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CONSTITUTIONALITY OF RESIDENTIAL SEGREGATION ORDINANCES

Shortly after the turn of the century when mass migration from rural to urban centers began, many of the large cities, especially those in the South, found it desirable to pass special ordinances segregating the races. The aim of these ordinances was to check the further infiltration of Negro elements of the population into the then existing white sections. The purpose of this comment is to trace the course and development of these residential segregation ordinances in the seventeen southern states in which segregation in education is decreed by state law.[1]

The state and federal courts will normally hold that if a statute or ordinance involves a reasonable exercise of the police power, it does not constitute a deprivation of property without due process of law merely because it limits or restricts the use which the owner may make of his property. This type of reasoning is employed in sustaining the constitutional validity of the customary residential and commercial type zoning ordinances for the public health, safety and welfare. Accordingly, the framers of residential segregation ordinances have contended that, since their purpose is to promote the public peace and safety by preventing race conflicts, they are not an unconstitutional exercise of the inherent governmental power of the state.

Apparently one of the first cities to enact a residential segregation ordinance was Baltimore, Maryland, in 1911. Within a few years many other cities had followed suit. The Baltimore ordinance prohibited white persons from residing in a block in which the buildings therein were occupied exclusively by Negroes, and likewise restricted Negroes from moving into a building in any block occupied exclusively by white persons. This ordinance was the first to be attacked by the courts. In *State of Maryland* v. *Gurry*[2] it was contended that the ordinance was violative of the Fourteenth Amendment to the Constitution of the United States. The Maryland Court of Appeals held that there was no unconstitutional discrimination between races in an ordinance which prohibited white and colored persons from moving into blocks occupied exclusively by members of the other race,

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[1] ALA. CONST., Art. XIV, sec. 256; ARK. STAT., 80-509(c); DEL. CONST., Art. X, sec. 2; FLA. CONST., Art. XII, sec. 12; GA. CONST., Art. VIII, sec. 1; KY. CONST., Sec. 187; LA. CONST., Art. XII, sec. 1; MISS. CONST., Art. VIII, sec. 207; MO. CONST., Art. IX, sec. 1(a); N. C. CONST., Art. IX, sec. 2; OKLA. CONST., Art. XIII, sec. 3; S. C. CONST., Art. XI, sec. 7; TENN. CONST., Art. XI, sec. 12; TEX. CONST., Art. VII, sec. 7; VA. CONST., Art. IX, sec. 140; W. VA. CONST., Art. XII, sec. 8; D. C. CODE, sec. 13.

[2] 121 Md. 534, 88 A. 546 (1913).

since what was denied one race was denied the other. However, the ordinance was declared void on the ground that it unreasonably interfered with vested rights in property, because the owner of a house whose rights therein accrued prior to passage of the ordinance was prohibited by it from occupying his own house. The court indicated that it would have sustained a segregation ordinance properly framed to allow those who owned residences at the time the ordinance became effective to move into and occupy them.

About this time a lower court decision in Virginia[3] held that a segregation ordinance more drastic in its practical effect than the one in Baltimore was constitutional. This ordinance prohibited the establishment, in the future, of residences by either race in any block except wherein the race was in a majority.[4] In its opinion the court said that it would take judicial notice that the close association of persons of the white and colored races results, or tends to result, in breaches of the peace, immorality, and danger to health, in view of state legislation providing for separate coaches on railroads and separate schools. In upholding the validity of the ordinance the court argued that since the ordinance applied to both white and colored it was not discriminatory, and further, that if the statutes providing for segregation in schools and transportation were constitutional then segregation-zoning ordinances must on the same basis be constitutional also.

The same question as that decided by the Virginia court above was presented to the Supreme Court of Appeals of Virginia in *Hopkins* v. *City of Richmond*.[5] The ordinance involved was the customary type except that it, like the Baltimore ordinance, would also prohibit an owner of a house at the time the ordinance was enacted from occupying it if it was in a block occupied by members of the other race. The court held this ordinance constitutional in so far as it applied to persons whose rights as owners or tenants had accrued subsequent to passage of the ordinance, and unconstitutional only as it restricted the right of any white or colored person to move into and occupy property of which he was the owner on the effective date of the ordinance.

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[3] Ashland v. Coleman, 19 Va. Law Reg. 427 (1913).

[4] This type of segregation ordinance is considered more drastic since it would prevent further movement into those blocks in which the negroes had gained a foothold but were not yet in the majority. The other type ordinance merely prohibited negroes from moving into blocks exclusively occupied by white persons. Thus, if in a particular block at the time of passage of the ordinance, only one negro resided therein, the ordinance would not prevent other negroes from moving in also.

[5] 117 Va. 692, 86 S.E. 139 (1915).

In Georgia a segregation ordinance passed by the city of Atlanta was contested in *Carey* v. *City of Atlanta*[6] in 1915. The Georgia Supreme Court held that that ordinance, which prohibited white and colored persons from residing in the same block and made no exception in the case of those with vested property rights at the time of passage of the ordinance, denied the inherent right of a person to acquire, enjoy and dispose of property, and for that reason was violative of the due process clause of the state and Federal constitutions. The city of Atlanta then passed an ordinance identical with the one enacted by Louisville, Kentucky, which had just been held constitutional by the Kentucky Court of Appeals. The Georgia Supreme Court aligned itself with the Kentucky court.[7] Both held that these ordinances were a valid exercise of the police power of the state in attempting to promote the public welfare and to preserve friendly relations between the races.

On the basis of the foregoing cases it would appear that the controlling factor was not a consideration of the drastic effect of any ordinance in the sense that it referred to blocks exclusively occupied or only partially occupied by one race, but rather was conditioned by the effect of the ordinance on existing property rights at the time the ordinance was enacted. Thus, those ordinances which were intended to apply only to property subsequently acquired were held valid, while those failing to make that distinction were held unconstitutional.

The only case holding a prospective residential segregation ordinance unconstitutional was *State* v. *Darnell*,[8] a North Carolina case, but that case was based upon an interpretation of the city charter. The ordinance was substantially the same as that involved in *Hardin* v. *City of Atlanta*.[9] The court held that Winston Salem was without authority to adopt the ordinance since it had not been expressly granted the power to pass such an ordinance, nor could that power be inferred in view of the general policy of the state, "there being no similar state laws, the legislature having enacted statutes tending to keep the Negroes from emigrating." This ordinance, the court said, attempted to forbid the owner of property to sell or lease to whomever he saw fit, but the "right of disposing of property, the jus disponendi, has always been held one of the inalienable rights incident to the ownership of property which no statute will be construed as

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[6] 143 Ga. 192, 84 S.E. 456 (1915).
[7] Harden v. City of Atlanta, 147 Ga. 248, 93 S.E. 401 (1917).
[8] 166 N. C. 300, 81 S.E. 338 (1914).
[9] *Supra*, note 7.

having power to take away." The North Carolina court declined to decide whether a state statute directly authorizing town commissioners to make such an ordinance would be constitutional. It did, however, imply that had the legislature intended to establish such a policy as to Negroes it would certainly have made provision for selecting districts and would not have conferred such unlimited powers on the commissioners.

Although other southern cities by this time had enacted similar segregation ordinances, there do not appear to be any more decisions by courts of record in those states prior to 1917 other than the ones reviewed.

The Supreme Court of the United States was faced with the question of the constitutionality of a residential segregation ordinance for the first time in the case of *Buchanan* v. *Warley*.[10] The case involved the segregation ordinance adopted by Louisville, Kentucky. The ordinance was entitled:

> "An ordinance to prevent conflict and ill feeling between the white and colored races in the city of Louisville, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring, as far as practicable, the use of separate blocks for residences, places of abode and places of assembly by white and colored people respectively."[11]

The ordinance declared it unlawful for any colored person to move into and occupy in the future any house on any block upon which a greater number of houses were accupied by white people than by colored people. Likewise, white people were forbidden from moving into any block where there were more colored persons' residences than white. The plaintiff Buchanan was a white man who sued defendant Negro to secure specific performance of a contract to purchase real estate owned by plaintiff. The defendant contended that since he was a colored person it would be unlawful for him to occupy the property he had contracted to purchase. The plaintiff contended the ordinance was unconstitutional in that it violated the Fourteenth Amendment to the United States Constitution by abridging the privileges and immunities of citizens of the United States to acquire and enjoy property, taking property without due process of law and denying equal protection of the laws. The Kentucky Court of Appeals, in the companion cases of *Harris* v. *City of Louisville* and *Buchanan* v. *Warley*,[12] had sustained the constitutionality of the Louisville ordinance, holding that it was neither a deprivation of property

[10] 245 U.S. 60 (1917).
[11] *Id.* at 70.
[12] 165 Ky. 559, 177 S.W. 472 (1915).

without due process of law nor a violation of the right of alienation since the ordinance did not deprive any person of the right to acquire property anywhere in the city—the only restraint being on occupancy. On appeal to the Supreme Court of the United States the plaintiff contended that although the ordinance did not expressly prohibit a white person from selling to a colored person, and vice versa, the practical effect of the ordinance was to deny such right of alienation. This is true, plaintiff's counsel contended, for if "he cannot sell to a colored person, he cannot sell at all, for the lot is so situated with reference to other colored men's residences that no white man would buy it."[13] The Supreme Court of the United States, in reversing the decision of the Kentucky Court of Appeals, stated that although the police power of the states was very extensive it could not validly be employed to pass a residential segregation ordinance discriminating on the basis of color. The decision was based entirely on due process and did not involve plaintiff's other contentions in regard to privileges and immunities and equal protection of the laws. The court distinguished the point involved herein from its earlier decisions upholding segregation statutes as to trains and schools, by asserting that in the latter cases a person was not denied the right to acquire, use, control and dispose of his property as in the *Buchanan* case. In those cases, of course, the railroad owners were deprived of the right to control their property, but they had never complained of that deprivation. The complainant passenger could show at best a mere regulation of a privilege.

The decision of the Supreme Court of the United States in the *Buchanan* case had the practical effect of overruling all the State court decisions upholding such ordinances. Subsequent to that decision, the Court of Appeals of Maryland considered an ordinance which differed from the Louisville ordinance in that the former related to blocks where all the occupants were of one race and prohibited one not of that race from occupying a residence of that block, while the latter related to blocks in which the white or colored inhabitants were in the majority, and thus involved one of the less-drastic types of segregation ordinances. The court, however, on the authority of the *Buchanan* case held the Baltimore ordinance unconstitutional.[14] The Supreme Court of Appeals of Virginia[15] and the Georgia Supreme Court[16] both relying on the *Buchanan* case held segregation ordinances substantially the same as Louisville's unconstitutional.

[13] Buchanan v. Warley, 245 U.S. 60, 62 (1917).
[14] Jackson v. State of Maryland, 132 Md. 311, 103 A. 910 (1918).
[15] Irvine v. City of Clifton Forge, 124 Va. 781, 97 S.E. 310 (1918).
[16] Glover v. City of Atlanta, 148 Ga. 285, 96 S.E. 562 (1918).

In searching for means of avoiding the Supreme Court's decision in the *Buchanan* case the city of New Orleans seized upon the distinction drawn by the Court between segregation zoning ordinances and segregation statutes relating to transportation and education and conceived the idea that if there were no direct state interference with a person's right freely to dispose of his property a segregation ordinance might be constitutional. Accordingly, the city adopted an ordinance making it unlawful for a white or colored person to *occupy* a residence in a community or portion of the city occupied by those of the other race without written consent of a majority of the residents of that community or section. The Louisiana court of last resort held the ordinance constitutional[17] on the theory that it was not actually a racial discrimination in civil or political rights, but merely a social distinction, and came within the exercise of the police power. In distinguishing the *Buchanan* case the court said that there the Supreme Court of the United States had found in fact that white persons were restrained by the ordinance from selling to colored persons, and vice versa, which was an interference with the freedom of contract; here there was nothing in the ordinance forbidding the sale by one to the other. The ordinance did not forbid a Negro owner of property in a Negro block from selling to a white person who intended to move into the house, and vice versa, but merely said that that person must get the written consent of a majority of residents of that block before carrying out his intent. It is difficult to see how the court arrived at this distinction inasmuch as the Louisville ordinance did not place any restriction on sale either. Nevertheless, in the *Buchanan* case the Supreme Court found that in its practical application the ordinance did have that effect. It would appear that the New Orleans ordinance would clearly have the same effect. On appeal of this case to the United States Supreme Court,[18] in a memorandum decision, the holding of the Louisiana Court was reversed on the authority of the *Buchanan* case.

The only written opinion by a federal court involving the distinction made by the Louisiana court in regard to restriction of occupancy, as distinguished from sale of real property, seems to have been that in *City of Birmingham* v. *Monk*,[19] decided by the United States Circuit Court of Appeals for the Fifth Circuit. In that case the court refused to make any distinction between the two ordinances and held this one unconstitutional also.

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[17] Tyler v. Harmon, 158 La. 439, 104 So. 200 (1925).
[18] Harmon v. Tyler, 273 U.S. 668 (1927).
[19] 185 F. 2d 859 (5th Cir. 1950).

After that decision the city of Richmond, Virginia, attempted another new approach. It passed an ordinance prohibiting any person from using as a residence any building on any street between intersecting streets where a majority of the residences on such street were occupied by those with whom the person by law was forbidden to intermarry. In arguing the case wherein the validity of this ordinance was attacked,[20] appellant-city attempted to distinguish the situation here from those in the *Buchanan* and *Harmon* cases by showing that this ordinance was based on the legal prohibition of intermarriage and not on race or color, but the Supreme Court of Appeals of Virginia decided that in the final analysis the ordinance was based on race since the legal prohibition of intermarriage was itself based on race.

In Oklahoma two more cases involving variations on this same theme arose. The first, in 1935, was an action for injunctive relief to prevent enforcement of the "Segregation Ordinance" of Oklahoma City.[21] This ordinance prohibiting occupation was justified by defendant-city by showing that it was enacted after the Governor of Oklahoma issued an Executive Military Order declaring a state of martial law to exist in certain areas of the city of Oklahoma City, and directing that city to enact this ordinance. The Oklahoma Supreme Court, however, held the Governor's Order void and legally unenforceable and, therefore, the ordinance based upon it failed also.

The next Oklahoma case in point arose ten years later. In *Crist* v. *Henshaw*[22] plaintiffs attempted to enjoin defendants from selling lots in a nearby subdivision to Negroes on grounds that it would create a public nuisance and destroy the value of their property. Despite the fact that the case at bar did not involve a zoning ordinance the Supreme Court of Oklahoma relied on the *Buchanan* case and held that although the action was primarily between individuals the court could not restrict the sales; to do so would be a clear violation by the court of the Fourteenth Amendment to the Federal Constitution.

The city of Winston Salem, North Carolina, created a very extensive zoning ordinance which contained one provision excluding Negroes from occupying houses in certain zones into which the city was divided, and was not, as in the *Buchanan* case an attempt at segregation directly by an ordinance not purporting to be a zoning ordinance. This raised the question of whether such a provision in a broad and otherwise valid zoning ordinance would be approved

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[20] City of Richmond v. Deans, 37 F. 2d 712 (4th Cir. 1930).
[21] Allen v. Oklahoma City, 175 Okla. 421, 52 P. 2d 1054 (1935).
[22] 196 Okla. 168, 163 P. 2d 214 (1945).

by the courts. In *Clinard* v. *City of Winston Salem*[23] the North Carolina court answered the question in the negative. There appears to have been only one other case[24] involving the inclusion in a general zoning plan of one provision for segregation. The court there also held the ordinance unconstitutional. While this question has never been directly decided by the Supreme Court of the United States it would appear, in view of the widespread application of the holding in the *Buchanan* case, that the court would merely declare the segregation provision unconstitutional while leaving the remainder of the ordinance substantially intact. It is submitted that this would be a fundamentally sound result.

The author was unable to discover cases in the remainder of the seventeen southern states having segregation by law, and it is, therefore, assumed that if the question has arisen in those states it has never been adjudicated by a court of last resort.

In view of the foregoing discussion it is now manifest that all ordinances contemplating segregation of the races as to places of abode are unconstitutional. Such legislation exceeds the proper exercise of the police power and in its purpose is clearly violative of the Fourteenth Amendment to the United States Constitution.

Any theory of promotion of the public peace and welfare by prevention of racial conflicts is overridden by the serious infringement of property interests. The courts contend that regardless of what may be argued in support of segregation legislation in other contexts and its application in particular to education, it will not apply to legislation of this variety wherein persons are clearly deprived, without due process of law, of their constitutionally guaranteed privilege of disposing of property.

JAMES S. KOSTAS

FREEDOM OF SPEECH AND MOTION PICTURES— THE "MIRACLE" DECISION

In *Burstyn* v. *Wilson*,[1] the Supreme Court of the United States for the first time was presented squarely with the question: Are motion pictures within the ambit of protection which the First Amendment, through the Fourteenth Amendment, secures to any form of speech or the press? The question was answered in the affirmative and a

[23] 217 N. C. 119, 6 S.E. 2d 867 (1940).
[24] Bowen v. City of Atlanta, 159 Ga. 145, 125 S.E. 199 (1924).
[1] 72 Sup. Ct. 777 (1952).