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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

GONZALO MENDEZ, et al.,
Petitioners,
vs.
WESTMINSTER SCHOOL DISTRICT OF ORANGE COUNTY, et al.,
Respondents.

No. 4292-M

PETITIONERS' OPENING BRIEF

This suit was begun to test the validity and constitutionality of Rules and Regulations under which American children of Mexican ancestry are segregated from all others in the public schools.

The petition alleges facts to show that the respondents have enacted such laws in their respective districts and schools and prays for a declaration that such Regulations are themselves, and as applied, unconstitutional and void for injunctive relief, for a writ of mandate and for such other and further relief warranted.

Exhibits provided by respondents and introduced during the trial briefly provided information as to the schools of the several districts involved, and those to which American-Mexicans, only, are sent and those where all other pupils attend.

The Court has jurisdiction of this action under the Judicial Code (28 U. S. C. A. Sec. 43, subdivision 14) which reads:

> "Suits to redress deprivation of civil rights.
> Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States. (R. S. § 563, par. 12; § 629, par. 16;)"

QUESTIONS SUGGESTED BY THE COURT

At the close of the trial the Court very clearly indicated certain questions to be briefed, the first question being:

> "First, the question of jurisdiction.
> I consider that to be a crucial question in the case, and I want to state it now so that there will be no misunderstanding about it. Has the Federal Court, the Federal District Court, jurisdiction of this case under the record as it exists at this time? That will involve, I think, a discussion as to whether or not education is not essentially a State matter."
> (R. Tr. p. 704.)

It is believed that no doubt can exist that this question must be answered in the affirmative. In fact the Supreme Court of California and the Supreme Court of the United States have each decided that in California education is definitely a State matter, but in Hamilton University of California, 293 U. S. 245, 79 L. ed. 343, the United States Supreme Court definitely answered the above question in toto.

The opinion shows that the University of California is a State institution created by an act whose purpose was declared to be educational; that by the Morrill Act, "called the organic act" it is provided any resident of California, of the age of fourteen (14) years or upwards, of approved moral character, shall have the right to enter himself in the University; and that said act makes provision for several colleges and for state funds to support the institution. This decision holds:

1. That the phrase "statute of any state" as used in Section 237 (a) of the Judicial Code, providing that the final judgment or decree in any suit in the highest court of the State in which a decision in the suit can be had, where is drawn in question "the validity of any statute of any state," on the repugnancy to the constitution of the United States, may be reviewed by the United States Supreme Court, is not limited to acts of the state legislatures, but is used to include every act legislative in character to which the State gives sanction.

2. That a Federal question was presented by a contention that an order of the State Board of Regents of the State of California by making an order compelling all students to receive military training was repugnant to the privileges and immunities clause and the due process clause of the 14th amendment.

3. That the privilege of attending the University does not come from a Federal source, and the only immunity claimed by the students "is freedom from the order prescribing

military training, and that alleged immunity is not distinguishable from the "liberty" of which they claimed to have been deprived.

4. That such order of the Board of Regents was not repugnant to the due process clause, and, therefore, its enforcement did not violate the privileges and immunities clause.

Thus it was held in the first instance that the petition might have merit, and that it presented a Federal question even though the right to attend a state educational institution was a right arising from the state citizenship and not from Federal citizenship.

In the instant case the petitioners do not claim that the rights of the children to attend the public schools, which right is undoubtedly created by the state constitution and laws, has been violated. However, they claim that their right to the equal protection of the State's laws has been infringed by discriminatively arbitrary and unreasonable segregation rules; and that such rules are repugnant to their right to the privilege of attending the schools in their district without regard to such descriminatory rules, and the immunity which they assert is to be free, as other children not Mexicans are, from regulations based upon no other ground than race ancestry, which privilege and immunity are both within the fourteenth amendment equal protection of the laws clause.

It seems that the Hamilton decision alone forecloses any doubt that a Federal question has been presented or that this Court has jurisdiction in a matter involving a state educational institution or system.

However, the case which the Court pointed out during the trial reaches the same conclusions, although it does not refer to the decision just discussed.

In Kerr v. Enoch Pratt Free Library, etc., 149 F. (2d) 212,

the petitioner was a Negress and complained that she was barred from receiving a library training course by an order of the Board of Trustees of the Library. The grounds relied upon were the same as in the instant case. It was held:

1. That although this Board was appointed independently of the city of Baltimore, and was self-perpetuating, since the city had supplied and was supplying the greater part of the funds to support it and otherwise exercised a public function in the matter of its direction, control and maintenance, the Library was not a private corporation but was a State instrumentality.

2. That the maintenance of a public library is a well-recognized proper function of the State.

3. That the petition presented a Federal question which gave the District Court full jurisdiction to hear and determine the questions involved.

4. That the order of the Board of Trustees was State action, and that the petitioner's averments as to the arbitrary and unreasonable discrimination, based upon racial classification, had been sustained.

It is believed that these two cases dispose of the Court's first question favorably to the petitioners herein.

RACIAL SEGREGATION HAVING BEEN CONCLUSIVELY PROVED AND EXPRESSLY ADMITTED, THE BURDEN WAS ON RESPONDENTS TO SHOW THAT SUCH SEGREGATION WAS NOT IN VIOLATION OF CONSTITUTIONAL INHIBITIONS.

First, petitioners contend that when it was made to appear that by action of state agencies all Mexican pupils were assigned to certain schools and all others to certain other schools, a prima facie case was made out. This situation at once and as

res ipsa loquitur bespeaks racial discrimination, and it becomes the responsibility of those who created it to show affirmatively, as they have pleaded affirmatively, that circumstances, conditions and facts exist which reasonably and justly warrant the action which has been taken.

The respondents are peculiarly qualified to produce such proof, if it exists; they know, and no one else can, the reasons upon which they have been actuated, and the facts which, to them, sufficed to sustain such reasons; they have or should have essential records, among others -- health records, student ability test records, student conduct records and student scholarship records. The teachers who have first hand knowledge of vital matters are their employees and agents; the whole res has been and is under their exclusive control. By analogy the principle res ipsa loquitur is applicable. Every element thereof is fully present, under which it is settled law that a prima facie case is established.

> Note. In a recent book, Chain on "Res Ipsa Loquitur," it is shown conclusively that the term "prima facie case" implies that the burden is on the defendant to explain and overcome, or at least meet the plaintiff case. Among the hundreds of cases cited are Gleeson v. Virginia Midland Ry., 140 U. S. 435, 35 L. ed. 458; Cincinnati etc. Ry. v. South Fork Coal Co., 139 Fed. 528, 1 L.R.A. (NS) 533 and other U. S. and Federal decisions. Also Judson v. Giant Powder Co., 107 Cal. 549, 29 L.R.A. 718, 48 A.S.R. 146; Michenor v. Hutton 203 Cal. 604, 59 L.R.A. 480; John v. McGinniss Co., 37 C.A. (2d) 176; Ky. v. Caldwell, 39 C.A. (2d) 698, and other California cases.

As a matter of common sense the situation places the burden on the respondents. Over and over again in the transcript we find Mexican parents asking school authorities just why their children

are treated differently than those of other Americans. That was a fair question. It cannot be denied that they had a right to ask it. Not once did they receive an explanation or an answer which was not an insult to their intelligence, their race and to them personally. They were told that Mexican children are dirty; that they do not take baths; that they do not speak English; that they are inferior to Portuguese and Japs and Negroes; that they do not have the mental ability of the "white children," and other similar statements.

These parents knew that as applied to their own children these reasons were fictitious, trumped up and false. Their children were not dirty; they did speak English; nearly all of them spoke it "perfectly;" they had proved their ability in schools of other districts or in those where they lived.

These parents still have a right to believe that they and their children have been grossly abused, and that their constitutional rights are being violated without any semblance of reason or justice, because the respondents have failed to meet the prima facie showing and inferences arising from actual racial segregation.

We have found no case which decides this question for or against petitioners' contentions, but the foregoing considerations are persuasive, and it is almost a universal rule that affirmative defenses must be proved, especially where the facts, as in this case are peculiarly within the knowledge of the defendant. (10 Cal. Jur. pp. 786 et seq. Cal. C.C.P. Sec. 1981.)

Hence, petitioners contend that unless respondents have produced satisfactory proof that the Regulations and the manner in which the Boards and their agents have construed and applied them are not arbitrary, unreasonable and discriminatively unjust, the judgment should be entered as prayed.

THE SECOND QUESTION

In framing the second question the Court said:

> "Secondly, the question, which is perhaps factual, that segregation having been proven -- and undoubtedly it has been proven, there is no question about that, and there cannot be any argument but what there has been segregation -- whether or not under the evidence that segregation has gone to the extent of unjust discrimination." (R. Tr. p. 704.)

The defendants' Answer, in effect, admits the fact of segregation of Mexican children in the districts involved from other children. Reference to Mexican children reads:

> "That for the efficient instruction of pupils from said families, the Westminster School District has found it desirable to instruct said pupils at different locations than are provided for the instruction of pupils who are familiar with the English language;
>
> "That for the purpose and for the benefit of said pupils, and to give them instruction in the aforesaid subject separate and apart from the English speaking pupils, the Board of Trustees of said District have determined that it is for the best interests of said pupils of Mexican descent and for the best interests of the English speaking pupils, that said groups be educated separately during the period they are in the lower grades."
>
> (Answer p. 3.)

The evidence also overwhelmingly shows such segregation, as will be pointed out in discussing the remaining portion of the question, to-wit:

> "Whether or not under the evidence that segregation has gone to the extent of unjust discrimination."

In discussing this question we will confine ourselves to evidence which indicates the unreasonable, unjust and discriminatory basis and grounds for the segregation of Mexican pupils in the schools of the districts involved and the unfair and discriminating manner in which the regulations of the Boards have been applied by those administering such regulations.

The testimony of the witnesses representing the schools but called by petitioners, coming from the sources adverse to the latter's cause, supplies the strangest type and quality of substantiation of the averments of the petition.

Early in the trial, in overruling an objection made by Mr. Holden, the Court indicated that the attitude of the state of mind of the Superintendent of the Garden Grove Schools, Mr. Kent, was important, where he is charged with discriminating against "certain people in a case." (R. Tr. p. 93.) Undoubtedly this element is a key factor in the quest for the truth of this charge. Therefore, let us begin with the testimony of James L. Kent.

Having admitted that "some Mexican children . . . have all of the qualifications" that are required of the children who are in the Lincoln School (where there are no Mexicans), (R. Tr. pp. 127, 128), and having testified that Mrs. Ochoa's child "had to be taken out of Lincoln because of a social problem," the Court asked, "Isn't that the parental duty, to see where the child goes rather than school authorities? I mean, except as to districts?" Mr. Kent answered, "Our job is to see that we put the child where he can get the best education, and there is more to it than just book learning. There is an assimilation of social outlook we must give these children."

Then the Court asked:

> "If Mrs. Ochoa, assuming that she is the legal guardian of the children, would request that her child be placed together with the other children where he or she could commingle with those children and acquire by constant association attitudes which we feel are necessary for our children to acquire in public schools, why wouldn't she be permitted to do that?"
> (R. Tr. p. 134.)

The foregoing testimony and the statement elsewhere made by Mr. Kent to the effect that the complete segregation practiced in his district was ordered for the welfare of the children of Mexican ancestry demonstrates a mental attitude and a beaurocratic psychology so unwarranted, unbalanced and arbitrary as to leave no room for doubt that this school administrator was blind to the rights and duties of parents and in an equal degree entertains concepts and exercises powers existing only in his imagination and violently in conflict with California School Law as well as State and Federal constitutional guaranties.

The parent is the natural and legal guardian of his children. No law of California has altered this common law condition. These American Mexican children are not juvenile delinquents to be taken over by the State on the theory that the parents have somehow failed in the performance of their legal and natural responsibilities.

Yet the concept held by Mr. Kent is that school administrators have the right to disregard the expressed desires and demands of American-Mexican parents as to their children not being associated solely with others of Mexican ancestry, and that they be educated in contact with Anglo-Saxons and American pupils generally in the "democratic schools," as the Court aptly termed them.

The Answer of the respondents also avers that the segregation of children of Mexican ancestry is for their own benefit. The School Boards, themselves, thus make this a vital issue, in fact a pivotal one in this case. The answer in its "Fourth Defense" avers:

> "That for the efficient instruction of pupils from said families, the Westminster School District has found it desirable to instruct said pupils at different locations than are provided for the instruction of pupils who are familiar with the English language;
>
> "That for the purpose and for the benefit of said pupils, and to give them instruction in the aforesaid subject separate and apart from the English speaking pupils, the Board of Trustees of said District have determined that it is for the best interests of said pupils of Mexican descent and for the best interests of the English speaking pupils, that said groups be educated separately during the period they are in the lower grades." (Answer p. 3.)

It is true that the Answer continues and says:

> "That to carry out said policy, the Board of Trustees established a rule requiring that persons of Mexican descent who were unfamiliar with the English language be required to attend a school set apart by said Board for said purpose." (Answer p. 3.)

However, this last averment does not concern the question now being presented. The Answer in unmistakable terms avows that the basis of segregation which prevails is the unlawful assumption of a power to determine what is "for the benefit of said pupils" even, if, in so deciding, arbitrary discrimination results and the pupils affected are denied the equal protection of the laws because, forsooth, they are of Mexican ancestry. The issue is parental rights and responsibility.

powers and responsibilities, and, incidentally, the child's privilege of looking to his parents for guidance and his immunity from the control of total strangers who are aliens to it as far as kinship, natural or legal, is concerned.

Neither the California Constitution nor the School Law Uphold Respondents' Claims and Their Pseudo Self-created Authority.

There is a lawful and constitutional way to manage public schools and to treat any genuine shortcomings of pupils of any race, without mocking constitutional guaranties by either sophisticated or simple-minded modes of discrimination.

The public schools of the State of California are created and maintained under the authority and mandate of the State Constitution. (Art. IX, Sections 1 to 15, inclusive.) Section 1 directs the legislature to "encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." Under Section 5 of said Act it was held that the opportunity is accorded to every child, between the ages of five and twenty-one years of age, to receive instruction in the public schools, and that this is a vested legal right which the parent should enforce. (Ward v. Flood, 48 Cal. 36, 51.)

The School Code, Section 3.170, provides that the elementary schools of each school district "shall be open for the admission of all children between six and twenty-one years of age residing in the boundaries of the district."

Parents and guardians having control of children between the ages of eight and sixteen are required to send such children to the public full-time school for the full time for which such schools are maintained in the district where the children reside. (School Code, Section 1.130.)

Several sections of the School Code expressly or implicitly

recognize the parent's authority and responsibility for the child's welfare. For example, under Section 16483 of the Education Code which provides for physical examinations, "to insure proper care of the pupils", the parent or guardian is authorized to refuse consent to such examination, and the child is exempted therefrom.

In Section 17261 of the Education Code providing for "compulsory education of the deaf" provides "nothing in this chapter shall be construed as limiting the power of a parent, guardian or person standing in loco parentis to determine what treatment or correction of any physical defect shall be provided for a child or the agency to be employed for the purpose."

There is no authority right or sanction by law given to any School Board or person to segregate children in attendance at Public Schools upon <u>any basis</u> except when expressly authorized by law, and any such unreasonable segregation is violation of their constitutional rights as well as those of their parents.

In Hardwick v. Board of Education, 54 Cal. App. 696, it was held:

> "The courts have the right to look into a public law or a local ordinance or regulation for the purpose of determining whether, upon its face, it is reasonable or in its operation will be unreasonably burdensome upon the body of citizens to which it may be applicable, and if it is found to be oppressive in its effect when put in operation or violative of any of the fundamental rights of any person or set of persons, it will and should be nullified by judicial fiat as unconstitutional and void, notwithstanding that the legislature or the governing board enacting or adopting such law or ordinance or regulation has passed upon the facts upon which the law or

ordinance or regulation is based and made a determination that it is reasonable or that it will not impose unreasonable burdens upon those who come within the purview of its terms.. . .

. . .

P. 709.

"In truth, the proposition even extends beyond the question of the ultimate effect of dancing exercises upon minor children. It also involves the right of parents to control their own children -- to require them to live up to the teachings and the principles which are inculcated in them at home under the parental authority and according to what the parents themselves may conceive will be the course of conduct in all matters which will the better and more surely subserve the present and future welfare of their children. Can it be true that a law which vests in others the authority to teach and compel children to engage in those acts which their parents, upon what they regard as a well-founded theory, have conceived that it is not conducive to their personal welfare to adopt and follow, have specially and strictly enjoined them not to engage in, is a valid enactment? Has the state the right to enact a law or confer upon any public authorities a power the effect of which would be to alienate in a measure the children from parental authority? May the parents thus be eliminated in any measure from consideration in the matter of thediscipline and education of their children along lines looking to the building up of the personal character and the advancement of the

personal welfare of the latter? These questions, of course, proceed upon the assumption that the views of parents affecting the education and disciplining of their children are reasonable, relate to matters in the rearing and education of their children as to which their voice and choice should first be heeded and not offensive to the moral well-being of the children or inconsistent with the best interests of society; and to answer said questions in the affirmative would be to give sanction to a power over home life that might result in denying to parents their natural as well as their constitutional right to govern or control, within the scope of just parental authority, their own progeny. Indeed, it would be distinctly revolutionary and possibly subversive of that home life so essential to the safety and security of society and the government which regulates it, the every opposite effect of what the public school system is designed to accomplish, to hold that any such overreaching power existed in the state or any of its agencies."

It seems from respondents' Answer, above quoted, that the mental attitude and bureaurocratic psychology of Mr. Kent also pervade the Boards of Education, and that this is the real reason for the complete segregation of the American-Mexican children.

Prior to a recess in the trial Mr. Kent had always believed that Mexicans are not of the white race and are an inferior people, and he clung to his superiority complex to the last. He repeatedly contrasted Mexicans with "white" children. He was first asked, "Is it not a fact that you believe that the Mexican is not of the white race?" and replied, "I believe he is an American. I don't believe he is of the white race." (R. Tr. pp. 119, 120.) He admitted having written a thesis in which he revealed his investigation of the Mexicans as a race, and claimed that they were not of the white race. After the recess he declared that he believed that a Mexican is of the "white" race, and he said, "That is one of the reasons why they are being segregated." (R. Tr. p. 124.)

Mr. Kent told the Court that Mexicans are inferior to the "white" in matters of personal hygiene, in their ability, in their economic outlook, their clothing and ability to take part in school activities. (R. Tr. pp. 121, 122.) Mr. Kent also said that he would not permit a Mexican child to attend schools set apart for Caucasians even if the child met all of the qualifications to attend such a school otherwise, because, he said, that "is not fair to him; and we haven't done that. . . to put him in a whole class of white people, and to put him there by himself, would not be fair to him or to the other children."

Kent admitted that from an educational standpoint it would be

practicable to transfer such a Mexican pupil, but "because there is a psychology of the thing" it would not be practicable. (R. Tr. pp. 128, 129.) This witness throughout his testimony has demonstrated an attitude of racial superiority such as that of Hitler combined with and productive of the belief that, at least as to Mexican inferiors, the State, acting through School Boards and School Superintendents, has the right and duty to determine whether the child should be allowed to exercise its constitutional rights to be treated as other American children are and to enjoy the same privileges.

As said in the Hardwick opinion, supra, of a similar concept, "it would be distinctly revolutionary and possibly subversive . . . to the safety and security of society and the government which regulates it," because Mr. Kent's and the respondents' ism, whatever it may be called, is at war with the American idea of equality and the democratic ideals declared in the bill of rights.

The attitude and psychology of the Boards and their Superintendents is further revealed by the evasive and sometime dissembling character of the latter's testimony. For example, Mr. Kent testified:

> "Our policy is not as you stated, to send the Mexicans to the Hoover School. However, the policy does read that for non-English-speaking students and students who need help, we have set up the Hoover School for the Spanish-speaking students. That is what we are following." (R. Tr. p. 81.)

On its face the foregoing is sham. It purports to provide that all "non-English-speaking students" and all "who need help" shall be assigned to the Hoover School, but adds that the school is for "Spanish-speaking students."

It is common knowledge, and Mr. Kent elsewhere was forced to admit that other race students need help and have the defects contemplated, which he said came from "a bilingual handicap." Also,

Kent admitted that these handicapped children of other races were assigned to the Anglo-Saxon schools. (R. Tr. pp. 82.)

Mr. Kent insisted that the Mexican children were not sent to Hoover School merely because of their Mexican ancestry, having first admitted that many Mexican pupils spoke English and had no "linguistic difficulties." (R. Tr. p. 84.) When pressed for reasons as to why such children were kept in the Hoover School, Mr. Kent answered, "Because of their location as to the Hoover School," and that it would be "silly to transport them to any other school." That this answer is sham, or, that there was arbitrary discrimination is shown by the facts, established by undisputed testimony of parents, that non-Mexican children also lived closer to the Hoover School than to the school to which they were sent, and that several of the witnesses lived closer to Lincoln School than to the Hoover.

Another reason was that the Mexicans must be "taught manners" and "cleanliness." (R. Tr. p. 85.) However, Mr. Kent admitted that the same defects in "white children" had required that special classes be provided at Lincoln School as were maintained at Hoover to remedy this. (R. Tr. p. 86.)

Another reason given was "mannerisms, dress and ability to get along with people." This one is too obviously trivial to discuss. However, he admitted that other race students required training in these matters which was given to them elsewhere. (R. Tr. p. 87.)

The next reason assigned was "Americanization" for which a special program was supplied. (R. Tr. p. 87.) Mr. Kent admitted that no tests were given to find out whether Mexican pupils were defective as to Americanization, and that they did not talk with the parent about the matter. Whether the pupil speaks English, he said, or has an "attitude" of some kind, or is "adapted to going to School" -- these are the tests in determing whether they should be placed in the school for Mexicans on account of needing Americanization. (R. Tr. p. 88.)

However, Mr. Kent declared that if the child speaks English, is clean, lives near the other school, it would make a difference, and if he met all of the tests which he had given (the foregoing reasons), the pupil would be allowed to attend the Lincoln School. Yet, he claimed that not one of the 292 at Hoover had ever met the tests. (R. Tr. p. 89.)

Elsewhere in this brief it is shown that, largely under the Court's questioning, the "Ajericanization" reason was exploded. Space will not permit pursuance of this question further as to this witness' testimony, but throughout it exhibits partiality against Mexican pupils in applying reasons to them which are in fact equally applicable to others and also triviality which can only be attributed to prejudice.

In contract with the theories of Mr. Kent and the respondents, the views of an American-Mexican parent are of value. Mrs. Fuentes said that in one of her conversations with Mr. Reinhard, he asked her why she wanted to put her son Bobbie in Franklin School, and she replied: In Franklin School he had more privileges, he would learn more, and he would not be held behind, kept behind in school. I told him that Bobbie knew how to talk in the English language, and, she said Reinhard merely stated that he couldn't do anything about it. (R. Tr. p. 154.)

In the same conversation Reinhard admitted that if he had a child he would not send him to Fremont School, "Because," he said, "they didn't have any privileges," and, "I would want the best for my child." (R. Tr. 157.)

It is submitted that these American-Mexicans have exhibited a far more sound and perfect appreciation of true Americanism than have the school authorities. When parents, like Mr. Palomino, organize and demand that their children be treated as other American children are, every agency of the government, including the Courts are duty-bound to aid them as far as it is within their power.

Palomino told the Court: I want to raise my children as good as Americans, if they give us a chance. I want my children to attend the Lincoln School. (R. Tr. p. 48.)

Juan Munoz told Mr. Emley, Superintendent of the Garden Grove Schools, "I am fighting for my children's rights," and was told, Mexicans are too dirty, Japanese and Filipinos are a higher race than Mexicans and better qualified citizens. Munoz protested that all Mexicans are not alike nor dirty; that for one dirty Mexican they should not all "have to take it;" he protested against Mr. Emley's directing "all Mexican pupils to the nurse's room" instead of sending only the ones who were dirty, and he said the pupils of other races "laugh at us." (R. Tr. pp. 65-67.)

American-Mexicans are unable to understand why their children should be segregated. For example, Mrs. Fuentes, in her endeavor to have her boy received in the Franklin School in Santa Ana, asked why her children, of Mexican descent, are not given "the same rights" and taught "just the same" and allowed to "mingle with the Americans right along with the citizens of the United States, as I am." (R. Tr. p. 161.)

This plain question speaks a volume. It depicts the injured and embarrassed feeling of Mexican parents, which must be reflected and magnified in the children who are the direct victims of the discrimination; it portrays a yearning for being taken into American life and fellowship and the despair which comes from realization of the sad reality that they are now a people apart from, and subject to a purported race who assume superiority.

Mrs. Fuentes is no doubt an example of others, and she has felt the humiliation of her position and that of her child so keenly that she kept her boy at home because "they have discrimination of the children," and she told the Superintendent that she would do so, and finally sent him to Fremont School (for Mexicans only) because she could not send him to Franklin. (R. Tr. p. 164.)

Other Grounds Advanced by Respondents as Reasons for Their Segregation Regulations Establish that Such Regulations Are Unjust and Arbitrarily Discriminatory.

I.

Superintendent Kent asserted that the Mexican children are "dirty;" have lice; impetigo; "generally dirty hands, face, neck, ears;" and are inferior to the white race in the matter of personal hygiene. (R. Tr. pp. 116, 121.) Mr. Kent admitted that "on account of cleanliness" the children of Mexican descent have been segregated. (R. Tr. p. 88.) That this is one ground for the segregation regulations is sufficient, of itself, to render them violative of the 14th amendment.

It would be unreasonable and unjust to deny these children privileges which others enjoy even if they were all uncleanly, and it is unnecessary; yet Kent admitted that some of them are not subject to this criticism. (R. Tr. p. 116.) It is contrary to the system established by the California School Code, which authorizes the governing board of any district to exclude children of vicious or filthy habits from the school. (School Code Sec. 1.10.)

The Code also enjoins upon the Boards the duty "to give diligent care to the health . . . of the pupils." (Part 1, Chapter IV, Article I, Sec. 1.100;)it authorizes the employment "such a number of nurses as are deemed necessary" to work under the direction of the physical inspector (Part 1, Chapter IV, Article II, Section 1.110), and for physical examinations of pupils (Part 1, Chapter IV, Article III, Sec. 1.120 a).

Section 1.122 of the same Article provides for the notification of the parent or guardian by the physical inspector of any defects discovered, "asking such action as will cure such defect or defects," and if the child is not cured and the physical disability is "inimical to the welfare of other pupils" the child may be

excluded (Part 1, Chapter 1, Article II, Sec. 1.12), or if the disease is contagious, like impetigo, the child may be excluded (Part 1, Chapter 1, Article II, Sec. 1.11).

These sections indicate the plan and system contemplated by the law of California for coping with the problem which, according to Mr. Kent, is the reason why the respondents "have segregated them," the Mexican pupils, and denied to them the privilege of attending the schools which the children of Negroes, Japanese, Portuguese, Chinese and all other Caucasians than those of Mexican ancestry are privileged to attend.

And what of the rights of the American-Mexican pupils who meet the standards of hygiene set by those who attend the schools from which the former are barred? Mr. Kent and the Santa Ana School Board keep them in the same school with those whose defects make them aliens in Franklin School, where the alleged super-race pupils are ensconced and safeguarded, and these authorities tell the Court that this procedure is for the benefit of the children of Mexican ancestry, including those who meet all of the requirements to enter the other school. The thesis is pure sophistry and too thin to deceive.

As far as the Santa Ana City District is concerned the Superintendent's testimony, alone, suffices to establish the unjust discrimination by board regulations, and as they have been applied, as alleged in the petition. However, the testimony of several witnesses pile up the evidence in that regard.

Mrs. Felicitas Fuentes testified that she lived in the Santa Ana District and her son, Roberto, eight years of age, attended the Fremont School (all Mexican pupils). (R. Tr. pp. 142-144.) That she made regular yearly pilgrimates to enroll her child in Franklin School and had three conversations with the Assistant Superintendent, Mr. Smith, one at the beginning of each school year, the last being in 1944, who told her, she testified, that "Mexicans

were dirty" and Roberto must attend Fremont School. (R. Tr. pp. 151, 152.)

Juan Munoz testified that in his talk with Superintendent Emley the latter asserted that the reason why Munoz' child must go to the school for Mexicans only was that these pupils are dirty and never bathe. (R. Tr. pp. 65-67.)

II.

Mr. Kent enumerated the prevalence of tuberculosis among Mexican children as one of the reasons for keeping them apart from others not of that national origin. (R. Tr. p. 116.) Of course, this was silly, almost childish, and he thereafter admitted as much in testifying that such children were not permitted to attend school, and that children in all schools were found who were thus afflicted and received the same tests and treatment. (R. Tr. pp. 118, 119.)

III.

The need for Americanization was one of the reasons stressed by Mr. Kent. He declared that a special course is given to the Mexicans, and that "it isn't needed in other schools." (R. Tr. pp. 87, 88.) Yet, he testified that no tests were given to determine whether a particular child requires the course. They decide the matter by talking with the pupil, "to see their attitudes and whether they can speak the English language;" sometimes they hear the parents talk and sometimes not. He asserted that "if a child speaks the English language and is clean and lives near the other school besides the Hoover School," it would make a difference then. (R. Tr. pp. 88, 89.)

It is submitted that nothing in all of this could provide a test by which it could be determined whether or not a child needed a special course in "Americanization." He might well speak the Engligh language, be clean and live near the Lincoln School for

Anglo-Saxons, and have little conception of American ideals or ways of life, and the same would be true in judging the parents and the home, from hearing them talk. However, it is plain that this was not any substantial reason which caused that district to segregate.

There were 292 children at the school for Mexican-Americans. R. (Tr. p. 39). According to Mr. Kent not one passed the test as to Americanism, except those who lived near the Hoover School and not in the district near the Lincoln School. This was untrue. Mr. Munoz testified that he lived only five blocks from the Lincoln School and a mile and a quarter from Hoover (R. Tr. pp. 68, 69); that they spoke both languages in their home; he denied that they were dirty or lacked cleanliness; and that his children talked English at school. (R. Tr. pp. 72, 73.)

Mrs. Sianez testified that she lived one-half mile from Bolsa School (for Anglo-Saxons) and three miles from the Hoover School. (R. Tr. pp. 54-56.) She said they spoke English when they came to the Garden Grove district and to school there, and they came from Huntington Beach schools where there was no segregation. (R. Tr. pp. 56, 57.) They were refused entrance to the Bolsa School "because they were Mexicans" and was so informed when she asked to have her children attend there. (R. Tr. p. 59.)

Mrs. Ochoa's children spoke the English language and were not unclean. (R. Tr. pp. 14, 15.) She testified that the Hoover School was further from her home than Lincoln, (R. Tr. p. 13), and she told Mr. Kent of this fact when she asked to have her boy admitted to the closer school. It was more than a mile to the Hoover School, and her boy was very young. (R. Tr. p. 25.)

These examples should suffice to show that Mr. Kent's exception above mentioned was without factual foundation, and also that he did not apply the test which he announced in refusing these parents permission to enter their children in Lincoln School,

and this excludes the alleged Americanization reason for segregation.

IV.

Frank A. Henderson, Superintendent of Schools in the Santa Ana City School District, stated that they classified the children for purposes of segregation largely by "looking at their names" to determine whether they were of Mexican descent. (R. Tr. p. 255.) He said it makes no difference whether they or their parents were born in the United States or are citizens here, and that the Board pays no attention to this question. (R. Tr. pp. 256, 257.) He admitted that there is complete segregation in the Santa Ana District (R. Tr. p. 213), and that even in a few cases where by special permission Mexican children had attended the schools for others, letters (in evidence) had been sent cancelling such permits and directing that the children go to the schools for those of Mexican ancestry. (R. Tr. pp. 218-221.) However, later he testified that it is not "the policy of the Board to segregate all the Mexican children in one school or another school." (R. Tr. p. 235.) He refused to say that the Board intends to refuse permission to grant transfers to Mexicans from the Mexican School. (R. Tr. p. 227.)

Yet, in answer to questions of the Court concerning an alleged contemplated change in the composition of the Fremont Mexican attended school, Mr. Henderson apparently gave the true picture which was much clouded by contradictory statements in his replies to questions by petitioners' counsel. On transcript page 227, et seq. the witness testified to the following as facts within his knowledge: Fremont School was then wholly Mexican attended; if it were changed so as not to be wholly Mexican, parents of children not Mexicans and living in the district would not have to get permission to have their children attend that school, (R. Tr. p. 229), but in the past such children have been given permission to go to non-Mexican schools in other three directions, outside of the

Fremont district, because this is the policy of the Board and it applied to "little colored children" of whom there were a few, the said policy being to permit those in a small minority to transfer to a school "where they find their own people." This is a policy and practice of the Board conveyed to the Superintendent, tacitly or by resolution.

It practically meant that the transfers were made "automatically," and "the request would come, if they knew it had to come," that is, the request from the parent or guardian, and the witness blandly asserted "they know our policy and practice."

In the same way Mexicans living in the Franklin district, all non-Mexican, got transferred to the Fremont school.

Henderson said, "We use the same practice with all classes of people and all nationalities," (R. Tr. pp. 227-230), but the only groups which he mentioned were Negroes and Mexicans, and this policy had existed for 12 or 13 years.

Petitioners insist that in this testimony Mr. Henderson significantly yet inadvertently gave the Court the true picture of actual operation of segregation as practiced. The Board had a policy and practice which actually segregated Mexicans solely on the basis of their respective races. To carry it out the children were transferred automatically, and the parents knew it so well that they did not generally ask for transfers but would if necessary because "they knew it had to come, of course."

Mr. Henderson emphasized the foregoing at once in answer to a question by petitioners' counsel; said that as an employee of the Board he followed the policy enunciated by the Board, which were made "tacitly or by resolution, in writing or orally." (Emphasis added.) (R. Tr. p. 231.)

Then, inexplicably, Mr. Henderson denied that "it is the policy of the Board to segregate all Mexican children in one

school or another," and declared that it just "happens so" in the Fremont School. (R. Tr. p. 234.) He was forced to concede that the same situation existed in the other two all-Mexican Schools, Delhi and Logan. (R. Tr. pp. 236, 237.)

Truly, strange things really happen in the Santa Ana District under the Board's policy to permit minority group children to join "their people in districts where they are a majority." Petitioners believe that this is a situation which calls for the application and use of the doctrine put into effect in Kerr v. Enoch Pratt Free Library v. Baltimore, 149 F. (2d) 212, where the Court said it would determine whether the petitioner had been excluded from a library training course because of her race and, if so, whether this was contrary to the Federal Constitution by "an appraisement of the facts," and not upon mere technicality. We apprehend that when the Court's questioning relaxed the bag, the cat emerged, and the story which he told was the truth.

This conclusion is upheld by the hypothesis which renders other admissions against interest admissible, namely, that a person will not prevaricate to his own disadvantage.

According to the truth the asserted happening in these all-Mexican children schools was the direct result of the Board's cleverly-varnished policy and practice by which compulsion was successfully achieved. The Mexicans, as Henderson said, all knew this practice and policy and "of course" would do what they knew "had to be" done.

V.

In El Modino District the basis of segregation was "intellectual" and "educational" according to Harold Hammarsten who had been Superintendent of the El Modino School District for seven years. He said, it is true that the general policy that the children of Mexican descent are to be educated in schools separate and apart from other students has been observed "over a long period

of years." (R. Tr. p. 291.) It has existed for 15 years. (R. Tr. p. 294.) He had inquired of the present Board or the Board that was there during "the last seven years" as to their reasons for this policy. (R. Tr. p. 293.) The enrollment at Lincoln School was 100% Mexican. Regardless of where the other children reside, they are sent to the Roosevelt School. (R. Tr. p. 294.)

He said he believed in segregation of Mexican pupils as set up in respondents' Answer, "If you will include that it is for the best interest of the Mexican pupils. (R. Tr. p. 295.) The two schools are 120 yards apart. He said the pupils "use the same sidewalks." (R. Tr. p. 296.)

However, right there community of interest and contact between Mexicans and others stops, as far as school policy can control the situation. The schools open at different times. The recesses are "staggered" so that each may use the playground separately. The lunch hours are different, and they get out of school at different times. (R. Tr. pp. 296, 297.) The Mexican students are American born. (R. Tr. p. 299.) If children are of Mexican descent, when they enroll "they all go there," to the Lincoln School, and no tests are given. (R. Tr. p. 302.)

Mr. Hammarsten definitely evaded answering when asked, "It is the policy of the board, isn't it?" He said, "We maintain the schools for them," and followed with similar answers to questions on the same point, but did admit that the children probably follow the policy of the Board in attending the Lincoln School. (R. Tr. p. 303.) The witness claimed that the children or their parents thought it was for their best interests to attend the Lincoln School, because, he said, if they did not think so they would have applied for a transfer to the Roosevelt School. (R. Tr. p. 303.)

Hammarsten was not as candid as Superintendent Henderson. The conditions as to segregation were similar in their districts.

The same policy had existed in both for a long period, and Henderson testified that everyone knew the Board's policy; that as Mexican children enrolled they were automatically assigned to schools for them only, and he said, in effect, that they knew they had to go to such schools and so did not make requests to be transferred.

Proof that even when requests for transfers were made the Mexican-American pupils were kept in the Lincoln School because of their lineage was produced as this witness admitted that Miss Torres and Robert Perez had no lack of basic understanding of the English language. (R. Tr. p. 306.) Yet, Miss Torres testified that she and others made known their desire to go to the Roosevelt School. (R. Tr. p. 264.) The boy probably did the same, but the Court sustained an objection by Mr. Holden because the conversation occurred in 1941. (R. Tr. p. 272.) Mr. Hammarsten admitted that he never had advised the children attending at Lincoln School that they could be transferred. (R. Tr. p. 306.)

After much testimony through which the witness, at times, indicated that there was a difference in the courses of instruction given in the two El Modino Schools, he finally conceded that the courses of instruction in both schools follow pretty much the course "prescribed" by the "County Schools," by which he meant the course prescribed by the County Board of Education, whose course they are bound to follow. He also admitted that the courses followed in the two El Modino Schools are "the same" on a basis that is "probably" not as broad and comprehensive in the Lincoln School as in the Roosevelt. (R. Tr. p. 319.)

In answer to questions by the Court this witness said the idea of segregation of the students was based on "the level in scholarship." He admitted that there were some students in a certain grade in the Lincoln School who surpass those of the same grade in Roosevelt. (R. Tr. p. 322.) Yet, when asked why these Mexican children were not transferred, Hammarsten replied, "It

would not be practical in our school management, and educationally I don't think it would be practical," and he said, ""Well, you are getting right into this business of segregating the Mexicans, and then you are selecting out of that group of Mexicans to send over to the Roosevelt School." The transcript continues:

> "Q But you are not selecting them on a Mexican basis, you are selecting them on an intellectual basis.
>
> A The trouble is they don't look at it from the educational standpoint, but from the Mexican standpoint.
>
> Q Well, never mind. You have never tried it."

(R. Tr. p. 323.)

By the foregoing Mr. Hammarsten definitely admits that the segregation is on the basis of Mexican ancestry. He admits that they are "selecting," that is, segregating them "on a Mexican basis," and he deplores the fact that the Mexicans adhere to their own "standpoint," which is that they want their constitutional rights.

Again in this same inquiry by the Court the witness said, off-guard, "Suppose we did allow them to make applications?" Thus, he plainly assumed that they do not allow these children to make applications for transfers. Finally, he admitted that it was "possible and practicable, from a school standpoint" to cease segregation and put all children together in the schools. (R. Tr. p. 325.) The witness said that he had never, at any time, where a child showed special aptitude in the English language to grasp the course of study, and had a basic training in it, transferred a Mexican child on his, the Superintendent's, own volition. (R. Tr. p. 333.)

The commencement exercises are separate for the two schools. (R. Tr. p. 337.)

It is believed that the testimony of this Superintendent

shows beyond dispute segregation on the basis of Mexican ancestry as to most of the Mexican children; that this is a matter of usage and custom, as well as school policy, and that it is definitely not regulated on intellectual or ability tests.

Although Mr. Holden expressed the opinion that, "In this Westmister District . . . the segregation was not proper, as far as that is concerned," the Superintendent made a strong effort to convince the Court to the contrary. This is the district concerning which an unsuccessful attempt was made to compare the issues on the basis of assurance that the segregation was about to be discontinued.

Mr. Harris testified that "the Hoover School is attended solely by Mexican children," and the Westminster School "is attended by children other than of Mexican descent, and of Mexican descent." (R. Tr. pp. 345, 346.) The essence of Mr. Harris' reason for segregation was the "cultural background" of persons of Mexican ancestry (R. Tr. p. 357), which he brought forth after indicating that their inability to speak the English language retarded, in some degree, all such children, and continued to do, even though about 60% of them spoke English when they entered the first grade, and the other 40% acquired such ability as they progressed. (R. Tr. pp. 352-355.)

This witness was cautious to the degree of uncertainty in difficult answers. He often qualified or safe-guarded his conclusions by such words as "perhaps" and "I suspect" and "I am not so sure." (R. Tr. p. 358.) In this way he testified that a "language handicap" might remain almost indefinitely, but "would not say that the educational program of which segregation was apparently a part is a benefit to all of these Mexican children. (R. Tr. p. 358.)

Again with caution he said, "It is very possible" that a child may be retarded in acquiring the English language by associating with others who do not speak it. (R. Tr. p. 360.) The transcript

contains pages of Mr. Harris' testimony about dividing the classes in the fourth grade into three groups, "a slow fourth," "a more progressive fourth," and "a more rapid learning fourth," classified on an "ability" basis. (R. Tr. pp. 362-369.) Yet, he testified that they were given the same course of study, but "it was given to them in a slightly different manner, or perhaps a more gradual incline basis."

The difference must be slight, indeed, because not one of them ever progressed fast enough to be sent to the Westminster School at the end of the fourth grade. (R. Tr. p. 367.) Yet, he testified there were Mexican children in the Hoover School whose ability is above that of some in Westminster. (R. Tr. p. 381.)

It seems quite obvious, therefore, that from a practical standpoint the "ability" groupings in the Hoover School, at least, were of no substantial advantage, but mere subterfuge. At any rate, in answer to a direct and simple question as to whether it is not a fact that the children at the Hoover School were separated because they were of Mexican descent, Mr. Harris declared that he was "unable to answer because of the historical background." (R. Tr. p. 369.) He was confronted with his answer which avers that "for the best interests of the pupils of the Hoover School, that, being of Mexican descent," it is the policy of the Board that they "be educated separate and apart from the English-speaking pupils," in the lower grades, and replied, "It undoubtedly is an educational policy which has been broadly interpreted." (R. Tr. p. 372.) He said that this segregation in the lower grades would undoubtedly continue. (R. Tr. p. 373.)

He admitted after reading another averment of this answer, that regardless of whether the child speaks or understands the English language, he is still required to attend the separate school because he is of Mexican descent, and that is the policy of his Board. (R. Tr. p. 374.) In explanation and attempted justification of this

un-American policy Mr. Harris Reverted to the "cultural background" of these Mexican-American children, and he claimed that it was due to this factor that they must remain segregated to be taught by specialists. However, in answer to the next question he averred that this was only one element, one handicap of these children as compared with an American culture "as interpreted in English words," and as thus "seen." When asked to distinguish this cultural basis, whether the child does or does not speak English, the Court was told that it all goes back to "Mother Goose Rhymes."

A poetess of renown wrote, "Little drops of water, little grains of sand, make the mighty ocean and the pleasant land." But a wise phylosopher reasoned, "Little things affect little minds." It seems that one or the other of these theories is applicable.

According to this erudate educator, out of the Mother Goose Rhymes "come stories of our American heroes, our American frontiers, rhymes, rhythms," and since the Mexican-American child, "has not had these stories read to him in the English language," he has no conception of them, and, ergo, he must have "a specially trained teacher" to give him the background which he lacks, presumably beginning with the Mother Goose Rhymes, and, of course, such classes are not given in any other school, regardless of how many pupils in them never were endowed with an education and Mother Goose cultural background. It would be interesting to take a poll of the judiciary or use a questionnaire to discover how much or how little they are thus endowed.

However, if Mr. Harris' estimate of Mother Goose Rhymes in interpreting stories of our American heroes, and other stories, has any substantial factual basis, what of the children of Portuguese descent, of German or French or Italian or Greek lineage? Admittedly, there were Portuguese and Filipinos and Japanese, and they were not sent to the Hoover School.

Also, Mr. Harris admitted, in answer to the Court's question

that some of the parents in the Westminster district of the children attending the Hoover School had themselves acquired the essential cultural background. (R. Tr. p. 377.) At least, as to them, the policy and regulations of the Board are discriminatory and unjust.

As far as the reason, cultural background, is concerned, it seems unthinkable that any Court can say that it reasonably warrants the impairment of constitutional guaranties herein involved and the substitution of State School authority for parental responsibilities and rights.

But, Mr. Harris finally admitted that when the child has grasped the English language so that through it he can see and grasp the cultural background, "he is equal and not inferior to the other children." (R. Tr. p. 382.)

Hence, the lack of said cultural background is, in fact, Mr. Harris' and his Board's only reason for keeping these children segregated, and the Mother Goose Rhymes in their view have grown into "mighty mountains" (but not pleasant lands), to block and blight the Americanization and realization of sacred rights under the Federal Constitution.

Before ending this discussion of the second question, attention should be called to the fact that although it is inconsistent with respondents' Answer, the several Superintendents of Schools, some less seriously than others, claimed that the lack of knowledge of the English language by children of Mexican ancestry was the principal reason for segregation. Yet, none of these witnesses testified that any genuine or definite or substantial test was used to determine the question, and Mr. Henderson of the Santa Ana district made no pretensions that any test was employed but said they were largely classified by their Mexican names. (R. Tr. p. 255.) Mr. Hammarsten of El Modino District said no tests were given for children entering the first grade. (R. Tr. pp. 301-303.)

On the other hand a number of the parent witnesses who attempted to have their children sent to the other schools said no test was given their children, but their requests were refused.

Mrs. Ochoa said no tests were given, and that Mr. Kent said nothing about the ability of her children to speak English (R. Tr. p. 37.)

Mr. Palomino said no tests were given his children. (R. Tr. p. 49.)

Mrs. Sianez testified to the same effect (R. Tr. p. 58), as did Mr. Munoz. (R. Tr. pp. 65-67, 69.)

Not one of the other parent witnesses who related conversations with school authorities related that any reference was made to the child's ability to qualify in the matter of knowledge of the English language. Their undisputed testimony also showed that each of the children of these petitioners who appeared spoke English in their homes and before they went to school.

THE THIRD QUESTION

In the language of the Court the third question is:

> "Third, as to whether or not the plaintiffs are in a position to invoke this action as a class action, or as to whether their rights are individualistic; and if the action is an individual suit between the individuals named as plaintiffs and the respective school district against which it is directed, any relief can be afforded in the action other than personal relief to the individual plaintiff as to the children of that individual plaintiff. And, ultimately, assuming that the plaintiffs can recover -- in other words, that there is jurisdiction in the court and that the evidence justifies recovery by

them -- what form of relief are they asking in this action, and what form of relief to the plaintiffs, if entitled to any relief, is appropriate within the issues of the action." (R. Tr. pp. 704-705.)

The averment of the Petition, Paragraph XXIII, in this behalf alleges: (Pp. 6-7.)

"This action is brought on behalf of petitioners and some 5,000 other persons of Mexican and Latin descent and extraction all citizens of the United States of America, residing within said Districts. That the questions involved by these proceedings are one of a common and general interest and the parties are numerous and it is impractical to bring all of them before the Court. Therefore, these petitioners sue for the benefit of all."

Also, it is alleged in Paragraph XVI as follows: (P. 4.)

"That each of Petitioners are beneficially interested in the privileges, management, control and operation of his respective School District and System and its facilities."

Section 382 of the California Code of Civil Procedure provides:

" . . . when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

This being a matter of practice and procedure in a civil case, the State law of California controls. (Title 28, Sec. 724; Jud. Code and Judiciary.)

The test of the right to sue under the above provision

of said Section 382 is whether an action for the same relief would lie on behalf of each of the parties alleged to be represented by the petitioners to protect or enforce their individual rights. If so, Section 382 applies and one may sue for the benefit of all. (Water District v. Stevens, 206 Cal. 400.)

In Carey v. Brown, 58 Cal. App. 505, it was held that a party who seeks to avail himself of this provision of Section 382, "must show that 'the question is one of common or general interest of many persons' or that 'the parties are numerous and it is impracticable to bring them all before the court.'"

The Court will take judicial knowledge that there are numerous parties situated similarly to the petitioners herein.

Also, the mere factual allegations of the Petition establish the common interest of "many persons," to-wit: all school-age American children of Mexican ancestry within the districts involved, and the data supplied by the respondents shows that there are hundreds of them attending the schools of said districts.

However, it is of no particular moment in this case to distinguish between individualistic and class actions, since a determination favorable to the petitioners as individuals must necessary determine the rights of all others similarly situated, that is, the privileges and immunities of all American school-age children of Mexican ancestry and their parents or guardians. This obvious fact, also, proves the class-action nature of the suit.

If the action be regarded as one between the individuals who instituted it and the defendants, the result is a judgment for plaintiffs and against defendants.

The Relief

There is but one form of action in California (Cal. C. C. P., Sec. 307). The pleadings of fact and the evidence determine what

relief the Court may adjudge and decree.

I.

The instant Petition asks injunctive relief. There can be no doubt of the jurisdiction of a District Court to grant this relief in a case of this nature. The decision of the United States Supreme Court in Hague v. Com. for Ind. Org., 307 U. S. 496, 83 L. Ed. 423, definitely determines this question.

It holds that Federal Courts have jurisdiction to entertain a suit to enjoin the enforcement of an ordinance of a municipality where the petition avers that the ordinance denies citizens rights protected by the 14th amendment to the Federal Constitution and violates the privileges and immunities clause thereof. It held that jurisdiction to grant injunctive relief is conferred by the provisions of Section 24 (14) of the Judicial Code, which, it is said, grants jurisdiction of suits "at law or in equity authorized by law to be brought by any person to redress the deprivation under color of law, statute, ordinance, regulation, custom, or usage, of any state, of any right, privilege or immunity, secured by the United States, or of any right secured by any law of the United States. . . "

The Petition alleged that, pursuant to an ordinance, they had been arrested for distributing printed matter on the public streets and prevented from holding public meetings within Jersey City.

In the instant case the same and similar constitutional rights are charged to have been violated, and injunctive relief is, under the Hague decision, a right of the petitioners, if they have established such charge during the trial.

II.

A Writ of Mandamus is sought.

"The practice, pleadings and forms and modes of

proceeding in civil causes, other than equity and admiralty in the district courts, shall conform, as near as may be, to the practice, pleadings, and form and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district Court is held, any rule of court to the contrary notwithstanding." (Title 28, Sec. 724, Jud. Code and Judiciary.)

Even though the Federal Courts do not thus conform to State procedure in equity matters, Federal Courts, in granting Writs of Mandamus, may follow such State procedure in proper cases. Wisdom v. Memphis, Fed. Cas. No. 17, 903 (C. C. Tenn.); Laird v. De Soto, 25 F. 76; U. S. v. Keokuk, 6 Wall. 514, 18 L. ed. 933.

It is said in Nielsen v. Richards, 69 Cal. App. 533, that:

"Where one has a substantial right which may be enforced by mandamus, 'and there is no plain, speedy, and adequate remedy in the ordinary course of law, he is entitled as a matter of right to the writ.' (Gay v. Torrance, 145 Cal. 144, 148 (78 Pac. 540); Inglin v. Hoppin, 156 Cal. 483. (105 Pac. 582.))."

And Section 377 authorizes Federal District Courts to issue mandamus where there is no other adequate remedy and an existing duty is peremptory and plain. (McCarthy v. U. S. Dist. Ct., 19 F. (2d) 462.)

The use of this Writ has been much extended in modern times. (Virginia v. Rives, 100 U. S. 313, 25 L. ed. 667.)

It is not a matter of right but of sound judicial discretion and upon equitable principles. (Duncan Townsite Co. v. Lane, 245 U. S. 308, 62 L. ed. 309; Katsh v. Rafferty, 12 F. (2d) 460; U. S. ex rel Stowell v. Deming, 19 F. (2d) 697.)

It is settled law that under Section 377, the Courts of the United States may issue Writs of Mandamus when necessary to the exercise of their jurisdiction. (Notes to U. S. C. A., Vol. 28, Sec. 377 Jud. Code. pp. 73, 74.)

In the instant case, indeed in all cases where a constitutional right is being openly and flagrantly violated and where the respondents are acting in pursuance of a long-established policy and system and which they threaten to and undoubtedly will continue unless restrained or compelled to abandon by order of this Court, the necessity for the issuance of a Writ of Restraint in the proper form is self-evident.

Damages are not asked in this case because the injury to the pupils, if illegal, could not be measured in damages, and no amount of damages could be adequate and a mere declaration of the petitioners' rights would be of no avail.

III.

The prayer seeks declaratory relief. It is prayed:

> "(1) That said rules, regulation, custom or usage be adjudged void and unconstitutional.
>
> . . .
>
> "(6) For such other and further relief as this Court may deem just, and for costs of suit."

Laws of the State of California and Federal laws provide for declaratory relief. Jurisdiction to grant such relief exists under Title 28, Section 400, U. S. C. (Jud. Code, Sec. 274 d), entitled "Declaratory Judgment Authorized; Procedure," Secs. (1) and (2).

Provisions for declaratory relief are found in Sections 1060 to 1062 a of the California Code of Civil Procedure.

Under both Federal and State laws declaratory relief may be granted without precluding any party from obtaining additional relief based on the same facts.

Hence, it must be concluded that in the instant case all

three forms of relief sought are within the Court's power to grant.

Although the following cited case might well have been interposed under the first question propounded by the Court, we feel that it is of such significance that discussion may be had of it at the present stage of this Brief. In Lane v. Wilson, 307, U. S. 268, the Court through Justice Frankfurter said:

> "The case is here on certiorari to review the judgment of the Circuit Court of Appeals for the Tenth Circuit affirming that of the United States District Court for the Eastern District of Oklahoma, entered upon a directed verdist in favor of the defendants. The action was one for $5,000 damages brought under § 1979 of the Revised Statutes (8 U. S. C. § 43), by a colored citizen claiming discriminatory treatment resulting from electoral legislation of Oklahoma, in violation of the Fifteenth Amendment. Certiorari was granted, 305 U. S. 591, because of the importance of the question and an asserted conflict with the decision in Guinn v. United States, 238 U. S. 347.
>
> . . .
>
> "The defendants urge two bars to the plaintiff's recovery, apart from the constitutional validity of § 5654. They say that on the plaintiff's own assumption of its invalidity, there is no Oklahoma statute under which he could register and therefore no right to registration has been denied. Secondly, they argue that the state procedure for determining claims of discrimination must be employed before invoking the federal judiciary. These contentions will be considered first, for the disposition of a constitutional question must

be reserved to the last. (Emphasis added.)

. . .

"This case is very different from Giles v. Harris -- the difference having been explicitly foreshadowed by Giles v. Harris itself. In that case this Court declared 'we are not prepared to say that an action at law could not be maintained on the facts alleged in the bill.' 189 U. S. at 485. That is precisely the basis of the present action, brought under the following 'appropriate legislation' of Congress to enforce theFifteenth Amendment:

"'Every person who, under color of any statute, . . . of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .'

. . .

"The Fifteenth Amendment secures freedom from discrimination on account of race in matters affecting the franchise. Whosoever 'under color of any statute' subjects another to such discrimination thereby deprives him of what the Fifteenth Amendment secures and, under § 1979 becomes 'liable to the party injured in an action at law.' The theory of the plaintiff's action is that the defendants, acting under color of § 5654, did discriminate against him because that Section inherently operates discriminatorily. If this claim is sustained his right to sue under R. S. § 1979 follows. The basis of this action

is unequality of treatment though under color of law, not denial of the right to vote. Compare Nixon v. Herndon, 273 U. S. 536. (Emphasis added.)

"The other preliminary objection to the maintenance of this action is likewise untenable. To vindicate his present grievance the plaintiff did not have to pursue whatever remedy may have been open to him in the state courts. Normally, the state legislative process, sometimes exercised through administrative powers conferred on state courts, must be completed before resort to the federal courts can be had. Prentis v. Atlantic Coast Line Co., 211 U. S. 210. But the state procedure open for one in the plaintiff's situation (§5654) has all the indicia of a conventional judicial proceeding and does not confer upon the Oklahoma courts any of the discretionary or initiatory functions that are characteristic of administrative agencies. See Section 1 of Article IV of the Oklahoma Constitution; Oklahoma Cotton Ginners' Assn. v. State, 174 Okla. 243; 51 P. 2d 327. Barring only exceptional circumstances, see e. g. Gilchrist v. Interborough Rapid Transit Co., 279 U. S. 159, or explicit statutory requirements, e. g. 48 Stat. 775; 50 Stat. 738; 28 U. S. C. § 41 (1), resort to a federal court may be had without first exhausting the judicial remedies of state courts. Bacon v. Rutland R. Co., 232 U. S. 134; Pacific Tel. Co. v. Kuykendall, 265 U. S. 196.

"We therefore cannot avoid passing on the merits of plaintiff's constitutional claims. The reach of

the Fifteenth Amendment against contrivances by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color, has been amply expounded by prior decisions. Guinn v. United States, 238 U. S. 347; Myers v. Anderson, 238 U. S. 368. The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." (Emphasis added.)

THE CONSTITUTIONAL VIOLATIONS CHARGED IN THE PETITION ARE SUSTAINED BY UNDISPUTED PROOF OF USAGE AND CUSTOM.

The matter of usage and custom was surely so completely proved that citations of testimony are unnecessary. It was shown in every district that segregation was complete, and that, except in a very few instances where special permits were given, no Mexican child had attended a school other than those where no others were enrolled, and that this was true although it was admitted that some Mexican pupils had all of the qualifications except ancestry to go to the other schools.

From this showing two propositions are established:

(1) As the rules and regulations of the several Boards were construed and applied by their administrative agencies, they have for years violated the equal protection of the laws clause of the Fourteenth Amendment and have denied to pupils of Mexican ancestry the privileges and immunities accorded to all other American pupils.

(2) Said usages and customs and such construction of them was a matter of common knowledge in the several districts, and neither the petitioners herein nor any other American-Mexican were required to demand that their children be received in schools other than those which the Boards had created for them exclusively, for no one is compelled, under penalty of waiver to make a demand which he knows will be refused, although the demand was made in each of the above districts.

C O N C L U S I O N

Much that might be said has been left unsaid in the interest of, not brevity, but an attempt to refrain from prolonging the Brief beyond the dictates of propriety.

The subject matter invites, indeed, necessitates discussion and argument, without which a Brief in this case would aid but little in providing answers to the questions which have arisen, because the proper interpretation of acts, and the language of witnesses, is the essence of such solution.

The erudite Superintendents, whose testimony comprises the greater part of the transcript, present their theories in professional and sometimes abstruse fashion necessitating interpretation. It is obvious that their viewpoint is quite one-sided and excludes the viewpoint of these Mexican-American petitioners and those of their ancestry group.

There is no doubt that their belief in segregation of the children of this group in the schools is genuine, but it seems that in their efforts to justify rules and regulations and usage and custom which puts their ideals into effect, the reasons advanced are, as was said of a certain other tenuous theory, "an illustration of exquisite folly resulting from wisdom too finely spun." For example: We cannot believe that the cultural background of an

American child ofMexican ancestry, perhaps several generations having been born in California, require that it be educated apart from all other children except others of the same ancestry, because of assumed deficiency in familiarity with Mother Goose Rhymes or even with the tales of American heroes, when American-Japanese, Portuguese and Filipino children need not be and are not segregated on that basis. We cannot believe that these and other educational volumes must be "seen" through the "English language" to have a cultural effect.

It is commonly known that in Europe almost everyone speaks one or more languages beside their own; they read books in such other languages, and it has never been thought or suggested that the cultural effects upon the readers of such books are lost or lessened. Many Americans of Anglo-Saxon ancestry have acquired aptitude in a foreign language, Spanish, for example, and read the Spanigh language books of all kinds, some of which have few if any superiors, culturally.

Has any broad gaged worthwhile educator ever condemned the practice because some one thinks such books must be "seen" through the Spanish language? Such wisdom would surely be regarded as too finely spun, and sheer folly by any clear thinking American, and it is difficult to descern a difference where a person versed in Spanish reads books in English, having acquired sufficient knowledge to do so.

Of what avail is our theory of democracy if the principles of equal rights, of equal protection and equal obligations are not practiced? Of what avail is our good-neighbor policy if the good neighbor does not permit of honest neighborliness? Of what use are the four freedoms if freedom is not allowed? Of what avail are the thousands upon thousands of lives of Mexican-Americans who sacrificed their all for their country in this great "War of Freedom" if freedom of education is denied them? Of what avail is our "education" if the system that propounds it denies the equality of all?

Are we to look to simple-minded theories of segregation and say these practices are not discriminatory? Are we blinded by the technicalities of theory and form over the broader intelligent matter of practice?

The indelible imprint of mass discrimination of psuedo theories of intellectual superiority upon the minds and lives of innocent children decries the principles of democracy, freedom and justice.

The decision of this Court is of tremendous importance. The burden cast upon this Court involves the lives, future happiness of uncounted thousands of American citizens. Eager eyes and attentive ears North and South of our borders await the result. We cannot fail them.

We respectfully submit the prayer of our Petition be granted.

DAVID C. MARCUS, Attorney for Petitioners.