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Constitutional Law - Equal Protection - Due Process of Law - Salary Discrimination Against Negro School Teacher

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compensation act] grows out of an accident"[5] which brings into effect an implied contract without which recovery could not be had. Strictly speaking, it is more accurate to say that the cause of action, based on contract,[6] grew out of and was incorporated in the employment agreement; the accident was but an event which completed the employer's liability. Therefore, the case under discussion should not properly be termed an "action or proceeding . . . growing out of any accident or collision"[7] so as to fall within the purview of the Louisiana nonresident motorist statute.

Moreover, the state's power to obtain jurisdiction ratione personae over a nonresident defendant by substituted service should be limited to cases wherein the cause does in fact arise out of the defendant's conduct on the state highways.[8] It would seem, then, that any statute which purports to extend this rule to cases not arising out of conduct on the highways would be unconstitutional as a violation of the due process clause of the federal Constitution.

A. B.

CONSTITUTIONAL LAW—EQUAL PROTECTION—DUE PROCESS OF LAW—SALARY DISCRIMINATION AGAINST NEGRO SCHOOL TEACHER—Action by a negro school teacher and negro teachers' association to obtain a declaratory judgment that the fixing by the school board of salaries of negro teachers at a lower rate than that of white teachers of equal qualifications and experience, performing the same duties, was violative of the due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs also prayed an injunction against such discrimination. The action was dismissed on motion without going to trial. *Held*, the facts ad-

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5. Maddry v. Moore Bros. Lumber Co., 197 So. 651, 653 (La. 1940).

6. The Louisiana rule is that action for compensation under a workmen's compensation act is based on contract and not tort. Legendre v. Barker, 5 La. App. 618 (1927); Hargis v. McWilliams Co., 119 So. 88 (La. App. 1928).

7. La. Act 86 of 1928, § 1, as amended by La. Act 184 of 1932.

8. Hess v. Pawloski, 274 U.S. 352, 47 S.Ct. 632, 71 L.Ed. 1091 (1927), and cases following the principle postulated therein. Moore v. Payne, 35 F. (2d) 232 (W.D. La. 1929); Schilling v. Odlebak, 177 Minn. 90, 93, 224 N.W. 694, 696 (1929): "Laws like our statute cannot be construed as a hostile discrimination against nonresidents. *The implied or constructive appointment is consistent with the necessities involved. The nonresident is subject to it only by his own conduct.* The individual, in using the modern highway, must recognize the police power which is the basis of all highway regulation measures." (Italics supplied.) See also Culp, Process in Actions Against Non-Resident Motorists (1934) 32 Mich. L. Rev. 325; Dodd, Jurisdiction in Personal Actions (1929) 23 Ill. L. Rev. 427; Scott, Jurisdiction over Nonresident Motorists (1926) 39 Harv. L. Rev. 563.

mitted by the motion to dismiss constitute an inequality in payment which is a clear discrimination on the ground of race that "falls squarely within the inhibition of both the due process and the equal protection clauses of the Fourteenth Amendment." Order reversed and cause remanded. *Alston v. School Board of City of Norfolk,* 112 F. (2d) 922 (C.C.A. 4th, 1940).[1]

It is permissible under the equal protection clause for the states to separate the races in the enjoyment of privileges, but a state law which discriminates against any class of people so separated, solely on the ground of race, is invalid.[2] By state law negroes may, therefore, under the Constitution be segregated in public carriers[3] and separated into schools of their own,[4] provided "substantially equal advantages" are afforded both groups.[5] They may not, however, as indicated in the opinion in the principal case,[6] be excluded on the grounds of race alone from service on petit[7] or grand juries;[8] nor may they be discriminated against with respect to participating in party primaries[9] and elections,[10] owning and occupying property,[11] Pullman accommo-

1. It is interesting to note that the writer of this opinion, Judge John J. Parker, was nominated to the Supreme Court in 1930 by Mr. Hoover. His confirmation by the Senate was opposed largely by organized labor and certain negro groups. The National Association for the Advancement of Colored People charged that Judge Parker in his campaign for the governorship of North Carolina in 1920 had "flagrantly and openly flouted the provisions of the Fourteenth and Fifteenth Amendments." The reference was to Judge Parker's expressed disapproval of the negro taking a part in politics. New York Times, March 30, 1930, p. 3, cols. 4, 5.

2. In Missouri v. Canada, 305 U.S. 337, 349, 59 S.Ct. 232, 236, 83 L.Ed. 208, 213 (1938) the court said: "The admissibility of laws separating the races in the enjoyment of privileges afforded by the States rests wholly upon the equality of the privileges which the laws give to the separated groups within the State." This principle was also enunciated in Hall v. De Cuir, 95 U.S. 485, 24 L.Ed. 547 (1877); Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896); Davenport v. Cloverport, 72 Fed. 689 (D.C. Ky. 1896).

3. Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

4. Hall v. De Cuir, 95 U.S. 485, 24 L.Ed. 547 (1877).

5. Bertonneau v. Board of Directors, 3 Fed. Cas. No. 1361, at 296 (C.C. La. 1878): "Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the constitution of the United States. Equality of rights does not necessarily imply identity of rights."

6. Alston v. School Board of City of Norfolk, 112 F. (2d) 992, 996 (C.C.A. 4th, 1940).

7. Strauder v. West Virginia, 100 U.S. 303, 25 L.Ed. 664 (1879).

8. Pierre v. State, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 (1939).

9. Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759 (1927); Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458 (1932).

10. Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, L.R.A. 1916A, 1124 (1915); Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281 (1939).

11. Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, L.R.A. 1918C, 210, Ann. Cas. 1918A, 1201 (1917).

dations on railroads,[12] educational facilities,[13] division of school funds,[14] or the pursuit of a trade or vocation.[15] The prohibitions of the equal protection clause apply to the actions of all agencies of the state,[16] which includes the defendant.

Though negro teachers may validly be confined to teaching in negro schools, the doctrines already enunciated by the Supreme Court relative to the equal protection clause clearly uphold the contention that they may not be paid less than those of the white race solely on the basis of race.[17] Moreover, it appears that a lowering of the qualifications requisite for negro teachers, in order to justify a lower salary scale, would deny equal advantages to school children of the negro race. This result would render the action vulnerable under the doctrine of *Missouri v. Canada*.[18]

Was the action of the defendant also a violation of due process of law? It is difficult to see how there was any deprivation of property, and liberty was involved only in the rather attenuated sense that the earning possibilities of members of the affected class were relatively restricted. Thus it is doubtful that it was proper for the decision to be predicated in part on the due process clause.

The implications of the instant case extend beyond the public school systems; they affect any sort of public employment. It would appear difficult, however, as a practical matter, to make

12. McCabe v. Atchison, T. & S. F. R.R., 235 U.S. 151, 35 S.Ct. 69, 59 L.Ed. 169 (1914).

13. Missouri v. Canada, 305 U.S. 337, 59 S.Ct. 232, 83 L.Ed. 208 (1938).

14. Davenport v. Cloverport, 72 Fed. 689 (D.C. Ky. 1896).

15. Chaires v. Atlanta, 164 Ga. 755, 139 S.E. 559, 55 A.L.R. 230 (1927).

16. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 175 S.Ct. 581, 41 L.Ed. 979 (1897).

17. The decision is in accord with the United States District Court's holding in the recent case of Mills v. Board of Education of Anne Arundel County, 30 F. Supp. 245 (D.C. Md. 1939). The district court held that where the salary schedule resulted in a discrimination between white and colored teachers based chiefly on race, the plaintiff was entitled to an injunction against the continuation of such discrimination to the extent that it was based solely on race. However, neither the plaintiff nor any other negro teacher was entitled to an identical salary with white teachers in equivalent positions, inasmuch as some discretion must be left to the school board in determining actual salaries according to efficiency and professional attainments. In a previous suit by the same plaintiff [Mills v. Lowndes, 26 F. Supp. 792 (D.C. Md. 1939)] the question of discrimination was fully discussed but an injunction was refused because the proper party had not been sued.

18. 305 U.S. 337, 351, 59 S.Ct. 232, 237, 83 L.Ed. 208, 214 (1938). In this decision the Supreme Court held that the state must provide for negroes "facilities for legal education substantially equal to those which the State there afforded for persons of the white race. . . ." This doctrine would apply to other departments of the educational system.

out an unconstitutional discrimination unless the positions in question were fairly well standardized as to qualifications, duties and salaries.

E. A. M.

CORPORATIONS—IMPLIED REPEAL OF BY-LAWS BY ACTION OF THE DIRECTORS—Plaintiff, who was elected comptroller by the board of directors of defendant company for a period of one year, was dismissed without cause. The by-laws provided that the board of directors should elect officers to serve during the pleasure of the board but authorized the board to make, alter or change the by-laws. *Held,* that since the board of directors had authority to make, alter and change the by-laws, their action in electing plaintiff for a period of one year abrogated the by-laws to that extent, and plaintiff is entitled to the balance due under his contract. *Hill v. American Co-operative Ass'n,* 197 So. 241 (La. 1940).

The power to make or amend the by-laws of a corporation ordinarily rests in the stockholders, but this power may be given to the board of directors.[1] When the power to make the by-laws rests in the stockholders, the general rule is that they may not be waived by the board of directors, and any act by the board in contravention thereof is ultra vires.[2] However, the courts have uniformly held, as in the instant case, that if the board of directors is given the power to make or alter the by-laws, it may waive any of them.[3] In reaching the above conclusion the court distinguished two earlier Louisiana cases[4] in which this power had been retained by the stockholders. In both of these cases it

1. La. Act 250 of 1928, § 28, I [Dart's Stats. (1939) § 1109, I]; Klix v. Polish Roman Catholic St. Stanislaus Parish, 137 Mo. App. 347, 118 S.W. 1171 (1909); North Milwaukee Town-Cite Co. No. 2 v. Bishop, 103 Wis. 492, 79 N.W. 785 (1899). ". . . the power to adopt by-laws resides inherently and primarily in the stockholders . . . in the absence of anything in the charter or general laws to the contrary." 8 Fletcher, Corporations (1931) 645, § 4172.

2. Hunter v. Sun Mutual Ins. Co., 26 La. Ann. 13 (1874); Fowler v. Great Southern Tel. & Tel. Co., 104 La. 751, 29 So. 271 (1901); Mulrey v. Shawmut Mutual Fire Ins. Co., 86 Mass. 116, 81 Am. Dec. 689 (1862); Douglass v. Merchants' Ins. Co., 118 N. Y. 484, 23 N.E. 806 (1890).

3. Realty Acceptance Corp. v. Montgomery, 51 F. (2d) 636 (C.C.A. 3rd, 1930); State v. Wiley, 100 Ind. App. 438, 196 N.E. 153 (1935); Bank of Holly Springs v. Pinson, 58 Miss. 421, 38 Am. Rep. 330 (1880); Farmer's State Bank v. Haun, 30 Wyo. 322, 222 Pac. 45 (1924).

4. Hunter v. Sun Mutual Ins. Co., 26 La. Ann. 13 (1874); Fowler v. Great Southern Tel. & Tel. Co., 104 La. 751, 755, 29 So. 271, 272 (1901). In the latter case the court did not find that the plaintiff was employed by the year and therefore the discussion concerning waiver of by-laws was dictum.