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Constitutional Law--Extensions of the Brown Case

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recovery by persons other than purchasers,[22] the New Jersey court recently permitted the driver of an automobile to recover from the seller even though there was no contractual relationship between them.[23] If the New Jersey court can find liability under the restrictive wording of the Sales Act, then certainly the Kentucky court can find liability under the less restrictive wording of the Commercial Code and extend much-needed protection to ultimate consumers.

Wayne T Bunch

CONSTITUTIONAL LAW—EXTENSIONS OF THE BROWN CASE.—Negroes, living in Mississippi, brought suit in a United States district court to enjoin numerous defendants from enforcing Mississippi statutes which required racial segregation of transportation facilities. The statutes[1] applied to interstate *and* intrastate transportation. The plaintiffs contended that the statutes denied them equal protection of the laws guaranteed by the fourteenth amendment of the United States Constitution. The district court judge, believing that a *substantial* constitutional issue existed, convened a three-judge court.[2] The three-judge court decided to abstain from proceedings until the Mississippi courts were given an opportunity to construe the statutes. A direct appeal was made to the United States Supreme Court. *Held*: Vacated and remanded. Since state statutes requiring racial segregation of transportation facilities have been held unconstitutional it is error for a federal district court to refuse to enjoin the enforcement of such statutes; no *substantial* constitutional issue requisite for the convening of a three-judge court exists. *Bailey v. Patterson*, 82 Sup. Ct. 549 (1962), *vacating per curiam* 199 F Supp. 595 (S.D. Miss. 1961).

Three cases[3] were cited by the Court to support the proposition that state statutes requiring racial segregation of interstate and intrastate transportation facilities are unconstitutional. Two of these cases,[4] however, involved interstate transportation and the statutes were repudiated in both instances on the basis of the commerce clause

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[22] See note 11 *supra* for the pertinent provision of the Uniform Sales Act.
[23] Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960).

[1] The statutes in question are: Miss. Code §§2351, 2351.5, 2351.7, 7784, 7785, 7786, 7786-01, 7787.5 (1956). Breach of peace statutes complained of but not affected by this decision are: Miss. Code §§2087.5, 2087.7, 2089.5 (Supp. 1960).
[2] Ostensibly required by 28 U.S.C. §2281 (1958).
[3] Boynton v. Virginia, 364 U.S. 454 (1960); Gayle v. Browder, 352 U.S. 903 (1956); Morgan v. Virginia, 328 U.S. 373 (1946).
[4] Boynton v. Virginia, *supra* note 3; Morgan v. Virginia, *supra* note 3.

of the Constitution. The third case, *Browder v. Gayle*,[5] stands alone as support for the proposition that a state may not require racial segregation of intrastate transportation. This case is a 1956 per curiam affirmation of the decision of a three-judge court holding Alabama statutes, basically identical to those involved in the principal case, unconstitutional.

The *Browder* case is one of a group of per curiam opinions extending the rule of *Brown v. Board of Education*[6] into areas other than education.[7] Prior to the *Brown* case state-imposed racial segregation was thought to be governed by the broad rule set down in *Plessy v. Ferguson*[8] that segregation laws do not violate the fourteenth amendment as long as the separate facilities provided are physically equal. In the *Brown* case the Court rejected this separate but equal doctrine as applied to public education. In a unanimous decision the Court found: that the separate but equal doctrine had never been approved or disapproved by the Court in a case involving schools; and that racial segregation in public schools causes psychological damage to the minority group by creating a sense of inferiority and denying equal educational opportunities. Lower federal courts, chiefly on the authority of the *Brown* case, have held state segregation statutes unconstitutional in other areas, such as parks,[9] beaches[10] and transportation facilities.[11] In this manner the *Brown* holding has been applied in fields other than public education.[12]

When a federal district court is confronted with a state statute requiring racial segregation[13] there are, it appears, three possible interpretations of the scope of protection guaranteed by the fourteenth amendment. One interpretation would restrict the *Brown* case and

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[5] 352 U.S. 903 (1956), *affirming per curiam* 142 F. Supp. 707 (N.D. Ala. 1956).

[6] 347 U.S. 483 (1954).

[7] *E.g.*, Wechsler, *Toward Neutral Principles*, 73 Harv. L. Rev. 1 (1959). (1959).

[8] 163 U.S. 537 (1896).

[9] City Park Improvement Ass'n v. Detiege, 252 F.2d 122 (5th Cir.), *aff'd*, 358 U.S. 54 (1958).

[10] Dawson v. Mayor and City Council, 220 F.2d 386 (4th Cir.), *aff'd*, 350 U.S. 877 (1955).

[11] Gayle v. Browder, 142 F Supp. 707 (N.D. Ala.), *aff'd*, 352 U.S. 903 (1956).

[12] *Cf.* Muir v. Louisville Park Theatrical Ass'n, 202 F.2d 275 (6th Cir. 1953), *vacated*, 347 U.S. 971 (1954). The lower court judgment was vacated and the case remanded in the light of the segregation cases.

[13] The statute must expressly, or by reasonable inference, impose racial segregation or must have been interpreted to do so by the state courts. When there is ambiguity as to whether segregation is imposed the state courts should be given the opportunity to interpret before federal action is taken. N.A.A.C.P. v. Bennett, 360 U.S. 471 (1959).

the rejection of the separate but equal doctrine to the field of public education. This would be unrealistic in the light of the Supreme Court's recent actions. A second interpretation would be that when state-imposed racial segregation creates psychological damage as a matter of *fact*, there is a denial of equal protection of the laws. This would require a presentation of evidence to determine psychological damage in each area of regulation. Since the Supreme Court has not required such evidence it would be error for a district court to impose this burden on the complainant. The third interpretation would be that psychological damage to the minority group and a denial of equal protection of the laws are necessary corollaries to any state statute clearly imposing racial segregation.[14] This would follow from (1) the legislative intent of such statutes, which is to prohibit the minority group from contact with the majority; and (2) the language, reasoning and sociological authorities[15] of the *Brown* decision. Under this last interpretation a district court could and should grant injunctive relief as soon as the segregative nature of the statute is made known; a three-judge court, if convened, need do little more than cite the *Brown* case as authority to hold the statute unconstitutional.

This analysis would account for the actions of the federal judicial system and explain the rebuke in the principal case to the district court which refused to grant relief. The Supreme Court has, however, avoided any broad declaration of the meaning of the equal protection clause of the fourteenth amendment and has been content to allow the lower federal courts to extend protection, case by case, into areas of state regulation other than education.[16] Once extended, it is error for a single-judge district court not to grant relief.

William H. Fortune

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[14] See Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421 (1959). While Black does not use the term "psychological damage" his analysis is very similar. He maintains that the intent of segregation, as shown by history, is to confine Negroes to an inferior station in life. From personal experience Black draws the conclusion that in a segregated society there is no feeling of equality between white and colored.

[15] Brown v. Board of Education, 347 U.S. 494 n.11 (1954).

[16] See Dorsey v. State Athletic Comm'n, 168 F. Supp. 149 (S.D. La.), *aff'd*, 359 U.S. 533 (1959). *But see* Han Say Nam v. Nam, 197 Va. 80, 87 S.E.2d 749, *vacated*, 350 U.S. 891 (1955), *on remand*, 197 Va. 734, 90 S.E.2d 849, *appeal dismissed*, 350 U.S. 985 (1956). The *Nam* case involved a miscegenation statute. The Virginia Supreme Court, after its decision upholding the statute was vacated by the U.S. Supreme Court, refused to grant relief to the plaintiffs. The U.S. Supreme Court, on appeal from this refusal, said the case was devoid of a properly presented federal question. Was the Supreme Court hedging in the face of the potential public reaction to extending the protection of the fourteenth amendment to racially-mixed marriages?