

# Constitutional Law--Equal Protection of Law-- Exclusion of Negroes from Juries (State v. Speller, 230 N.C. 345 (1949))

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similar circumstances, it was decided that defendant's attendant did not exercise the proper degree of care when he quitted the lot at midnight leaving the key in the unguarded automobile without having previously informed the motorist of the hour of closing. Relying on *Continental Ins. Co. v. Himbert*,<sup>8</sup> the court also instructed the jury that the converse of the above rule would be true, *i.e.*, that if the plaintiff knew the time of closing and agreed that the key be placed under the mat, then defendants would not be liable, for the duration of the bailment contract was limited to closing time, and by leaving the key in the car after closing as stipulated, there was a constructive delivery of the car.

That New York is aligned with the weight of authority and the case under discussion in finding a bailment under such circumstances, there is no doubt.<sup>9</sup> Whether New York would ascribe to a bailee the duty of giving notice to a bailor that his car—the keys inside—will be unprotected after a certain time, is not known. There are no New York cases on the point. It seems elementary that this obligation is reasonable and not so burdensome as to be outside the scope of a bailee's duty of due care.

A. C. M.

CONSTITUTIONAL LAW—EQUAL PROTECTION OF LAW—EXCLUSION OF NEGROES FROM JURIES.—The prisoner, a Negro, was convicted of the capital crime of rape upon a verdict returned by a jury composed entirely of white men.<sup>1</sup> At the trial the judge unexpectedly caused a special venire of petit jurors to be summoned from Warren County, 82 miles away.<sup>2</sup> Counsel for prisoner presented a challenge to the entire array of petit jurors on the ground of systematic exclusion of Negroes from petit juries of Warren County contrary to the United States Constitution and the laws of North Carolina. Counsel then moved for time to allow the defense to get evidence to sustain the challenge. This motion was denied by the trial judge thus forcing defendant's counsel to undertake to support the challenge by calling six witnesses at random from among bystanders in the court room. The judge thereupon overruled the

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<sup>8</sup> 37 So. 2d 605 (La. App. 1948).

<sup>9</sup> *Galowitz v. Magner*, 208 App. Div. 6, 203 N. Y. Supp. 421 (1924); *Potomac Ins. Co. v. Donovan*, 274 App. Div. 666, 87 N. Y. S. 2d 145 (1949).

<sup>1</sup> This was the second trial and appeal of the prisoner. His former conviction had been set aside because of denial of the constitutional right of equal protection of law through the purposeful exclusion of the members of his race from the grand jury by which he was indicted. *State v. Speller*, 229 N. C. 67, 47 S. E. 2d 537 (1948).

<sup>2</sup> N. C. GEN. STAT. ANN. §§ 1-86 provides that the judge may summon jurors from any other county in the same judicial district, if he has probable grounds to believe that a fair and impartial trial cannot otherwise be obtained.

challenge to the array finding that the challenge had not been substantiated by the evidence the defense had offered. The prisoner appealed his conviction on the grounds that he had been denied his constitutional right to be defended by counsel in criminal prosecutions.<sup>3</sup> *Held*, conviction reversed. The prisoner had been denied his constitutional right to be defended by counsel. The defendant's counsel should have been allowed time to secure evidence of exclusion of Negroes from juries of Warren County in support of the challenge to the array. Had the judge found that Negro jurors were systematically excluded from juries, it would have been a denial of equal protection of the law and the challenge would have been sustained. *State v. Speller*, 230 N. C. 345, 53 S. E. 2d 294 (1949).

From the time of the ratification of the Fourteenth Amendment and the enactment of complementary legislation by Congress, the United States Supreme Court has consistently held, in a long line of cases, that intentional discrimination against a class or race, solely on account of their race or color, by officials in charge of the selection of juries in criminal cases is a violation of the constitutional rights of defendants who are members of the excluded class.<sup>4</sup> The early cases establish the right of Negroes to serve on juries<sup>5</sup> and uphold the constitutionality of federal statutes making it a crime to discriminate against Negroes in the selection of federal juries.<sup>6</sup> The constitutional prohibition extends to discrimination against any race in the selection of a grand or petit jury.<sup>7</sup> Such discriminatory exclusion is unconstitutional whether it is the result of a statute<sup>8</sup> or of the acts of administrative officials.<sup>9</sup> The defense may be raised only by a defendant who is a member of the excluded race,<sup>10</sup> and the burden of proving the existence of discrimination is on the one making the allegation.<sup>11</sup> This does not mean that Negro defendants are entitled to a jury composed entirely of Negroes or even to one on which there are Negroes in proportion to their number in the community, but merely that no class can be excluded from the jury solely on

<sup>3</sup> U. S. CONST. AMEND. VI.

<sup>4</sup> U. S. CONST. AMEND. XIV, § 1, provides that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws."

<sup>5</sup> *Virginia v. Rives*, 100 U. S. 313, 318 (1879); *Strauder v. W. Virginia*, 100 U. S. 303 (1879).

<sup>6</sup> *Ex parte Virginia*, 100 U. S. 339 (1879).

<sup>7</sup> *Pierre v. Louisiana*, 306 U. S. 354 (1939); *Neal v. Delaware*, 103 U. S. 370 (1881).

<sup>8</sup> *Bush v. Kentucky*, 107 U. S. 110 (1882).

<sup>9</sup> *Norris v. Alabama*, 294 U. S. 587 (1935); *Neal v. Delaware*, *supra* note 7.

<sup>10</sup> *Rawlins v. Georgia*, 201 U. S. 638 (1906).

<sup>11</sup> *Fay v. New York*, 332 U. S. 261 (1947); *Tarrance v. Florida*, 188 U. S. 519 (1903); *Carter v. Texas*, 177 U. S. 442 (1900).

account of their race or color.<sup>12</sup> The mere absence of the defendant's class or race from the jury is not in itself proof of discrimination.<sup>13</sup> However, by showing that no members of the excluded race have appeared on juries for many years, the defendant makes out a *prima facie* case of the denial of the equal protection which the Constitution guarantees.<sup>14</sup>

A state may prescribe the qualifications for jurors within its jurisdiction, provided no discrimination is made on account of race or color.<sup>15</sup> The New York statute<sup>16</sup> scrupulously avoids the exclusion of any class on the grounds of color or race,<sup>17</sup> and the selection of grand and petit juries is distinguished by the absence of any appreciable discrimination against race or color.<sup>18</sup> The cases in which the question of discrimination most frequently arises in New York are in connection with the system of special or "blue ribbon" juries which are provided for by statute in counties of more than one million population.<sup>19</sup> However, the system, often challenged by defendants who charged that members of their class were discriminated against in the selection of "blue ribbon" jurors, has been repeatedly upheld as constitutional.<sup>20</sup>

The law is well settled that intentional discrimination against Negroes in the selection of juries, solely because of their race, is a denial of the constitutional right of equal protection of the law. It is encouraging to note in the principal case that states which in the past have been less than zealous in the observance of the constitutional rights of Negro defendants, have begun conscientiously to protect these rights.

H. R. S.

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<sup>12</sup> *Clark v. Commonwealth*, 167 Va. 472, 189 S. E. 143 (1937); 16 C. J. S., Constitutional Law § 540.

<sup>13</sup> *State v. Walls*, 211 N. C. 487, 191 S. E. 232 (1937), *cert. denied*, 302 U. S. 635 (1937).

<sup>14</sup> *Hale v. Kentucky*, 303 U. S. 613 (1938); *Norris v. Alabama*, *supra* note 9; *Neal v. Delaware*, *supra* note 9.

<sup>15</sup> *Owens v. Commonwealth*, 188 Ky. 498, 222 S. W. 524 (1920).

<sup>16</sup> N. Y. JUDICIARY LAW §§ 502, 502a.

<sup>17</sup> N. Y. CONST. Art. 1, § 11, provides: "No person shall be denied the equal protection of the law of this State, or any subdivision thereof."

N. Y. CIVIL RIGHTS LAW § 13 provides: "No citizen of the State possessing all other qualifications which are or may be required or prescribed by law, shall be disqualified to serve as a grand or petit juror in any court of this state on account of race, creed, color, national origin or sex . . ."

<sup>18</sup> *People v. Dessaure*, 299 N. Y. 126, 85 N. E. 2d 900 (1949).

<sup>19</sup> N. Y. JUDICIARY LAW § 749aa.

<sup>20</sup> *Moore v. New York*, 333 U. S. 565 (1948) (no evidence of discrimination against qualified Negroes in the selection of the special jury which tried petitioner). *Fay v. New York*, *supra* note 12 (holding Special Jury Statute constitutional).