Constitutional Law--Fourteenth Amendment--Racial Segregation for the Purposes of Education

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CASE COMMENTS

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—RACIAL SEGREGATION FOR THE PURPOSES OF EDUCATION.*

This was an action for mandamus to compel the curators of the University of Missouri to admit the relator, a member of the colored race, to the law school. Under Missouri statutes Lincoln University was provided to give negroes facilities equal to those given the whites at the University of Missouri. It was further provided that where the curriculum of Lincoln failed to equal that given the whites, applying negroes should be sent to an institution in an adjoining state, where their tuition would be paid, and where such discrimination did not exist. Held: that the statute did not violate the "equal protection" clause of the Constitution, and that mandamus would not issue. State ex rel. Gaines v. Canada, 113 S. W. (2d) 783 (Mo. 1937).

It has been universally held that segregation is constitutional when equal facilities are provided for the colored, "while it may be, and probably is, opposed to the spirit of the (Fourteenth Amendment), still it is not obnoxious to (the) letter".2 "Equality (does) not (mean) identity,"3 and, "civil rights do not mean social rights".4 These observations serve to point out the attitude of the courts, as does the statement of the New York court that "we cannot see why the establishment of separate institutions for the education and benefit of different races should be held any more to imply the inferiority of one race than that of the other ..."5

Due to the delicacy of the situation, the United States Supreme Court has followed a laissez faire policy, as voiced by Justice Harlan:*6

"... while all admit the benefits and burdens of public taxation must be shared without discrimination against any class on account of their race, the education of the people in schools maintained by the state taxation is a matter belonging to the state, and any interference on the part of federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

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*This note was written immediately before the Supreme Court decision was handed down on the instant case on appeal. That decision settled the legal problem involved, but left unfortunately unaffected those practical problems which are herein set out. For this reason the note is being published in its original form.

6 Cummings v. County Board of Education, 175 U. S. 528 (1899).
The reluctance of the Court to commit itself on the question has discouraged appeals from the state courts, with the result that there are few opinions by the Court on this subject, and little is found in them to prick out the pale, past which the state legislatures may not go.

It is well settled that to permit segregation the state must provide equal facilities for the colored people. The California court placed its finger upon the true doctrine when it said: 7

"... the exclusion of colored children from schools where white children attend as pupils, cannot be supported ... except where separate schools are actually maintained for the education of colored children; and that such separate schools be maintained in fact, all children ... whether white or colored, have an equal right to become pupils at any common school organized under the law of the state ..."

These separate schools must be equal in equipment, 8 and although the fact that they are less accessible won't breach the constitutional requirements, 9 if they are so situated as to be dangerous to reach, there is a breach of constitutional duty. 10

The question raised by the instant case would seem to be whether or not a state may, by 'proper' legislation, substitute for the accepted separate school provided by it, the facilities of another state with tuition paid, and thus satisfy the "equal protection" clause of the Constitution. In another case 12 the question has arisen under substantially the same set of facts and statutory provisions. 12 In that case the Maryland court held that the statute involved was unconstitutional and in contravention of the Fourteenth Amendment, saying:

"... the requirement of equal treatment would seem to be clearly enough one of equal treatment in respect to any one facility or opportunity furnished to its citizens, rather than of a balance in state bounty to be struck from the expenditure and provisions for each race generally. We take it to be clear ... that a state could not be rendered free to maintain a law school exclusively for whites by maintaining at equal cost a school of technology for colored students ... (As) no separate law school is provided by this state for colored students, the main question in the case is whether the separation can be maintained, and negroes excluded from the

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9 Lehew v. Brummell, 103 Mo. 546, 15 S. W. 765 (1891).
12 The relator in the Maryland case had to travel the distance between Washington, D. C., and Baltimore, Md., to attend school. The court in that case pointed out that he would be denied the advantages of the special instruction in the law of his state, as it was taught at the state institution there; and also that he would be denied the opportunity to attend the courts of his state so that he might become conversant with their procedural method. In that case the statute also failed to provide an amount sufficiently large to care for all the applicants, but the court's language indicated that this made no difference in the decision it would reach if such had not been the case.
present school, by reason of equality of treatment furnished the latter in scholarships for studying outside the state, where law schools are open to negroes."

The Missouri court, in refusing to follow this case on which the plaintiff strongly relied, laid much emphasis upon the similarity of the distances traveled, the cost of living in adjoining states, and the high standing of the universities in question. It is doubtful nevertheless whether or not this answers the accepted doctrine that, although it is not the duty of the states to give their citizens an education by common schools, where such is undertaken, the Constitution requires the legislature to furnish a system of common schools where each and every child may be educated; not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages granted by that instrument."

Does this provision for an education in another state meet the requirements of the Fourteenth Amendment? Or, as the cases are in accord that separation is permissible so long as equal facilities are afforded within the state, does the provision for "equal" facilities outside the state, with tuition paid, also meet the requirements of "equal protection"? Since this question has not as yet been answered by the United States Supreme Court, it is pardonable to suggest a few of the practical problems which are crying for recognition.

There are three possible solutions to the problem: (1) construction of a separate school for the colored, (2) intermingling of the two races at the school reserved for use by the whites, and (3) the providing of "equal" facilities at the institution of another state. Statistics show that there are so few applicants for an education of this type as to make it impractical to operate a separate school. Sentiment in the South (bulwarked by the written opinions of Northern courts dealing with the same subject) is so strongly against the mixing of the two races that to grant the negro admission to the school for whites would in effect deprive him, or the large majority of his race, from such an education at the state's expense, because of the difficulties and obstructions that would be placed in his way by his fellow students, if not by his professors. On the other hand, under the provisions of the instant

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13 The Maryland court, supra n. 11, also discussed these considerations, but refused to be swayed by them. It evidently considered the question to be a more fundamental one than a mere physical question as to distances, etc.


15 113 S. W. (2d) 783, 791.

16 "The attempt to enforce social intimacy and intercourse between the races by legal enactments, would probably tend only to embitter the prejudices . . . which exist between them, and produce an evil instead of a good result." King v. Gallagher, 93 N. Y. 493, 448, 45 Am. Rep. 232 (1883).

17 As indicative of the extremes to which this feeling may go is the fact that in the history of the United States Military Academy, West Point, only two colored men have succeeded in graduating; and, as an interesting sidelight, the second was the son of the first.
statute, a substantial equality is afforded the negro in another state where unpleasantries need not be suffered. But, accepting this as a solution, we are still confronted with the dilemma which arises when a state more deeply southern, as Florida, attempts to enact a similar statute. In Missouri the facilities of the adjacent state lend more to the reasonableness of "equality," than in the case where the colored applicant would find it necessary to traverse several states and hundreds of miles to acquire the benefits offered him by the state.

To the crusader, acceptance of the doctrine set out in the instant case may seem a flagrant violation of the "equal protection" guaranteed citizens under the Federal Constitution, but to one more concerned about the best interests of the colored race, the solution suggests itself as a sane and acceptable answer to a difficult situation.

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CRIMINAL LAW—MURDER WITH MALICE—NEGLIGENCE

The defendant, who had drunk five bottles of beer and was admittedly not sober when he began drinking beer, drove out of town at sixty miles per hour, swerved completely across a nine-foot highway to his left, striking and killing two boys walking eight feet off the pavement in the weed growth. Held, that evidence establishing these facts was sufficient for the jury to find the driver guilty of murder with "malice". Cockrell v. State, ..... Tex. Cr. R. ..... 117 S. W. (2nd) 1105 (1938).

Texas has by statute created four degrees of culpable homicide: (1) Negligent homicide in the first degree, (2) Negligent homicide in the second degree, (3) Murder without malice, and (4) Murder with malice.

Without discussing what other degrees the defendant in this case might have been convicted of, it is pertinent to see wherein the court was justified in finding him guilty of murder with malice. It is to be presumed, as the defendant was prosecuted under the general law governing homicide, with the intent "to prove, if possible, a killing with malice," that instructions were properly submitted to the jury. Since it was held that the evidence was sufficient to justify the jury in finding the defendant guilty of murder with "malice", the important consideration of what constitutes "malice aforethought" or "malice" in this case is of primary concern.

In determining what constitutes malice here, the court cited and followed the case of Banks v. State, in which it had been said that "Malice may be toward a group of persons as well as toward an individual. It may exist without former grudges or antecedent menaces. The intentional doing of any wrongful act in such manner and under such circumstances as that the death of a human being may result therefrom is malice." Collins v. State decided malice to be "a state