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REAL PROPERTY—DUE PROCESS— PLAT RECONSTRUCTION STATUTE INVALID

The seller of land sought a declaratory decree as to the validity of a Florida statute¹ requiring the recordation of plats as a condition precedent to the conveyance of certain size plots of land.² *Held*, the statute is an unreasonable restraint on the right to alienate property under the due process and equal protection clauses of the fourteenth amendment of the federal constitution. *Kass v. Lewin*, 104 So.2d 572 (Fla. 1958).

There are two facets to the problem presented by this case: (1) The extent of the state's police power as contained in the due process clause of the fourteenth amendment and; (2) the application of the equal protection clause in regard to the reasonableness of state police regulations.

The *due process clause* of the fourteenth amendment has passed through three phases of judicial interpretation since its ratification in 1868. Between that date and the middle 1880's the due process clause was never used to check state economic and social legislation.³ Until the middle 1930's, it was utilized by the United States Supreme Court to invalidate economic and social legislation of the states since such legislation was contrary to the Court's *laissez-faire* economic theory.⁴ From the middle nineteen-thirties to the present, the Court has developed a strong presumption of validity in favor of these state regulations.⁵ In *Williamson v.*

1. Fla. Laws 1955, ch. 30202, § 3, at 271. "Whenever any land, a plat of which has not been recorded in the Public Records of the county wherein the land lies, shall be platted into lots, blocks, parcels, tracts or other portions, however designated, so that any of the same shall comprise one acre or less in size, and whenever any land, a plat of which has been recorded in the county wherein such land lies, is replatted into lots, blocks, parcels, tracts or other portions, however designated, so that any of the same shall comprise one-half acre or less in size, a plat thereof shall be recorded in the Public Records of the county wherein such land lies." The statute applies to counties with a population in excess of 300,000.

2. The facts of the instant case fit the two classifications of the statute exactly.

3. 2 CUSHMAN, *SELECTED ESSAYS ON CONSTITUTIONAL LAW* 62 (1938).

4. *Ribnik v. McBride*, 277 U. S. 350 (1928), under the due process clause of the fourteenth amendment a state cannot fix the compensation that an employment agency may charge for its services; *Tyson & Brother v. Banton*, 273 U. S. 418 (1927), state statute fixing prices to be charged for admission to public contests, exhibitions, games or performances violates the due process clause; *Wolff Co. v. Industrial Ct.*, 267 U. S. 552 (1925), state statute which provided for submission of controversies to compulsory settlement by state agency and compulsory fixing of wages and hours violates the due process clause because this compels the parties to continue in business on terms that were not agreed upon; *Coppage v. Kansas*, 236 U. S. 1 (1915), state statute making it a misdemeanor for employer to require an employee to agree not to become a member of any labor organization during time of employment is in violation of the due process clause; *Lochner v. N. Y.*, 198 U. S. 45 (1905), state statute forbidding employment of bakers for more than 60 hours per week or 10 hours per day violates the due process clause; See also CUSHMAN, *supra* note 3, at 67, 69; SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 813 (1943).

5. CUSHMAN, *supra* note 3, at 76-77, 81; SWISHER, *supra* note 4, at 99; WOOD, *DUE PROCESS OF LAW* 181-2 (1951); See cases cited, *infra* note 6.

Lee Optical Company,⁶ the Court held that there was no violation of the due process clause where a state statute forbade an unlicensed optician to practice optometry. In that case, the Court stated that it would no longer use the due process clause to strike down state laws regulating business and industrial conditions even though they might be unwise, lacking in foresight, or were out of harmony with a particular school of thought.⁷

The Supreme Court's interpretation of the due process clause of the fourteenth amendment has always been generous to the state's police power dealing with fraud.⁸ In *Schmidinger v. Chicago*⁹ the Court upheld a state statute which regulated the making and selling of loaves of bread. It was reasoned that local authorities and *not* the courts are the judges of the necessities of local situations calling for the exercise of the police power. The judiciary may only interfere with such laws when they are so arbitrary as to be obviously and unmistakably in excess of any reasonable authority conferred.¹⁰ It was further set forth that laws and ordinances tending to prevent frauds have long been upheld as valid exertions of the police power.¹¹ The Florida Legislature in adopting this recordation statute to prevent land contracts involving fraudulent schemes and maintain zoning requirements was acting within the limits of a state's police power as defined by the United States Supreme Court.

In the early history of the *equal protection clause* of the fourteenth amendment the United States Supreme Court maintained rigorous requirements that persons be treated alike where economic and social legislation

6. 348 U. S. 483 (1954); See *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421 (1952), a state statute which entitled an employee to absent himself from work to vote on election days without a loss of wages was not a denial of equal protection or due process to the employer; *Daniel v. Family Ins. Co.*, 336 U. S. 220 (1949), state statute which denies insurers or their agents the right to engage in the undertaking business and denies an undertaker the right to serve as an agent of an insurance company does not violate the two clauses; *Lincoln Union v. Northwestern Co.*, 335 U. S. 525 (1949), state statute forbidding closed shop arrangements and guaranteeing right to work to all does not deny the employer nor the union due process or equal protection; *Olsen v. Nebraska*, 313 U. S. 236 (1941), state statute limiting the amount an employment agency may charge for its services does not violate the due process clause, overruling *Ribnik v. McBride*, 277 U. S. 350 (1928); *West Coast Hotel Co. v. Parrish*, 300 U. S. 379 (1937), where plaintiff chambermaid sued for statutory minimum wage, the Court held such setting of minimum wage by state statute does not violate due process clause; *Nebbia v. New York*, 291 U. S. 502 (1934), where grocer sold milk in violation of state minimum price there was no violation of due process of law.

7. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488 (1954).

8. See, e.g., *National Fertilizer Assn., Inc. v. Bradley*, 301 U. S. 178 (1936) state statute requiring tag disclosing contents before offering a mixed commercial fertilizer for sale does not deny due process of law; *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936); *Corn Products Refining Co. v. Eddy*, 249 U. S. 427 (1919), state statute requiring branding of syrup compounds before they can be sold was a valid exercise of police power. See also *Jacobson v. Massachusetts*, 197 U. S. 11 (1905); *Atkin v. Kansas*, 191 U. S. 207, (1903); *Minnesota v. Barber*, 136 U. S. 313, 320 (1890); *Mugler v. Kansas*, 123 U. S. 623 (1887).

9. 226 U. S. 578 (1913).

10. *Id.* at 588.

11. *Ibid.*

was concerned.¹² The Court now respects the determination by the state legislature that a classification is reasonable and necessary even though the result reached is ill advised, unequal, and oppressive legislation.¹³ As early as 1910, in the *Lindsley v. Natural Carbonic Gas Company*¹⁴ case it was held that the equal protection clause of the fourteenth amendment permits great discretion by the state in regard to classifications established in the adoption of police laws.¹⁵ Such classifications will be held invalid only when they are purely arbitrary or without any reasonable basis.¹⁶

Generally, the Supreme Court of Florida presumes the validity of state legislation.¹⁷ However, in the instant case the court concluded that

12. *Lochner v. New York*, 198 U. S. 45 (1905); *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540 (1901), state statute directed against combinations in trade made to affect prices of commodities violated the equal protection clause by excluding agricultural products from its operation while in hands of producer; *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79 (1901), state statute regulating charges of a particular stock yards company in the State, but which exempted certain stock yards from its operation denied to that company equal protection; *Duluth & Iron Range R.R. Co. v. St. Louis County*, 179 U. S. 302 (1900), state statute which exempted railroad land and property of a company from all taxation and all assessment violated equal protection; *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150 (1897), state statute which singles out railroads and requires them to pay attorney fees in certain suits violates equal protection; *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), administration of a municipal ordinance denying to Chinese the right to engage in laundry business within the state violates equal protection; See CUSHMAN, *supra* note 3, at 69.

13. ROTTSCHAEFFER, *THE CONSTITUTION AND SOCIO ECONOMIC CHANGE*, 154; TUSSMAN & TEN BROEK, *Equal Protection of the Laws*, 34 CALIF. L. REV. 341 (1949).

14. 220 U. S. 61 (1911).

15. *Id.* at 78. See also *Walters v. City of St. Louis*, 347 U. S. 231, 237 (1953), where city under authority of a state statute imposed an income tax on gross salaries and wages of employed persons but only on net profits of self employed persons such statute on its face was not violative of due process or equal protection clauses; *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U. S. 183 (1936), court upheld a fair trade act as not violative of equal protection of the law even though it confers a privilege upon producers and owners of goods identified by trade-mark, brand or name when it denies such privilege to unidentified goods; *Colgate v. Harvey*, 296 U. S. 404, 422, 423 (1935), the imposition of a tax upon dividends earned outside the state, from which tax dividends earned within the state are exempt, constitutes reasonable classification; *Cf. Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535 (1942), state statute requiring sterilization of "habitual criminals" as one who was convicted two or more times of "felonies involving moral turpitude" as applied to person convicted of stealing chickens once and twice for robberies denied equal protection; *New York Rapid Transit Corp. v. City of New York*, 303 U. S. 573 (1938), state statute granting utilities subject to supervision by New York Dept. of Public Service a privilege tax of 3% of gross incomes does not deny equal protection; *Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412 (1936), state statute which lays progressively increasing rate of taxation on chain store's business done inside the state while considering all stores inside as well as outside of the state does not arbitrarily discriminate against chains of a national or sectional character in favor of local chains; *Dominion Hotel, Inc. v. Arizona*, 249 U. S. 265 (1919), state statute restricting hours of labor for women in hotels but which exempts in part railroad restaurants or eating houses upon railroad rights of way does not violate equal protection.

16. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911).

17. *Kass v. Lewin*, 104 So.2d 572, 577 (Fla. 1958). See also *Wright v. Board of Public Instr.*, 48 So.2d 912, 914 (Fla. 1950); *Waybright v. Duval County*, 142 Fla. 875, 878, 196 So. 430, 432 (1940); *Ex Parte White*, 131 Fla. 83, 93, 178 So. 876, 880 (1938); *State ex rel Landis v. Prevatt*, 110 Fla. 29, 32, 148 So. 578, 579 (1933); *Jackson Lumber Co. v. Walton County*, 95 Fla. 632, 665, 116 So. 771, 783 (1928).

the statutory requirements imposed on the vendor were an "unreasonable" restraint on the right to alienate property.¹⁸ This is in agreement with the dicta in *Garvin v. Baker*¹⁹ stating it was not necessary that a plat or map be recorded before property could be sold. The court in the instant case further held that the statute establishing the classifications did so unreasonably and hence was discriminatory and was in violation of the equal protection clause.²⁰

Scholarly authority agrees that the due process and equal protection clauses are not violated by state legislation similar to that under consideration.²¹ As one writer expressed it, "Any measure which could gather enough support to pass the legislature would be upheld by the Court."²² Comparable legislation has been adopted in states other than Florida, but as yet there has been no judicial interpretation on the precise point involved in this case.²³ It does not appear that either the regulatory effect or the classification of the statute is so "utterly unreasonable"²⁴ or "without any reasonable basis,"²⁵ as to justify the court in invalidating it under the fourteenth amendment. It appears that the court was in error in holding that this law was arbitrary. The Supreme Court of Florida should accept the *present* federal position on the impact of the due process and equal protection clauses on property and contract rights.

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18. *Kass v. Lewin*, 104 So.2d 572, 577 (Fla. 1958).

19. 59 So.2d 360, 365 (Fla. 1952) (dictum), where plaintiff sought writ of mandamus to compel officials to approve proposed plat for real estate subdivision. ". . . It is not necessary that a plat or a map of a person's property showing lots and blocks be recorded before it can be sold. It may be more convenient to sell by lots and blocks as was shown by a recorded plat, but he may sell it by the inch, the foot, or the yard, and describe it by metes and bounds."

20. *Kass v. Lewin*, 104 So.2d 572, 577-8 (Fla. 1958).

21. 2 CUSHMAN, *SELECTED ESSAYS ON CONSTITUTIONAL LAW*, 76-7, 81 (1938); SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 99 (1943); WOOD, *DUE PROCESS OF LAW* 181-2 (1951); HETHERINGTON, *State Economic Regulation and Substantive Due Process of Law*, 53 *Nw. U. L. Rev.* 13 (1958).

22. HETHERINGTON, *supra* note 19 at 25.

23. ARIZ. REV. STAT. § 9-479 (1956); IDAHO CODE §§ 50-2501, 2512 (1957); ILL. REV. STAT. ch. 109 §§ 1, 2, 5, 35 (1957); IOWA CODE ANN. § 409.45, 14, 15, 16 (1946); MINN. STAT. ANN. § 471.29, § 505.08 (1945); NEB. REV. STAT. §§ 17-415, 426 (1943); N.Y. REAL PROP. LAW § 334; S. C. CODE § 60-207 (1952); TENN. CODE § 13-606 (1956); VA. CODE §§ 15-781, 784, 796 (1956); WIS. STAT. ch. 236.16 (1953), WIS. STAT. ANN. ch. 236.31 (1953). These statutes differ from the statute under consideration in the penalty imposed for violation of the statute.

24. *Schmidinger v. Chicago*, 226 U. S. 578, 587 (1913); See *Williamson v. Lee Optical Co.*, 348 U. S. 483, 487 (1954), both the due process and equal protection clauses were at issue in this case.

25. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 78 (1911). See *Walters v. City of St. Louis*, 347 U. S. 231, 237 (1953).