SUPREME COURT OF THE UNITED STATES

No. 645.—October Term, 1967.

Joseph Lee Jones et ux., Petitioners, *v.* Alfred H. Mayer Co. et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 17, 1968.]

Mr. Justice Douglas, concurring.

The Act of April 9, 1866, 14 Stat. 27, 42 U. S .C. § 1982, provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Act was passed to enforce the Thirteenth Amendment which in § 1 abolished "slavery" and "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted" and in § 2 gave Congress power "to enforce this article by appropriate legislation."

Enabling a Negro to buy and sell real and personal property is a removal of one of many badges of slavery.

> "Slaves were not considered men. . . . They could own nothing; they could make no contracts; they could hold no property, nor traffic in property; they could not hire out; they could not legally marry nor constitute families; they could not control their children; they could not appeal from their master; they could be punished at will." Dubois, Black Reconstruction in America 10 (1935).[1]

[1] The cases are collected in five volumes in Catterall, Judicial Cases Concerning American Slavery and the Negro (1937). And see Cobb, Law of Negro Slavery, c. XIV (1858); Ostrander, The Rights of Man in America 1606–1861, p. 252 (1960); Stroud, Slavery 45–50 (1827); Wheeler, Law of Slavery 190–191 (1837).

The true curse of slavery is not what it did to the black man, but what it has done to the white man. For the existence of the institution produced the notion that the white man was of superior character, intelligence, and morality. The blacks were little more than livestock—to be fed and fattened for the economic benefits they could bestow through their labors, and to be subjected to authority, often with cruelty, to make clear who was master and who slave.

Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die. We have seen contrivances by States designed to thwart Negro voting, *e. g., Lane* v. *Wilson,* 307 U. S. 268. Negroes have been excluded over and again from juries solely on account of their race, *e. g., Strauder* v. *West Virginia,* 100 U. S. 303, or have been forced to sit in segregated seats in court rooms, *Johnson* v. *Virginia,* 373 U. S. 61. They have been made to attend segregated and inferior schools, *e. g., Brown* v. *Board of Education,* 347 U. S. 483, or been denied entrance to colleges or graduate schools because of their color, *e. g., Pennsylvania* v. *Board of Trusts,* 353 U. S. 230; *Sweatt* v. *Painter,* 339 U. S. 629. Negroes have been prosecuted for marrying whites, *e. g., Loving* v. *Virginia,* 388 U. S. 1. They have been forced to live in segregated residential districts, *Buchanan* v. *Warley,* 245 U. S. 60, and residents of white neighborhoods have denied them entrance, *e. g., Shelley* v. *Kraemer,* 334 U. S. 1. Negroes have been forced to use segregated facilities in going about their daily lives, being excluded from railway coaches, *Plessy* v. *Ferguson,* 163 U. S. 537; public parks, *New Orleans* v. *Detiege,* 358 U. S. 54; restaurants, *Lombard* v. *Louisiana,* 373 U. S. 267; public beaches, *Mayor of Baltimore* v. *Dawson,*

350 U. S. 877; municipal golf courses, *Holmes* v. *City of Atlanta,* 350 U. S. 879; amusement parks, *Griffin* v. *Maryland,* 378 U. S. 130; busses, *Gayle* v. *Browder,* 352 U. S. 903; public libraries, *Brown* v. *Louisiana,* 383 U. S. 131. A state court judge in Alabama convicted a Negro woman of contempt of court because she refused to answer him when he addressed her as "Mary," although she had made the simple request to be called "Miss Hamilton." *Hamilton* v. *Alabama,* 376 U. S. 650.

That brief sampling of discriminatory practices, many of which continue today, stands almost as an annotation to what Frederick Douglass (1817–1895) wrote a century earlier:

> "Of all the races and varieties of men which have suffered from this feeling, the colored people of this country have endured most. They can resort to no disguises which will enable them to escape its deadly aim. They carry in front the evidence which marks them for persecution. They stand at the extreme point of difference from the Caucasian race, and their African origin can be instantly recognized, though they may be several removes from the typical African race. They may remonstrate like Shylock—'Hath not a Jew eyes? hath not a Jew hands, organs, dimensions, senses, affections, passions? fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same summer and winter, as a Christian is?'—but such eloquence is unavailing. They are Negroes—and that is enough, in the eye of this unreasoning prejudice, to justify indignity and violence. In nearly every department of American life they are confronted by this insidious influence. It fills the air. It meets them at the workshop and factory, when they apply for work. It meets them at the church, at the hotel, at the

> ballot-box, and worst of all, it meets them in the jury-box. Without crime or offense against law or gospel, the colored man is the Jean Valjean of American society. He has escaped from the galleys, and hence all presumptions are against him. The workshop denies him work, and the inn denies him shelter; the ballot-box a fair vote, and the jury-box a fair trial. He has ceased to be the slave of an individual, but has in some sense become the slave of society. He may not now be bought and sold like a beast in the market, but he is the trammeled victim of a prejudice, well calculated to repress his manly ambition, paralyze his energies, and make him a dejected and spiritless man, if not a sullen enemy to society, fit to prey upon life and property and to make trouble generally." [2]

Today the black is protected by a host of civil rights laws. But the forces of discrimination are still strong.

A member of his race, duly elected by the people to a state legislature, is barred from that assembly because of his views on the Vietnam war. *Bond* v. *Floyd*, 385 U. S. 116.

Real estate agents use artifice to avoid selling "white property" to the blacks.[3] The blacks who travel the country, though entitled by law to the facilities for sleeping and dining that are offered all tourists, *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241, may well learn that the "vacancy" sign does not mean what it says, especially if the motel has a swimming pool.

On entering a half-empty restaurant they may find "reserved" signs on all unoccupied tables.

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[2] Excerpt from Frederick Douglass, The Color Line, The North American Review, June 1881, IV The Life and Writings of Frederick Douglass 343–344 (1955).

[3] See *Kanter* v. *Secretary of State* (N. Y. Ct. App. May —, 1968), in N. Y. Times, May 19, 1968, at 31, col. 1.

The black is often barred from a labor union because of his race.[4]

He learns that the order directing admission of his children into white schools has not been obeyed "with all deliberate speed," *Brown* v. *Board of Education,* 349 U. S. 294, 301, but has been delayed by numerous strategies and devices.[5] State laws, at times, have even encour-

[4] See, *e. g.,* O'Hanlon, The Case Against the Unions, Fortune, Jan. 1968, at 170.

[5] The contrivances which some States have concocted to thwart the command of our decision in *Brown* v. *Board of Education* are by now legendary. See, *e. g., Monroe* v. *Board of Commissioners,* — U. S. — (Tennessee "free transfer" plan); *Green* v. *County School Board,* — U. S. — (Virginia school board "freedom-of-choice" plan); *Raney* v. *Board of Education,* — U. S. — (Arkansas "freedom-of-choice" plan); *Bradley* v. *School Board,* 382 U. S. 103 (allocation of faculty allegedly on a racial basis); *Griffin* v. *County School Board,* 377 U. S. 218 (closing of public schools in Prince Edward County, Virginia, with tuition grants and tax concessions used to assist white children attending private segregated schools); *Goss* v. *Board of Education,* 373 U. S. 683 (Tennessee rezoning of school districts, with a transfer plan permitting transfer by students on the basis of race); *United States* v. *Jefferson County Board of Education et al.,* 372 F. 2d 836, aff'd *en banc,* 380 F. 2d 385 (C. A. 5th Cir. 1967) ("freedom-of-choice" plans in States within the jurisdiction of the United States Court of Appeals for the Fifth Circuit); *Northcross* v. *Board of Education,* 302 F. 2d 818 (C. A. 6th Cir. 1962) (Tennessee pupil assignment law); *Orleans Parish School Board* v. *Bush,* 242 F. 2d 156 (C. A. 5th Cir. 1957) (Louisiana pupil assignment law); *Hall* v. *School Board,* 197 F. Supp. 649 (D. C. E. D. La. 1961), aff'd, 368 U. S. 515 (Louisiana law permitting closing of public schools, with extensive state aid going to private segregated schools); *Holmes* v. *Danner,* 191 F. Supp. 394 (D. C. M. D. Ga. 1961) (Georgia statute cutting off state funds if Negroes admitted to state university); *Aaron* v. *McKinley,* 173 F. Supp. 944 (D. C. E. D. Ark. 1959), aff'd, 361 U. S. 197 (Arkansas statute cutting off state funds to integrated school districts); *James* v. *Almond,* 170 F. Supp. 331 (D. C. E. D. Va. 1959) (closing of all integrated public schools). See also *Rogers* v. *Paul,* 382 U. S. 198; *Calhoun* v. *Latimer,* 377 U. S. 263; *Cooper* v. *Aaron,* 358 U. S. 1.

aged discrimination in housing. *Reitman* v. *Mulkey*, 387 U. S. 369.

This recital is enough to show how prejudices, once part and parcel of slavery, still persist. The men who sat in Congress in 1866 were trying to remove some of the badges or "customs" [6] of slavery when they enacted § 1982. And, as my Brother STEWART shows, the Congress that passed the so-called Open Housing Act in 1968 did not undercut any of the grounds on which § 1982 rests.

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[6] My Brother HARLAN's listing of some of the "customs" prevailing in the North at the time § 1982 was first enacted (*post*, at ——) shows the extent of organized white discrimination against newly-freed blacks. As he states, "[r]esidential segregation was the prevailing pattern almost everywhere in the North." *Post*, at ——. Certainly, then, it was "customary." To suggest, however, that there might be room for argument in this case (*post*, at ——, n. 65) that the discrimination against petitioners was not in some measure a part and product of this longstanding and widespread customary pattern is to pervert the problem by allowing the legal mind to draw lines and make distinctions that have no place in the jurisprudence of a nation striving to rejoin the human race.