Supreme Court of the United States

October Term, 1966

No. 395

RICHARD PERRY LOVING, et ux.,
Appellants,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

Appeal From the Supreme Court of Virginia

Brief of the State of North Carolina As Amicus Curiae

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The State of North Carolina files this brief as amicus curiae under the sponsorship of T. W. Bruton, Attorney General of North Carolina, pursuant to Rule 42(4), Rules of the Supreme Court.

INTEREST OF THE STATE OF NORTH CAROLINA

As will be hereafter shown North Carolina has the same legal status as the State of Virginia as to intermarriage between the white and colored races and as to the intermarriage between a white person and a colored person who go out of the State and are married and afterward return to and reside in the State, cohabiting as man and wife.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article XIV, Section 8, of the Constitution of North Carolina, provides as follows:

"Sec. 8. *Intermarriage of whites and Negroes prohibited.* —All marriages between a white person and a Negro, or between a white person and a person of Negro descent to the third generation, inclusive, are hereby forever prohibited." (Convention 1875)

Section 51-3 of the General Statutes of North Carolina (Replacement 1966) provides as follows:

"Sec. 51-3. *Want of capacity; void and voidable marriages.*—All marriages between a white person and a Negro or between a white person and a person of Negro descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a Negro, or between a Cherokee Indian of Robeson County and a person of Negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen-years of age and any female, or between a female person under sixteen-years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void * * *".

Section 14-181 of the General Statutes of North Carolina (Volume 1B) provides as follows:

"Sec. 14-181. *Miscegenation.*—All marriages between a white person and a Negro, or between a white person and a person of Negro descent to the third generation inclusive, are forever prohibited, and shall be void. Any person violating this section shall be guilty of an infamous crime, and shall be punished by imprisonment in the county jail or State's Prison for not less than four months nor more than ten years, and may also be fined, in the discretion of the court."

Section 14-182 of the General Statutes provides as follows:

"Sec. 14-182. *Issuing license for marriage between white*

person and Negro; performing marriage ceremony.— If any register of deeds shall knowingly issue any license for marriage between any person of color and a white person; or if any clergyman, minister of the gospel or justice of the peace shall knowingly marry any such person of color to a white person, the person so offending shall be guilty of a misdemeanor."

OPINION BELOW

The appeal in this case arises upon the validity of the Virginia Statute, which was held to be valid by the highest appellate court in Virginia (LOVING, et al. v. COMMONWEALTH, 206 Va. 924, 147 S. E. 2d 78).

QUESTION PRESENTED

ARE THE VIRGINIA STATUTES (SECS. 20-58 and 20-59) CONSTITUTIONAL AND VALID WHEN MEASURED BY THE STANDARDS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

ARGUMENT

The Facts in the Virginia Case

We do not enter into the facts of the case in any detail for they are stated in the Virginia brief. Richard Perry Loving is a white person and Mildred Jeter Loving is a colored person. They left the State of Virginia for the purpose of being married, the ceremony having been performed in the District of Columbia, and they had the intention of returning to Virginia. They did return to Virginia where they lived together and cohabited as man and wife. The facts are all set forth in detail in the Opinion of the Supreme Court of Appeals of Virginia.

The North Carolina Statutes and Decisions

A mere reference to the facts in the Virginia case will

show that had the same event occurred in the State of North Carolina the result would have been the same so far as our courts are concerned (STATE v. KENNEDY, 76 N. C. 251).

Neither the Virginia Statutes nor the North Carolina Statutes Violate any Provisions of the Fourteenth Amendment.

It is the contention of the State of North Carolina that the proper rule of constitutional construction on this question is as follows (16 Am. Jur. 2d, p. 239, sec. 64):

"The fundamental principle of constitutional construction is that effect must be given to the intent of the framers of the organic law and of the people adopting it. This is the polestar in the construction of constitutions. A constitutional clause must be construed reasonably to carry out the intentions of the framers, and should not be construed so as to defeat the obvious intent if another construction equally in accordance with the words and sense may be adopted which will enforce and carry out the intent. The intent must be gathered from both the letter and the spirit of the document, the rule being that a written construction is to be interpreted in the same spirit in which it was produced. The court should put itself as nearly as possible in the position of the men who framed the instrument.

"Wherever the purpose of the framers of a constitution is clearly expressed, it will be followed by the courts. If the terms of a constitutional provision are not entirely free from doubt, they must be interpreted as nearly as possible in consonance with the objects and purposes in contemplation at the time of their adoption, because in construing a constitutional provision, its general scope and object should be considered.

"Notwithstanding that the intent of the framers is to be ascertained and effectuated wherever possible, the fact that the framers of the Federal Constitution could not possibly have been familiar with a certain subject

matter is of little significance in determining whether a provision of the Constitution applies thereto. *Contrariwise judicial notification of legislation cannot be justified by attributing to the framers of the Constitution views for which there is no historic warrant.*" (Emphasis ours)

We cannot improve upon the able argument set forth in the Virginia brief as to the "original understanding" on this question when the Fourteenth Amendment was adopted. The debates in Congress clearly show that it was not the understanding that the Fourteenth Amendment would invalidate the Anti-Miscegenation Laws of the States since this point was clearly brought up in the debates and considered by those passing upon the proposed amendment. This is clearly shown by the statements of Senator Trumbull from Illinois, who introduced the then Civil Rights Bill and was its manager, and Phelps of Maryland. It is noteworthy that Senator Trumbull spoke to an objection made by the Senator from Indiana, which shows that Indiana, a northern state, at that time had laws "prohibiting black people from marrying whites." Unless, therefore, the Fourteenth Amendment is construed as a grand commission which constitutes the federal courts as a species of judicial privateers to sink every state ship in sight if they do not like the cut of its sails, then the historic position asserted by Virginia is clearly sound. It is also sound that when the states who ratified the Fourteenth Amendment, having at that time Anti-Miscegenation Statutes in their codes, clearly did not think that they were thereby invalidating such statutes.

This Court has in many cases referred to the historical setting as well as the debates in Congress in passing upon such questions and we see no need for us to marshal the legal authorities on this point.

The Judicial Authorities Available Support the Virginia Position.

We do not go into all of the judicial constructions on this point for this has been well done in the Virginia brief and it is sufficient for us to say that we adopt the arguments and

cases there cited. Unless this is a mere policy matter and judicial precedents are not controlling then we assert that the great weight of judicial authority supports the constitutional validity of a state's anti-miscegenation statute.

The So-Called Scientific Argument

We do not enter into the scientific realm on this question. There is no equalitarianism in the field of biology, anthropology and geneticism. There is no certitude or concrete exactness in this field. These so-called sciences have not yet reached the position or status of the exact sciences one hundred and fifty years ago. Usually the major emphasis in such books or discussions centers around the alleged sex jealousies of the white man and the alleged preference of the Negro man for white women. You can select books and treatises both pro and con on this question; one thing is sure and that is neither cranial measurements, intelligence quotients nor statistical averages will ever settle the question. This field is like expert witnesses in that you pay your money and take your choice. If a state feels like the life of its people is better protected by a policy of racial integrity as to both races, or for any other race for that matter, then it has the right to legislate in such field. The fact that the state's conclusions may differ from the conclusions of other groups should not affect the matter unless minority groups are entitled to preferential constitutional privileges contrary to the judgment of the majority.

Respectfully submitted,

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