South Carolina Law Review

Volume 4 | Issue 1 Article 7

Fall 9-1-1951

RECENT CASES

RECENT CASES

CONSTITUTIONAL LAW—Validity of Segregation in Public Schools. Plaintiffs, Negro school children, sought a declaratory judgment and injunctive relief, alleging that schools and educational facilities provided for Negro children in School District No. 22, Clarendon County, South Carolina, were inferior to those provided for white children in that district and that this amounted to a denial of the equal protection of the laws guaranteed them by the Fourteenth amendment, and further that the segregation of Negro and white children in the public schools was in and of itself a denial of equal protection. HELD, where separate schools are maintained for Negroes and whites, the educational facilities afforded by them must be equal, but if equal facilities are offered, segregation of the races in the schools is not of itself a denial of the equal protection of the laws prescribed by the Fourteenth amendment. *Briggs v. Elliott,* 20 U. S. L. Week 2015 (E. D. S. C. June 23, 1951).

In a decision cited in the instant case as directly controlling, the Supreme Court reaffirmed the right and power of the state to regulate the method of providing for the education of its youth, even though such regulation included segregation. *Gong Lum v. Rice,* 275 U. S. 78 (1927). The *Gong Lum* opinion was based on state and lower federal court decisions upholding the right of a state to require segregation in the schools. *Roberts v. City of Boston,* 5 Cush. (Mass.) 198 (1849); *Ward v. Flood,* 48 Cal. 36 (1874); *Cory v. Carter,* 48 Ind. 327, 17 Am. Rep. 738 (1874); *People v. Gallagher,* 93 N. Y. 438, 45 Am. Rep. 232 (1883); *Wong Him v. Callahan,* 119 F. 381 (C. C. N. D. Cal. 1902). "Constitutional invalidity does not arise from the mere fact of separation . . ." *Carr v. Corning,* 182 F. 2d 14, 17 (D. C. Cir. 1950). And the doctrine that segregation is a political rather than a judicial problem was reiterated in a decision involving the petition of a Negro to enter the Law School of the University of South Carolina. *Wrighten v. Board of Trustees,* 72 F. Supp. 948 (E. D. S. C. 1947). However, the constitutionality of present-day segrega-

tion provisions is directly dependent upon the *Plessy* doctrine of "separate but equal" facilities. *Plessy v. Ferguson,* 163 U. S. 537 (1896). And from the earlier cases cited above to the more recent decisions based on the *Plessy* doctrine, separation of the races was validated by, and its validity was dependent upon, the equality of the separate facilities and opportunities. *People v. Gallagher, supra; Ward v. Flood, supra; Gaines v. Canada,* 305 U. S. 337 (1938); *Sipuel v. University of Oklahoma,* 332 U. S. 631 (1948); *McLaurin v. Oklahoma State Regents,* 339 U. S. 637 (1950). Further, the right to the equal protection of the law being an individual and personal right, the requirement of equality is met only where the same, or equivalent, treatment is accorded to persons of different races *similarly situated.* (Italics added.) *McCabe v. Atchison, Topeka, and Sante Fe Railroad Co.,* 235 U. S. 151 (1914); *Corbin v. School Board of Pulaski County,* 177 F. 2d 924 (4th Cir. 1949). But equality does not require that privileges be provided members of the two races *in the same place.* (Italics added.) "The state may choose the method by which equality is maintained." *Pearson v. Murray,* 169 Md. 478, 182 A. 590, 103 A. L. R. 706, 711 (1936). In so choosing the method, the state must furnish the equal facilities and opportunities within its own borders. *Gaines v. Canada, supra.*

However, as an indication that the current status of the *Plessy* doctrine is not free of doubt, the Supreme Court has interpreted "equality," in law school cases, to include many intangible qualities, such as reputation of faculty, position and influence of alumni, traditions and prestige, and association with present and future members of the profession. *Sweatt v. Painter,* 339 U. S. 629 (1950); *McKissick v. Carmichael,* 187 F. 2d 949 (4th Cir. 1951). Further, the decisions deeming it to be a denial of equal protection for a state or federal court to attempt to enforce private restrictive covenants must be noted in considering the present status of the "separate but equal" doctrine. *Shelley v. Kraemer,* 334 U. S. 1 (1948); *Hurd v. Hodge,* 334 U. S. 24 (1948). But when the cases immediately above were utilized in an argument that the *Plessy case* has been weakened by these subsequent decisions, a lower federal court replied: "We are not at liberty to disregard a decision of the Supreme Court which that court has not seen fit to overrule and which it expressly refrained

from re-examining (See *Sweatt v. Painter, supra*)." *Boyer v. Garrett,* 183 F. 2d 582 (4th Cir. 1950).

The decision in the instant case is undoubtedly in full accord with the "separate but equal" doctrine, both as to the decree ordering equalization and the denial of plaintiffs' contentions against segregation. However, in view of the court's recent decisions noted above, the fate of this case upon its impending appeal to the Supreme Court is a matter of wide discussion and notable variety of opinion. The *Sweatt* decision indicates that the "equality," which validates separation, may be measured, at least on the graduate and professional school level, by such strict standards as to be impossible of achievement. And further, it would seem to be only a logical extension of the principle of the much-criticized *Kraemer* decision to declare segregation itself to be unconstitutional. It is the oft-expressed view that in the *Kraemer case* and to some extent in the *Sweatt case,* the court erred in finding questions of constitutional rights in controversies smelling more of public policy.

FRANCIS B. NICHOLSON

TORTS—NEGLIGENCE—Last Clear Chance Doctrine in South Carolina. Plaintiff's intestate, while helpless under the influence of intoxicants, was sitting in a stooped position on a cross tie of the defendant's track. The defendant's locomotive, equipped with a headlight and oscillating Mars light, and affording a full view of the track, gave no warning signals after passing a public crossing 1,025 feet from the place where the deceased was sitting. The track was straight for 3,600 feet, and it was shown that the plaintiff's intestate was near several paths which had been in use by the public for over twenty years with the acquiescence of the defendant. When some six or seven hundred feet from the deceased, the crew of the train saw him, but believing him to be a piece of paper or cardboard, failed to slacken speed or sound any warning. Not until the engine was approximately two hundred feet from the deceased did they determine that it was a human being on the track and apply brakes. Still no signals were given, and the last of the eight cars had passed the spot where the deceased was sitting before the train was finally stopped. The lower court found for the plaintiff and awarded damages

of $5,000.00 for wrongful death. On appeal, HELD, affirmed. Under the doctrine of the last clear chance a railroad company is under a duty to keep a reasonable lookout for obstructions on its track, and if the direct and proximate cause of an injury is the negligence of the railroad in failing to keep a reasonable lookout and discover helpless persons on its track in time to prevent the injury, it is liable. *Jones v. Atlanta-Charlotte Air Line R. Co., et al.,* 218 S. C. 537, 63 S. E. (2d) 476 (1951).

The reasoning employed in the instant case is the same as that used in *Davies v. Mann,* 10 M. & W. 548, 152 Eng. Reprints 588, 17 Eng. Rul. Case Law 190 (1842), wherein the court upheld a charge of the trial judge to the effect that, although the plaintiff was negligent in fettering his donkey on the highway, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, or if the collision might have been avoided by the exercise of ordinary care on his part, the action was maintainable against the defendant. Among the early South Carolina decisions adopting this view, was *Farley v. Charleston Basket & Veneer Co.,* 51 S. C. 222, 28 S. E. 193 (1897), which held that although the plaintiff was guilty of contributory negligence, if the proximate cause of the injury was the failure of the defendant to exercise reasonable care and prudence to avoid the injury, plaintiff would be entitled to recover. Another celebrated early case found, on the basis of proximate cause, that a railroad company is not bound to slacken the speed of its train upon seeing someone approach its track unless the circumstances indicate that he does not, or cannot, see the train, or unless there is some reason which would induce a reasonable engineer under similar circumstances, to slacken his speed. *Fletcher v. South Carolina & Georgia Extension R. R. Co.,* 57 S. E. 205, 35 S. E. 513 (1899). When there is negligence on the part of the injured person, and ordinary care on the part of the one inflicting the injury would have discovered such carelessness in time to prevent the injury, there is no contributory negligence, because the fault of the one injured becomes remote in the chain of causation and the want of ordinary care on the latter's part is held not a proximate cause of his injury. *Bodie v. Charleston and Western Carolina Ry. Co.,* 61 S. C. 468, 39 S. E. 715 (1901). The proximate cause rule has been adopted in a number of

cases, notably *Kirkland v. Augusta-Aiken Ry. & Electric Corp.*, 97 S. C. 61, 81 S. E. 306 (1913). By way of dicta, the court repudiated this reasoning by declaring a judge's charge that "even though the plaintiff was negligent, yet if the defendant's servant saw the plaintiff in time to avoid the collision, plaintiff might still recover" to be the doctrine of "the last clear chance" and not the law in this state. *Spillers v. Griffen*, 109 S. C. 78, 95 S. E. 133 (1917). Quoting *The Spillers Case*, the Court again denied its application in *Blackwell v. First National Bank of Columbia*, 185 S. C. 427, 194 S. E. 339 (1934). However, that same year the court held non-prejudicial a charge that if the defendant could have avoided the injury by exercising due diligence in performing his duties, and in keeping a reasonable lookout ahead, so as to discover the plaintiff in time to avoid injuring him, but failed to do so, then such failure and not the negligence of the plaintiff formed the main and proximate cause of the injury. *Leppard v. Southern Ry. Co., et al.*, 174 S. C. 237, 177 S. E. 129 (1934). The court generally followed this reasoning in subsequent decisions, including *Seay v. Southern Ry.—Carolina Division*, 205 S. C. 162, 31 S. E. (2d) 133 (1945) and *Nettles v. Southern Ry. Co.*, 211 S. C. 187, 44 S. E. (2d) 321 (1947), until, by way of dicta, the court said the definition of "the last clear chance doctrine" found in 2 *Restatement, Torts*, § 480, was "sound law." *Scott v. Greenville Pharmacy*, 212 S. C. 485, 48 S. E. (2d) 324 (1948). In the instant case, the court for the first time invoked the "last clear chance doctrine" by name, asserting that the defendant's belief that it was not the law in this State was in error. *Jones v. Ry., supra.*

The doctrine of "the last clear chance" in South Carolina seems to be merely a phase of the theory of proximate cause, and not an exception to the rule of contributory negligence. Denied twice by dicta, it has apparently been in force in this State under the guise of "proximate cause" since well before the turn of the century, and it is difficult to understand the antipathetic attitude of the court toward the use of the name "last clear chance" prior to this year. However, the instant case has resolved all doubt as to the position of the court on this theory and has made the doctrine of the "last clear chance" officially a part of the law of South Carolina.

ROBERT R. CARPENTER

INSURANCE—Presumption of Death After Seven Years Absence. Insured had been making frequent visits to the home of his niece where he received monthly checks from his brother and also kept some of his personal belongings. He had been employed by the Chevrolet Company at which time he had been insured by Defendant under a group policy, naming his niece as beneficiary. On May 1, 1941, the insured disappeared and in June his niece made a thorough search for him, interviewing the owner of a small cafe where the insured cashed checks and also where he ate. No checks were cashed after April. She enlisted the aid of the police authorities. Meeting with no success, niece, on October 6, 1943, furnished defendant with four affidavits containing all the available information concerning the disappearance and alleged death of the insured. Defendant's inspectors then made a search but with no success. Defendant contended that the policy had lapsed on May 30, 1941, and as it had not been proven that insured had died prior to that time, defendant refused to pay the claim. Niece assigned her rights to the insured's brother (who died) and his administrator brings action to collect the insurance. The lower court directed a verdict for the defendant holding that there was no evidence from which the jury could conclude that the insured died before the policy lapsed for non-payment. On appeal, HELD, reversed; where one has disappeared and has not been heard of for seven years by those who would ordinarily hear, the question as to the time of death is for the jury. *Ligon v. Metropolitan Life Insurance Company,* —— S. C. ——, 64 S. E. 2d 258 (1951)

The conception of the presumption of death after seven years of unexplained absence was first found in 1603 in a statute which exempted from the punishment of bigamy those marrying again when their spouses had been beyond the seas for seven years with no report of them. 1 James 1, c11. A later statute decreed in 1667 that if an estate depends on the life of a person who remained beyond the seas or absented himself elsewhere in the kingdom for seven years, in an action by a lessor to recover an estate, such a person was accounted dead. 19 Charles 2nd, c6. There was no general presumption of death from such an absence until Lord Ellenborough expanded these two statutes and held that a presumption that the duration of life ends at the expiration of seven years with respect to persons of whom no account can be given. *Doe v.*

Jesson, 6 East 80 (1805). Four years later Lord Ellenborough held that the burden is on the one alleging life to show that the one missing is still alive. *Hopewell v. DePinna,* 2 Camp 113 (1809). From these two statutes and these two cases developed the rule that death is presumed at the expiration of seven years unexplained absence. Phillips on Evidence (2nd ed.) p. 152 (1815). South Carolina has adopted the rule holding that one absent seven years without being heard from is presumed dead. *Burns v. Ford,* 1 Bailey 507 (1830). The presumption of death from seven years unexplained absence prevails over the presumption of the continuance of life. *Day v. Day,* 216 S. C. 334, 58 S. E. 2d 83 (1950). The rule that seven years continued absence raises a presumption of death is part of our "public policy". *Dill v. Sovereign Camp W. O. W.,* 202 S. C. 401, 25 S. E. 285 (1943). A lapse of seven years from the date of last known information raises a presumption of death and the absentee is presumed alive for the seven year period unless the facts and circumstances indicate a shorter period. *Canaday v. George,* 6 Rich. Eq. 103 (1853). One desiring to show that one who has been absent seven years without being heard from, died before the end of the period, may, by showing special facts and circumstances, establish death at an earlier time. *The Praetorians v. Phillips,* 184 Okla. 521, 88 P. 2d 647 (1939). The burden of proof is on the one who undertakes to overthrow the presumption of death. *Chapman v. Cooper,* 5 Rich. 452 (1852). The presumption arising after seven years' absence is a presumption of death, not as to the time of death. *Ingram v. Metropolitan Life Insurance Company,* 37 Ga. App. 206, 139 S. E. 363 (1927). Whether death occurred at the beginning or the end of the seven-year period is to be determined from the facts of each particular case and the burden of proof is on the one whose interest it is to fix the time of death prior to the expiration of the period. *Corley v. Holloway,* 22 S. C. 380 (1885). Evidence relating to character, habits, conditions, affections, attachments, prosperity, and other objects in life which are motives of men's actions are evidence from which you can infer the death of the absentee, whatever the duration of the absence. *Tisdale v. Connecticut Mutual Life Insurance Company,* 26 Iowa 170, 96 Am. Dec. 136 (1868). The character of the insured, manner of his life and his relationship to his family taken with the circumstances of his disappearance constitute evidence to

justify the jury in finding that the absentee died at the commencement of his disappearance. *Behlmer v. Grand Lodge of A. O. U. W. of Minnesota,* 109 Minn. 305, 123 N. W. 1071 (1909). Evidence showing missing person was a devoted husband and father, happy in his home life, sober, respected in his community, raises a presumption that he died a short time after his dissappearance. *Sovereign Camp of Woodman of the World v. Robinson,* 187 S. W. 215 (1916). Death of the absent one may be presumed where the evidence consists of facts and circumstances, other than exposure, which could result in his death without regard to the duration of the absence and at some time prior to the expiration of the seven year period. *Kansas City Life Insurance Company v. Marshall,* 84 Colo. 71, 268 P. 529 (1928). It might be conceded that if the testimony is not legally sufficient to support a finding that the absentee died the very day of his disappearance, and yet, if the testimony is sufficient to support a finding, that finding could be that he died a short time after his disappearance. *American National Insurance Company v. Hicks,* 35 S. W. 2d 128 (1931). Death may be proved by circumstantial evidence but to prove death at a particular time the evidence must prove it is more probable that the insured died at a particular time than that he survived. *Free v. Life Insurance Company of Virginia,* 176 S. C. 295, 180 S. E. 28 (1938). A person in bad health, walking near a lake, died at the date of his disappearance although the seven-year period had not lapsed. *Jacobson v. Jacobson,* 56 N. Y. S. 2d 588 (1945).

The results reached in this case are in accord with the modern trend. With our modern facilities, it is difficult for one to completely disappear unless death occurs. An absence for seven years is not *prima facie* evidence that the absentee died at any particular time but must be determined from the facts of each particular case. Under suspicious circumstances one could presume that an absentee is concealing his identity but, as in this case, where a man leaves his loved ones and leaves his only means of livelihood without notifying them, one could reach a logical conclusion that he died immediately following his disappearance. Burden should be on the defendant to prove that the absentee still lives or that he died in the latter part

of the period. But if death is proved at the beginning of the missing period, what effect would the Statute of Limitations have on it?

E. C. BURNETT, JR.

CONSTITUTIONAL LAW—Interference With Jury Trial. Petitioners, four Negroes accused of raping a white girl, had to be transferred, after arrest, from the county jail to the state prison to protect them from a mob. After the arrest and prior to the trial, mob violence reigned in the county. The incidents of violence were reported in the newspapers and this further incensed the mob. The sheriff of the county informed the newspapers that the prisoners had confessed to the crime, but no confession was produced at the trial. Special precautions had to be exercised at the trial to provide for the safety of the prisoners. In the lower court the defendants were found guilty and sentenced to death. On appeal, HELD: reversed. When a trial is conducted in such an atmosphere of public hostility and prejudice that a fair trial cannot be had, it is a denial of due process of law. *Shepherd v. Florida,* 19 L. Week 4207 (1950).

The fourteenth amendment of the Constitution of the United States forbids a state from taking one's life, liberty, or property without due process of law. A fair and impartial trial is one of the inherent rights embodied in the fourteenth amendment and protected from abridgement by the states. *Chambers v. Florida,* 309 U. S. 227 (1939). This fair and impartial trial has been defined as a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm. See *Goldstein v. U. S.,* 63 F. 2d 609, 613 (C. C. A. Mo. 1933). Legal trials are not like elections, to be won through the use of the radio, meeting halls, and newspapers, for the very word "trial" connotes decision on the evidence and arguments properly advanced in open court. *Bridges v. California,* 314 U. S. 252 (1941). In the case of *Brown v. Mississippi,* 297 U. S. 278 (1935), the court held a confession to be invalid when obtained through brutal treatment of a mob. This case relied heavily on a statement by Justice Holmes: "But if the case is that the whole proceeding is a mask—that counsel, jury, and judge were swept to the fatal end by an irresistible wave of public passion, and that the state court failed to cor-

rect the wrong—neither perfection in the machinery for correction nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this court from securing to the petitioners their constitutional rights." *Moore v. Dempsey,* 261 U. S. 86 (1923). The Supreme Court has not laid down any definition of mob domination, nor any rule by which one may determine when there has been mob domination of a trial. The Circuit Court of Appeals has passed on the question several times, but did not lay down any set rule to guide in determining whether or not there has been mob domination. In many of these cases the Supreme Court has denied Certiorari. A person on trial for a serious crime is entitled to more than a mere pretense of a trial; and if the trial is so dominated by mob violence that there is actual interference with the court, and the state carries into effect a judgment of imprisonment based upon a verdict from such proceedings, the state deprives the person of his liberty without due process of law. *Wilson v. Lanagan,* 19 F. Supp. 870 (1937), affirmed, 99 F. 2d 544 (1 Cir. 1938), cert. den'd, 306 U. S. 634 (1939). It was held to be a denial of due process of law in *Downer v. Dunaway,* 53 F. 2d 586 (5 Cir. 1931), when a state court, dominated by mob violence, returned the death sentence against one accused of rape. And in the case of *Carruthers v. Reed,* 102 F. 2d 933 (8 Cir. 1939) cert. den'd, 307 U. S. 643 (1939), the court said it is a deprivation of life or liberty when one is executed or imprisoned under a conviction produced at a trial influenced by mob violence.

The result in the instant case is in accord with the great weight of authority. Though the Supreme Court has never laid down a rule to measure mob domination, Justice Holmes said in a dissenting opinion that mob domination is present when a judge admits to himself that the prisoner would not be safe if the verdict was for acquittal. This gives rise to an overwhelming presumption that the jury has responded to the passions of the mob. Dissent in *Frank v. Mangum,* 237 U. S. 309 (1914). The fact that the supreme court has refused certiorari in cases of mob domination seems to indicate that the Circuit Courts have ruled correctly in regards to cases of this kind. A trial dominated by a mob is a denial of due process of law, for every essential of a fair and impartial

trial is missing. Neither the judge nor the jury can avoid being impregnated with the environing atmosphere. Mob violence is the remotest point from judicial calm.

WILEY M. CRAFT