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CONSTITUTIONAL LAW-EXCLUSION FROM JURIES ON GROUNDS OF RACE AND COLOR-SCOTTSBORO CASE

CONSTITUTIONAL LAW—EXCLUSION FROM JURIES ON GROUNDS OF RACE AND COLOR—SCOTTSBORO CASE—A negro convicted of rape in one of the so-called "Scottsboro" cases moved to quash the indictment and the trial venire, alleging systematic exclusion of negroes from the grand and petit juries on the grounds of race and color. The trial court overruled the motions, and the Alabama Supreme Court sustained this decision, holding that the evidence failed to establish such exclusion. On certiorari to the United States Supreme Court, *held*, that the refusal to quash the indictment and trial venire was a denial of equal protection of the laws contrary to the Fourteenth Amendment, since the evidence on those motions sufficiently established systematic exclusion of negroes from both juries on grounds of race and color. *Norris v. Alabama*, (U. S. 1935) 55 Sup. Ct. 579.

The courts have clearly settled that exclusion of negroes from grand and petit juries on the grounds of race and color, in the indictment and trial of a negro upon a criminal charge, is a denial of equal protection of the laws to the defendant, contrary to the Fourteenth Amendment.[1] This is held to be the case whether the discrimination results from the constitution or statutes of the state,[2] or from the acts of administrative or executive officers.[3] Such protection is plainly closer to the original purpose which was largely responsible for the adoption of the Fourteenth Amendment, to secure the negro an equal status with other

[1] Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664 (1879); Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567 (1880); Carter v. Texas, 177 U. S. 442, esp. p. 447, 20 Sup. Ct. 687 (1900); Rogers v. Alabama, 192 U. S. 226, 24 Sup. Ct. 257 (1904); Martin v. Texas, 200 U. S. 316, 26 Sup. Ct. 338 (1906).

[2] Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664 (1879).

[3] Carter v. Texas, 177 U. S. 442, 20 Sup. Ct. 687 (1900).

races,[4] than many of the applications which have since been made of that Amendment. Yet the principal case revealed that no negro had ever sat on any jury, either in the county in which the indictment was returned or that in which the trial was held, within the memory of elderly citizens and court officers familiar with the judicial proceedings there for decades back.[5] Similar testimony has been given in many other cases.[6] This cannot be laid altogether to the inability of negroes to meet educational or other qualifications, particularly in recent years;[7] nor to mere social pressure, in view of the place negroes have taken in many communities.[8] The legal protection against such discrimination seems to have fallen short in many cases.[9] Removal to the federal courts on this ground may be had only where the exclusion is by state constitutional provision or by statute,[10] and not then if such statute has been ruled unconstitutional by the highest court of the state.[11] In the case of exclusion by the action of such officers as jury commissioners, who are given wide discretion under many modern laws,[12] the remedy is the expensive one of appeal through the highest court of the state to the United States Supreme Court.[13] Further, many state courts seem loath to find that the evidence establishes such exclusion to have been solely on the grounds of race and color,[14] and have been strict in requiring, for review on this constitutional ground, that the objection shall have been raised below in correct technical

[4] Slaughter-House Cases, 83 U. S. 36 at 67, 68, 21 L. ed. 394 (1872).

[5] (U. S. 1935) 55 Sup. Ct. 579.

[6] STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 253-271 (1910). This gives an extensive survey of the actual extent of jury service by negroes in the South.

[7] STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 348-362 (1910); 11 ENCYCLOPEDIA OF SOCIAL SCIENCES 351 ff. (1933). See also the discussion of this point in the principal case.

[8] Supra, note 7.

[9] See comment, 29 ILL. L. REV. 498 (1934), for a good discussion of the practical defects in the legal remedies. See also supra, note 7.

[10] Ex parte Virginia (Virginia v. Rives), 100 U. S. 313, 25 L. ed. 667 (1879), decision based on the terms of the statute providing for removal, which referred only to discrimination arising before trial.

[11] Neal v. Delaware, 103 U. S. 370, 26 L. ed. 567 (1880); Bush v. Kentucky, 107 U. S. 110, 1 Sup. Ct. 625 (1883).

[12] For the state statute involved in the principal case, see Alabama Code 1928, sec. 8603; Gen. Acts Alabama 1931, no. 47, p. 55. Besides the usual requirements as to age, freedom from habitual drunkenness, disease or mental infirmity, and lack of a criminal record, this contains the very general provision that jurors should be "male citizens of the county who are generally reputed to be honest and intelligent men and are esteemed in the community for their integrity, good character and sound judgement." Another interesting provision found in the 1931 Acts cited is, "If a person cannot read English and has all the other qualifications prescribed herein and is a free holder or householder his name may be placed on the jury roll and in the jury box." (Sec. 14.) See also comment, 29 ILL. L. REV. 498 at 505 (1934), and statutes cited there; also note, 52 A. L. R. 919 (1928).

[13] Supra, note 10.

[14] See the decision below in the principal case, Norris v. State, 229 Ala. 226, 156 So. 556 (1934). For an extensive compilation of such cases in other states, see 29 ILL. L. REV. 498 at 502 n. (1934).

form and at the proper time.[15] In most cases the United States Supreme Court has refused certiorari or affirmed the decisions, refusing to overturn the finding of the state court on the evidence,[16] or affirming the decision that the objection had not been correctly raised.[17] Fortunately, the objections were properly made in the principal case, by timely motion to quash the indictment and the trial venire,[18] with the essential allegation that such exclusion was upon the sole grounds of race and color, and the proffer of evidence to support this in respect to both proceedings.[19] Further, the Court in this case did not accept the decision of the state courts as to the evidence as conclusive, but carefully examined the record, with the resultant finding contrary to that of the Alabama courts that the evidence clearly showed systematic exclusion of negroes from both the grand and petit juries on the sole grounds of race and color.[20] It is submitted that this holding, and most particularly the searching exposé and criticism of the actual practices in jury selection which have been held constitutional by state courts [21] should have a salutary effect in improving the civil status of the negro, not alone with respect to his right to serve upon a jury.[22]

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[15] See note 14, supra.

[16] Thomas v. Texas, 212 U. S. 278, 29 Sup. Ct. 393 (1909); Martin v. Texas, 200 U. S. 316, 26 Sup. Ct. 338 (1906).

[17] In re Wood, 140 U. S. 278, 11 Sup. Ct. 738 (1891). It is to be noted that this case arose in New York; the question of negro jury service is by no means confined to the South.

[18] For a discussion of the technical requirements for raising the issue of the exclusion of eligible classes from the jury, see note, 52 A. L. R. 919 (1928). The usual forms are challenge of the array, or if no opportunity is given for this, motion to quash the indictment, in the case of the grand jury; motion to quash the trial venire, in the case of the petit jury. Habeas corpus, or mandamus directed to the jury commissioners or similar officers have generally been held procedures unavailable for this purpose.

[19] Norris v. Alabama, (U. S. 1935) 55 Sup. Ct. 579.

[20] In the counties in which the indictment was returned and the trial held, the percentage of negro residents was respectively 7.2 per cent and 18 per cent; the evidence tended to show that no negro had ever served on a jury in either county. One of the jury commissioners testified that no discussion was ever had of the statutory qualifications of any negro to serve on a jury. Extensive lists of negroes residing in the two counties and allegedly qualified for this service were presented, and few of the names on them were challenged.

[21] Note 20, supra.

[22] See STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW (1910), for a discussion of other racial problems involved in American law. Of considerable recent interest has been the question of exclusion of the negroes from taking part in primaries: see Nixon v. Condon, 286 U. S. 73, 52 Sup. Ct. 484 (1932); White v. County Democratic Executive Committee, (D. C. Tex. 1932) 60 F. (2d) 973.