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CONSTITUTIONAL LAW--COMMERCE CLAUSE--FOREIGN COMMERCE--VALIDITY OF STATE STATUTE PROHIBITING RACIAL DISCRIMINATION BY CARRIER

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CONSTITUTIONAL LAW—COMMERCE CLAUSE—FOREIGN COMMERCE—VALIDITY OF STATE STATUTE PROHIBITING RACIAL DISCRIMINATION BY CARRIER—Appellant owns and operates two steamships for transportation of its patrons between Detroit and Bois Blanc Island, part of the Province of Ontario, Canada. The island is owned by appellant and operated as an amusement and recreation center for the people of Detroit.[1] For refusal to transport a negro girl, appellant was prosecuted and convicted under the Michigan Civil Rights Act [2] which provides that "All persons within the jurisdiction of this state shall be entitled to full and equal accommodations . . . facilities and privileges . . . of public conveyances on land and water . . . ," and that it shall be unlawful to withhold any such accommodation on account of race, creed or color. The Michigan Supreme Court upheld the conviction.[3] On appeal, appellant contended that the Michigan statute as applied to foreign commerce violated the Commerce Clause of the United States Constitution. *Held*, affirmed. Foreign commerce of such peculiarly local concern may be regulated by a state, and the statute does not impose an undue burden on foreign commerce. *Bob-Lo Excursion Co. v. Michigan*, (U.S. 1948) 68 S.Ct. 358[4]

Appellant relied upon two decisions of the Court which declared unconstitutional state segregation statutes as applied to interstate commerce. *Hall v. DeCuir* [5] held unconstitutional a Louisiana law forbidding steamboats which plied the Mississippi from segregating passengers according to race. *Morgan v. Virginia* [6] held unconstitutional a Virginia law requiring segregation of passengers on interstate buses. Both cases turned on the point that such regulation by a state interfered with the uniformity essential for the movement of carriers in interstate commerce and constituted an undue burden on interstate commerce. The principal case is distinguishable and does not involve the problem of segregation.[7] The issue here is discrimination, an issue not involved in the segregation cases for the reason that substantially equal transportation accommodations were furnished. The burden on commerce is quite different. The Michigan statute, requiring only that the carrier furnish transportation to persons of the Negro race indiscriminately with others, imposes no undue burden on the carrier within the meaning of the term as used by the Court in past decisions.[8] The

[1] The island is but fifteen miles from Detroit, and is "economically and socially, though not politically, an amusement adjunct of the city of Detroit." Principal case at 362.

[2] Mich. Comp. Laws (Supp. 1940) §§ 17115-146, 17115-147; Mich. Stat. Ann. (Supp. 1946) §§ 28.343, 28.344.

[3] 317 Mich. 686, 27 N.W. (2d) 139 (1947).

[4] Concurring opinion by Justice Douglas joined by Justice Black; Justice Jackson and Chief Justice Vinson dissented.

[5] 95 U.S. 485 (1877).

[6] 328 U.S. 373, 66 S.Ct. 1050 (1946). Noted in 45 MICH. L. REV. 209 (1946).

[7] See on this subject Jones, "The Supreme Court's Role in Jim Crow Transportation," 3 NAT. B.J. 114 (1945); and note in 45 MICH. L. REV. 209 (1946).

[8] As to the meaning of undue or unreasonable burden in this class of cases, see Southern Pacific R. Co. v. Arizona, 325 U.S. 761, 65 S.Ct. 1515 (1945); Morgan v. Virginia, 328 U.S. 373, 66 S.Ct. 1050 (1946).

danger of unreasonable burden resulting from diverse and conflicting state laws, a point emphasized in the segregation cases, is not present in the principal case. Of significance on this point is the concurring opinion of Justice Douglas who declares that no state, nor the federal government, has the power to enact discriminatory legislation which would require a carrier to deny transportation to anyone because of race or color.[9] While a foreign government might enact legislation conflicting with the Michigan statute, that possibility is remote in the principal case because Canadian law [10] and policy is in accord therewith. To Justice Douglas, the issue is simply the extent of the police power of a state to prevent discrimination against its citizens, a power not challengeable on the facts of the principal case.[11] With regard to the power of a state to regulate foreign commerce, the Court follows the doctrine first enunciated in *Cooley v. Board of Wardens* [12] that absent federal legislation, a state may regulate foreign and interstate commerce with respect to matters of local concern not requiring uniform national regulation. The foreign commerce in the principal case was of peculiarly local concern. In view of the protective attitude evidenced by the present Court toward civil liberties generally, and its decisions declaring unconstitutional state action which discriminated against colored persons,[13] it is consistent policy to uphold a state statute forbidding discrimination. Although seventeen other states have statutes [14] comparable to that of Michigan, the significance of the principal case would appear to be confined to similar fact situations. These statutes are inapplicable to carriers in interstate commerce for the reason that federal legislation has occupied the field. The Interstate Commerce Act [15] has been interpreted to preclude discrimination generally by carriers in

[9] Any attempt by a state to bar colored persons from passage on public carriers, says Justice Douglas, would invade a fundamental right guaranteed against state action by the Fourteenth Amendment. Principal case at 365.

[10] The Province of Ontario enacted in 1944 its Racial Discrimination Act, Statutes of Ontario (1944) c. 51, p. 231.

[11] See Railway Mail Assn. v. Corsi, 326 U.S. 88, 65 S.Ct. 1483 (1945).

[12] 12 How. (53 U.S.) 298 (1851). The Court points out that the Cooley case dealt indiscriminately with foreign and interstate commerce. Most of the cases following this decision and upholding state regulation of foreign commerce deal with pilotage statutes. See Pacific Mail Steamship Co. v. Joliffe, 2 Wall. (69 U.S.) 450 (1865); Olsen v. Smith, 195 U.S. 332, 25 S.Ct. 52 (1904). See also Kelly v. Washington, 302 U.S. 1, 58 S.Ct. 87 (1937).

[13] See for example, Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 59 S.Ct. 232 (1938); Sipuel v. Board of Regents of University of Oklahoma, (U.S. 1948) 68 S.Ct. 299; cf. Edwards v. California, 314 U.S. 160, 62 S.Ct. 164 (1941). Interesting articles on this general subject are: Waite, "The Negro in the Supreme Court," 30 MINN. L. REV. 219 (1946); and Baker, "Trend of United States Supreme Court Decisions as Affecting Negroes' Rights," 1 NAT. B.J. 30 (1941).

[14] See principal case at 360, note 10. The statutory citations are given in Morgan v. Virginia, 328 U.S. 373 at 382, note 24, 66 S.Ct. 1050 (1946). Some of these statutes can be construed to prevent racial segregation as well as discrimination and were thus discussed in Morgan v. Virginia, supra, which dealt exclusively with segregation.

[15] Section 3(1) of the Interstate Commerce Act [49 U.S.C. (1940) § 3(1)] provides that "It shall be unlawful for any common carrier subject to the provisions of

interstate commerce.[16] There is, however, no federal legislation dealing with discrimination by carriers in foreign commerce. How far such state regulation will be upheld where the foreign commerce is not of such local character, or in the event of conflict with a foreign law, is left to future decision.

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this act . . . to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 49 U.S.C. (1940) § 484 (b) extends this provision to carriers by air, and 49 U.S.C. (1940) § 905(c) to water carriers.

[16] Mitchell v. United States, 313 U.S. 80, 61 S.Ct. 873 (1941), held that the Interstate Commerce Act prohibited discrimination against colored passengers in interstate commerce.