

6-1953

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Recommended Citation

Guin, Jesse J. Jr. (1953) "Ramifications of Miscegenation Statutes," *South Carolina Law Review*. Vol. 5 : Iss. 4 , Article 8.

Available at: <https://scholarcommons.sc.edu/sclr/vol5/iss4/8>

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RAMIFICATIONS OF MISCEGENATION STATUTES

Introduction

Miscegenation statutes are a part of the law in most states. The varying language of these statutes has created certain problems of statutory construction and has raised serious problems of constitutionality. Based, as these statutes are, on the power of the state to regulate marriages in general, some preliminary discussion of the basic principles of marriage is required to enable the reader to understand the underlying principles involved in such laws and the reasons for their existence.

Marriage in General

Marriage has been defined as an institution,¹ a status,² a contract,³ a relationship brought about via a contract,⁴ and a contract *sui generis* in nature.⁵ Some cases have embraced two or more of the above terms,⁶ so quite obviously there is no standard definition of the term marriage. A classic example of this admixture of definitions can be found in *Sweigart v. State*⁷ which expresses the concept of marriage relation is more than a personal relationship between the spouses, since it constitutes a status founded on contract and established by law, an institution regulated and controlled by law founded on principles of public policy. Bishop regarded marriage as the civil status of one man and one woman legally united for life, with the rights and duties which, for the establishment of families and the multiplication and education of the species, are, or from time to time may thereafter be, assigned by the law to matrimony.⁸ Blackstone called marriage a civil contract⁹ but it is thought that in expressing this view he was attempting to get away from the idea of a religious contract.¹⁰

In South Carolina our courts now regard marriage as a status¹¹ which constitutes a change from previous cases which had defined

1. *Sweigart v. State*, 213 Ind. 157, 12 N. E. 2d 134 (1938).

2. *Williams v. North Carolina*, 325 U. S. 226 (1945).

3. *Fisher v. Fisher*, 250 N. Y. 313, 165 N. E. 460 (1929).

4. *French v. McAnarney*, 290 Mass. 544, 195 N. E. 714 (1935).

5. *Franzen v. Equitable Life Assur. Soc. of United States*, 130 N. J. L. 457, 33 A. 2d 599 (1943).

6. *State ex rel Foster v. Anders*, 135 Fla. 59, 184 So. 515 (1938).

7. *Sweigart v. State*, 213 Ind. 157, 12 N. E. 2d 134 (1938).

8. BISHOP ON MARRIAGE AND DIVORCE ch. 1, § 3 (5th ed. 1864).

9. GAVITS' BLACKSTONE 185 (1941).

10. *Wiley v. Wiley*, 75 Ind. App. 456, 123 N. E. 522 (1919).

11. *Jackson v. United States*, 89 F. 2d 572 (1936).

it as a civil contract.¹² Regardless of the definition chosen by the various courts, however, one fact remains clear: marriage relations in all jurisdictions are founded on contract principles, either civil¹³ or of a *sui generis* nature.¹⁴

While some seventeen states and the Territory of Alaska have statutes which define marriage as a civil contract¹⁵ and six states describe it as a "personal relation" growing out of a civil contract,¹⁶ there are some marked distinctions between the contract of marriage and the ordinary civil contract. These distinctions are: (1) the marriage contract cannot be rescinded nor its fundamental terms changed by agreement;¹⁷ (2) it results in a status;¹⁸ (3) the tests as to capacity differ from those of ordinary contracts;¹⁹ (4) it is not a contract within Article I, Section 10, of the United States Constitution which forbids legislation impairing the obligation of contracts;²⁰ (5) it is more than a contract between a man and a woman in that the state is a party to every marriage.²¹ In view of these distinctions brought out in the cases it would seem logical to consider marriage as a *sui generis* contract for which the states establish certain qualifications.

In every contract of marriage the state is thus clearly recognized as an interested party. The relation between husband and wife is no longer of purely private concern but is of concern to the commonwealth as well; hence the state is deeply concerned in its maintenance in purity and integrity.²² A state has, therefore, the power to prescribe who may marry,²³ at what age they may marry,²⁴ the duties and obligations created by marriage,²⁵ and the effect of marriage on the property rights of the parties.²⁶ The states possess this power over marriages, notwithstanding constitutional inhibitions con-

12. Jewell's Lessee v. Jewell, 1 How. 219 (U. S. 1843).

13. VERNIER, AMERICAN FAMILY LAWS, ch. 1, § 14 (1931).

14. Lindquist v. Lindquist, 130 N. J. Eq. 11, 20 A. 2d 325 (1941).

15. States defining marriage as a civil contract are: Arkansas, Colorado, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oregon, Washington, Wisconsin and Wyoming.

16. States defining marriage as a personal relation growing out of a contract are: California, Idaho, Montana, Oklahoma, North Dakota, South Dakota.

17. State *ex rel.* Foster v. Anders, 135 Fla. 59, 184 So. 515 (1938).

18. *In re* Morehead's Estate, 289 Pa. 542, 137 A. 802 (1927).

19. Hess v. Pettigrew, 261 Mich. 618, 247 N. W. 90 (1933).

20. Fearon v. Treanor, 272 N. Y. 268, 5 N. E. 2d 815 (1936).

21. Lippincott v. Lippincott, 141 Neb. 186, 3 N. W. 2d 207 (1942).

22. Coy v. Humphreys, 142 Mo. App. 92, 125 S. W. 877 (1910).

23. Francois v. State, 9 Tex. App. 144 (1880).

24. State v. Ward, 204 S. C. 210, 28 S. E. 2d 785 (1944).

25. Stevens v. United States, 146 F. 2d 120 (10th Cir. 1944).

26. Crouch v. Crouch, et al., 28 Cal. 2d 243, 169 P. 2d 897 (1946).

cerning the impairing of obligations of contracts or interfering with private rights and immunities,²⁷ provided such regulations are not prohibitory.²⁸ The power of the states being complete in this area, permits them to establish degrees of consanguinity and affinity and to forbid miscegenation.²⁹ These laws if sumptuary, however, have no extra-territorial effect.³⁰

The Federal Constitution confers no power on the Federal government to regulate marriage or its dissolution in the states³¹ since that power was reserved to the state by the Constitution.³² This point was well expressed in *State v. Gibson*³³ in which the court ruled that Congress has no power under the Federal Constitution to regulate or control the institution of marriage in the several states of the union. This decision, although rendered in 1871, is still followed by our courts, and in *Stevens v. United States*,³⁴ the court ruled that a state, within the range of permissible adoption of policies deemed to be promotive of the welfare of society as well as of individual members thereof, is empowered to forbid marriages between persons of African descent and persons of other races or descents without violating the Fourteenth Amendment. From these decisions it can be seen that each state has the power to control marriages within its borders.³⁵ As was pointed out in *State v. Walker*³⁶ the state legislatures in exercising such power must prescribe reasonable regulations; otherwise it seems logical that an individual could seek protection of the Constitution under the theory that marriage is a natural right.³⁷ The only places in which the Federal government has the power to regulate marriages are the District of Columbia and in the territories of the United States.³⁸

As a general rule, the validity of a marriage depends on the law where the marriage is performed. This idea is expressed in a number of cases and, as pointed out by Mr. Justice Story,³⁹ has been the prevailing view since the first case involving such a question. Con-

27. *Tipping v. Tipping*, 65 App. D. C. 222, 82 F. 2d 828 (1936).

28. *State v. Walker*, 36 Kan. 297, 13 P. 279 (1887).

29. VERNIER, *AMERICAN FAMILY LAWS*, ch. 3, § 37 (1931).

30. *Lyannes v. Lyannes*, 171 Wis. 381, 177 N. W. 683 (1920).

31. *Lippincott v. Lippincott*, 141 Neb. 186, 3 N. W. 2d 207 (1942).

32. *Lonas v. State*, 50 Tenn. (3 Heisk) 287 (1871).

33. *State v. Gibson*, 36 Ind. 389, 10 Am. Rep. 131 (1871).

34. *Stevens v. United States*, 146 F. 2d 120 (10th Cir. 1944).

35. *Howe v. Howe*, 179 Va. 111, 18 S. E. 2d 294 (1942).

36. *State v. Walker*, 36 Kan. 297, 13 P. 279 (1887).

37. *Norman v. Norman*, 121 Cal. 620, 54 P. 143 (1898).

38. *Great Northern R. Co. v. Johnson*, 166 CCA 181, N. P., 254 F. 683 (1918).

39. STORY, *CONFLICTS OF LAWS*, § 113 a. (8th ed. 1841).

versely, as a general rule, if the marriage is invalid at the *lex loci contractus*, then it is invalid everywhere.⁴⁰

The courts of the states uphold these rules not because they are bound to do so under the full faith and credit clause of the Constitution but on grounds of sound policy and comity.⁴¹ Based, however, as these are on comity rather than full faith and credit, the states have engrafted some exceptions to the general rule of recognition. Exceptions to the general rule that a marriage valid where contracted is valid everywhere are: (1) incestuous or unnatural marriages;⁴² (2) polygamous marriages;⁴³ (3) marriages by parties under the age of consent entered into in a foreign state;⁴⁴ (4) where the citizens of one state go to another state for the purpose of evading the laws of the domiciliary state;⁴⁵ (5) marriages which the legislature of a state has declared shall not be allowed any validity because they are contrary to the public policy of that state, *e. g.*, miscegenation.⁴⁶

Miscegenation

Miscegenation has been defined as the intermarrying, cohabiting, or interbreeding of persons of different races, when prohibited by law.⁴⁷ Naturally, as was the case of the term "marriage," there are several definitions of this word. In some jurisdictions the courts have held that living together is an essential of the criminal offense known as miscegenation.⁴⁸ This has been held true even though there were frequent acts of intercourse.⁴⁹ In other states the courts have ruled that a marriage between a white person and a colored person was necessary to constitute the crime.⁵⁰ Still, in other jurisdictions, cohabitation in concubinage will be considered miscegenation.⁵¹ It must be noted that some states not only declare such marriages void but make it a crime as well; these different statutory purposes are one reason for the variations in definitions. It is apparent from this that there is no single definition of the term miscegenation but it can be said that miscegenation in the United States, as commonly

40. *Rhodes v. Rhodes*, 68 App. D. C. 313, 96 F. 2d 715 (1938).

41. *Tofer v. Oakwood Smokeless Coal Corp.*, 173 Va. 425, 4 S. E. 2d 364 (1939).

42. *Smith v. Goldsmith*, 223 Ala. 155, 134 So. 651 (1931).

43. *Jackson v. Jackson*, 82 Md. 17, 33A. 317 (1895).

44. *McDonald v. McDonald*, 6 Cal. 2d 457, 58 P. 2d 163 (1939).

45. *In re Stull's Estate*, 183 Pa. St. 625, 39 A. 16 (1898).

46. U. S. *ex rel. Modianos v. Tuttle*, 12 F. 2d 927 (1925).

47. See note, 79 Am. St. 382.

48. *Jackson v. State*, 23 Ala. App. 555, 129 So. 306 (1930).

49. *Wilson v. State*, 178 Ark. 1200, 13 S. W. 2d 24 (1929).

50. *Frasher v. State*, 3 Tex. App. 263, 30 Am. Rep. 131 (1877).

51. *State v. Treadaway*, 126 La. 300, 52 So. 500 (1910).

understood, consists of the marriage of a white person with a person of another race.

Statutory prohibitions against the marriage of a white person with a Negro or mulatto are found in thirty states,⁵² none of which are in the New England and upper Atlantic states. In addition to this particular restriction fifteen of these states prohibit intermarriage of a white person and a person of Mongolian or Oriental descent;⁵³ five states bar marriage between a white person and an American Indian;⁵⁴ and eight states prohibit cohabitation between persons of different races.⁵⁵ It is seen from the foregoing that miscegenation statutes are not restricted to a particular section of this country nor are they directed toward any certain race.

The South Carolina miscegenation statute reads as follows:

It shall be unlawful (a) for any white man to intermarry with any woman of either the Indian or Negro races or any mulatto, mestizo or half breed; (b) for any white woman to intermarry with any person other than a white man; or (c) for any mulatto, half breed, Indian, Negro or mestizo to intermarry with a white woman; and any such marriage or attempted marriage shall be utterly null and void and of no effect. Any person who shall violate any provision of this section shall be guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine of not less than five hundred dollars or imprisonment for not less than twelve months or both in the discretion of the court.⁵⁶

As can be seen, the context of this statute is rather definite which eliminates some of the difficulties encountered by other jurisdictions when they were confronted with the task of interpretation.

In some jurisdictions when the courts have had to deal with statutes of this nature the question as to just what constitutes a "Negro" or "colored person" has arisen and the decisions have tended to

52. Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Wyoming. It must be noted that California's anti-miscegenation statute was declared invalid by the case of *Perez v. Lippold*—Cal.—198 P. 2d 17 (1948) but an attempt to repeal the statute during the 1949 legislature was unsuccessful.

53. Arizona, California, Georgia, Idaho, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, Oregon, South Dakota, Utah, Virginia, Wyoming.

54. Nevada, North Carolina, Oregon, South Carolina, Virginia.

55. Alabama, Arkansas, Florida, Louisiana, Maryland, Nevada, Tennessee, Virginia.

56. S. C. CODE, § 20-7 (1952).

follow local social conditions.⁵⁷ An Alabama statute declares that it will be miscegenation for a white person to marry or live in adultery or fornication with any Negro or descendant of a Negro.⁵⁸ This is an extreme view and is not followed in other jurisdictions. For the purpose of miscegenation statutes the term "Negro" is commonly defined as one having one-eighth or more negro blood.⁵⁹

What constitutes a "Negro" can best be determined by turning to the statutes in the various jurisdictions. Probably some of the statutes, if ever challenged, would be ruled unconstitutional by the courts due to the unreasonableness in their definition of what constitutes a Negro for this purpose. Miscegenation statutes have been declared constitutional by a number of courts throughout the United States⁶⁰ under the theory that such statutes express the public policy of the individual state. This view was taken in *Leon v. Torrulla*⁶¹ in which the court stated that the legislature of a state has the power to enact laws defining who, when, and under what circumstances its citizens and subjects may marry and the causes of divorce upon which the married status may be dissolved whenever public good or justice to parties would thereby be preserved. Such statutes have also been held not to be abrogated by the Civil Rights Act.⁶² While the constitutionality of miscegenation statutes has been challenged, the courts have upheld these restrictions on marriage in a vast majority of cases, basing their reasoning on the state's right to control the marriage relationship.

As has been pointed out earlier, statutes prohibiting marriage because of race differences exist in a large number of our states. These statutes tend to follow definite geographic lines and such is to be expected. The chief bases for such legislation is no doubt the problem raised by the existence of minority racial groups coupled with some degree of prejudice. States west of the Mississippi and especially those of the Pacific coast, are almost the sole authors of legislation prohibiting the intermarriage of white persons with those of the Mongolian races.⁶³ The Southern states are the authors of legislation aimed at preventing Negroes and whites from intermarrying. This geographic distribution of statutes prohibiting racial intermar-

57. *Weaver v. State*, 22 Ala. App. 469, 116 So. 893 (1928); *Bailey v. Fiske*, 34 Maine 77 (1852).

58. ALA. CODE, ch. 60, § 360.

59. S. C. CONST. Art. III, § 33.

60. *Stevens v. United States*, 146 F. 2d 120 (1945). *State v. Pass*, 59 Ariz. 16, 121 P. 2d 882 (1942).

61. *Leon v. Torrulla*, CCA Puerto Rico, 99 F. 2d 851 (1939).

62. *Green v. State*, 58 Ala. 190, 29 Am. Rep. 739 (1877); *Georgia v. Tutty*, 41 F. 753 (1890); *State v. Gibson*, 36 Ind. 389 (1871).

63. VERNIER, AMERICAN FAMILY LAWS, ch. 3, § 44 (1931).

riage leads to the conclusion that such legislation is based on psychological and physiological factors which the courts recognize and adhere to.⁶⁴

Void and Voidable Marriages

The question now arises as to the status of those persons who disregard the established laws and enter into a prohibited marriage relation. Are such marriages void or voidable?⁶⁵ There is a general distinction at law between a void and a voidable marriage.⁶⁶ If a marriage is void, then no legal rights are conferred; and when such marriages have been determined to be void, it is as if no marriage had ever existed.⁶⁷ The grounds for such result are usually based on the incapacity of the parties to contract due to their relationship, their mental or physical capacity, or some other expressed prohibition.⁶⁸

Voidable marriages differ from those that are void in that a voidable marriage may be subject to ratification by the parties and may become valid, and is treated as valid until decreed void.⁶⁹ Usually where it is possible to construe a marriage as voidable in lieu of void, such is done.⁷⁰ A voidable marriage is valid prior to being avoided by court action⁷¹ and it must be brought before a court prior to the death of the parties; otherwise, the marriage is considered valid *ab initio*.⁷² A void marriage may be attacked collaterally even after the death of the parties.⁷³ Generally, it may be said that marriages void as against public policy and good morals cannot be made valid by limitations or prescription, nor will they be sustained as a civil contract since such a contract is against public policy.⁷⁴

The question as to void or voidable marriages does not come up where the statutes use such words as "null and void," "utterly null and void," and "illegal and void;" however, there is some question when words less explicit are used. In such cases, the words should always receive their natural force and effect where, by the use of well-known rules of construction, they reflect the legislature's intent.⁷⁵

64. *Ibid.*

65. See, 26 HARV. L. REVIEW 536 (1913) for discussion of effect of void and voidable marriages.

66. *In re De Conza's Estate*, 114 N. J. L. 156, 146 A. 156, 176 A. 192 (1934).

67. *Woodward v. Blake*, 38 N. D. 38, 164 N. W. 156 (1917).

68. *Schneider v. Schneider*, 183 Cal. 335, 191 P. 533 (1920).

69. *State v. Smith*, 101 S. C. 293, 85 S. E. 958 (1914).

70. *Harrison v. State*, 22 Md. 468, 85 Am. Dec. 658 (1864).

71. *In re Martinez's Estate*, 181 N. Y. S. 907 (1920).

72. *Bowers v. Bowers*, 10 Rich. Eq. 551 (S. C. 1858).

73. *Henderson v. Ressor*, 265 Mo. 718, 178 S. W. 175 (1915).

74. *Simmons v. Simmons*, 57 App. D. C. 216, 19 F. 2d 690 (1927).

75. *Wilbur v. Bingham*, 8 Wash. 35, 35 P. 407 (1894).

In South Carolina, the wording of the statute leaves no doubt as to the intention of the legislature.

The question now arises as to just what happens in the case where two people enter into a marriage valid where contracted and subsequently move to a state where such marriage violates the statute against miscegenation. This question has come up in relatively few cases and these are not in agreement.⁷⁶ It is well established that if the parties are domiciled in one state and go to another state to get married, the validity of that marriage depends on the law of the domiciliary state and not on the place of the contract.⁷⁷ This is true because the question is one of legal capacity and not one of proper solemnization of the marriage. As pointed out above, each state is sovereign in respect to the control and the regulation of marriage within its jurisdiction; hence, it has the power not only to determine who shall assume but who shall occupy the marriage relationship within its borders.⁷⁸ As to the comity between the states, it must be noted that no state is bound to grant such; but that they do so because justice demands it. No state is bound by comity to give effect to marriages which are repugnant to its own laws and policies.⁷⁹ The legislature of a state may declare what marriages shall be void in its own state notwithstanding their validity in the state where performed. They can do this as to marriages where the parties in good faith domiciled in another state move to or return to a state having such a statute⁸⁰ so long as that state has a positive law against such marriages. The South Carolina statute pertaining to the subject under discussion would constitute a positive law as to miscegenation.⁸¹

As can be seen, the first matter for consideration when such a case arises is the statute of that state in which the parties are located. If the terms of the statute void such relationship in definite expression, then the invalidity of the marriage follows without the court having to turn to the *lex domicile* or *lex loci*.⁸² If the statute merely prohibits such marriages in general terms, then it becomes necessary to examine the nature and object of the statute in order to determine the scope of prohibition.⁸³ Thus the object of such a statute may

76. *State v. Ross*, 76 N. C. 242, 22 Am. Rep. 678 (1877); *Horton v. Horton*, 22 Ariz. 490, 198 P. 1105 (1921).

77. *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683 (1877).

78. *Re Gregorson*, 160 Cal. 21, 116 P. 60 (1911).

79. *Toler v. Oakwood Smokeless Coal Corp.*, 173 Va. 425, 4 S. E. 2d 364 (1939).

80. *Moore v. Hegeman*, 92 N. Y. 521, 44 Am. Rep. 408 (1883).

81. S. C. CODE § 20-7 (1952).

82. *McDonald v. McDonald*, 6 Cal. 2d 457, 58 P. 2d 163 (1936).

83. *State v. Shattuck*, 69 Vt. 403, 38 A. 81 (1897).

be fully satisfied by limiting it to marriages entered into within the borders of that particular state. Where it is possible to do this, the legislatures and courts usually do so.⁸⁴ When the courts are confronted with such a situation, they follow the general rule that the intent of the legislature must find a clear expression in the statute⁸⁵ and in the absence of such clearly expressed intent, the *lex loci contractus* controls.

While it must be admitted that in most cases it is difficult to determine whether a statute is a part of the public policy, it is a question which must be determined by the facts involved in each particular case. This determination is left up to the courts of the state in which the statute was enacted. It is axiomatic that miscegenation statutes are an expression of public policy.

Conclusion

One of the most widespread racial restrictions in the United States is to be found in the field of marriage. Such regulations are founded on the firm ground of logic and common sense. Such measures as the current miscegenation statutes should be placed under the heading of "protective" rather than "discriminatory" laws if they are to be accurately catalogued.

The first basis for enacting a law restricting intermarriage between the races can be found in a study of Mendel's Law.⁸⁶ This law had its inception in an obscure journal in the year 1866. Mendel cited the results of several years work on the breeding of ordinary garden peas, in that particular article, and in so doing established a law over which no man has control. From crosses between different varieties of peas he derived the simple law of heredity which bears his name today. In 1900 investigators working independently reaffirmed the Mendelian principle and from that time forward Mendelian ratios have become the foundation of all genetics.⁸⁷

Under this theory, it was ascertained that certain physical characteristics are inherited from one's forefathers and, while certain of these may be recessive in the immediate generation, it is highly possible that they will spring forth in a later generation.⁸⁸ In other words, physiological factors are in a large measure due to the individual's inheritance from his parents as well as from the long line of ances-

84. *Smith v. Goldsmith*, 223 Ala. 155, 134 So. 651 (1931).

85. *State v. Hand*, 87 Neb. 189, 126 N. W. 1002 (1910).

86. GRIFFITH, *GENERAL INTRODUCTION TO PSYCHOLOGY*, 260 (1928).

87. MASBY, *PSYCHOLOGY PRINCIPALS AND APPLICATIONS*, 196 (1950).

88. *Ibid.*

tors reaching into the past.⁸⁹ From this it can be seen that it would be highly possible for two white persons to produce a child with Negroid characteristics provided there has been intermixture of the races in the past.

The second reason for such laws actually hinges on the first. As was pointed out in *Plessy v. Ferguson*,⁹⁰ legislation is powerless to eradicate racial instincts or to abolish distinctions based on physical differences, and any attempt to do so can only result in accenting the difficulties of the situation. A statute which implies a mere legal distinction between the white and colored races has no tendency to destroy the legal equality of the two since such a distinction is founded in the color of the races which will exist so long as men are distinguished from each other by color.

While it is true that some courts have upheld miscegenetic marriages even though their own state laws forbid such,⁹¹ they are in a small minority and were not confronted with a situation such as that existing in *Tucker v. Blease*.⁹²

In a marriage between a white person and another with less than one-eighth negro blood, the children born had negroid characteristics. After a petition by citizens of the community, it was necessary for the State to set up special school facilities apart from both white and negro schools since the children were acceptable to neither group. When difficulties such as this can exist, miscegenation statutes serve the useful purpose of preventing social conflict and possible social upheaval. While the preservation of the structure of a given society is not the primary function of a state, it does owe a duty to its citizens that changes in the social structure evolve gradually and without excessive internal conflict.

JESSE J. GUIN, JR.

89. *Ibid.*

90. *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138 (1896).

91. *State v. Kennedy*, 76 N. C. 251, 22 Am. Rep. 683 (1877).

92. *Tucker v. Blease*, 97 S. C. 303, 81 S. E. 668 (1914).