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SEGREGATION OF PASSENGERS ON COMMON CARRIERS ON BASIS OF RACE.

By J. R. RICHARDSON*

The practice of Motor Bus Carriers in southern sections of our country to segregate passengers, on the basis of race as a matter of right, is being challenged by actions in the state and federal courts. In studying the circumstances of various cases, one is led to the conclusion that the suits are part of a planned, but not as yet well organized program, to break down various racial barriers. A further conclusion that the movement is closely tied in with a general civil rights agitation with its unfortunate attendant political aspects is inescapable. One finds it practically impossible to discuss the law on this subject without commenting on the broader phases so closely allied are they found to be. It is not our intent to display the existence of any prejudices, if such there be, nor to promulgate any propaganda either pro or con. Yet one's thought must leave its indelible imprint on the written word, and an opinion, though erroneously conceived, may lead to fruitful ends.

Our topic is one which is vitally alive and of immense interest to all as we seek to live together and demonstrate that ours is the better way of life in a world that is, voluntarily or not, aligning itself in opposing camps for a showdown on the right of democratic government to survive in what has not as yet reached the proportions of a "shooting war"

On January 30, 1948 what is called a "discrimination case"¹ by the trade was tried in the District Court of the United States for the Eastern District of Kentucky at Lexington before the Honorable H. Church Ford, Judge. The writer's general interest in the principle involved was augmented by his having taken part in the case, thereby culminating in further thought and research, the results of which are submitted for consideration of the layman and lawyer alike.

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¹ Ernest C. Preston, Jr. v Southeastern Greyhound Lines (No. 562—Civil—unreported at this writing).

Preston, a resident of Roanoke, Virginia, and student at Kentucky State College, a school maintained by the Commonwealth at Frankfort, Kentucky, for Negroes, purchased a bus ticket from Frankfort to Roanoke, boarding the bus at Frankfort. He took a seat in the front portion of the bus, was asked by the driver to move to the rear and, upon persistent refusal, was removed by two city patrolmen.

This case had all the earmarks of a planned test case, as the passenger very calmly refused to take a rear seat, stating that he had the right to sit anywhere on the bus by reason of a recent United States Supreme Court decision. Cross examination elicited the fact that he referred to the "Morgan Case" and that it was part of the curriculum at Kentucky State College. This case will receive detailed treatment hereinafter.

The petition apparently claimed federal jurisdiction on diversity of citizenship rather than on violation of constitutional guarantees against discrimination as applicable to common carriers engaged in interstate commerce. Allegations were to the effect that the complainant took a seat provided by the company for passengers and that he was wrongfully ejected therefrom in a violent and forceful manner. Damage by reason of personal injury and delay in transportation was claimed.

The defendant produced and filed a certified copy of its rules and regulations on file with the Interstate Commerce Commission. The pertinent part as to seating is as follows

"The carrier reserves to itself full control and discretion as to seating of passengers and reserves the right to change such seating at any time during the trip."

The rule as set out is published in the present effective tariffs of the company and also appears in its timetables and printed notices to the public posted in its stations. While the defendant produced transportation experts who testified as to the reasonableness and necessity of segregating colored and white passengers due to custom, usage, and tradition in the South, the court did not submit to the jury the question of reasonableness of the rule reserving the right to seat, ruling that the company had the right to seat its passengers in view of the regulation being on file with the Interstate Commerce Commission, thereby having the force and effect of a statute. The only issue submitted was whether or not more force was used than was reasonably

necessary to remove the plaintiff upon his failure to take a designated seat. The proof on this point was preponderantly in favor of the defendant, and the jury, for the defendant had filed its motion for a jury trial, found accordingly

It cannot be successfully argued that a common carrier should not have the right to seat its passengers. This certainly is a reasonable rule. However, the question naturally arises as to whether segregation by seating whites from the front and colored from the rear is a reasonable application of the right to seat. This issue could well have been submitted to the jury. Admittedly, a certain woman might not wish to sit next to a certain man or one person might prefer not to sit next to one who had been drinking intoxicants, or next to a restless child. When the seating is based arbitrarily on color, the question of reasonableness is brought forcefully to the forefront. If at all, it must be justified upon grounds of preserving the peace.

This case brings another point to one's attention, namely, that in reality by reason of the Federal Judge's right to comment on the evidence before the case is submitted to the jury, the court has the last and most effective argument. The court stated that it was impressed by the fact that eight impartial witnesses appeared from different cities and states for the defendant and not one for the plaintiff. In equity it could have been pointed out that there were no other colored passengers on the bus who possibly would have made witnesses, and that the plaintiff lacked equal facilities for producing witnesses. Actually it seems the plaintiff was not prejudiced as these comments did not change the outcome which was quite evident from the proof adduced.

Before leaving this case, the writer desires to point out that the plaintiff was represented by a young colored attorney, a graduate of the University of Michigan College of Law, whose court room manner was admirable and who showed no lack of legal ability by reason of his color.

The *Morgan* case,² to which reference has heretofore been made, and which seems to have aroused a flurry of suits of a like nature, was one in which Irene Morgan, a colored woman, became a passenger on a bus traveling from Gloucester County, Virginia, to Baltimore, Maryland. Consequently she was an inter-

²*Morgan v Virginia* (Case 704, announced June 3, 1946), 90 L. Ed. 982, 66 Sup. Ct. 1050.

state passenger and the bus company, in transporting her, was engaged in interstate commerce.

In order to make room for a standing white passenger during the trip, the driver asked Miss Morgan to move to a seat in the rear and this she declined to do. Thereupon the passenger was arrested and later convicted under the Virginia Race Separation Act.³ This act is worthy of some consideration and comment, as it is stringent and in some respects novel. It requires all passenger motor vehicle carriers operating as common carriers to

“Separate the white and colored passengers in their motor busses and set apart and designate 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.”

The act prohibits any “difference or discrimination in the quality or convenience of the accommodations provided for the two races” It gives the driver full power to designate the seats to be taken, makes him the judge of race when a passenger refuses to disclose same and constitutes each bus driver, while actively engaged in the operation of his bus, a special policeman with all powers of a peace officer in enforcing the provisions of the law. If a passenger refused to take a designated seat, he could be ejected without refund on the ticket and neither the bus company nor the driver was amenable to law in an action for damages. A penalty of \$50.00 to \$250.00 was provided for each offense upon conviction, and the driver was liable for a fine of \$5.00 to \$25.00, upon failure to enforce the provisions of the act.

Aside from considerations of discrimination this act would seem to place “due process” at a minimum. None has been found that attempted to go quite so far with arbitrary provisions.

Having been fined under this law, Irene Morgan took an appeal to the Supreme Court of Appeals of Virginia.⁴ The lower court was affirmed on the grounds that the act was a valid exercise of police power reserved to the state, this right outweighing whatever slight burden it might place on interstate commerce.

By successive steps the case reached the Supreme Court of the United States, as shown, and in that court the validity of

³ VIRGINIA CODE, Secs. 4097-z—4097-dd.

⁴ *Morgan v. Commonwealth*, 184 Va. 24, 34 S.E. (2) 491 (1945).

provisions for segregation of white and colored passengers as discriminatory was not raised. The question before the court was the contention that the Virginia statute was unconstitutional when applied to an interstate passenger, because it thereby created and imposed an undue burden on interstate commerce and consequently was repugnant to the Federal Constitution which grants to Congress the exclusive power to regulate interstate commerce.⁵

In its decision the Supreme Court declared the Virginia law unconstitutional and void on the above grounds. The only dissent was expressed in a written opinion by Mr. Justice Burton (formerly a United States senator from Ohio and the most recent addition to the court)

The court made it quite clear that it was not passing on a regulation of the bus company itself, but rather upon a state statute which attempted to regulate passenger traffic on busses engaged in interstate commerce.

In the course of its decision the court expressly approved of and relied on the case of *Hall v DeCuir* ⁶ In the *DeCuir* case, which was decided seventy years ago, a statute of the State of Louisiana forbade any discrimination between or separation of passengers on public carriers on account of race or color. A public carrier engaged in interstate traffic by steamboat, in pursuance of a custom and rule adopted by the carrier, required that white and colored persons occupy separate decks of the boat. It enforced this rule against a colored passenger in Louisiana, with the result that the passenger invoked the state statute as a basis for a successful suit for damages against the carrier. The Supreme Court reversed the judgment on the grounds that the state statute was an attempt to regulate interstate commerce and as such was unconstitutional.

The *DeCuir* case and the subject case involve the validity of statutes of directly opposite effect in that the former forbade segregation and the latter required it. The cases are of course not inconsistent. On the contrary the older case is authority for the case under consideration. If one wonders at a statute forbidding racial segregation in Louisiana note that the date shows the case to involve a piece of reconstruction days legislation.

Constitution, clause 3, sec. 8, art. 1.

⁶ 95 U.S. 485 (1877).

As we understand the *Morgan* decision, in the light of the *DeCuir* case, they hold that the power to regulate interstate commerce rests exclusively in Congress, even though it be true that Congress has not exercised this power to its full extent and has refrained from enacting legislation dealing with certain phases of interstate commerce, and any state legislation interfering with such commerce or burdening in any degree is invalid as an encroachment on a right entrusted to Congress though not exercised through legislation.

Mr. Justice Frankfurter, in concurring, stated that the *DeCuir* case "is controlling" as it had on occasion been approvingly cited and never questioned. The justice also said.

"The imposition upon national systems of transportation of a crazy-quilt of state laws would operate to burden commerce unreasonably."

To carriers it is highly significant that this most recent decision so strongly relies on the *DeCuir* case, for its effect is that when a carrier is engaged in interstate commerce, individual states have no power or right to enact laws interfering with the carrier's own regulations and that no valid law interfering with a carrier's regulations can be enacted except by Congress.

Investigation discloses that in addition to Virginia the following states have segregation statutes

Tennessee	Alabama
Georgia	Florida
South Carolina	Mississippi
Texas	North Carolina
Arkansas	Louisiana
Oklahoma	Kentucky (trains only)

The following named states have anti-segregation statutes.

California	Michigan
Colorado	Minnesota
Connecticut	Nebraska
Illinois	New Jersey
Indiana	New York
Iowa	Ohio
Kansas	Pennsylvania
Massachusetts	Rhode Island
Washington	Wisconsin

It can readily be seen that where interstate commerce is involved the decision in the *Morgan* case casts a cloud on the validity of all these statutes, whether requiring or prohibiting segregation.

Speaking for the court in the *DeCuir* case, Mr. Chief Justice Waite said

“Inaction by congress is equivalent to a declaration that interstate commerce shall remain free and untrammelled. Applying that principle to this case, congressional inaction left Benson, the carrier, at liberty to adopt such reasonable rules and regulations for disposition of passengers upon his boat, while pursuing her voyage within Louisiana or without, as seemed to him most for the interest of all concerned.”

In the opinion it was pointed out that a steamer carrying passengers “interstate” may have separate cabins and dining rooms for white and colored passengers for the plain reason that Congress has not prohibited it. Steamers carrying for hire are bound, if they have suitable accommodations, to take all who apply for passage, unless there is reasonable objection to the conduct, or character of the applicant. And the right to passage is subject to reasonable regulations as the proprietors may prescribe.

Corresponding views are expressed by the Supreme Court of Michigan in an analogous case,⁷ wherein the distinction between the right of an applicant to be admitted on board and his claim of right to dictate what part of the vessel he shall occupy is clearly drawn. The high degree of care required of a carrier for the safety of its passengers carries with it the commensurate right it is said to control occupation of accommodations.

In *Railroad Company v Miles*⁸ the court held that it is not an unreasonable regulation to seat passengers so as to preserve order and decorum and to prevent contacts and collisions arising from natural or well known customary repugnances which are likely to breed disturbances where white and colored passengers are huddled together without their consent.

Another old federal case⁹ upheld distinctions between the races based upon the “established wages, customs and traditions

⁷ *Day v. Owen*, 5 Mich. 520 (1888).

⁸ 55 Pa. 209 (1867)

⁹ *Flersy v Ferguson*, 163 U.S. 540 (1895).

of the people” and the “promotion of their comfort and preservation of public peace and good order”

In *Chiles v C. & O Railway Company*,¹⁰ a Negro interstate passenger with a ticket from Washington, D. C., to Lexington, Kentucky, sued the railroad for excluding him from a car set apart for white passengers and requiring him to occupy a car for colored only, when the train crossed into Kentucky from West Virginia at Ashland, Kentucky

The Supreme Court commented on the Kentucky Statute¹¹ requiring railroads to furnish separate coaches for white and colored passengers but put it out of consideration as having no application to interstate trains, as the defendant rested its defense not on the statute but its rules and regulations (see footnotes)

The court said we must bear in mind that we are not dealing with a statute which seeks to regulate interstate commerce beyond its powers to do so but rather a private person, to wit the railroad company and its rules and regulations. The court continued to the effect that regulations which are induced by the community for which they are made and upon which they operate cannot be said to be unreasonable.

It is an obvious observation that segregation by railroads is a much more complicated and burdensome thing than by motor busses when one considers that an extra car and even an extra pullman might become necessary for one colored passenger in order to maintain equal and like accommodation. Should the railroad choose not to adopt rules in accord and to rely on the statute, it would be held an undue burden on commerce.

In the section on carriers in American Jurisprudence,¹² it is set out that

“In general, those rules and regulations of the carriers are deemed reasonable which are necessary to enable such carrier to perform the duties it has undertaken, to secure to itself its just rights and to conserve the safety, convenience and comfort of its passengers.”

¹⁰ 125 Ky. 299, 101 S.W. 386 (1909), affirmed in 218 U.S. 71 (1910).

¹¹ Ky. R. S. 276.440. On Sept. 23, 1946, the U. S. Court of Appeals for District of Columbia, in case of *Matthews et al. v Southern Railway*, 157 F. (2) 609, held that the Morgan case was applicable to train travel as well as motor bus.

¹² 10 AM. JURIS. 1020.

Again in *ELLIOTT ON RAILROADS*¹³ we find the following

“Rules and regulations in regard to separate cars for ladies and their escorts or providing for the segregation of white from colored passengers have also been upheld as reasonable when equal accommodations are offered to all.”

In another Kentucky case¹⁴ the direct question at issue was not segregation but the right of the bus company to limit the number of passengers to its seating capacity. The plaintiff, a colored woman, was refused transportation because no seat was available.

In an opinion by Judge Richardson the court said.

“In the discharge of its duties as a public carrier, a bus company must use their conveyances and busses set apart by it for that purpose, for the transaction of passengers without favor or discrimination, to all persons, offering themselves for transportation, who pay or are willing to pay the customary charges, unless such person is objectionable because of contagious disease, abnormal condition or due to bad, dissolute or doubtful character.”

The court continued with the observation that a common carrier has the right, in the absence of statute, to prescribe rules and regulations for the separation of white and colored passengers, giving equal and like protection and accommodations to both. This last is only dicta as the question of segregation was not an issue.

We believe it a sound conclusion that a carrier, independently of any statute, has a legal right to make reasonable rules for the separation of passengers belonging to different races, provided reasonable conditions of equality of accommodations are observed. This proposition has been sustained by various state and federal court decisions as shown.

There has been a considerable lapse in time as to litigation on segregation cases and the current decisions of necessity refer to very old cases. Aside from considerations of state statutes and interstate commerce which are mainly in issue now, there are other factors which will be discussed later as will “reasonable” as applied to transportation rules.

One will scarcely dispute the right of a motor bus company to operate on the same schedules two identical busses, the one for

¹³ Vol. 1, Sec. 200.

¹⁴ *Brumfield v. Con. Coach Corp.*, 240 Ky 1, 40 S.W (2) 356 (1931).

white and the other for colored, nor the right of a railway to operate duplicate coaches, dining cars and pullmans. We would then have equal and like accommodations, but with resultant economic ruin.

Certainly transportation officials did not wish this problem on themselves. It is an additional and severe headache to be met in a business that has its quota. We cannot conceive of a bus or tram company official sitting in his office and carrying his prejudices into the business to the extent that the company's net return is lessened. Certainly such official has no personal desire to enforce segregation. He is motivated by sound business policies, attempting to have satisfied customers and increased revenues.

It cannot be denied that carriers serving the southern part of the United States must meet and deal with white prejudices which cannot be disregarded.

Rightly or wrongly as the case may be, there are reasons for these prejudices. No one will argue that a different situation does not exist in the South due to population percentages of the races.

In the United States there is a population of 131,666,275. Of this number 12,865,518 are colored.¹⁵ Of this number a total of 8,111,645 or approximately 66-2/3% are residents of eleven southern states with a total white population of 24,837,798.

Alabama and Georgia have a population which is one-third Negro. Forty per cent (40%) of Louisiana's population is Negro, as is that of South Carolina, while Mississippi's is 50%. New York state has 571,221 Negroes within its boundaries, yet this is only 4% of the total. Other percentages of colored population are Pennsylvania 5%, California 2%, Ohio 5% and Illinois 4%. The colored population of Wisconsin and Minnesota is in each instance less than 1%. Seven states, namely, Idaho, Nevada, New Hampshire, North Dakota, South Dakota, Vermont and Wyoming each have less than 1,000 Negroes as a part of their population.

These figures are the factual basis for the existence of a real problem wherein the white population of the South seek to maintain dominance in their economic, political and social structures.

¹⁵ U.S. Census 1940 (all figures and percentages used).

The writer knows from first hand information that motor bus companies serving the South have fought and continue to fight to meet the situation from their angle and handle it with the greatest justice possible to all.

Drivers are instructed to bear in mind that it is the company's duty to handle all passengers without regard to nationality or color, even though the company has the right, and in all its publications notifies the passengers that it has the right, to seat them. It is emphasized that it is essential that there be no discrimination of any kind against any passenger, whether white or colored, and that all seats be substantially equal in comfort and convenience, being not only a requirement of law but of common sense.

It is pointed out to drivers that the accomplishment of the duty to assure the comfort, pleasure, congeniality, security and safety of all passengers and to preserve the public peace and good order depends primarily upon courtesy, tact and common sense exercised by drivers in handling the seating of passengers.

It is further brought out that the motor bus is, in fact, a large automobile with close, personal contacts necessary to such a vehicle. Cognizance is taken of "customs, usages and traditions" in the South as to commingling of the races. At the same time the fact is not ignored that a substantial part of the company's revenue comes from colored patrons. Force is prohibited on the part of the driver while the advantages of reasoning and peaceful persuasion are shown to be desirable in seating passengers.

Another interesting and very recent case on the subject was tried before Judge John Paul in the District Court of the United States for the Western District of Virginia at Roanoke.¹⁶ The decision in the case was announced on December 30, 1947. The *Simmons* case, unlike the *Morgan* case, did not involve a statute of Virginia, such differentiation having caused some confusion in the minds of the public, particularly among many Negroes as the court pointed out.

As to the facts briefly, the plaintiff, a Negro minister and resident of Roanoke, Virginia, purchased a bus ticket to Salisbury, North Carolina, to attend the annual synod of his church. He took a seat in the forward part of the bus and was shortly

¹⁶ *Simmons v. Atlantic Greyhound Co.*, 75 F. Supp. 166 (1947).

asked by the driver to move to the rear. This he refused to do and, after a discussion with the driver and station manager, left the terminal without accepting a refund.

The plaintiff alleged he was inconvenienced, delayed and missed various church meetings. By this action the plaintiff sought to establish the right to be free of any compulsion in regard to a choice of seats on defendant's bus where that compulsion is based solely on the plaintiff's race.

The question of jurisdiction in this case is of interest and merits discussion. The district courts of the United States are courts of limited jurisdiction. Their original jurisdiction is fixed by section 24 of the Judicial Code.¹⁷

The plaintiff and defendant were both residents of the State of Virginia, hence it seems that the following sub-sectional provisions were applicable as to jurisdiction.

"(1) United States as plaintiff: Civil suits at common law or in equity—of all suits of a civil nature—where the matter in controversy—arises under the constitution or laws of the United States.

(8) Suits for violation of interstate commerce laws—of all suits and proceedings arising under any laws regulating commerce.

(14) Suits to redress deprivation of civil rights—of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation under color of any law, statute, ordinance, regulation, custom or usage, of any state of any right, privilege or immunity secured by the constitution of the United States, or of any rights secured by any law of the United States providing for equal rights of citizens of the United States or of all persons within the jurisdiction of the United States."

The plaintiff did not allege violation of any interstate commerce law, and it has been determined that at the pre-trial conference he expressly disclaimed any intention to rely on subsection (8) above quoted.

In line with such disclaimer it is admitted that any claim of discrimination in treatment of passengers must first be passed upon by the Interstate Commerce Commission.¹⁸ This rule in the case arising in Texas involves the reasonableness of freight rates but is considered the leading case on the general subject

¹⁷ 28 U.S.C.A. Sec. 41.

¹⁸ *Texas & P Ry. Co. v Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 27 Sup. Ct. 350 (1907)

of discrimination in allocation of coal cars.¹⁹ *Mitchell v. U S.*²⁰ states the rule on discrimination in accommodations to passengers.

It seems very soundly argued by counsel for the defendant that in order to show jurisdiction the plaintiff must rely on subsections (1) and (14) of section 41 of the Judicial Code above set out. Subsection (14) was obviously inserted in the act to provide a federal remedy for violation of the so-called civil liberties act²¹ as follows

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities, secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress."

For the purpose of this case, it is apparent that subsection (1) of the Judicial Code is no broader in general terms than is subsection (14), consequently it was argued that plaintiff's cause of action rests on whether or not his civil rights have been involved.

The plaintiff, quite naturally it seems, contended very vigorously that the defendant was doing by authority of a regulation that which the Supreme Court in the *Morgan* case, *supra* had held could not be done under state statute. This is in a manner of speaking true, yet it has been shown that this argument would be unavailing.

The defendant on its part contended that as a matter of *fact* its driver was acting under a company regulation and not the Virginia Statute and as a matter of *law* could not have been acting under the authority of the statute for racial segregation because, prior to such occurrence complained of, the Supreme Court had finally held the statute unconstitutional and void and further not applicable to interstate commerce.²²

The court in finding for the defendant said that the defendant was entitled to a directed verdict, holding that the plaintiff

¹⁹ See also *Morrisdale Coal Co. v Penn. Ry. Co.*, 230 U. S. 304, 57 L. Ed. 1494, 33 Sup. Ct. 938 (1913)

²⁰ 313 U. S. 80, 85 L. Ed. 1201, 61 Sup. Ct. 873 (1941).

²¹ 8 U.S.C.A. Sec. 43.

²² *McCabe v. A. T. & S. F Ry Co.*, 235 U.S. 151, 59 L.Ed. 169, 35 Sup. Ct. 69 (1914).

showed no invasion of rights guaranteed by the "Civil Rights Act" or the Fourteenth Amendment, the pertinent part of which is as follows.

" no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States "

The court stated as follows.

"The Supreme Court has consistently held that there is no infraction of the Fourteenth Amendment by a requirement for separate accommodations for white and colored persons on public carriers so long as the accommodations are equal."

The court further held in line with other decisions that the power to regulate interstate commerce rested with Congress. In commenting on plaintiff's argument that defendant sought to do by regulation that which had been held could not be done under a state law, the court said this argument missed the point, that it failed to recognize the distinction between the action of a state in attempting to regulate the business of a carrier in respect to matters which are the sole concern of Congress, and the right of the carrier to operate its own business subject to such regulations as Congress may impose.

Considerable mention has been made of carriers' right to make regulations. By the Motor Carriers Act of 1935,²³ the regulation of motor carriers engaged in interstate commerce was vested in the Interstate Commerce Commission.

By section 216(A) of the act it is made the duty of such carriers to "establish just and reasonable regulations and practices relating to rates, fares and charges, and to the issuance and form of tickets, the carrying of baggage and facilities for transportation" Carriers are required to file with the Commission and to keep open to public inspection "tariffs showing all rates, fares and charges for transportation and all services in connection therewith, of passengers or property "

From the above act and by virtue of authority cited in the *Abilene Oil Company* case, *supra* it is shown that the proper procedure to attack an interstate carrier's regulations on any ground is by original action in form of hearing before the Interstate Commerce Commission. The matter could then by proper

²³ 49 STAT. 543, 49 U.S. C. A. 301 *et seq.*

appeal therefrom be adjudicated by ultimate authority of the courts.

Due to dicta in recent cases and adverse decisions therein there seems little room for doubt that such action will be taken.

We accept the broad proposition that the right to seat passengers is a reasonable rule and right of the carrier. As previously set out earlier in this article, we cannot but wonder if seating of white persons from the front and colored from the rear will be held to constitute an arbitrary exercise of that right. It may well be that proof before the Commission will show that such seating is reasonably necessary in the South, while the reverse is true in the North. A suggestion is submitted that carriers to which the problem is relevant should conduct impartial surveys to accurately determine what portion of the public they serve actually desires segregation of the races.

The above expressed doubt that the reasonableness of segregation will be upheld is expressed with full knowledge of a case recently decided in the sixth judicial circuit by a three judge court²⁴ wherein there is an examination of the rule (*idem* pp. 912-914) with the court reaching the conclusion that

"It therefore being clear that racial segregation of interstate passengers is not per se forbidden by the Constitution, the Interstate Commerce Act or any other act of Congress, we turn "

If racial segregation were a violation *per se*, it would in effect mean that a colored person is guaranteed the right to sit with a white person on an interstate carrier. No one should attempt to maintain such an absurd proposition. It is maintained however that a colored person has that right if it is required in the exercise of "like and equal accommodations" The question will eventually be raised as to whether the rear of a bus meets such provisions. The right to equal and like accommodations should not be confused as a right to commingle as such.

It must be borne in mind that the *Morgan* case prohibits even a slight burden on interstate commerce and the law which resulted in the necessity for a passenger to change seats at a state line was such burden. When and if the Interstate Commerce Commission has the segregation rule before it, due consideration

²⁴ Henderson v U.S., 63 F Supp. 906 (1945).

must and will be given the question from the angle of constituting an unnecessary burden.

As stated at the outset in this article, these segregation cases, which have recently been and are being litigated in various jurisdictions, seem definitely to have been inspired, at least in part, by President Truman's civil rights program with its political coloration, the "Southern Revolt." This program including anti-poll tax legislation, anti-lynching and the Fair Employment Practices Commission would undoubtedly be looked upon with less suspicion, if not more favor, were it not for the fact that the proponents seek to woo votes in the process.

It has been well said that morals cannot be legislated into the hearts and souls of the people. It appears as equal a truism that social equality and justice cannot be had by legislation. It must be an awakening or consciousness that comes from within voluntarily, but perhaps with proper stimulation. Organizations that publish "handouts" or "dodgers"²⁵ advising colored persons that they do not have to ride "Jim Crow" do not to our mind add anything of substance to a problem that needs a sane, orderly and dignified approach to a solution.

Possibly this awakening may partially come about by a realization of the cost of segregation. Can we in a southern economy, admittedly none too sound, afford the "luxury" of segregation? It is probable that the reader noted that Ernest C. Preston was a student at Kentucky State College without giving consideration to the fact that this was a separate physical plant with separate instructors maintained at an additional cost by the taxpayers. The same is true throughout the South, along with the maintenance of municipal parks, playgrounds and swimming pools for the colored. It is a definite tax burden to be assumed and will be increasingly so with litigation being instituted to admit colored persons to state institutions or bring graduate schools in colored schools up to a comparable level.

It is true that our minority races must have equal protection before the law as to life, limb and property. In the main this has been achieved at least theoretically—practically perhaps no, if 100% equality is the desired objective. Note that lynchings which were formally considerable are now at a very

²⁵ Inter-racial Workshop, 916 N. St. N.W., Washington, D. C., Congress of Racial Equality, 2929 Broadway, New York 25, N. Y.

low ebb, not indicating that lawlessness has the upper hand in the South.²⁶ This is said with the firm conviction that the taking of one life by mob violence is a crime against humanity and good government. But there is something to be said for the southerners' proposal that picket-line violences, so common to our industrial sections, be included in the list of "mob" actions which would be made a federal offense by proposed legislation or should not, in justice, peace officers be penalized for failure to use "diligent efforts" to solve *any* felony?

In reality it is submitted that there is no absolute equality for man irrespective of his color or creed, and it has ever been so. So long as there is property to be gained, power or prestige to be wielded, and advantages of any nature to be attained in public or private life, so will innate greed mitigate against the forces that seek practical equality.

Lest the writer be branded a pessimist, it might be well to recognize that medical science has conquered heretofore so-called incurable disease. The germ that flourishes in damp, dark and hidden recesses often yields to the bright sunlight of day, as do fear and intolerance yield to enlightenment.

It is true that penalty for murder does not erase the crime, yet organized society must attempt to remove man-made barriers. It is possible that legislation proposed in the civil rights program is a step in the right direction if correctly drawn and judiciously applied. However, aside from the fact that the South is trying to put its own house in order, we entertain a serious doubt that we are ready for such legislation at the present time.

One's neighbors may not have designs on his home, life or purse and yet decline to invite him into their homes or sit with him in a public conveyance. Yet had he designs of sufficient intensity the home would be violated, the life endangered or the purse lifted irrespective of statutory prohibitions. So it seems that a legislative enactment will not bring about social equality or commingling of our people.

²⁶ Most correct data available show that lynching in 1942 totalled 6 negroes; 1943, 3 negroes; 1944, 2 negroes; 1945, 1 negro; 1946, 6 negroes. These figures contrast with a high, since 1900 of 105 lynchings of colored persons in 1901. It is of further significant interest that since 1900 in the U.S. there have been lynchings of 1291 white persons and 3408 negroes. (Figures from Natl. Assn. for adv. of colored people, 20 W 40th St., New York, N. Y., and World Almanac 1943.)

We Americans have a sense of independence that rebels against prohibitions, yet equally developed is a sense of fair play and justice. It is believed that in time, the minority race can so improve its position that even such diametrically opposed races can live in harmony. As an example, one might look to North Carolina, southern both traditionally and geographically. The racial issue has ceased to be of any real consequence in that state. Only three of its twelve representatives in Congress were among seventy-four southerners who signed an ultimatum on the civil rights program. Twenty-eight years ago the poll-tax was abolished as a qualification for voters in that state. Its record of votes by both whites and negroes is high in comparison with that of its neighbors. Surely what has happened in one southern state can be brought about in another without agitation by federal legislation.

No thinking person can disregard the unsettled conditions of the world today. One truly looks upon the world political situation with great misgivings at a time when the freedom seeking people of the world look to this country for guidance. Is it not then a mistake to do that which stokes the fires of internal dissension when our combined forces of thought and energy are desperately needed in battle for what well may be the very survival of democratic processes in the broader sense?

The writer certainly does not have the answer to this momentous question which is a cornerstone to our political, social and religious well being, and which has drawn the attention of experts in the field.

However, it is sound counsel to consider the fact that we should not become obsessed with an irritating skin rash while the cancer of Communism eats at the vitals of our national existence, or it may well be that we will have equality forced upon us in that none has any rights, not even the right to clamour for them.