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Constitutional Law—Due Process of Law—Classification of Races

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come within the purview of the commerce clause. Directly contrary to this holding is *State v. Goetz*, 43 W. Va. 495, 27 S. E. 225, wherein the court denies the legislature the right of taxing cigarettes in packages of 20, imported from foreign states; however, such a right is now universally upheld; *Lloyd et al. v. Richardson*, 158 Ga. 633, 134 S. E. 37; *Phillips v. Raynes*, 120 N. Y. S. 1053; *City of Newport v. Wagner*, 168 Ky. 641, 182 S. W. 834; Cooley on Taxation (4th ed.) 818 *et seq.* An ordinance enacted in furtherance of municipal police power prohibiting the smoking of cigarettes anywhere within the corporate limits was held void for unreasonableness, *Hershberg v. Barbourville*, 142 Ky. 60, 133 S. W. 958. A similar ordinance restraining the smoking of tobacco was held invalid, *Zion v. Behrens*, 262 Ill. 510, 104 N. E. 836. However, in *Commonwealth v. Thompson*, 12 Met. (Mass.) 231, the court assumed the validity of a statute prohibiting smoking in any "lane or passageway." *Zion v. Behrens*, *supra*, seems to present the modern view of the subject.

Prior to the passage of the 18th amendment it was generally conceded that the various states, in the exercise of their police power, had the authority to prohibit the advertising for sale of intoxicating liquors, *State v. J. P. Bass Pub. Co.*, 104 Me. 288, 71 Atl. 894, declaring R. S. 1903, chap. 29, sec. 45, valid, and *State ex rel. West v. State Capitol Co.*, 24 Okla. 252, 103 Pac. 1021, upholding a similar constitutional provision, (Bunn's Edition sec. 499) as a legitimate exercise of the police power. These decisions cannot be considered as being in conflict with the case under discussion because by the Williamson Act Congress, to a large extent, withdrew intoxicating liquors from the protection of the commerce clause of the federal constitution. In these cases the ultimate aim of the advertiser, from an intrastate standpoint, was unlawful, while in the Kansas case the sale of cigarettes was legal. The resulting interference with interstate commerce in publications hence was justifiable in the absence of Congressional legislation covering the same field.

Newspapers are subjects of commerce within the meaning of the constitution of the United States relating to commerce between the states, *Preston v. Finley*, 72 F. 850; *Post Printing Co. v. Brewster*, 246 F. 321.

Mining coal has been held not to be interstate commerce, *i. e.*, the production of the commodity, *per se*, preparatory to shipment is but a means or a step to the ultimate end, and is not, therefore, subject to the power of Congress to regulate it. *United Mine Workers v. Coronado Coal Co. et al.*, 259 U. S. 344, 42 Sup. Ct. 570. The above case does not seem repugnant to the case here discussed because there is a vast difference between production and advertising—the latter is more in the nature of an appeal to the public upon the merits of a product and a means by which sales and consumption can be increased. As it reaches beyond the borders of the state of publication it is interstate in character.
W. G. S., '28.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—CLASSIFICATION OF RACES.—A Chinese citizen was refused admittance to a school for white children. He was classed among the "colored" races and given the right to enter a school for "colored" children furnishing an education equal to that offered in the school for white children. *Held*, that he was not denied equal protection of the laws, since the facilities furnished were equal to that offered to all, whether white, brown, yellow or black. *Ging Lum v. Rice*, 48 Sup. Ct. 91, 72 L. ed. 79 (1927).

The right to a common school education is conferred solely by the state, and does not exist in the absence of state laws. *Lehew v. Brummel*, 103 Mo. 546, 15 S. W. 765, 23 Am. St. Rep. 895, 11 L. R. A. 828. When provisions for schools have once been made, however, the state cannot discriminate between persons

of different races, the constitution providing for equal privileges. But the overwhelming weight of authority is to the effect that a statute providing for separate schools for white and colored children is constitutional. A number of the cases so holding are collected and cited in the principal case. A more complete citation of authorities may be found in 13 Ann. Cas. 342 and Ann. Cas. 1916 C. 806. Nor is the validity of the act affected by the motives in its enactment. *Wong Kim v. Callahan*, 119 F. 381. The test of constitutionality is not whether the privileges of the races are identical, but whether equal educational opportunities are afforded. *Greenwood v. Rickman*, 145 Tenn. 361, 235 S. W. 425; *Daviess County Board of Education v. Johnson*, 179 Ky. 34, 200 S. W. 313. Hence, where separate schools are not maintained, colored children cannot be excluded from schools for white children. *State v. Duffy*, 7 Nev. 342, 8 Am. Rep. 713.

Statutes providing for taxes to be used exclusively for white schools are unconstitutional, because discriminatory. *Williams v. Bradford*, 158 N. C. 36, 73 S. E. 154. *McFarland v. Goins*, 96 Miss. 67, 50 So. 493. Void also, in general, are statutes which provide that the taxes raised from white persons be used for school for white children and the taxes from negroes for negro children. *Riggsbee v. Durham*, 94 N. C. 800 and other cases cited in note 13 Ann. Cas. 343.

Most of the decided cases involve the rights of negro children; the principal case holds that Mongolians, or for that matter, any other race except the Caucasian, may be excluded from white schools where there are equally good schools for "colored" children. In general, however, the word "colored" is limited to persons wholly or in part of negro blood. *Wall v. Oyster*, 36 App. Cas. (D. C.) 50, 32 L. R. A. (N. S.) 180, 38 Wash. L. Rep. 794. A number of cases to the same effect are listed in the note in Ann. Cas. 1912 D. 457. But in most of these cases the definition is dictum. On the other hand, the word "white," is usually held to mean person of the Caucasian race. *Ozawa v. United States*, 260 U. S. 178, 67 L. ed. 199, 43 Sup. Ct. 65. Other cases are cited in *Rice v. Ging Lum*, 139 Miss. 760, 104 So. 105, the principal case in the court below. Thus, the question in the principal case in the state court was one of construction rather than constitutionality. If "white" means Caucasian only, *ex necessitate*, "colored" must include all other races. This was the reasoning and conclusion of the Mississippi court in the principal case, and the Supreme Court held the statute as thus construed to be unconstitutional. J. N., '29.

NEGLECT—RES IPSA LOQUITUR—BURDEN OF PROOF.—Plaintiff was injured when car driven by defendant on slippery pavement suddenly skidded on to the sidewalk, knocking plaintiff down. Negligence was pleaded generally, and the plaintiff relied upon the doctrine of *res ipsa loquitur*. Concerning the manner of the accident, the only testimony offered by the plaintiff was a telephone conversation between plaintiff's wife and defendant, in which the latter stated that she lost control of the car. The instructions when read together informed the jury that it might infer negligence by means of the *res ipsa loquitur* doctrine without knowing the specific act or omission which constituted the negligence, if it should find from the evidence that the defendant's auto ran upon the sidewalk and struck the plaintiff unawares from behind. *Smith v. Hollander*, 257 Pac. 577 (Cal. App., June, 1927).

On principle and authority, the holding seems unjustified. Courts have labored hard to keep to the maxim that negligence is never presumed. *Brown v. Light, Power & Ice Co.*, 137 Mo. App. 718, 109 S. W. 1032. As a general rule, it may be stated that negligence is a fact which must always be proved and will never be presumed. *Mentzer v. Armour*, 18 Fed. 373; *Pennsylvania Company v. Conlan*, 101, Ill. 93. The mere fact that an accident has happened