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there is, nevertheless, sound logic which will validate the rule.[15] After examining the procedural rules of the various states the Supreme Court decided that the rule followed by the majority of the states was the most adequate to bring before the jury the true evidence in issue in the simplest manner. Moreover, congressional inaction after the rules were reported to Congress would lead to the conclusion that Rule 35a was within the intent of the legislature.

JOHN H. CLARK, JR.

EFFECT OF MITCHELL vs. UNITED STATES ON THE DUTY OF THE COMMON CARRIER IN KENTUCKY TOWARD THE NEGRO PASSENGER

An Arkansas statute requires segregation of white and colored passengers and "equal but separate and sufficient accommodations." The demand for first class accommodations being practically negligible on the part of colored passengers, no separate first class facilities were provided for them. Instead, when a colored person applied for such accommodations he was given a drawing room for no additional charge. In Mitchell v. U.S.[1] the drawing rooms were all occupied and the plaintiff, a colored representative to the United States Congress, was required to occupy a second class car of marked inferiority in quality and comfort. On appeal from a decision of the Interstate Commerce Commission the Supreme Court held this to be a violation of the Fourteenth Amendment and "unjust discrimination" within the Interstate Commerce Act.[2]

Though a segregation statute that is intrastate in character has been permitted if its effect on interstate commerce is purely incidental[3] no state can impose upon interstate commerce standards of treatment for passengers,[4] this being reserved to federal authority. Since this is true, and the legislatures of certain areas have decided upon segregation as necessary, the carrier has been allowed to establish rules of segregation of its own. These have, in practice, no effect except in "Jim Crow" states, and are said to be reasonable if

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which the defendant could demand such a physical examination, which were closely related.

[15] "There is no reason for permitting the inspection and examination of property and chattels, and denying it with respect to the physical or mental condition of a party where that condition is in controversy. The law has not, and should not, create any immunity or sanctity of the human body from a reasonable search for truth in a judicial proceeding." Moore, Federal Practice Under the New Federal Rules (1938), (1940 Supp.) 2648, n. 2.

[1] 61 S. Ct. Rep. 873 (1941).

[2] 24 Stat. 380 (1887), 49 U.S.C.A. section 3 (1). In reference to this the court said there was no question of segregation, but only one of equality of treatment.

[3] South Cov. &.C. Ry. Co. v. Kentucky, 252 U.S. 399 (1919).

[4] Hall v. DeCuir, 95 U.S. 485 (1877).

induced by the general sentiment of the community for whom they are made and upon whom they operate.[5]

It is under such conditions as these that the Mitchell case arose. The court did not overrule the carrier's rules of segregation, similar to the local standard, but made a tacit acceptance, not abolishing segregation as long as equal accommodations are provided. The court said, "The supply of particular facilities of a carrier may be conditioned upon a reasonable demand therefor, but if the facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused." In view of precedent, the statute, the Interstate Commerce Act, and the Fourteenth Amendment it seems almost impossible that any less radical decision could be reached. Yet we find the Interstate Commerce Commission and the lower court both in support of the railroad's action.

It would seem that no new or startling doctrines of law have been propounded by the court, but rather an affirmation of previous decisions. In the case of *Chiles* v. *C. & O. Ry. Co.*,[6] affirming a decision of the Kentucky Court of Appeals, it was said that a railroad may, independent of the statute, require interstate colored passengers to occupy separate coaches if substantial equality in accommodations is provided. Another case, one that might be considered as a companion to the Mitchell case, due to the fact that Justice Hughes wrote both opinions, is that of McCabe v. Atchison T. & S. F. Ry. Co.[7] This, too, stated that equal facilities must be provided.

Though the Kentucky court seems willing to enforce equality in interstate commerce, there has been a seeming reluctance to either face or enforce all phases of the segregation[8] statute in Kentucky.[9] Perhaps this is a key to the importance of the Mitchell case. In this day of the all-inclusive nature of interstate commerce, the complaining party can generally appear before the Interstate Commerce Commission rather than seek redress first in reluctant state courts. Though there has been no restriction to the state courts when a Constitutional question is involved, the above method seems more direct when it can be established that interstate commerce is affected.

Having seen that the main problem to date has been the enforcement of the law, rather than the law itself, we are faced with one remaining problem. This is a question that in the past has been

[5] Chiles v. C. & O. Ry. Co., 218 U.S. 71 (1907).
[6] Supra, note 5. Also, 125 Ky. 299, 101 S.W. 386 (1907).
[7] 235 U.S. 151 (1914).
[8] Carroll's Kentucky Statutes (1936), sections 795, 796. Segregation required, but with "no difference or discrimination in the quality, convenience, or accommodation in the cars or coaches or partitions."
[9] Ill. Cent. Ry. Co. v. Com., 25 Ky. L. Rep. 295, 74 S.W. 1076 (1903); L. & N. Ry. Co. v. Com., 117 Ky. 345, 78 S.W. 167 (1904). Segregation suits defeated on technicalities when the equality of treatment question raised.

largely of academic interest, but in view of an apparent trend[10] to affirm and enforce equality between the races it promises to become more of a practical problem in the future. This is the question of the validity of segregation practices in themselves. Though considered, this issue has received no very recent serious treatment.[11]

Though not an unjust one within the meaning of the Interstate Commerce Act, segregation is certainly a type of discrimination—one that might be brought within the purview of the Fourteenth Amendment. The existence of segregation is itself a recognition of the feeling of a difference between the Negro and other races. It often seems to have become more than a mere exercise of police power, but a legalization of a social distinction, and this should not be a function of the law.

Though relations between the races are far less strained than previously, there remains prejudice and intolerance enough in certain areas to support the argument for segregation as a necessary precautionary measure in the exercise of police power.[12] It is the task of the court to face existing social conditions as well as express the fundamental concepts of the system. The two conflict here, however. If the question is resolved in favor of segregation as a necessary exercise of police power, as is probable today, it should be no more than minimum. It cannot be the policy of the courts to nurture the prejudices of a time, but anticipate increasing tolerance on the subject.

Not only does the argument of discrimination apply to the problem of racial segregation, but also to the possible discrimination between railroads and motor busses. The later not being required to segregate,[13] an additional burden is on the railroads in the form of enforced duplication or provision of extra or separate facilities.

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[10] Mitchell v. United States supra, note 1. Smith v. Texas, 61 S. Ct. Rep. 164 (1941); Missouri ex rel Gaines v. Canada, 305 U.S. 337 (1938).

[11] Plessy v. Ferguson, 163 U.S. 540 (1895). Distinguishing between "social . . . and political equality" the court held that the Fourteenth Amendment granted only political equality, and that hence segregation was not unconstitutional. Though the conclusion may be true, the grounds for it may be questioned for has the court the right to recognize social distinctions for such purposes? A more valid ground, and employed also by the court, was that of proper exercise of police power. Also see Murphy v. Western A.R. Co., 23 Fed. 637 (1895); Ohio Valley Ry. v. Lander, 104 Ky. 431, 47 S.W. 344 (1898), wherein the separate coach law was upheld as a reasonable classification of passengers.

[12] Quinn v. L. & N. Ry. Co., 98 Ky. 231, 32 S. W. 742 (1895); Louisville & E. Ry. Co. v. Vincent, 29 Ky. L. Rep. 1049, 96 S.W. 898 (1906). These are successful tort actions against railroads where passengers occupied sections other than set aside for them, violence resulting. It is interesting to note that these cases date to the turn of the century. Today one finds white and colored passengers traveling in the same motor busses without such friction.

[13] Brumfield v. Consolidated Coach Corp., 240 Ky. 1, 40 S.W. (2d) 356 (1931).

This is an important factor for consideration though the advent of motor bus transportation is recent enough not to have been within the contemplation of the statutes.

A review of the cases has been necessary to outline the general background before the effect of the Mitchell case on the duty of the common carrier in Kentucky towards the colored passenger can be determined. The principles laid down in the case are applicable to both intrastate and interstate commerce. If discrimination is a violation of the Fourteenth Amendment the principle applies to intrastate commerce. That amendment was directed at the states, and if under it equal facilities are necessary then it is the duty of the state to so enforce and the carrier to so provide. If the interstate carrier makes its own rules to comply with local custom it cannot claim that the rule for segregation justifies discrimination when equal facilities have not been provided, as such facilities are a prerequisite to a valid practice of segregation. If this is true, and equality is continually denied in segregation, the courts are justified in taking cognizance of that condition. Certainly, having already recognized the illegal character of discrimination, they may be forced to declare the practice of segregation illegal due to the fact that its prerequisite of equal treatment is not practiced and is the inevitable root of such discrimination.

Thus, for the time being, it is the duty of the common carrier to provide equal facilities if segregating, and not to interfere with the attempts of anyone to avail one's self of these facilities. This is a minimum requirement. If the conditions necessitating segregation are eventually recognized as nonexistent, it seems safe to predict that equally nonexistent will be the justifications of segregation as a necessary exercise of police power. Until then segregation is a harmless type of discrimination.

SCOTT D. BRECKINRIDGE, JR.