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CONSTITUTIONAL LAW

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"Civil Rights" Cases

The socialistic enunciations that have been coming forth from the Supreme Court of the United States in Washington during the last two decades have produced a noticeable effect upon the type of cases involving constitutional questions. Prior to the time when the Supreme Court of the United States departed from its time-honored position as an interpreter of the Constitution of the United States and the effect of that document on enactments of the Congress and state legislatures, cases before the United States Supreme Court in the field of constitutional law, generally related to the construction of statutes and the defining of property rights in relation thereto.

It had been intended by those who actually wrote the Constitution of the United States that so long as the states observed a republican form of government the exercise of the police power was to be the function of the states. But with the advent of the so-called "New Court", there has been a striking tendency to invade fields which had been thought by most legal scholars to have been of no concern to the federal judiciary. This tendency is particularly noticeable since Warren assumed office as Chief Justice of the United States. Hence there have been constant encroachments upon functions given by the Constitution to Congress and to the states.

The post-Civil War amendments, including the Fourteenth Amendment, were not believed by those who promoted them, and certainly not many of the legislatures which ratified these amendments, to have been intended to convert our nation from one founded on Anglo-American theories of jurisprudence to one conceived on the basis of socialistic dogma. It would appear to be clear that the Fourteenth Amendment was intended to supplement the Fifth Amendment. The Fifth Amendment contains a due process provision protecting the individual against abuses by the Federal Gov-

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ernment. The Fourteenth Amendment was intended as a counter-part to the Fifth Amendment which would afford the individual similar protection against abuses from the states. Yet from its present-day treatment, it would appear that the Court conceives it to be the basic plank of the entire Constitution, which need not be harmonized with the rest of that document, but may stand alone as though it were in fact an entirely new Constitution. It is not surprising that the views so pronounced have produced litigation conceived on theories not earlier dreamed of. It is therefore interesting to observe that in the cases decided by the South Carolina Supreme Court in the period covered by this review, many involve so-called Civil Rights, and reflect the attempt on the part of individuals to assert so-called personal rights and privileges allegedly conferred on them by the Fourteenth Amendment.

It is the theory of these persons that rights — social and personal in nature — are paramount to basic property rights so long cherished and fought for by the founders of this nation. We should not fail to note, in passing, that if these theories shall ultimately prevail, then there will have in fact taken place a socialistic revolution whose architects are those occupying the highest judicial positions of the nation, and who paradoxically have been sworn to uphold the Constitution and laws of the United States as written, rather than as promulgated by them.

Four decisions handed down during the period under review arise out of the so-called "sit-in" demonstrations, and deal with the same constitutional question: *City of Greenville v. Peterson,*[1] *City of Charleston v. Mitchell,*[2] *City of Columbia v. Barr,*[3] and *City of Columbia v. Bouie.*[4]

The factual background in each of these cases was generally the same. Negroes presented themselves in privately owned and operated restaurants or lunch counters accustomed to serving only white customers, and requested that they be served. In each case service was refused, and the Negroes were asked to leave the premises. The Negroes refused to comply, and thereupon, were arrested and charged with trespass under one of several State statutes.[5] In each case, the

1. 239 S. C. 298, 122 S. E. 2d 826 (1961).
2. 239 S. C. 376, 123 S. E. 2d 512 (1961).
3. 239 S. C. 395, 123 S. E. 2d 521 (1961).
4. 239 S. C. 570, 124 S. E. 2d 332 (1962).
5. CODE OF LAWS OF SOUTH CAROLINA, §§ 16-388 and 16-386 (1952).

demonstrators were convicted, and they appealed their convictions to the South Carolina Supreme Court.

The question before the Court was the reconciliation of two basic legal concepts — one of ancient Anglo-American origin, and the other of recent expression. The State, in urging that the convictions be upheld, based its position on the traditional concept of private property, and the basic rights inherent therein which are recognized and protected by the states through the enforcement of the trespass statutes which act without discrimination upon, and for the protection of, all citizens without regard to race or color. The defendants, on the other hand, based their appeals upon the legal concept first enunciated by the United States Supreme Court in 1948 in the case of *Shelly v. Kramer*.[6]

The *Shelly* decision represents a landmark decision in the interpretation and implementation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. This case involved the right of property owners to enforce, in state courts, residential restrictions limiting the occupancy of property to persons of the caucasian race. At the time the case was argued, it was generally held that privately agreed upon racial restrictions were outside the purview of the Fourteenth Amendment, and could be enforced in law or equity in the same manner as other restrictive covenants are enforced. However, in the *Shelly* decision, written by then Chief Justice Vinson, it was held that the action of state courts to enforce racial restrictions and thereby to deny, on the grounds of race or color, the enjoyment of property rights which the petitioners were willing and financially able to acquire, was, in effect, state action which denied rights subject to the protection of the Fourteenth Amendment. The decision held such private agreements were not themselves prohibited, but the *enforcement* of them by a state court constitutes state action within the proscription of the Fourteenth Amendment and therefore, violated constitutional rights of the persons excluded in derogation of the equal protection clause.

The concept of the *Shelly* decision provided the legal underpinning for the defendants' argument in the cases under review. They concede that the South Carolina trespass statutes are constitutional, but contend that state action in *enforcing*

6. 334 U. S. 1; 92 L. Ed. 845; 68 S. Ct. 836; 3 A.L.R. 2d 441 (1948).

them violated the defendants' rights subject to the equal protection clause of the Fourteenth Amendment because the state action furthered and implemented a policy of racial segregation in the State of South Carolina.[7]

In the *Peterson* decision, the first of the four handed down, the South Carolina Supreme Court ignored the basic question of state action, and, in upholding the convictions, ruled that the Fourteenth Amendment "erects no shield against merely private conduct however discriminatory or wrongful." The opinion cites the *Shelly* decision, and declares as the general rule that:

> In the absence of a statute forbidding discrimination based on race or color, the operator of a privately owned place of business has the right to select the clientele he will serve irrespective of color.

In the next decision, *City of Charleston v. Mitchell,* by the late Mr. Justice Oxner, the Court did consider the question of what constitutes state action within the prohibition of the Fourteenth Amendment. The opinion points out that upholding the position of the defendants would mean that a property owner could enforce his rights against white trespassers but not against Negro trespassers. The opinion then specifically holds that the acts of judicial officers of the state in arresting the defendants do not constitute state action in enforcing racial segregation in violation of the Fourteenth Amendment.

In the last two decisions the contention of the appellants was overridden on the authority of the earlier *Peterson* and *Mitchell* decisions.

Certiorari was granted by the United States Supreme Court in the *Peterson* case and it was argued before the United States Supreme Court on November 6, 1962. On the same day, similar decisions from the state courts of Alabama, Louisiana and North Carolina were also argued, but no edict from the Warren Court has yet been handed down in any of these cases as of the date of this writing. A decision upholding the position of the appellant demonstrators would establish a concept, the full implications of which cannot be

7. This contention apparently only applies to those states where the use of its police power to enforce trespass statutes supposedly stems from a community custom "generated" by a "complex network of State laws" to perpetuate racial segregation. In recently arguing a similar North Carolina case before the United States Supreme Court, the attorney for the demonstrators agreed that discrimination by a New York or Montana store owner would stand on a different footing!

foreseen. As was pointed out by the North Carolina Supreme Court, in its opinion in the case of *Avent v. North Carolina,*[8] the right to eject trespassers, if not recognized and enforced by state law, will be handled by individual property owners, and the peace and security of the community seriously threatened as a result. So-called social or personal rights thus upheld could destroy our present concepts of all property rights, with resulting chaos.

Statute Requiring Parade Permit Held Constitutional

Here again, we have a "Civil Rights" case. In the *City of Darlington v. Stanley,*[9] the appellants were convicted in the lower court for staging a parade or procession on the city streets without a permit, in violation of an ordinance of the city of Darlington requiring a permit for all parades and processions within the corporate limits of the city of Darlington. The ordinance provided that upon application being made, "the Mayor or City Council shall in its discretion issue such permit subject to the public convenience and public welfare." Appellants in fact had never applied for a permit.

The appellants based their appeal on the proposition that the aforesaid ordinance was unconstitutional, (a) because it fixed no standard to be used by the City Council and Mayor in considering whether or not to issue a permit, and (b) because it deprived the appellants of their constitutionally guaranteed rights of freedom of speech and assembly (Section 4, Article I of the South Carolina Constitution and the Fifth and Fourteenth Amendments to the United State Constitution).

In a well written opinion by Mr. Justice Oxner, the South Carolina Supreme Court upheld the convictions. The opinion points out that although the ordinance set forth no express standards to guide the City Council and the Mayor in the issuance of parade permits, it was, nevertheless, *implicit,* that they be guided by the safety, comfort and convenience of those using the streets. The opinion recognizes the general rule that a statute which reposes an absolute or undefined discretion in an administrative or public body will not be upheld. However, the Court concluded that in the instant case, the discretion of the Mayor and City Council was not unfettered and could not be exercised arbitrarily, but must be

8. 253 N. C. 580, 118 S. E. 2d 47 (1961).
9. 239 S. C. 139, 122 S. E. 2d 207 (1961).

exercised in connection with the safety, public order and convenience in the use of the streets.

Regarding the issue of freedom of speech and assembly, the opinion points out that these freedoms, while they are fundamental, are not absolute, and must be exercised in subordination to the general comfort and convenience and in consonance with peace and good order — that is to say, they are subject to the police power of the state. The Court concluded that the ordinance here was a reasonable and nondiscriminatory regulation and limitation upon freedom of speech and assembly.

Due Process Clause Does Not Require Counsel to Be Provided in All Noncapital Cases

The appellant in the case of *Shelton v. The State*[10] had been charged in the Court of General Sessions for York County with the crime of assault with intent to kill, and he plead guilty to the lesser offense of assault of a high and aggravated nature and was sentenced to six years imprisonment. The appeal was from the order of the lower court denying his petition for a writ of habeas corpus, and the appellant contended that his sentence was invalid because he had not been represented by counsel at the time he plead guilty.

In upholding the lower court, the Supreme Court pointed out: (1) that there is no statutory requirement for the appointment of counsel to represent a person charged with the commission of a crime, except when the charge is a capital offense; (2) that the due process clause of the Fourteenth Amendment to the United State Constitution requires counsel in noncapital cases in state courts only where necessary to insure the furtherance of justice; and (3) the voluntary intoxication of the defendant at the time of the commission of the crime in no way invalidated his subsequent plea of guilty.

The opinion here is constitutionally sound, and apparently well supported by the facts. At the time that he plead guilty, the defendant was in control of his faculties and at no time did he request counsel. Apparently his alleged grievance arose only because he was given a heavier sentence than he was expecting.

10. 239 S. C. 535, 123 S. E. 2d 867 (1962).

Lee County Forestry Board Act an Unconstitutional Special Act

Apparently an impasse had existed over a period of several years prior to 1961 between the members of the Lee County delegation, who could not agree on recommendations of persons to fill vacancies in the Lee County Forestry Board in the manner prescribed by the general statute providing for the appointment in each county of a County Forestry Board. As a consequence, the Lee County Forestry Board existing in 1961, had been, with the exception of one member, appointed by the State Forestry Commission.

The 1961 legislation under attack in the case of *McElveen, et al v. Stokes, et al*,[11] in effect appointed by name to the Lee County Forestry Board four individuals to replace four that were serving under appointments from the State Forestry Commission. These appointees of the State Forestry Commission instituted this action to have the said Act declared unconstitutional. The lower court sustained the constitutionality of the statute as a special provision in a general law within the purview of Article III, Section 34, Subdivision IX, of the South Carolina Constitution. The Supreme Court, however, reversed the lower court, and held that the legislation was an unconstitutional special act in controvention of Article III, Section 34, Subdivision IX, of the South Carolina Constitution prohibiting a special law where a general law can be made applicable.

The opinion in some detail outlines the background of Subdivision IX of Section 34 of Article III as an effort to avoid legislation by delegation and to insure the most thorough consideration of public problems by the General Assembly as a whole.

In striking down the statute, the opinion points out that here not only can a general law be made applicable, but a general law has in fact been made applicable by the legislature in the enactment of the Forest Fire Protection Act of 1945. In this connection it should be noted that under the South Carolina decisions, the existence of a general law is not the determining factor on the issue here, but rather it is the existence of the power of the General Assembly to enact an applicable general law that is the determining factor.

11. 240 S. C. 1, 124 S. E. 2d 592 (1962).