DEPARTMENT OF JUSTICE

CIVIL RIGHTS DIVISION

Enforcement of Court Desegregation Orders

UNIVERSITY OF MISSISSIPPI

Meredith v. Fair

Appeals and Research Files

Pleadings, Briefs and Memoranda

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19475

JAMES H. MEREDITH, on behalf of himself and others similarly situated,

Appellant,

versus

CHARLES DICKSON FAIR, President of the Board of Trustees of the State Institutions of Higher Learning, Et Al.,

Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(July 10, 1962)

Before BROWN and WISDOM, Circuit Judges, and DeVANE, District Judge.

DeVANE, District Judge, Dissenting: Considered as a brief in support of appellant's case, the decision of Judge Wisdom is a masterpiece. I agree with almost everything

he has to say in the opinion about the defenses advanced by appellees and I further agree that appellees scraped the "bottom of the barrel" in their efforts to keep Meredith out of the University of Mississippi. In so doing appellees weakened their case very much before this Court for on every ground save one the defenses advanced are not deserving of serious consideration by this Court.

The one defense that leads me to dissent is the fear expressed by the appellees that Meredith would be a troublemaker if permitted to enter the University of Mississippi. Judge Wisdom sets out the evidence forthrightly in his opinion dealing with this issue and reaches the conclusion that it too is not a valid defense to the efforts of appellees to keep appellant out of the University. Considering the facts as he outlines them in his opinion, I disagree with the Court's conclusion on this issue.

Judge Mize heard the case, observed appellant throughout the trial and reached the definite conclusion from appellant's testimony, his conduct and other testimony that was offered that Meredith would be a troublemaker if permitted to enter the University. Under such circumstances, the opinion of Judge Mize is entitled to more weight than any conclusion that could be reached by Court of Appeals Judges where their opinion is based upon a cold, printed record of the facts at issue. This conclusion is supported by the last sentence in Judge Wisdom's opinion on this point, when he states:

> "Another short answer (to the defendants' contention) is that Meredith's record shows just about the type of Negro who might be expected to try to

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crack the racial barrier at the University of Mississippi: a man with a mission and with a nervous stomach."

In considering this matter, I recognize that the appellees never have, and probably never will, approve the decision of the Supreme Court of the United States in *Brown, et al. v. Board of Education of Topeka, et al.*, 347 U. S. 483. Nevertheless, my approach to this issue, and I am sure it was the approach of Judge Mize, is the same as my approach to many laws District Judges are called upon to enforce where the District Judge would prefer that the law was otherwise. This has never deterred me in following the mandates of Congress and the Supreme Court insofar as the laws of the United States are concerned, and I am sure that it would not deter Judge Mize in ordering the appellees to admit Meredith to the University of Mississippi, if he felt that the proof on this issue was not sufficient to support his decision to deny appellant's application for entry.

In passing upon this case, I do not consider that we have a right to ignore what the effect of this decision could be upon the citizens of Mississippi and I feel that it is the duty of our Courts to avoid where we can incidents such as the Little Rock case and I fear that the result of this decision may lead to another comparable situation, particularly for "a man with a mission and with a nervous stomach". Integration is not a question that can ever be settled by Federal Judges. It is an economic, social and religious question and in the end will be amicably settled on this basis.

In my opinion Judge Mize was correct in finding and

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holding that appellant bore all the characteristics of becoming a troublemaker if permitted to enter the University of Mississippi and his entry therein may be nothing short of a catastrophe.

I, therefore, dissent for the reasons stated above.

Adm. Office, U. S. Courts — Scofields' Quality Ptrs. Inc., N. O. La.

corporation. The very fact that Hallmark sold the exhibits in question is proof that the parties did not comply with the order and judgment of the Court prohibiting the use of the designations for the perfume and cosmetics and that they did not deliver them up for destruction.

Conclusions of Law.

Restraining orders of a Court are binding upon parties to the actions, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with those who receive actual notice of the order by personal service or otherwise. Rule 65 (d), F.R.Civ.P., 28 U.S.C.

[1] The injunction of the Court is binding upon the parties-defendant and those in privity with them so that defendants may not nullify a decree by carrying out prohibitive acts through aiders and abettors, although they were not parties to the original proceeding. Moore's Federal Practice, Vol. VII, pp. 1670–75; Regal Knitwear Co. v. N. L. R. B., (1945) 324 U.S. 9, 14, 65 S.Ct. 478, 89 L.Ed. 661.

The Courts have repeatedly held that if a person has actual knowledge of an injunction he may be amenable to it even where not a party to the suit and was not served with a copy of the injunction. Mitchell v. Wilkie Gravel Works, Inc., D.C., 181 F.Supp. 628.

[2] Successors and assigns, not parties to the enforcement order, may become part of it and subject to its prohibitions when they become instrumentalities by which parties-defendant seek to escape and thereby be in active concert or participation in the violation of the injunction. Federal Practice and Procedure, Vol. III, p. 502; Regal Knitwear Co. v. N. L. R. B., supra.

[3] A corporation acts through its officers and agents and the officers and agents, when in control of the corporation, may be responsible for the acts of the corporation. Parker v. United States, 1 Cir., 126 F.2d 370.

The Court may punish those who violate its injunctive orders and disobey or resist its orders, decrees or commands. 18 U.S.C. § 401.

[4] Proceedings in civil contempt are for the purpose of coercing obedience to the decree passed in complainants' favor or to compensate complainants for loss caused by respondents' disobedience of the decree. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797; Parker v. United States, 1 Cir., 153 F.2d 66, 163 A.L.R. 379.

[5] The parties here agreed that the issue of contempt would be first decided and if decided in favor of complainants, the taking of evidence on damages and attorneys' fees would be subsequently heard and the right to hear subsequent evidence on damages and attorneys' fees was reserved. (See transcript of record 286–288, in which counsel for complainant asked that same be done and counsel for respondents made no objection.) Therefore, it is the Court's conclusion that an order be entered finding Pierre Marche, Inc., a corporation, Hallmark Distributors, Inc., a corporation, Fred Malorrus, Jean Catanzaro, and Jack Yawitz in contempt of court for the violation of the judgments aforesaid. A hearing will be set for the taking of testimony on the matters of damages and attorneys' fees and the Court will reserve its final order until after said hearing.

PLEASE RETURN TO
MISS BLAIR

James Howard MEREDITH, Plaintiff,
v.
Charles Dickson FAIR et al., Defendants.
Civ. A. No. 3130.

United States District Court
S. D. Mississippi,
Jackson Division.
Dec. 12, 1961.

Action brought by member of Negro race for injunctive relief against refusing him admission to state university and for declaratory judgment. On plaintiff's motion for a temporary injunction and to set the case for final hearing, the District Court, Mize, Chief Judge, held that evidence adduced established that plaintiff was not denied admission to state university because of his color or Negro race but that, in honest judgment of registrar, he did not meet requirements for all students at university.

Motion denied; case set for hearing on merits.

1. Domicile ⇐10

Evidence established that applicant for admission to state university was citizen of county in which he was born and reared and finished high school and which, during period of military service, he claimed as his residence, notwithstanding evidence adduced to show that he had changed residence to another state.

2. Colleges and Universities ⇐10

Evidence on temporary injunction application established that plaintiff was not denied admission to state university because of his color or Negro race but that, in honest judgment of registrar, he did not meet requirements for all students at university. 42 U.S.C.A. § 1983.

R. Jess Brown, Vicksburg, Miss., Constance Baker Motley, Derrick A. Bell, Jr., New York City, for plaintiff.

Joe T. Patterson, Atty. Gen. of Mississippi, Ed Cates, Asst. Atty. Gen., Charles Clark, Sp. Asst. Atty. Gen., for defendants.

MIZE, Chief Judge.

Plaintiff, James Howard Meredith, is a member of the Negro race and a citizen of Mississippi. He filed his complaint on behalf of himself and of other Negro students in the State of Mississippi similarly situated. He seeks a preliminary and permanent injunction enjoining the defendants from refusing him admittance to the University of Mississippi and for a declaratory judgment. The defendants in the case are members of the Board of Trustees of State Institutions, the Chancellor of the University of Mississippi, the Dean of the College of Liberal Arts, and the Registrar of the University.

The management and control of the University of Mississippi and all other state institutions of higher learning in the State of Mississippi is vested in the Board.

James Howard Meredith filed his complaint on the 31st day of May, 1961 and alleged that he had been deprived of rights secured to him by the Constitution of the United States in violation of Title 42 U.S.C.A. § 1983. He alleged that the University of Mississippi is limited by policy and custom to students on a segregated basis only. The defendants answered and denied the material allegations of the complaint, particularly that part where he alleged that he was denied admittance solely because of his race. Plaintiff further alleged that certain rules and regulations of the University of Mississippi have been improperly and unconstitutionally applied to him and avers that he was not accepted as a resident undergraduate transfer student solely because he is a Negro. This was denied by the defendants.

Concurrently with the filing of the complaint plaintiff moved for a temporary restraining order without notice. This application for preliminary restraining order without notice was denied by the Court on the ground that

notice of application should have been given to the defendants. Concurrently with the filing of the complaint he also filed a motion for a preliminary injunction and this motion was noticed for hearing on the 12th of June, 1961 at Biloxi, Mississippi, at which time it came on for hearing. This motion specifically related to the summer session of the University of Mississippi beginning June 8, 1961. The motion was called for hearing on June 12 and before the beginning of any proceedings the Court inquired of counsel on both sides as to whether or not the motion was to be heard on affidavits or on oral testimony. Attorney for the plaintiff advised the Court that she desired to proceed on oral testimony and the trial was thereupon begun upon the application for the preliminary injunction. Not having finished the case during that day and because prior to this time other matters had been set for hearing on the following day, the Court recessed this hearing until July 10, 1961. On June 29, 1961 plaintiff filed another motion for preliminary injunction, praying that the Court would enjoin the defendants from refusing to admit plaintiff to the second summer session commencing on July 17, 1961 solely because of his race and color. On July 10, pursuant to the former order of recess, the Court met and at that time was advised that the leading counsel for the defendants was seriously ill and that his physical condition prevented his attendance at the hearing. The Court heard this matter and from the affidavits and from doctors' certificates determined that it would endanger the life of leading counsel if he were compelled to proceed. He is the first Assistant Attorney General of the State and has taken the leading part throughout all hearings and the Court determined that sound discretion dictated out of necessity that it should again recess the hearing to the next available date, which was the 10th of August. On that date counsel for plaintiff announced in open court that she would withdraw her motion for preliminary injunction relating to the date of June 8, 1961 and the Court granted her leave to withdraw that motion and gave her permission to file a later motion, but a later motion was not filed. However, the one that was filed on June 29, 1961 was left pending and it was this motion that was taken up for hearing on August 10 and proceeded to a conclusion on August 16. It is the contention of plaintiff that although the July 17 session—the second summer session—was past, yet it was the duty of the Court to proceed and determine if a preliminary injunction should be granted for the remainder of the summer session or for future terms or sessions of the University of Mississippi. No application had been filed with the authorities of the University of Mississippi other than the one mentioned in the original complaint.

In his original complaint the plaintiff alleged that on the first day of February, 1961 the Registrar of the University of Mississippi received by registered mail an application from the plaintiff for admission to the mid-year or 1961 spring session, which commenced on February 6, 1961. In that application he represented himself to be a citizen of Mississippi, having a permanent address at Kosciusko, in Attala County, Mississippi, and a mailing address in the City of Jackson, Hinds County, Mississippi. In his application he stated that he applied to be classified as a junior in the College of Liberal Arts. The Court finds as a fact that he did make application by that letter and that in response to that request forms for the listing of the names of six alumni residing in the County of plaintiff's residence, who had known plaintiff for at least two years and who would certify him as a person of good, moral character, and would recommend him for admission to the University of Mississippi, but as a matter of fact these forms were never furnished by the plaintiff. Instead, he sent five certificates addressed "To Whom It May Concern", certifying that he was of good moral character, none of which were signed by persons who were alumni of the University of Mississippi. On the 4th day of February, 1961 the Registrar telegraphed plaintiff and all

other applicants whose applications had been received after January 25, 1961 that the University had found it necessary to discontinue consideration of all applications for the Spring, 1961 mid-year semester received subsequent to that date. The facts show that this was due to an overcrowded condition existing in the University classrooms and dormitories, which had been recognized and had been under consideration by the University Committee on Admissions since October, 1960 as a part of an over-all plan to upgrade the quality of educational opportunity afforded by the University. This applied to all applications made after January 25, 1961, without any regard to the race or color of the applicant. The testimony shows without contradiction, and I find as a fact, that many other potential applicants who made inquiry about applications subsequent to February 4 were similarly treated and none were permitted to apply for the Spring, 1961 mid-year semester. The testimony shows, and I find as a fact, that there was no discrimination against any student, and particularly the plaintiff, solely because of his race or color with regard to the action of the University of Mississippi in discontinuing consideration of applications for the Spring, 1961 semester after the January 25, 1961 cut-off date.

By letter dated February 20, 1961 plaintiff responded to the Registrar's cut-off telegram by requesting that his application be considered as an application for admission to the Summer, 1961 session beginning June 8. This letter, as well as all subsequent correspondence, was sent to the University by plaintiff by registered mail with return receipt requested, which is an unusual procedure. Again on March 26 the plaintiff wrote the Registrar admitting that his previous five certificates did not comply with the regulations of the University in that they did not recommend his admission to the University of Mississippi and with this letter he enclosed additional letters from the same five people which referred to his good moral character and also recommended him for admission to the University of Mississippi. On April 12, 1961 plaintiff mailed a letter which was prepared by his attorneys to the defendant, Dr. Lewis, who is Dean of the College of Liberal Arts, which stated that plaintiff concluded that the Registrar had failed to act upon his application solely because of his race and color and requesting Dr. Lewis to review his case. In response to that letter the Registrar on May 9, 1961 sent plaintiff a preliminary evaluation of credits indicating a maximum credit allowance at the University of Mississippi or 48 semester hours out of a total of 90 semester hours offered, according to plaintiff's transfer from Jackson State College. On May 15, 1961 the Committee on Admissions at the University of Mississippi met with eight members in attendance. Only two of these eight members had any knowledge that plaintiff had applied to the University of Mississippi. At this meeting no specific instructions or students were discussed. The Committee at that time adopted several regulations. The action of the Committee taken that day affected the award of credit for military training; acceptance of credits from institutions which are not members of regional accrediting associations; and also problems connected with school credits. The undisputed testimony is that the adoption of these particular regulations were considered in terms of the quality of students transferred to the University and the adoption of the regulations was a means of improving that quality and was simply a part of a continuing study and action by the Committee on Admissions to effect such improvement. The testimony is and I find as a fact that this action was not taken in any attempt direct or indirect, to discriminate against anyone solely on the ground of race or color.

Later, in a letter received by the University on May 16, 1961, plaintiff stated that he desired to have his application treated as a pending application for admission to the summer session beginning with the first term in June, 1961.

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Later, in a letter received by the University on May 16, 1961, plaintiff stated that he desired to have his application treated as a pending application for admission to the summer session beginning with the first term in June, 1961.

Many of the credits tendered by the plaintiff for admission as a transfer student were denied because they did not measure up to the regulations required of all students who applied for admission to the University. The Jackson State College, where plaintiff was in attendance, was not a member of the Southern Association of Colleges and Secondary Schools.

[1] Plaintiff contends and alleges that he is a citizen of Attala County, Mississippi. The defendants denied this and they contend that he was a non-resident of the State of Mississippi and not a resident citizen of this State, and they cross examined him at length about his various movements and activities. Defendants contend that while he was born in Mississippi, yet he changed his domicile either to Michigan or Indiana and that he never did move back to Mississippi as a citizen, but only came back as a student. On cross examination it was shown that he was married to an Indiana girl and that he claimed Michigan as his residence; that he enlisted in the Army from the State of Michigan and not from the State of Mississippi. Defendants further brought out on cross examination that after he entered Jackson State College at Jackson, Mississippi, he registered in Hinds County, Mississippi and that when he registered in Hinds County, Mississippi he swore falsely that he was a citizen of Hinds County, Mississippi and that this was knowingly done for the purpose of obtaining a registration. He admitted that he knew he was not a citizen of Hinds County, but that he knew he was a citizen of Attala County, and finally, on cross examination, he admitted that he knew he was swearing falsely when he swore to the Registrar of Voters in Hinds County, Mississippi that he was a citizen of that county. He stated that he had always claimed Attala County as his domicile and still claims it as his domicile. As a result of his false swearing the record shows that he was registered as a voter in Jackson, Hinds County, Mississippi. In determining whether he is a resident of Mississippi or a non-resident of Mississippi I have taken this evidence into consideration, along with all of the other evidence touching on that question. The testimony shows without conflict that he was born and reared in Kosciusko, Attala County, Mississippi; that he finished High School there and thereafter took courses in other schools and while he was in the service, but that during all this time he claimed Attala County as his domicile. The record further shows that while he was in the Army he made investments back in Attala County, having bought two farms there. The record further shows that in order for one to register as a voter in Mississippi he must be a citizen of the state for a period of two years and a citizen of the county and precinct in which he was to register for a period of one year. It is unnecessary to detail further the testimony touching on this question, but I find as a fact from all of the testimony that he was and is now a citizen of Attala County, Mississippi. This holding is supported by the authorities of State of Texas v. State of Florida et al., 306 U.S. 398, 59 S.Ct. 563, 830, 83 L.Ed. 817.

[2] There was a good deal of testimony introduced in the cause, but very little conflict, and the overwhelming weight of the testimony is that the plaintiff was not denied admission because of his color or race. The Registrar swore emphatically and unequivocably that the race of plaintiff or his color had nothing in the world to do with the action of the Registrar in denying his application. An examination of the entire testimony of the Registrar shows conclusively that he gave no consideration whatsoever to the race or the color of the plaintiff when he denied the application for admission and the Registrar is corroborated by other circumstances and witnesses in the case to this effect. Careful consideration was given to the application and in the honest judgment of the Registrar he did not meet the requirements required of all students at the University. This testimony is undisputed and the testimony of the Registrar was not unreason-

able, but on the contrary was given openly and fairly; and in addition to his testimony, of course there is the presumption of law that an official will perform his duties honestly.

The burden of proof, of course, is upon the plaintiff to prove by a preponderance of the evidence that his admission was denied because of his race or color and this the plaintiff has utterly failed to do. The action taken by the Registrar and the other authorities at the University was not based to any extent at all on his race or color and the plaintiff has failed to meet the burden and the motion for the preliminary injunction should be denied.

An order may therefore be drawn denying the motion for the temporary injunction and the case set for final hearing on its merits on January 15, 1962.

Joaquina QUINONES, Administratrix of the Estate of Sixto Quinones

v.

TOWNSHIP OF UPPER MORELAND

and

Miles Potter, Defendants and Third-Party Plaintiffs,

v.

Patrick McCABE, James McCabe, individually and as co-partners, trading as McCabe Brothers, Third-Party Defendants.

Civ. A. No. 23521.

United States District Court
E. D. Pennsylvania.
Dec. 6, 1961.

The administratrix of a deceased employee of contractors brought an action against a township under the Pennsylvania Wrongful Death and Survival Statutes for the death of the deceased employee, and the township impleaded the contractors as third-party defendants. The United States District Court for the Eastern District of Pennsylvania, 187 F.Supp. 260, held that right of contribution from contractors was limited to the extent of the contractors' workmen's compensation liability, and the township appealed, and the administratrix cross-appealed. The Court of Appeals, 293 F.2d 237, affirmed the $35,000 judgment of the administratrix against the township and directed a judgment notwithstanding the verdict in favor of the township against the contractors for the full extent of its liability to the administratrix. A motion was made in the District Court for judgment in accordance with the mandate of the Court of Appeals. The District Court, Wood, J., held that the township would be required to pay $35,000 with interest and costs into the court's registry, and that the administratrix would be required to remit to the township $7,408.71 received as workmen's compensation, less counsel fee of one-third, and that two-thirds of the future compensation should be paid to the township and one-third should be paid to the administratrix.

Judgment in accordance with opinion.

Courts ⇐403.9(19)

Where Court of Appeals affirmed $35,000 judgment for administratrix of deceased employee of contractors against township under Pennsylvania Wrongful Death and Survival Statutes and directed judgment notwithstanding verdict for township against contractors to full extent of its liability to administratrix, township would be required to pay $35,000 with interest and costs into court's registry, and administratrix would be required to remit to township $7,408.71 received as workmen's compensation plus counsel fee of one-third, and two-thirds of future compensation should be paid to township and one-third should be paid to administratrix. 77 P.S.Pa. §§ 1 et seq., 671.

guage, under its express terms, clearly gave it the right to obtain all of Bettinger's "skills" *without limitation* relating to ceramic coatings. It contends that such an interpretation is impelled when considered in the light of the obvious objective and intention of an "establishment of a product line of ceramic automotive parts" for Walker and where the contract expressly provided for the possibility that Walker might manufacture ceramic automotive parts in its own facilities. It is Walker's position that Bolton's survey of the Bettinger plant in January was clearly within both the letter and the spirit of the above-cited language, under which authority it was undertaken.

The Bettinger trustees take the position that this agreement was prospective in nature and called solely for the transfer of any future developments which Bettinger might thereafter "conceive" under the contract. They argue that the agreement contemplated no transfer of the developments or "know-how" already in existence at the time of the execution of the agreement and consequently that Bolton was outside the contract in making his January survey of the Bettinger plant.

Whatever the precise import to be ultimately accorded the language of this agreement at a plenary hearing on the merits, its broadness certainly lends at least a surface validity to Walker's position. Moreover, it appears that the parties to this agreement apparently gave it the interpretation for which Walker contends.

When Bolton arrived at the Bettinger plant he informed Meeker, the general manager, that the purpose of his visit was to obtain "information necessary to make a complete report which would enable Walker to build a plant either at Racine or Jackson * * *." Meeker testified that he was aware of the Product Development Agreement and that he did not think it was extraordinary that Walker should be gathering this information for the purpose of building its own plant. Thereafter, he cooperated fully in supplying Bolton with whatever information the latter required. Moreover, Bolton's visit to the Bettinger plant was expressly authorized by a Mr. Shaw, a vice-president in charge of engineering for Bettinger who stated that Bolton was "to get any and all information that he wanted except that there were to be no photographs taken." Finally, after testifying that the idea of Walker's constructing its own plant had been discussed by November, 1960, Meeker testified:

> "Q. * * * But this plant that was being discussed was to include the Bettinger process, so-called, wasn't it? A. It would eventually, yes.
>
> "Q. Not just what had been discovered from August 18, 1960, up until November, 1960, was it? A. Oh, no.
>
> "Q. It was to include the whole works, wasn't it? A. Absolutely."

Walker clearly acted openly relative to Bolton's visit. Bolton secured permission to visit the plant, stated the purpose of his business upon arrival and at the conclusion of his stay, submitted a copy of the results of his survey to Bettinger officials. In short, during this period at least, there does not appear to have been any doubt among the parties to the agreement that Walker had the right to obtain information relative to the "Bettinger process." It has been said that where there is doubt as to the express language of the agreement, the interpretation of the parties placed thereon should control. Eustis Mfg. Co. v. Saco Brick Co., 201 Mass. 391, 393, 87 N.E. 596 (1909); Restatement of Contracts, Section 235 E.

At all events, the contract of August 18, 1960 undoubtedly called for Bettinger to make available to Walker some of its expertise in the ceramic coating industry, whatever the precise limits of this expertise may later prove to be.

On November 28, 1960 when Bettinger filed its petition for an Arrangement under Chapter XI, and on November 30 when the referee issued an order ap-

pointing receivers, the Product Development Agreement of August 18 was executory. Under Chapter XI the receivers had the power and authority to reject or to continue to perform executory contracts. After November 30, 1960 Bettinger continued to render services to Walker incident to the agreement and Walker made payments thereunder to Bettinger for such services. It is undisputed that this contract was continued until March 31, 1961 when Walker chose to terminate it under a concededly proper right to do so. Since the agreement of August 18, concededly called for a transfer of expertise, it must have been obvious that by continuing the contract and rendering research and development services, Bettinger would necessarily have to make available to Walker some of its intangible assets. Since Bettinger and its receivers expressly chose to keep this contract in effect, we do not believe that Walker can be said to have violated paragraph 7 of the referee's order by acting, apparently in good faith, under the contract terms.

Furthermore, in holding that Walker resorted to "self-help" in not securing the court's permission before obtaining the Bolton survey, the district judge made no mention of the referee's order of December 16, 1960. As noted previously, this order called for the issuance of a Certificate of Indebtedness to Walker in consideration of a loan by Walker in the amount of $50,000 and expressly authorized Walker to set-off amounts that would become due to it on this loan against amounts that might become due to Bettinger because of the agreement of August 18, 1960. This order was issued two weeks *after* the order of November 30th which the court below found that Walker had violated.

Under these circumstances we believe that Walker not only did not have to secure the court's permission to continue receiving the Bettinger expertise under a contract which Bettinger, its receivers and trustees chose to keep in force, but, more significantly, that Walker in fact had the court's permission through the medium of the referee's order of December 16, 1960. We believe that the court's reference to "self-help" and running the "risk of colliding with the Court's control of the assets of the debtor-in-possession" is unwarranted and unjustified. Whatever may be the ultimate determination on the merits, we do not think the court has made the findings, or that the trustees have made the special showing, which would entitle them to preliminary relief.

The order of the district court entered on August 8, 1961, is vacated and the case is remanded to the district court for further proceedings not inconsistent with this opinion.

James H. MEREDITH, on behalf of himself and others similarly situated, Appellant,

v.

Charles Dickson FAIR, President of the Board of Trustees of the State Institutions of Higher Learning, et al., Appellees.

(2)

No. 18394.

United States Court of Appeals
Fifth Circuit.

Jan. 12, 1962.

Action to enjoin state university from limiting admissions to white persons. The United States District Court for the Southern District of Mississippi, 199 F.Supp. 754, Sidney C. Mize, Chief Judge, denied a preliminary injunction, and plaintiff appealed. The Court of Appeals, Wisdom, Circuit Judge, held that state university's requirement that each candidate for admission furnish certificates from alumni was denial of equal protection of laws in its application to Negro candidates, but that, under

the circumstances, the order would be affirmed.

Order affirmed and plaintiff's motion denied.

1. Evidence ⇐25(2)

Court of Appeals took judicial notice that state of Mississippi maintains policy of segregation in its schools and colleges.

2. Injunction ⇐126

Plaintiff in action to enjoin state university from limiting admissions to white persons had burden of showing that discriminatory policy was applied to him, although existence of policy and its effect as guiding force were established.

3. Constitutional Law ⇐220

State university's requirement that each candidate for admission furnish certificates from alumni was denial of equal protection of laws in its application to Negro candidates. Code Miss. 1942, § 6791.5; U.S.C.A.Const. Amend. 14.

4. Injunction ⇐147

Denial of preliminary injunction against state university's limiting admissions to white persons would be affirmed where, although one ground for plaintiff's exclusion was found to have been unconstitutional, record did not disclose whether there were valid, non-discriminatory grounds, and trial on merits could be held at early date. 28 U.S.C.A. § 1343(3); 42 U.S.C.A. § 1983; U.S.C.A.Const. Amend. 14.

5. Injunction ⇐127

Evidence concerning state university summer session was improperly excluded from action to enjoin university from limiting admissions to white persons, wherein university's policy and practice were at issue and it appeared that plaintiff had applied for regular term as well as for summer term.

Constance Baker Motley, New York City, R. Jess Brown, Vicksburg, Miss., for appellant.

Dugas Shands, Asst. Atty. Gen., Charles Clark, Special Asst. Atty. Gen., for appellees.

Before TUTTLE, Chief Judge, and RIVES and WISDOM, Circuit Judges.

WISDOM, Circuit Judge.

James H. Meredith is a Mississippi Negro in search of an education. Mississippi is one of three states which have not yet allowed a Negro citizen to seek an education at any of its state-supported, "white" colleges and universities.[1]

After graduation from high school at the age of seventeen, Meredith volunteered for the United States Air Force. He was honorably discharged nine years later. During his years in the service, he acquired thirty-four semester credits by attending night courses at the University of Maryland (Far Eastern Division, Tokyo), the University of Kansas, and Washburn University. His A's and B's at the University of Maryland show that he applied himself diligently.[2] In addition, over the years, Meredith attended numerous college level courses offered by the Armed Forces Institute. Jackson State College allowed him fifty-seven quarter hours credit for the work he had taken at the Armed Forces Institute. After his discharge from the Air Forces in the summer of 1960, Meredith returned to Mississippi and enrolled in Jackson State College, a Negro college in Jackson. Throughout his years of seeking to improve himself, he elected to study demanding and challenging sub-

1. The state-supported colleges in South Carolina and Alabama are also uniracial. The University of Alabama, however, is under order to admit negroes. Lucy v. Adams, N.D.Ala., 1955, 134 F.Supp. 235, affirmed 5 Cir., 228 F.2d 619, cert. denied, 351 U.S. 931, 76 S.Ct. 790, 100 L. Ed. 1460; 350 U.S. 1, 76 S.Ct. 33, 100 L.Ed. 3 (1955).

2. In the 1958-59 term Meredith was given the grade of B in each of five subjects. In the 1959-60 term he received 3 A's, 4 B's, and 1 F.

jects indicative of a determined effort to obtain a solid education. In the early part of 1961, Meredith applied for admission to the University of Mississippi. At that time he had about ninety credits. When asked on the witness stand why he wished to transfer from Jackson State College to the University of Mississippi, he said that he regarded Jackson State as "substandard".

January 26, 1961, Meredith mailed formal applications for admission to the University of Mississippi. His letter of transmittal informed the registrar that he was a Negro; the forms required a statement of the applicant's race and also required him to attach a photograph. He furnished with his application five certificates from residents of Attala County, each certifying to his good moral character. Meredith's letter to the registrar stated: "I will not be able to furnish you with the names [certificates] of six University Alumni [as required by University regulations for admission] because I am a negro and all graduates of the school are white. Further, I do not know any graduate personally."

February 4, 1961, the registrar wired Meredith that it "has been found necessary to discontinue consideration of all applications for admission or registration for the second semester which were received after January 25, 1961." University officials stated that overcrowding at the University prompted its action.

February 20, 1961, Meredith wrote the registrar requesting that his application be considered "a continuing application for admission during the summer session beginning June 8, 1961." He asked that the registrar advise him whether his transcripts from other universities had been received and whether he had forwarded to the registrar all of the information necessary to make the application for admission complete. In answer, the registrar wrote him that since the University was "unable to accept application for admission", the ten dollars for the room deposit was being returned.

February 23, 1961, Meredith wrote the registrar and again requested that he be considered for admission to the summer session. The registrar did not reply to this letter. March 18, Meredith wrote, requesting that his application "be considered a continuing one for the Summer Session and the Fall Session, 1961". Again he asked "whether there remains any further prerequisites to admission". Not having received a reply by March 26, he wrote the registrar calling attention to the statement in the Bulletin of the University of Mississippi 1960 Catalog, that the registrar "will provide each transfer student with an evaluation of the credits acceptable to the University", and asking that he be sent a copy of the evaluation of his credits. In the same letter he forwarded five amended certificates from the same Attala County residents who signed the original certificates, not only attesting to his good moral character, but specifically recommending his admission to the University.

Meredith received no answer from the registrar to any of these three letters. On April 12, 1961, he wrote the Dean of the College of Liberal Arts of the University of Mississippi. This letter requested the Dean "to review the case with the registrar and to advise Meredith" which admission "requirements, if any, [he] failed to meet, and to give [him] some assurance that [his] race and color are not the basis for [his] failure to gain admission to the University". This letter produced a reply almost four weeks later. The registrar answered May 9, 1961, stating that the "application had been received and will receive proper attention". As for Meredith's credits, he stated that "under the standards of the University of Mississippi the maximum credit which could be allowed is forty-eight semester hours" of the total of ninety according to the transcripts. Meredith wrote on May 15 and again on May 21, 1961 stating that he still wanted his application considered as pending.

May 25, 1961, the registrar closed his file on Meredith with the following letter:

"The University cannot recognize the transfer of credits from the institution which you are now attending since it is not a member of the Southern Association of Colleges and Secondary Schools. Our policy permits the transfer of credits only from member institutions of regional associations. Furthermore, students may not be accepted by the University from those institutions whose programs are not recognized.

"As I am sure you realize, your application does not meet other requirements for admission. Your letters of recommendation are not sufficient for either a resident or nonresident applicant. I see no need for mentioning any other deficiencies."

May 31, 1961, Meredith filed a complaint in the United States District Court for the Southern District of Mississippi against the Board of Trustees of the State Institution of Higher Learning of the State of Mississippi, the Chancellor of the University of Mississippi, the Dean of the College of Liberal Arts, and the Registrar of the University. The Board of Trustees, apointed by the governor with the consent of the Mississippi senate, is vested, under the state constitution, with the management and control of all the state institutions of higher learning. The complaint is filed as a class action on behalf of Meredith and all other Negro students similarly situated.[3] It seeks to enjoin, at the University of Mississippi and other state institutions of higher learning, the practice of limiting admissions to white persons.

The particular phase of the litigation now before this Court is an appeal from an order of the district court denying Meredith's motion for a preliminary injunction enjoining the registrar at the University from denying appellant's admission solely on account of his race and color. The motion, which was filed with the complaint, asked for specific relief with regard to the summer term beginning June 8, 1961, but the pleadings and the hearings show that the plaintiff sought admission to the next available term, summer session or regular session. The hearing on the motion was set for June 12, 1961, four days after commencement of the first summer term. About 3:30 p. m. on the afternoon of the hearing the district judge stopped the hearing and continued the case, on the ground that he had set aside only one day to hear the case, because of his crowded docket. The case was continued until July 10, 1961, at which time, according to the court, the entire case would be heard since, in the interim, the answer would have been filed. The case could not be heard on July 10, however, because it conflicted with the trial of a special three-judge court case.

Since it was apparent that the first summer term would be over before the case would be heard, the appellant filed another motion urging the court to grant a preliminary injunction before commencement of the second term on July 17, 1961. The motion was fixed for hearing on July 11, 1961. On July 10, the chief counsel for the appellee, an assistant attorney general for the state, was ill. The case was therefore continued until August 10, 1961.

In the two months' interim between filing of the complaint and the hearing August 10 the plaintiff made five unsuccessful attempts to take the registrar's deposition. The first motion was denied on the ground that the deposition could not be taken before the expiration of twenty days from the filing of the complaint. The second was denied because of the assistant attorney general's ill health. The last three were denied

3. The complaint invokes the jurisdiction of the court and 28 U.S.C.A. § 1343(3), alleging deprivation of rights in violation of (1) the due process and equal protection clauses of the Fourteenth Amendment and (2) 42 U.S.C.A. § 1983.

on the grounds that the court was "in the process of trial on plaintiff's motion for temporary injunction and in the exercise of [the] court's discretion".

The plaintiff moved for the production of records of all students admitted to the February 8, 1961, term, the 1961 summer term, and the September 1961 term for inspection by the plaintiff's counsel. This motion, filed on June 20, was not heard until July 27, again because of the assistant attorney general's ill health. On August 1 the district judge entered an order allowing inspection of certain records, limiting the inspection, however, to applications for admission of "regular undergraduate transfer students for enrollment in the 1961 summer session".

The registrar filed his answer July 19, 1961, denying that any state law, policy, custom or usage limits admissions to the University of Mississippi to white persons and denying that Meredith had been refused admission solely because of race or color. The registrar averred that Meredith was denied admission because: (1) he had failed to submit the requisite alumni certificates; (2) he was not seeking admission in good faith; (3) under established rules of the Board of Trustees no institution is required to accept a transfer student unless the program of the transferring college is acceptable to the receiving institution and in this case the previous program of Jackson State College is not acceptable to the University because Jackson State College is not a member of the Southern Association of Colleges and Secondary Schools; and (4) for the reasons assigned in the registrar's letter of May 25, 1961 to Meredith.

On August 10, 1961, the hearing was resumed. August 11 it was continued until August 15 in order to allow the assistant attorney general to appear in another case. The hearing resumed August 15 and was concluded on August 16.

The district judge allowed the appellee until September 5, 1961, to file a brief and gave the appellant until September 21 in which to file a reply brief. The last summer session was over on August 18. The first semester of the 1961–62 school year began September 28, 1961.

The district judge rendered his decision December 12, 1961, denying the plaintiff's motion for a preliminary injunction. The court set the case for trial on the merits on January 15, 1962.

In its opinion, which the district court treated as "findings of fact and conclusions of law", the court made these findings: (1) Meredith never presented the alumni certificates required for admission; (2) denial of Meredith's admission in February 1961 was based on overcrowding at the University; (3) on May 15, 1961, the Committee on Admissions decided, without any attempt to discriminate, to raise scholastic standards by accepting "credits only from institutions which are members of a regional accrediting association or a recognized professional accrediting association"; (4) Jackson State College was not a member of the Southern Association of Colleges and Secondary Schools [4] and, therefore, many of Meredith's credits were not acceptable to the University. The district court ruled that "the overwhelming weight of the testimony is that the plaintiff was not denied admission because of his color or race".

The appellant filed his notice of appeal on December 14, the day the court below entered its formal order. December 18, appellant moved for an order ad-

4. The University regulation adopted May 15, 1961 provides that the University will "accept credits only from institutions which are members of a regional accrediting association *or a recognized professional accrediting association*".

Jackson State College is accredited by the Mississippi College Accrediting Commission and the Council on Study and Accreditation of Institutions of Higher Learning. The College Accrediting Commission is a statutory body (Miss.Code 1942, § 6791.5). The registrar testified that he knew of his own knowledge that Jackson State College was accredited by that Commission.

vancing the date of the hearing of his appeal. This Court granted the motion and heard the appeal January 9, 1962.

I.

This case was tried below and argued here in the eerie atmosphere of never-never land. Counsel for appellees argue that there is no state policy of maintaining segregated institutions of higher learning and that the court can take no judicial notice of this plain fact known to everyone. The appellees' chief counsel insists, for example, that appellant's counsel should have examined the genealogical records of all the students and alumni of the University and should have offered these records in evidence in order to prove the University's alleged policy of restricting admissions to white students.

[1] We take judicial notice that the state of Mississippi maintains a policy of segregation in its schools and colleges.[3] Cf. United States ex rel. Goldsby v. Harpole, 5 Cir., 1959, 263 F.2d 71, cert. denied, 361 U.S. 838, 80 S.Ct. 58, 4 L.Ed.2d 78.

[2] The existence of this policy is an important factor in determining the purposes and effects of statutes and actions superficially innocuous. The existence of the policy and its effect as a guiding force, however, do not relieve the plaintiff of the necessity of showing in this case that the policy was applied to him to produce discrimination on the ground of race. James Meredith, like any applicant for admission to a university, may be denied admission on non-discriminatory grounds.

II.

[3] We hold that the University's requirement that each candidate for admission furnish alumni certificates is a denial of equal protection of the laws, in its application to Negro candidates. It is a heavy burden on qualified Negro students, because of their race. It is no burden on qualified white students.

3. Mississippi's strong policy in favor of segregation is reflected in its statutes. Mississippi, in addition to enacting a resolution of interposition, enacted a statute requiring all members of the executive branch of the state government to prevent implementation of Brown v. Board of Education, 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 and enforce segregation in the public schools and other public facilities "by any lawful, peaceful and constitutional means" (Miss.Code 1942, § 4065.3). There is no statute limiting admissions to the University of Mississippi but Mississippi State College is limited to white males (Miss.Code 1942, § 6694); Alcorn Agricultural and Mechanical College was established in 1878 for the education of the colored youth (Miss.Code 1942, § 6703); Mississippi State College for Women is also limited to white students (Miss.Code 1942, §§ 6711 and 6714); Jackson State College for Negro Teachers, now known as Jackson State College, is the institution of higher learning which appellant now attends (Miss.Code 1942, §§ 6808-01, 6809). The Board of Trustees has statutory authority to provide graduate and professional instruction for Negro youth outside the State "when such instruction is not available for them in the regularly supported Mississippi institutions of higher learning" (Miss.Code 1942, § 6726.5). Moreover, in 1959 the State Sovereignty Commission of Mississippi issued a report on the state's Negro and white schools, teachers and colleges. This report states the following:

The 1958-1959 allocation of state appropriated funds for Senior Colleges broken down on the basis of the amount allocated per student, is as follows:

1. Alcorn A. & M. College —(Negro) $747.65
2. Mississippi Vocational —(Negro) 725.09
3. University of Mississippi—(white) 675.69
4. Delta State College—(white) 652.54
5. Miss. State College for Women—(white) 552.53
6. Jackson State College —(Negro) 476.47
7. Mississippi State University—(white) 454.67
8. Mississippi Southern College—(white) 387.10

4 Race Relations Law Reporter 467 (1959). There is a state constitutional provision and several state statutes requiring segregation in the public schools. E. g., Miss.Constitution 1956, Art. 8, § 207; Miss.Code 1942, § 6220.5, 6328-03.

The fact that there are no Negro alumni of the University of Mississippi, the manifest unlikelihood of there being more than a handful of alumni, if any, who would recommend a Negro for the University, the traditional social barriers making it unlikely, if not impossible, for a Negro to approach alumni with a request for such a recommendation, the possibility of reprisals if alumni should recommend a Negro for admission, are barriers only to qualified Negro applicants. It is significant that the University of Mississippi adopted the requirement of alumni certificates a few months after Brown v. Board of Education was decided.

In Ludley v. Board of Supervisors Louisiana State University of E. D. La., 150 F.Supp. 900, aff'd 5 Cir., 252 F.2d 372 (1958, cert. denied, 358 U.S. 819, 79 S.Ct. 31, 3 L.Ed.2d 61 (1958), a somewhat similar requirement was invalidated. There, a statute required for admission to state universities a certificate of good moral character addressed to the particular university by the principal of the high school from which the applicant was graduated. Negro high schools were furnished certificates addressed only to negro colleges. This Court held that the purpose and effect of the statute was to discriminate against Negroes. More recently, in Hunt v. Arnold, N.D.Ga., 1959, 172 F. Supp. 847, 849 (not appealed), the court held that an alumni certificate requirement of the University of Georgia adopted in 1953, was unconstitutional. In that case the court said: "The Court takes judicial notice of the fact that it is not customary for Negroes and whites to mix socially or to attend the same public or private educational institutions in the State of Georgia, and that by reason of this presently existing social pattern, the opportunities for the average Negro to become personally acquainted with the average white person, and particularly with the alumni of a white educational institution, are necessarily limited."

To the extent, therefore, that the University of Mississippi relied on the requirement of alumni certificates and recommendations, Meredith was discriminated against in violation of the equal protection clause of the Fourteenth Amendment and was unlawfully denied admission to the University.

III.

[4] That holding does not dispose of the case. The state of the record is such that it is impossible to determine whether there were valid, non-discriminatory grounds for the University's refusing Meredith's admission. Considering the state of the record and considering that the trial on the merits, heretofore set for January 15, 1962, can be held at an early date, we feel that it would promote the proper disposition of the case if, in declining to reverse the denial of the preliminary injunction, we make the following observations for the guidance of the district judge presiding at the trial on the merits.

A. First, the transcript and the deposition taken in the presence of the trial judge show that the counsel for the defendants was allowed so much latitude while at the same time the counsel for the plaintiff was so severely circumscribed in the examination of witnesses, introduction of evidence, and argument that the record contains a welter of irrelevancies and, at the same time, a conspicuous omission of evidence that should be helpful to a proper determination of the case.

[5] B. The limitation of evidence to that pertaining to the summer session of 1961 is clearly erroneous. It is erroneous since the policy and practice of the University in admissions were at issue. It is erroneous because Meredith made it plain that his application for admission was intended as a continuing application to the regular term as well as to the summer term of the University.

C. In oral argument on appeal, counsel for both parties called to the attention of this Court that since the hearing

low Jackson State College has been approved by the Southern Association of Colleges and Secondary Schools. This fact has a material bearing on the issue.

D. It is not clear from the record whether the University gave any effect to Meredith's credits from the Universities of Maryland, Kansas, and Washburn, and the twelve acceptable credits from Jackson State College, although a letter of the Registrar seems to accept forty-eight credits.

E. It is not clear from the record whether the University's references to Jackson State College mean that Meredith was rejected simply because he had attended that college or he was rejected because the University would not accept *all* of Jackson State College's credits. (Apparently, although this too is unclear, the University accepted twelve credits Meredith submitted from Jackson State.)

A full trial on the merits is needed in order to clarify the muddy record now before us. *Within proper legal bounds*, the plaintiff should be afforded a fair, unfettered, and unharassed opportunity to prove his case. A man should be able to find an education by taking the broad highway. He should not have to take by-roads through the woods and follow winding trails through sharp thickets, in constant tension because of pitfalls and traps, and, after years of effort, perhaps attain the threshold of his goal when he is past caring about it.

Accordingly, the order of the district court denying appellant's motion for a preliminary injunction is affirmed. The motion of the appellant that this Court order the district court to enter a preliminary injunction in time to secure the appellant's admission to the February 6 term is denied. It is suggested that the district judge proceed promptly with a full trial on the merits and that judgment be rendered promptly, especially in view of the fact that a new term of the University of Mississippi begins February 6, 1962. The Court's mandate will be issued forthwith.

Ralph BILLECI, Appellant,

v.

UNITED STATES of America, Appellee,

and

California Stevedore and Ballast Company, Appellee-Impleaded.

No. 17112.

United States Court of Appeals
Ninth Circuit.

Jan. 18, 1962.

Action by longshoreman against shipowner for injuries received when winch fell out of gear and became freewheeling, causing hatch section to swing and strike longshoreman. The United States District Court for the Northern District of California, Southern Division, Michael J. Roche, J., 185 F.Supp. 711, dismissed the libel, and the longshoreman appealed. The Court of Appeals, Jameson, District Judge, held that shipowner was not liable for injuries sustained by longshoreman on ground that winch was unseaworthy when safety devices were reasonably fit for their intended use and the injury was caused by negligence of fellow longshoremen in failing to use safety devices while using the winch.

Judgment affirmed.

1. Shipping ⇐84(3½)

Shipowner was not liable for injuries sustained by longshoreman on ground that winch was unseaworthy when safety devices were reasonably fit for their intended use and injury was caused by negligence of fellow longshoremen in failing to use safety devices while using winch, causing a hatch board to fall and injure longshoreman.

2. Shipping ⇐84(3¼)

Shipowner owes a nondelegable duty to furnish seaworthy vessel and such duty extends to employees of stevedoring companies.

3. Shipping ⇐84(3½)

Warranty of seaworthiness of vessel extends to appliances appurtenant to ves-

a description is sufficient if it may be aided by parol proof and the property covered by the mortgage identified." (Emphasis added.)

[2] Fifty-nine years ago, in Sparks v. Deposit Bank of Paris, 115 Ky. 461, 74 S.W. 185, 78 S.W. 171, the Kentucky Court of Appeals set forth the rule concerning the sufficiency of the description of mortgaged chattels:

"The description need not be such as would enable a stranger to select the property. A description which will aid third persons, aided by inquiries which the instrument itself suggests, to identify the property, is sufficient."

The court's opinion was modified on rehearing but this principle remained unchanged. The court said:

"The original opinion holds, and is fully sustained by all the textwriters and cases, that the mortgage need not of itself identify the mortgaged property. It is enough if it puts the purchaser on inquiry which, if reasonably pursued, will result in his obtaining the exact information as to what property the mortgage incumbers."

The cases of Hauseman Motor Co. v. Napierella, supra, and Hart County Deposit Bank v. Hatfield, supra, relied upon by the referee in this case, both involved mortgages in which the address of the mortgagor was not stated. The general rule as to the importance of this information is stated in 10 Am.Jur. 756, 7, Chattel Mortgages § 63:

"A statement as to the location of the chattels is one of the most important elements in the description. Other details without this element often amount to little or nothing, whereas its presence with other slight details often makes easy the ascertainment of the property meant to be designated and may make sufficient a description which otherwise would be insufficient. There should be a designation of the property conveyed and of the place where it may be found."

In the "Note and Security Agreement" here the address of the mortgagor is stated and the mortgage provides that the chattels "will be kept at the debtor's address above and not moved without the written consent of the secured party."

The Napierella and Hatfield cases discuss the question of the sufficiency of description, and the concluding portion of the Napierella opinion reiterates the rule of the Kentucky Court of Appeals laid down in 1903 in Sparks v. Deposit Bank of Paris, supra, at page 440 of 223 Ky., at page 1087 of 3 S.W.2d:

"A description, assisted by external evidence that does not add to or contradict the terms of the contract, which will enable a third party to identify the property, is sufficient. Such is the rule prevailing in this state."

The referee relies upon General Motors Acceptance Corp. v. Sharp Motor Sales Co., supra, to support his holding that the description must enable the public in general to identify the mortgaged property. It is stated in that opinion:

"It is insisted, nevertheless, that the property stored must be described in the warehouse receipt with the same particularity that is required in a chattel mortgage. The description of the property in a chattel mortgage must be sufficiently definite and certain to enable the public in general to identify the property. Hauseman Motor Co. v. Napierella, * * *."

The instrument involved in Sharp Motor Sales Co., supra was a warehouse receipt. Possession of the chattel in transactions evidenced by warehouse receipts is in the warehouseman, while possession is in the mortgagor in mortgage transactions. In that case the court observed the distinction between the two instruments, saying:

"Obviously a different rule obtains as to the description necessary in a warehouse receipt. The latter is sufficient when it identifies the property in the warehouse, or furnishes

> sufficient data for the warehouseman to ascertain and deliver the property represented by the receipt. * * * The distinction is a sound one based upon the essential differences in the character of the two transactions, the purposes to be subserved, and the persons to be protected."

In Liberty National Bank & Trust Co. v. Miles, supra, referring to its opinion in the Napierella case, the Kentucky Court said:

> "As pointed out in the above case, an adequate description need not describe the property with utmost particularity, but it is sufficient if the facts shown would enable a third party, *assisted by external evidence*, to identify it." (Emphasis added.)

In the Napierella case the court had characterized as sufficient a description, assisted by external evidence that does not add to or contradict the terms of the contract, which will enable a third party to identify the property.

Guided by this rule, a third party would have had little difficulty in identifying the two-piece wine living room suite, whether comprised of a divan or davenport and a chair or two chairs. It would have been equally easy to identify the yellow dinette set, whether it consisted of a table and four chairs or a table, a sideboard, and fewer chairs. The same "external evidence" would have identified the lime oak panel bedroom suite, mattress, and springs. The location of the property at the address of the mortgagors and in their possession furnished reference to "external evidence" of identification.

While this Court is not in accord with the modern usage of highly abbreviated descriptions of property in mortgages of this type, the description of the property in the mortgage here involved is considered sufficient. It would hardly be doubted that one interested in or affected by the identity of the property would have little concern deciding whether the bankrupt owned more than one wine-colored living room suite, one yellow dinette set, or one lime oak bedroom suite. As stated in 14 C.J.S. Chattel Mortgages § 59, p. 668:

> "The scarcity or plentitude of chattels similar to those mortgaged is an element to be considered in determining the sufficiency of the descriptions of the chattels covered by the mortgage, and the nonexistence of other property to which the terms of the mortgage could apply frequently renders valid a description in a mortgage which otherwise would be indefinite."

The rule governing the problem posed here is perhaps a bit variable and each case may have certain convincing language of description and "external evidence." As long ago as 1885, in Boulware's Adm'r v. Pendleton, 6 Ky.Law Rep. 727, 731, Kentucky's Court of Appeals announced the proper rule to be "sufficiently broad and liberal to meet the necessities of the careless to an extent beyond which it is neither safe nor prudent to go."

An appropriate order is this day entered in which the petition to review the referee's order is sustained, the order is set aside, and the mortgage lien is adjudged valid.

(3)

James Howard MEREDITH

v.

Charles Dickson FAIR et al.

Civ. A. No. 3130.

United States District Court
S. D. Mississippi,
Jackson Division.
Feb. 3, 1962.

Action brought by member of the Negro race asserting that he had been denied admission to the University of Mississippi solely because of his race. The District Court, Mize, Chief Judge,

held that evidence established that plaintiff was not denied admission to University of Mississippi as resident, undergraduate, transfer student because of his Negro race or color.

Judgment for defendants.

1. Colleges and Universities ⇐10
Evidence established that University of Mississippi is not a racially segregated institution.

2. Evidence ⇐21
Court would take judicial notice of prior custom required by state statutes, of maintaining University of Mississippi as racially segregated institution.

3. Evidence ⇐52
Judicial notice of prior custom of racial segregation at University of Mississippi was not enough to meet burden cast upon plaintiff to show that he was denied admission thereto because of his race.

4. Evidence ⇐52
Judicial notice of facts is not conclusive but is considered with all other evidence in case.

5. Federal Civil Procedure ⇐1163
Court would take judicial notice of statute.

6. Colleges and Universities ⇐10
Evidence established that plaintiff was not denied admission to University of Mississippi as resident, undergraduate, transfer student because of his Negro race or color. Code Miss.1942, §§ 4065.-3, 6718 et seq., 6724.

7. Evidence ⇐586(3)
Sworn positive testimony, unless so unreasonable as to be unbelievable, or unless denied by sworn testimony, is to be accepted as true.

8. Federal Civil Procedure ⇐161
Where plaintiff failed to maintain action in his own behalf, he could not maintain it as a class action. Fed.Rules Civ. Proc. rule 23(a) (3), 28 U.S.C.A.

Constance Baker Motley, Derrick A. Bell, New York City, R. Jess Brown, Vicksburg, Miss., for plaintiff.

Joe T. Patterson, Atty. Gen., Ed Cates, Asst. Atty. Gen., Charles Clark, Sp. Asst. Atty. Gen., for defendants.

MIZE, Chief Judge.

Plaintiff, James Howard Meredith, is a member of the Negro race and a citizen of Mississippi. He filed this suit against the members of the Board of Trustees of State Institutions, the Chancellor of the University of Mississippi, the Dean of the College of Liberal Arts, and the Registrar of the University. He alleged that he sought admission to the University of Mississippi as a resident, under-graduate, transfer student to that Institution and that he was denied admission solely because of his race. The complaint was answered by the Defendants, denying that he was refused admission solely because of his race. A motion for preliminary injunction was filed and a full and complete hearing upon the motion for the preliminary injunction to enjoin the Defendants from refusing to admit him was had by the Court and on December 12, 1961 his motion for preliminary injunction was denied and the Court set the case for final hearing on January 15, 1962. After fully hearing all the evidence and considering the record on the motion for a preliminary injunction the Court held that the Plaintiff was not denied admission because of his race. The Plaintiff filed his notice of appeal from that judgment on December 14, 1961 to the Court of Appeals for the Fifth Circuit, which appeal was heard on January 9, 1962 and the opinion rendered by the Court of Appeals on January 12, 1962, 298 F.2d 696, affirming the judgment of the District Court, and the Court of Appeals denied the motion of the Plaintiff to order the District Court to enter a preliminary injunction in time to secure the Plaintiff's admission to the February 6 term of the University.

The statement of the pleadings and the background of the facts leading up to the filing of the suit are contained in the

opinion of the District Court which was filed on December 12, 1961 and which is reported in 199 F.Supp. 754.

The only question now posed for decision is whether or not the Plaintiff was denied admission to the University of Mississippi solely because of his race or color and only a question of fact appears for determination.

After the Mandate came down from the Court of Appeals a hearing of the controversy was begun in the District Court on the final merits on the 17th of January and was concluded on the 27th of January, and after oral argument was submitted to the Court for decision. During this hearing many additional witnesses testified, principally the parties to the suit, and in addition thereto all the testimony that was given on the hearing for the preliminary injunction was introduced into evidence along with all of the exhibits, and several questions of law relative to procedure were raised.

The Plaintiff obtained a subpoena duces tecum addressed to the Registrar of the University to bring with him certain records pertaining to the admission and denial of all the transfer students from the summer term to the date of the trial. The Defendants moved to quash the subpoena duces tecum, which was overruled, and the Plaintiff moved for an inspection of the documents to be produced under the subpoena duces tecum before placing the Registrar on the witness stand. The Defendants objected to this procedure on the ground that the only way Plaintiff could obtain inspection of the documents was by motion under Rule 34, showing good cause for the inspection and production. The Court overruled this objection and stated that in this particular instance it was permissible to look through the shell of the subpoena to bring with him the documents and go to the substance and that rather than delay the trial to permit a motion under Rule 34, the Court would require the Registrar to bring the applications and all correspondence pertaining thereto with reference to all students from the summer school up to the date of the trial, and would permit the Plaintiff to inspect those documents without making a motion under Rule 34, for the reason that it was apparent that there was sufficient good cause appearing that the Plaintiff would be entitled to inspect the documents with reference to transfer students situated as was the Plaintiff. Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C.A., of course, requires that when one is in possession of documents that are material to the issues in a lawsuit, he may be required to produce them on motion and on showing of good cause, but in this particular case it was proper and not error for the Court to rule as it did. Plaintiff alleges and contends that he was denied admission solely because of his race. Defendants categorically deny that he was denied admission because of his race and aver that his race had no bearing at all on the rejection of his application for admission.

As held on the hearing on motion for preliminary injunction, the evidence overwhelmingly showed that the Plaintiff was not denied admission because of his race. The Plaintiff, during this hearing on the merits, called as adverse witnesses nearly every member of the Board of Trustees, who testified unequivocally and definitely that at no time had the question of the race of a party ever been discussed at a meeting of the Board of Trustees or at any other place and that so far as the members of the Board of Trustees was concerned, all policies and regulations were adopted and followed without regard to race, creed or color, and that at no time was the application of James Meredith, the Plaintiff, ever discussed by any members of the Board of Trustees. The Registrar, who also had testified on the motion for preliminary injunction, again testified to the effect that the question of the race of the Plaintiff was not discussed or considered in any way whatsoever when his application for admission to the University was being considered. All of the other officials of the University testified to substantially the same thing. One member of the Board of Trustees was not used, in addition to a few members who were not called because of ill health.

The effect of this additional testimony heard during the trial on the final merits

strengthens the former finding of the Court that the Plaintiff was not denied admission because of his race, rather than weakens it.

[1–4] The proof shows on this trial, and I find as a fact, that there is no custom or policy now, nor was there any at the time Plaintiff's application was rejected, which excluded qualified Negroes from entering the University. The proof shows, and I find as a fact, that the University is not a racially segregated institution. Prior to the decision in the case of Brown et al. v. Board of Education of Topeka et al., 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 there was such a custom which was required by the statutes of the State of Mississippi and the Court takes judicial notice of that custom as outlined by the statutes prior to the trial of the Brown case. This custom or doctrine had been approved by the doctrine of the Supreme Court of the United States in the case of Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256. Prior to the Brown decision this was a legitimate and lawful custom and it was within the province of the Legislature to pass those Acts. The proof in the instant case on this hearing fails to show that the application of any Negro or Chinaman or anyone of any other race has been rejected because of his race or color. Under the proof in this case judicial notice, while considered, and properly so, is not enough to meet the burden of proof cast upon Plaintiff to show that he was denied admission because of his race. Judicial notice of facts is not conclusive on factual matters, but is considered along with all the other evidence in the case. Shapleigh v. Mier, 299 U.S. 468, 57 S.Ct. 261, 81 L.Ed. 355; Words & Phrases, Vol. 23, p. 294, and the 1961 pocket part.

[5, 6] The Court takes judicial notice of Sec. 4065.3 of the Mississippi Code of 1942 as amended. This was passed in 1956 and the Act requires the officers to use any lawful, peaceable or constitutional means to prevent the implementation of or the compliance with the integration decisions of the Supreme Court of the United States. The Legislature in passing that Act had in mind to use every legitimate means to prevail upon the Supreme Court of the United States to return to the doctrine of Plessy v. Ferguson, but nowhere are any of the officers required to disobey the decisions of the Supreme Court of the United States. There is nothing in the Act that obligates or casts a burden upon any official to disobey or disregard the decisions of the Supreme Court of the United States or to use any unlawful methods to prevent compliance. All the proof in this case, considered in the light of the opinion of the Court of Appeals affirming the judgment of this Court and denying the preliminary injunction, but holding that it was improper to consider the failure to furnish certificates from the alumni of the University, demonstrates clearly that the Plaintiff was not denied admission because of his race. I have weighed the testimony carefully in the light of the decision of the Court of Appeals and have rejected, in weighing it, the evidence to the effect that he had failed to furnish certificates of the alumni, and have taken judicial notice of the statutes affecting the custom of segregation, and am of the opinion, and find as a fact, that he was not denied admission because of his race. It is rather difficult to determine the weight to be given to judicial notice of facts as differentiated from judicial notice of laws, but giving full consideration to the judicial notice that the policy prior to the decision in the Brown case was to segregate the races, and considering that policy along with all the evidence in this case as of 1961 and 1962, I conclude that the evidence is insufficient to hold that that policy is now in effect.

[7] The burden of proof was upon the Plaintiff to prove by a preponderance of the evidence that there was a policy at the time of his application of denying entry to the University of Mississippi because of race, and to prove by a preponderance of the evidence that such policy was applied to the Plaintiff in order to produce discrimination. The Plaintiff failed entirely to meet that burden, but on the contrary the evidence shows rather conclusively that he was not denied admission because of his race. In the trial

on the merits every witness called by the Plaintiff testified that the race of the Plaintiff was not discussed or considered at all in passing on his application for admission. Each member of the Board of Trustees who was called testified that the question of race was not at any time discussed with any other member of the Board of Trustees concerning the admission of applicants to the University of Mississippi. It is a well accepted rule of law that sworn positive testimony, unless so unreasonable as to be unbelievable, or unless denied by sworn testimony, is to be accepted as true.

Since all of the evidence and all of the exhibits that were introduced into evidence on the trial of the motion for preliminary injunction is now before this Court upon this trial on the merits, I adopt the finding of fact that was made in my opinion of December 12, 1961 as my finding of fact herein, and in addition thereto I find as a fact from all of the additional evidence that was offered on this trial, when considered with all of the evidence offered on the former trial that the Plaintiff was not denied admission because of his race and that the evidence taken in its entirety shows clearly that there was no denial of admission because of his race or color. In adopting the finding of fact which I made in my opinion of December 12, 1961, I am making the same finding after having disregarded those features of it that were eliminated by the Court of Appeals in its decision affirming my judgment.

The Registrar, on cross examination by attorney for Plaintiff, testified that if the application filed by the Plaintiff for admission were considered as still a pending application for admission that he would not accept the application of the Plaintiff, but that his rejection of the application for admission would be based not in the slightest on his race, but that the same rule would be applied if the applicant had been a white person; that the race of the Plaintiff did not enter into his judgment. The Registrar gave as his reason for this statement that credible evidence had been furnished to him since Plaintiff's applications had been presented and rejected that Plaintiff was a rather unstable person; was depressed at times and of a highly nervous temperament; that the Plaintiff had sworn falsely before the Circuit Clerk of Hinds County in making application to register as a voter, swearing that he was a citizen of Hinds County when, as a matter of fact he knew he was a citizen of Attala County, Mississippi and that through this false affidavit Plaintiff had procured himself to be registered as a voter by the Circuit Clerk of Hinds County, Mississippi; that Plaintiff had filed five certificates by citizens of Attala County, certifying that he was of good moral character and recommending him for admission to the University, but that subsequent investigation showed that in procuring these certificates Plaintiff made false representations to the signers as to the purpose for which he intended to use them, stating to two of the signers in substance that he was without a job and needed these statements to help him get a job.

Some of this evidence was objected to, but was tentatively received in evidence. Since the main question before me is whether the Registrar, an administrative officer of the State of Mississippi, had acted in good faith in his rejection of Plaintiff's application for reasons other than race and since these facts were not known to the Registrar at the time the application was rejected, I have concluded that this testimony should not be considered and have not considered it in reaching my conclusions.

There is one other question of law which was raised prior to the beginning of the trial on the merits that should be commented upon. A motion was filed by the Defendants for the organization of a three-judge court to pass upon the constitutionality of the requirement of the Board of Trustees of State Institutions of Higher Learning that every application for admission to any state institution must be accompanied by recommendations of five alumni. I did not pass upon this question in considering the application for a temporary injunction because of the universal rule that constitutional questions will not be considered if a de-

cision can be reached on non-constitutional questions. In that decision I denied the application for temporary injunction solely on the finding of fact that Plaintiff's application had not been rejected because of his race.

Under the laws of Mississippi this Board of Trustees is a constitutional body and its duties are fixed by Articles V, et seq., Title 24, Vol. 5, Recompiled, of the Mississippi Code, being set forth in Section 6724 and the following sections of that chapter. The Registrar in acting on Plaintiff's application was engaged in the enforcement of an order made by an administrative Board acting under the statutes of Mississippi, but I overruled the motion, declining to request that a three-judge court be convened because the Court of Appeals had, in its opinion, declared these requirements of Mississippi law unconstitutional.

[8] Inasmuch as Plaintiff has failed to meet the burden by showing by a preponderance of the evidence that he was denied admission to the University of Mississippi solely because of his race, the complaint must be dismissed. The Plaintiff undertook to bring the action as a class, acting under Rule 23(a) (3) of the Federal Rules of Civil Procedure, but since Plaintiff failed to maintain this action in his own behalf, he cannot maintain it as a Class Action.

MIDWEST EMERY FREIGHT SYSTEM, INC.

v.

UNITED STATES of America and Interstate Commerce Commission.

No. 61 C 558.

United States District Court N. D. Illinois, E. D.

Dec. 21, 1961.

Action to set aside orders of Interstate Commerce Commission. The three-judge District Court, Perry, J., held that interstate commerce motor vehicle common carrier engaged in bona fide transportation of crude rubber prior to 1958 Transportation Act had no right, under "grandfather" clause of that act, to continue transporting crude rubber without obtaining certificate of public convenience and necessity from Interstate Commerce Commission.

Complaint dismissed and temporary restraining order dissolved.

Commerce ⇐85.29(4)

Interstate commerce motor vehicle common carrier engaged in bona fide transportation of crude rubber prior to 1958 Transportation Act had no right, under "grandfather" clause of that act, to continue transporting crude rubber without obtaining certificate of public convenience and necessity from Interstate Commerce Commission. Interstate Commerce Act, §§ 203(b)(6), 206, 207 as amended 49 U.S.C.A. §§ 303(b) (6), 306, 307.

Charles W. Singer, Chicago, Ill., Charles F. Riddle, Washington, D. C., Todd, Dillon & Singer, Chicago, Ill., of counsel, for plaintiff.

Lee Loevinger, Asst. Atty. Gen., John H. D. Wigger, Atty., Dept. of Justice, Washington, D. C., James P. O'Brien, U. S. Atty., Omaha, Neb., for defendant United States of America.

Robert W. Ginnane, General Counsel, Fritz R. Kahn, Atty., Interstate Commerce Commission, Washington, D. C., for defendant Interstate Commerce Commission.

Stephen Robinson, Des Moines, Iowa, for intervenor Nebraska-Eastern Express, Inc., Omaha, Neb.

Donald E. Cross, Washington, D. C., Earl Meisenbach, Chicago, Ill., Watkins & Rea, Washington, D. C., of counsel, for intervenors All States Freight, Inc., Cooper-Jarrett, Inc., Kramer Bros. Freight Lines, Inc., Spector Freight System, Inc., Wilson Freight Forwarding