in 1950, specifically required that high schools be erected in compliance with its provision:

> "which * * * provides equal accommodations and facilities for such pupils of the African race."

HERBERT B. FINN
ATTORNEY AT LAW
415 GOODRICH BUILDING
PHOENIX, ARIZONA
ALPINE 2-3513

Nor is a statute lacking provisions for equality of facilities and accommodations saved by the supposition that equality of facilities will in fact result (Macfarlane v. Goins, 96 Miss. 67, 50 S. 493; Compare Piper v. Big Pines School District, 193 Cal. 664; Stoutmeyer v. Duffy, 7 Nev. 342; Williams v. Bradford, 158 N.C. 36, 73 S.E. 154).

VI

THE ARIZONA STATUTE IN QUESTION IS UNCONSTITUTIONAL AS APPLIED TO PLAINTIFFS BECAUSE THE STATUTE NEITHER DIRECTS, NOR PERMITS, NOR AUTHORIZES, MAINTENANCE OF SEPARATE SCHOOLS FOR PLAINTIFFS.

Section 54-430, Arizona Code Annotated 1939, as amended, authorizes board of trustees to segregate "groups of pupils". This statute was construed in Burnside v. Douglas, 33 Ariz. 1, by the Arizona Supreme Court. The construction there put upon it was that boards of trustees had the right to segregate groups of pupils within the high school. The Court said:

> "The plaintiff was entitled * * * to receive his high school education in the high school of school district 27 of Cochise County, but not necessarily in any particular building which was a part of such high school." (Burnside v. Douglas, 33 Ariz. 1, 10.)

It must be kept in mind that at the time of the Burnside case, Arizona statutes provided the method by which a separate high school could be established. That method was set forth in Section 2733, which later became Section 54-918, Arizona Code Annotated. That statute provided an elaborate method for the establishment of separate high schools as such. There was no contention in Burnside v. Douglas that the Douglas School District had followed the statutory method for the establishment of a separate high school. It proposed to and did segregate the Negro high school pupils in a separate building in the district high school.

HERBERT B. FINN
ATTORNEY AT LAW
ATS GOODRICH BUILDING

The section of the statute under which separate high schools as such can be constructed or maintained has been specifically repealed. There is now no warrant in the Arizona Code for the erection, construction or maintenance of separate schools, be they high schools or elementary schools. Any segregation now attempted must be based upon Section 54-430 of the Arizona Statute and that statute can be applied only within the limits established in Burnside v. Douglas--that is to segregate groups of pupils within schools.

At the time the Burnside case was decided the United States Supreme Court had not considered the problem of segregation within schools. Since that time the issue has been before it, and it has held without equivocation that once admitted to a state school a Negro pupil may not be subjected to any distinctions or discriminations (McLaurin v. Oklahoma State Board of Regents, 339 U.S. 367).

In that case the United States Supreme Court emphatically stated that McLaurin "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." Mr. Chief Justice Vinson pointing out that McLaurin, a person of the Negro race, after being admitted to the graduate college was forced to sit apart from his fellow students and to eat apart from the school cafeteria, stated as follows:

> "these separations signify that the state in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that Appellant (McLaurin) is handicapped in his pursuit of effective graduate education. Such restrictions impair and inhibit his ability, to study, engage in discussions and exchange views with other students, and, in general, to learn his profession *** state imposed restrictions which produce such inequalities cannot be

HERBERT B. FINN
ATTORNEY AT LAW
415 GOODRICH BUILDING
PHOENIX, ARIZONA

sustained. * * There is a vast difference--a constitutional difference--between restrictions imposed by the state which prohibit the intellectual co-mingling of students and the refusal of individuals to co-mingle where the state presents no such bar. The removal of the state restrictions will not necessarily abate individual and group predilection, prejudices and choices. But at the very least the state will not be depriving Appellant (McLaurin) of the opportunity to secure acceptance by his fellow students on his own merits."

In other words putting it in terms that all legal minds are familiar with and referring to Sweatt v. Painter, 339 U.S. 629 the United States Supreme Court has clearly recognized that education does not alone consist of fine buildings, classroom furniture and appliances, but that included in education are all the intangibles that come into plan in preparing one for meeting life. As was so well said by the Court:

"Few students and no one who has studied law chooses to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

"Equal protection of the law is not achieved through indiscriminate imposition of inequalities."

As Judge Ling, Federal District Judge for the District of Arizona, so aptly stated in Gonzales v. Sheeley, 96 Fed. Sup. 1004, 1008:

"Segregation of school children in separate school buildings because of recial or natural origin, as accomplished by regulation, custom and usages of respondent, constitutes a denial of the equal protection of the laws guaranteed to petitioners as citizens of the United States by the provisions of the Fourteenth Amendment of the Constitution of the United States of America. Discriminations less acute than those practiced by respondents have recently been held in violation of the Equal Protection Clause of the Fourteenth Amendment in McLaurin v. Oklahoma State Regents supra, where the very act of setting plaintiff apart from other students in the same room because of the racial origin of the plaintiff was held to deny plaintiff equal

protection. A paramount requisite in the American system of public education is social equality. It must be opened to all children by unified school associations, regardless of lineage."

It must be pointed out here that the defendants in the Gonzales case, supra, relied upon the Burnside case but the District Court, apparently agreeing with our point of view, failed to cite this case in its decision.

The affidavit submitted by one of the plaintiffs in support of the Motion for Summary Judgment in the trial court contains the uncontradicted allegations:

"Segregation of African people by race has a detrimental effect upon such African peoples imparting to them a distinct inferiority, retarding their education and mental development, depriving them of some of the benefits they would receive in an integrated school system free from racial discrimination or segregation."

Thus, it can be seen from the foregoing that the courts look with all favor upon segregation and make the strictest statutory requirements for any sanction of segregation practices and that our present statutes do not meet these requirements in any manner.

VII

SEGREGATION OF PUPILS BY RACE, AND SPECIFICALLY SEGREGATION OF AFRICAN PEOPLE FROM CAUCASIAN PEOPLE, IS A DENIAL OF THE GUARANTEES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND OF ARTICLE 2, SECTION 13, OF THE CONSTITUTION OF THE STATE OF ARIZONA.

This proposition is of course now being argued before the United States Supreme Court. Plaintiffs would like to reiterate that they are not now basing their case on the Fourteenth Amendment. Plaintiffs contend that our statute cannot stand whatever the decision of the Supreme Court. Further,

HERBERT B. FINN
ATTORNEY AT LAW
415 GOODRICH BUILDING
PHOENIX, ARIZONA
ALPINE 2-3513

plaintiffs strongly feel that Mr. Justice Harlan's dissent in Plessy v. Ferguson is wholly applicable:

> "We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law, which, practically, puts the brand of servitude and degredation upon a large class of our fellow citizens, our equals before the law. The thin disguise of 'equal' accommodations for passengers on railroad coaches will not mislead anyone nor atone for the wrong this day done."

Respectfully submitted,

PARKER & MUECKE
HERBERT B. FINN
H. B. DANIELS

By H. B. Finn
Attorneys for Plaintiffs

HERBERT B. FINN
ATTORNEY AT LAW
415 GOODRICH BUILDING
PHOENIX, ARIZONA
ALPINE 2-3513