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Constitutional Law -- Civil Liberties -- Segregation on Intrastate Travel

CASES NOTED

CONSTITUTIONAL LAW — CIVIL LIBERTIES — SEGREGATION ON INTRASTATE TRAVEL

Upon entering respondent's bus, where Negroes seat from the rear and Whites from the front, petitioner, a Negro on an intrastate journey, was refused the last empty seat. The sole reason given was that he was a Negro and the last available seat was beside one already occupied by a white person. Such contiguous seating was prohibited by statute.[1] Petitioner asked for injunctive relief from discrimination claiming an unconstitutional interpretation of the segregation statute by respondent. *Held, group*[2] segregation is not discrimination if facilities are equal as between the races, even though at times an *individual of either race*[3] must suffer. *Commonwealth v. Carolina Coach Co. of Virginia*, 66 S.E.2d 572 (Va. 1951).

The constitutionality of the "separate but equal" doctrine, which permits segregation of the races if facilities for each race are equal, has been consistently upheld.[4] Under this doctrine facilities do not have to be identical, but only substantially equal.[5] However, recently the courts seem to interpret substantially equal as practically identically equal.[6] The constitutionality of segregation statutes does not depend upon either the number of persons involved[7] or the frequency of the discriminatory incidents affecting one person.[8] The courts have held that, though such a statute be constitutional, the enforcement or interpretation of it might be unconstitutional.[9] Opposed to group segregation is the right of the individual to equal

1. VA. CODE ANN. (1950) § 56-326 "All motor carriers of passengers . . . shall separate the white and colored passengers . . . and set apart and designate in each motor vehicle a portion thereof or certain seats therein to be occupied by white passengers and a portion thereof or certain seats therein to be occupied by colored passengers. . . ." § 56-327 ". . . carriers . . . shall make no difference or discrimination in the quality or convenience of the accommodations provided for the two races. . . ." § 56-328 ". . . no contiguous seats on the same bench shall be occupied by white and colored passengers at the same time . . . ."

2. Italics supplied by writer.

3. Italics supplied by writer.

4. E.g., Chesapeake & O. Ry. v. Kentucky, 179 U.S. 388 (1900); Briggs v. Elliott, 98 F.Supp. 529 (1951). Doctrine is first set forth in Plessy v. Ferguson, 163 U.S. 537 (1896); but see Note, *Plessy v. Ferguson Reexamined*, 49 COL. L. REV., 629 (1949). The doctrine has been strongly criticized, *e.g.*, Note, 30 NEB. L. BULL. 69 ("This doctrine should be irretrievably interred").

5. McCabe v. A.T. & S.F. Ry., 235 U.S. 151 (1914).

6. See McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Davis v. Commonwealth, 182 Va. 760, 30 S.E.2d 700 (1944).

7. *See* Mitchell v. United States, 313 U.S. 80, 97 (1941).

8. *See* Carter v. School Bd., 18 F.2d 531, 534-535 (4th Cir. 1950); Corbin v. County School Bd., 177 F.2d 924, 926 (4th Cir. 1949).

9. Yick Wo v. Hopkins, 118 U.S. 356 (1886); *cf.* Society of Good Neighbors v. Van Antwerp, 324 Mich. 22, 36 N.W.2d 308 (1949).

protection of the law[10] which has been an undercurrent of several vigorous dissents[11] and recently the basis of a few majority opinions.[12] Upon the basis of individual rights the United States Supreme Court has struck down discrimination in interstate commerce,[13] in restrictive covenants[14] and in education on the graduate and professional level in state-supported schools.[15] However, in other areas subjugation of individual rights to group segregation based on theories of states rights[16] have been upheld and followed through stare decisis.[17]

The instant case presents a clear conflict of these two ideas: group segregation versus individual rights. The majority opinion, almost in toto, founds its support on the early case of *Plessy v. Ferguson*, where the court was concerned with balancing the equities between races rather than individuals. This court admits that its definition of discrimination is not based on equality of treatment, since one might have to stand "and thus undergo a minor inconvenience not then incurred by others."[19] The court declined to give any significance to any of the petitioner's cited cases,[20] and dismissed them because none dealt with the "precise question here presented."[21] Thus the majority reached the conclusion that the law in regard to the question of racial segregation had not changed since 1896,[22] nor have any possible reasons arisen for the court to change it now.

The vigorous dissenting opinion, setting forth the opposing doctrine of individual rights, deserves separate discussion in view of this unusual stand by a supreme court justice in a southern state.[23] His concise analysis of the

10. This principle was first expounded in dissent by Justice Harlan in Plessy v. Ferguson, *supra* note 4 at 552.

11. *E.g.*, Plessy v. Ferguson, *supra* note 4 at 552-64 (Justice Harlan); Slaughterhouse Cases, 16 Wall. 36, 111-124 (U.S. 1873) (Justice Bradley); Henderson v. Interstate Commerce Commission, 80 F.Supp. 32, 39-42 (Md. 1948).

12. Henderson v. United States, 339 U.S. 816 (1950); McLaurin v. Oklahoma State Regents, *supra* note 6; Sweatt v. Painter, *supra* note 6; Shelley v. Kraemer, 334 U.S. 1 (1948); Mitchell v. United States, *supra* note 7; Carter v. School Bd., *supra* note 8; Corbin v. County School Bd., *supra* note 8.

13. *E.g.*, Henderson v. United States, *supra* note 12; Mitchell v. United States, *supra* note 7.

14. Shelly v. Kraemer, *supra* note 12. *Cf.* Buchanan v. Warley, 245 U.S. 60 (1917) (racial zoning).

15. McLaurin v. Oklahoma State Regents, *supra* note 6; Sweatt v. Painter, *supra* note 6.

16. See discussion of state's right to protect local custom in Chiles v. Chesapeake & O. Ry., 218 U.S. 71, 76-77 (1910).

17. Chesapeake & O. Ry. v. Kentucky, *supra* note 4.

18. *Supra* note 4.

19. Commonwealth v. Carolina Coach Co. of Virginia, 66 S.E.2d 572, 578 (Va. 1951).

20. Henderson v. United States, *supra* note 12; Buchanan v. Warley, *supra* note 14; Chance v. Lambeth, 186 F.2d 879 (4th Cir. 1951); Washington, B. & A. Elec. Ry. v. Waller, 289 Fed. 598 (D.C. Cir. 1923).

21. Commonwealth v. Carolina Coach Co. of Virginia, *supra* note 19 at 577.

22. The date of decision of Plessy v. Ferguson, *supra* note 4.

23. The writer's research fails to disclose any cases decided on the question of racial segregation in any southern state in which a dissent has been taken on the basis of individual rights.

more recent segregation-discrimination cases and similar Virginia statutes[24] was soundly reasoned and ably supported. It is the dissent's view that though the federal courts decided certain recent cases[25] under the Interstate Commerce Act,[26] their language defined discrimination *generally*[27] to be an abuse of the right of the individual to equal protection of the laws,[28] and thus applicable to *intra*state[29] commerce. If the criterion of discrimination is to be the effect on the individual rather than the group, the distinction between interstate and intrastate traffic is immaterial. Since an interstate Negro passenger would not be refused this seat,[30] it is discrimination to this individual petitioner, an intrastate passenger, to be refused this seat.[31] Virginia has an almost similar statute[32] which regulates segregation on electric vehicles but which prohibits contiguous seating *"unless or until"*[33] all of the other seats . . . shall be occupied."[34] The dissent treats all segregation statutes as *pari materia* so that the "unless or until" limitation should apply to all.[35] As a result of this reasoning the dissent is able to hold for the petitioner, and still uphold the validity of the statute.

The dissent in setting forth the definition of discrimination as being an abuse of the rights of the individual, at the same time upholding the constitutionality of segregation statutes, creates a conflict within its own opinion, since it would seem that individual rights per se are incompatible with segregation. However, this is unimportant since the constitutionality of this statute was never questioned. Should this case come before the United States Supreme Court it would seem to present a proper opportunity for that Court to sustain the dissent concordantly with its present trend.

DOMESTIC RELATIONS — ANCILLARY ACTION FOR FOREIGN DIVORCE ENJOINED

Pending final judgment in a separation action brought by defendant's wife in a New York court, wherein defendant had appeared generally, defendant established residence in the Virgin Islands where he sued plaintiff

24. VA. CODE ANN., §§ 56-390, 56-391, 56-392 (1950) (regulating segregation on electric railways); VA. CODE ANN., §§ 56-396, 56-397 (1950) (regulating segregation on steam railroads); VA. CODE ANN., §§ 56-452, 56-453 (1950) (regulating segregation on steamship lines).

25. Henderson v. United States, *supra* note 12; Mitchell v. United States, *supra* note 7; Chance v. Lambeth, *supra* note 20.

26. 24 STAT. 380 (1887), 49 U.S.C. § 3(1) (1946).

27. Italics supplied by writer.

28. Commonwealth v. Carolina Coach Co. of Virginia, *supra* note 19 at 579.

29. Italics supplied by writer.

30. Morgan v. Commonwealth, 328 U.S. 373 (1946) (segregation statute in instant case held unconstitutional on an interstate commerce basis). In New v. Atlantic Greyhound Corp., 186 Va. 726, 43 S.E.2d 872 (1947), it was held that the Morgan case only applied to interstate passengers, not intrastate passengers.

31. Commonwealth v. Carolina Coach Co. of Virginia, *supra* note 19 at 580.

32. VA. CODE ANN., §§ 56-390, 56-391, 56-392 (1950).

33. Italics supplied by writer.

34. VA. CODE ANN., § 56-392 (1950).

35. Commonwealth v. Carolina Coach Co. of Virginia, *supra* note 19 at 581.