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Schools-Race Segregation-Constitutional Law

SCHOOLS—RACE SEGREGATION—CONSTITUTIONAL LAW—Appellant, a next friend of the relatrix, began suit in the Lake County superior court for the purpose of mandating appellees either to reinstate relatrix in a certain named high school or to transfer and admit her "as a high school pupil in one of the accredited high schools of the * * * school city of Gary, Indiana." At the opening of schools of Gary in September, 1927, relatrix enrolled as a pupil of the 10B grade (second year high school) in Virginia Street school. On that date, this school was organized to offer the eight years of grade work and two years of high school work. Shortly after, all tenth grade work was discontinued in this school, and relatrix, a member of the colored race, was transferred to Emerson High School. Shortly thereafter, a large number of white pupils "struck" at Emerson as a protest against the transfer of colored pupils to that school. The school officials refused to make any changes at that time, and the strikers returned to their classes. It is charged that they were induced to return by the promise that the colored pupils would be removed within 90 days. Within such period, relatrix was notified by the Gary superintendent of

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[17] 286 Burns, *Hawke v. Thorn*, 54 Barb (N. Y.) 164.

[18] *Wong Sun v. United State*, 293 F. 273.

[19] *Cromwell v. County of Sac, supra*, note 7.

[20] *Dodson v. Southern Ry. Co.*, 137 Ga. 583, 73 S. E. 834 (1912).

[21] *Royal Ins. Co. v. Stewart*, 190 Ind. 444, 129 N. E. 353 (1921).

[22] *Holman v. Tjosevig*, 136 Wash. 261, 239 Pac. 545 (1925); *Bates v. Bodie*, 245 U. S. 520 (1918); *Fairview Chase Corp. v. Schorf*, 232 N. Y. S. 530; *Gust v. Edwards Co.*, 129 Ore. 409, 274 Pac. 914 (1929).

[23] *Hahl v. Sugo*, 169 N. Y. 109, 62 N. E. 135 (1901).

schools to return to Virginia Street School after the Christmas holidays. On refusal of the superintendent to admit relatrix to any school except the Virginia Street school, this action was commenced apparently asking that the appellees be mandated. The case was venued to Porter county and judgment rendered for the defendants. *Held,* the transfer of relatrix to another school was not illegal.[1]

As early as 1849[2] it was decided that a school board had the power, under the constitution and laws of Massachusetts, to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance at schools maintained for white children.[3] The fact that colored children must go a greater distance is immaterial.[4] But in some states this is regarded as unreasonable.[5] If colored schools are not provided, colored children cannot be excluded from schools established for white children.[6] Children of Chinese parents may be classed under the "colored school" statutes, and given the privilege of attending only schools provided for negroes.[7] An act prohibiting and imposing a punishment for maintaining and operating an institution of learning in which white and colored persons may be taught at the same time, and in the same place is a valid exercise of the police power of a state,[8] and is not a violation of equal protection of the law or of due process of law.[9] The right to teach white and negro children in a private school at the same time and place is not a property right.[10] An act prohibiting maintenance of any institution of learning of separate and distinct branches for white and colored persons less than twenty-five miles distant from each other is unreasonable, and not within the police power of the state.[11] The classification of scholars on the basis of race or color, and their education in separate schools involves questions of domestic policy, which are within the legislative discretion and control, provided that substantially equal facilities are furnished both races. This neither violates Art. I, Sec. 23, of the Indiana Constitution, which declares, "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens," nor the privileges and immunities clause of the Federal Constitution, which applies only to action by the federal government, nor with the Thirteenth Amendment of the Federal Constitution, this being no servitude, nor with other clauses of the Fourteenth Amendment.[17]

In 1867 appeared the first of the decisions sanctioning the segregation

[1] *State ex rel. Cheeks v. Wirt,* Supreme Court of Indiana, July 21, 1931, 177 N. E. 441.

[2] 21 Illinois Law Review, p. 704 ff.

[3] *Roberts v. City of Boston,* 5 Cush. (Mass.) 198.

[4] *Lehew v. Brummel,* 103 Mo. 541, 15 S. W. 765.

[5] *People v. Mayor of Alton,* 193 Ill. 309, 61 N. E. 1077.

[6] *Wysinger v. Crookshank,* 82 Cal. 588, 23 Pac. 54.

[7] *Gong Lum v. Rice,* 48 Sup. Ct. 91.

[8] *Berea College v. Commonwealth,* 94 S. W. (Ky.) 623; (affirmed) 211 U. S. 45.

[9] *Berea College v. Commonwealth, supra,* note 8.

[10] *Berea College v. Commonwealth, supra,* note 8.

[11] *Berea College v. Commonwealth, supra,* note 8.

[12] *Cory v. Carter,* 48 Ind. 327. See, also, *Martin v. Board of Education,* 42 W. Va. 515; *Ohio v. McCann,* 21 Ohio St. 210; *Cisco v. School Board,* 161 N. Y. 598, 56 N. E. 81.

of races in public conveyances. In the absence of statute, a railroad company has the right to segregate its white and colored passengers.[13] Under a state statute, a railroad company can provide for such segregation,[14] but colored people cannot be denied the privilege of any dining or sleeping cars.[15]

In a number of the foregoing decisions, the courts used the analogy, in support of their decisions, of the statutes prohibiting inter-marriage of races.[16] Although there is a remote connection here, the cases seem scarcely in point.

The civil right of a white man, however, to dispose of his property, if he sees fit to do so, to a colored person, and of a colored person to make such disposition to a white person cannot be violated by zoning laws.[17] Property of a person cannot be taken without due process of law. However, the court could see no violation of the Fifth, Thirteenth, or Fourteenth Amendments to the Federal Constitution in a decree of the Court of Chancery which restrained a property owner from violating a private contract by which he and other owners of certain contiguous parcels of land had agreed with one another that none of such parcels should be sold, leased or occupied by members of the colored race for a period of years, because the Fifth Amendment limits only the powers of the general government, and not of individuals, the Thirteenth Amendment denounces only involuntary servitude, and the Fourteenth Amendment refers only to state action and not to that of individuals.[18] No question of restraint on alienation was raised here.[19] However, restraints on alienation which are total as to persons, but reasonably limited as to time have been upheld when the question was raised,[20] and others limited as to persons, and total as to time have been upheld.[21]

While a legislature can pass laws providing for segregation of races in the exercise of police power (with the exception of laws affecting rights in real property), it cannot exclude a person or discriminate against him totally because he is of another race.[22] In those cases cited referring to so-called political rights, the person of another race may not have a right,[23] (to serve on a jury), but he has an immunity from discrimination because of his race. A state statute denying a colored person the right to vote in

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[13] *Westchester Railway Co. v. Miles*, 55 Pa. St. 209, 93 Am. Dec. 747.

[14] *Plessy v. Ferguson*, 16 Sup. Ct. 1138, 163 U. S. 537; *Smith v. State*, 100 Tenn. 494, 46 S. W. 566, 41 L. R. A. 432; *Railway v. Mississippi*, 133 U. S. 587; *Railway v. Kentucky*, 179 U. S. 392; *Railway v. Commonwealth*, 99 Ky. 663, 37 S. W. 79.

[15] *McCabe v. A. T. & S. F. Ry.*, 235 U. S. 151.

[16] *State v. Gibson*, 36 Ind. 402; *State v. Jackson*, 80 Mo. 177, 50 Am. Rep. 499; *State v. Hairston*, 63 N. C. 453; *Green v. State*, 58 Ala. 190, 29 Am. Rep. 742; *Lonas v. State*, 3 Heisk. (Tenn.) 309.

[17] *Buchanan v. Worley*, 245 U. S. 60.

[18] *Corrigan v. Buckley*, 46 Sup. Ct. 521.

[19] 21 Illinois Law Rev., *supra*, note 2.

[20] *Lawson v. Lightfoot*, 84 S. W. 739.

[21] *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641, L. R. A. 1916-B, 1201.

[22] *Davenport v. Cloverport*, 72 Fed. 689; *Strander v. West Virginia*, 100 U. S. 303; *Yick Wo v. Hopkins*, 118 U. S. 356; *Wysinger v. Crookshank*, *supra*, note 6; *McCabe v. A. T. & S. F. Ry.*, 235 U. S. 151; *Ex parte Virginia*, 100 U. S. 339.

[23] *Ex parte Virginia*, 100 U. S. 339.

the Democratic primary election is in violation of the Fourteenth Amendment of the Federal Constitution.[24]

The doctrine of the principal case is recognized by the overwhelming weight of authority, and the principle of it seems to be reasonable and correct. However, in writing its opinion, the court apparently assumed in great measure, (quite properly enough), the constitutional background of its decision. L. H. W.

[24] *Nixon v. Herndon*, 273 U. S. 536.