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CONSTITUTIONAL LAW - RACE SEGREGATION ORDINANCE - EFFECT OF MILITARY ORDER OF GOVERNOR ISSUED FOR SAME PURPOSE

CONSTITUTIONAL LAW — RACE SEGREGATION ORDINANCE — EFFECT OF MILITARY ORDER OF GOVERNOR ISSUED FOR SAME PURPOSE — A "segregation ordinance" of Oklahoma City, prospective in nature, made it unlawful for any negro to occupy as a residence any house or building located in a block wherein a majority of the buildings used were occupied by white persons. The initial step in the segregation of races in the city occurred when the Governor issued a military order for the separation of the races, because it appeared that riot and bloodshed were imminent; such order to remain in effect until an ordinance was passed in lieu of the order. *Held*, the ordinance was an invalid exercise of the police power; it deprived the negro of property without due process of law and abridged a privilege which he was entitled to enjoy as a citizen of the United States. The military order was not material in so far as the validity of the ordinance as an exercise of the police power

was concerned. *Allen v. Oklahoma City*, 175 Okla. 421, 52 P. (2d) 1054 (1935).

In the instant case the Oklahoma court held that *Buchanan v. Warley*,[1] decided by the Supreme Court of the United States, was directly in point. Under the rule of decision in such case, when an ordinance is based on color and nothing more, it passes the legitimate bounds of the police power and invades the civil right to acquire, enjoy and use property, which is guaranteed in equal measure to all citizens, white or colored, by the Fourteenth Amendment. Assuming that the cases holding that provisions for separate railroad accommodations for white and for colored persons (and similar decisions) are valid [2] and are distinguishable from the instant case and from the *Buchanan* decision, still it should be noted that the principal argument for the validity of the ordinance in the *Buchanan* case was that the court should not declare invalid a police regulation unless it clearly appeared from the law itself, or from facts of which the court may take judicial notice, that it violated constitutional guarantees; that whether legislation is wise, expedient, or necessary, or the best calculated to promote its objects, is a legislative and not a judicial question.[3] It should also be noted that the decision in *Buchanan v. Warley* has been severely criticized on the basis that "When both the legislative and judicial departments of four states have explicitly declared it reasonable, one can not pretend that it is 'arbitrary' or 'palpably and unmistakably in excess of any reasonable exercise of authority' or even that it is 'clearly' unreasonable." [4] To the same effect was the criticism that the Court in that case did not give "sufficient weight to the presumption of validity attaching to the act of even such a subordinate legislative body as a city council." [5] Police regulations prohibiting the carrying on in defined areas of certain lawful industries have been sustained.[6] How can the court say that racial segregation is a more stringent legislative deprivation of privilege than such restriction of districts for purposes of industry? It is difficult to see how in the case of segregation ordinances such legislation is clearly unreasonable, when in the case of segregation of certain

[1] 245 U. S. 60, 38 S. Ct. 16 (1917).

[2] Chiles v. Chesapeake & Ohio Ry., 218 U. S. 71, 30 S. Ct. 667 (1910); West Chester & Philadelphia R. R. v. Miles, 55 Pa. St. 209 (1867); The Sue (D. C. Md. 1885) 22 F. 843.

[3] Chicago, B. & Q. Ry. v. McGuire, 219 U. S. 549, 31 S. Ct. 259 (1911); McLean v. Arkansas, 211 U. S. 539, 29 S. Ct. 206 (1909); Noble State Bank v. Haskell, 219 U. S. 575, 31 S. Ct. 299 (1911); Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257 (1888).

[4] 16 MICH. L. REV. 109 at 111 (1917). This comment cites the state decisions holding such ordinances valid.

[5] 31 HARV. L. REV. 475 at 477, 478 (1918): "it is difficult to see on what basis the court could have declared it so clearly lacking in reasonableness as to be unconstitutional. . . . While opinions may well differ . . . can it be said that there is no reasonable and appropriate relation between the end sought and the means adopted?"

[6] Hadacheck v. Chief of Police of Los Angeles, 239 U. S. 394, 36 S. Ct. 143 (1915); Reinman v. Little Rock, 237 U. S. 171, 35 S. Ct. 511 (1915); Fischer v. St. Louis, 194 U. S. 361, 24 S. Ct. 673 (1904); Schefe v. St. Louis, 194 U. S. 373, 24 S. Ct. 676 (1906).

industries such unreasonableness does not appear.[7] Bearing in mind this criticism that the judicial department is substituting its judgment as to what police measure is reasonably necessary for the judgment of the legislative department in the decisions holding segregation ordinances invalid, in the instant case there was the added element of the Governor's military order. If the criticisms of the case of *Buchanan v. Warley* are sound, still more do such criticisms apply in the principal case. Since such a condition existed that a state of martial law was declared to prevent riot and bloodshed, and a military segregation order was issued, evidently some such regulation was *immediately* necessary. If not, it is probable that no such emergency order would have been issued, but rather that an ordinance would have been passed in the ordinary course of city affairs. At least, under the circumstances of this case, it seems that the legislative body (city council) had reasonable grounds to believe such an ordinance was necessary for the welfare of the inhabitants of the city, and that the court substituted its own judgment for that of the legislative body. However, it is not difficult to see why the Oklahoma court in the instant case followed the rule of the United States Supreme Court as laid down in *Buchanan v. Warley*—whether or not that decision be sound—since the facts of the instant case came directly under that rule.

N. E.

[7] 27 YALE L. J. 393 (1918).