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CASES NOTED

CONSTITUTIONAL LAW—EQUAL PROTECTION—INVALIDITY OF MISCEGENATION STATUTE

Petitioners, a white woman and a Negro man, instituted a mandamus proceeding against the county clerk seeking to compel the issuance of a marriage license. *Held*, that the writ prayed for must issue. The miscegenation statute¹ invoked by the respondent was invalid because it violated the provisions of the Federal Constitution regarding "the equal protection of the laws"² and "the free exercise" of religion,³ and because it was too uncertain to be enforceable, in that there was a lack of provision for the application of the statute to persons of mixed ancestry. *Perez et al. v. Lippold*, 198 P.2d 17 (Cal. 1948) (4-3 decision).

Prior to this decision, miscegenation statutes,⁴ though frequently attacked, had been upheld consistently.⁵ This result was based upon the premise that the marriage relation is an institution of society, subject to regulation and control under the police power of the state in the interest of good order and the public welfare.⁶ This view was supported in the dissenting opinion. But there have been few recent cases involving miscegenation statutes, and some of these have been decided upon precedent.⁷ For this reason the majority believed it

1. CAL. CIV. CODE § 69 (Deering, Supp. 1947). ". . . and no license may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian, or member of the Malay race; . . ." This section implements CAL. CIV. CODE § 60 (Deering, 1941). "All marriages of white persons with Negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void." Amendments had been made to these sections as recently as 1945 and 1933, respectively.

2. U. S. CONST. AMEND. XIV, § 1.

3. U. S. CONST. AMEND. I. With regard to the contention of the petitioners, both Catholics, that the statute denied them the sacrament of matrimony and thereby prohibits the free exercise of their religion, the court held that the state may not impose this restriction under its power to regulate the performance of acts in the exercise of religion as in *Cantwell v. Connecticut*, 310 U. S. 296 (1940) (when necessary to prevent acts which would incite violence and breaches of the peace), and *Reynolds v. United States*, 98 U. S. 145 (1878) (prevention of "actions which are in violation of social duties or subversive of good order"), because it is discriminatory and irrational. This was especially emphasized in the concurring opinion.

4. RADIN, PHRONISTRY, KEEPING OUR BLOOD PURE 92, n.7 (1933), lists thirty states in which Negroes may not marry white persons.

5. *E.g.*, *Pace v. Alabama*, 106 U. S. 583 (1882); *Stevens v. United States*, 146 F.2d 120 (C. C. A. 10th 1944); *State v. Tutty*, 41 Fed. 753 (C. C. S. D. Ga. 1890). Almost all other decisions have been in state courts. See 35 Am. Jur., Marriage §§ 10, 12, 146; 36 Am. Jur., Miscegenation § 3; 55 C. J. S., Marriage § 15.

6. In *Maynard v. Hill*, 125 U. S. 190 (1888), the Court said on page 213: "It partakes more of the character of an institution regulated and controlled by public authority, upon principles of public policy for the benefit of the community." The Supreme Court of Florida recently termed the state's power to regulate the marriage status "plenary" in *Rotwein v. Gersten*, 36 So.2d. 419, 421 (Fla. 1948). See *Reynolds v. United States*, 98 U. S. 145 (1878). See note 5 *supra*.

7. *E.g.*, *Stevens v. United States*. *supra*.

appropriate to re-examine the problem in the light of more recent racial relations decisions of the United States Supreme Court.

As a preliminary step, the majority, relying on certain language used in *Meyer v. Nebraska*⁸ and *Skinner v. Oklahoma*,⁹ adopted the proposition that marriage is a "fundamental right."¹⁰ As such it comes under the protection of the Fourteenth Amendment, and must not be infringed by restrictions upon the scope of the individual's choice except by the use of reasonable means to obtain an important social objective, such as the prevention of marriages that are socially dangerous because of physical disability.¹¹ However, the court rejected the attempt to show the statute to be within this exception.¹² A distinction is drawn between this statute and similar statutes which express a public policy in prohibiting polygamy because of its supposed anti-social propensities.¹³

The crux of this decision, however, seems to lie in the interpretation of the "equal protection" clause. The court discarded the construction to be found in many of the cases to the effect that there is no discrimination and denial of equal protection if the statute applies alike to both whites and Negroes.¹⁴ It adopted another, based upon *McCabe v. Atchison, T. & S. F. Ry.*,¹⁵ *Missouri ex rel. Gaines v. Canada*,¹⁶ and *Shelley v. Kraemer*¹⁷ and

8. 262 U. S. 390 (1923), where the Court said: "Without doubt, it ("liberty" as used in the Fourteenth Amendment) denotes not merely freedom from bodily restraint but also the right of the individual . . . to marry. . . ." *Id.* at 339.

9. 316 U. S. 535 (1942), where the Court said: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541.

10. *Cf. Norman v. Norman*, 121 Cal. 620, 54 Pac. 143 (1898).

11. *Cf. Buck v. Bell*, 274 U. S. 200 (1927) (statute providing for sterilization of mental defectives upheld); *Gould v. Gould*, 78 Conn. 242, 61 Atl. 604 (1905) (statute prohibiting marriage of epileptic and making it a criminal offense held not to be in violation of state constitution).

12. "The categorical statement that non-Caucasians are inherently physically inferior is without scientific proof. In recent years scientists have attached great weight to the fact that their segregation in a generally inferior environment greatly increases their liability to physical ailments. In any event, generalizations based on race are untrustworthy in view of the great variations among members of the same race. . . . If this premise were carried to its logical conclusion, non-Caucasians who are now precluded from marrying Caucasians on physical grounds would also be precluded from marrying among themselves on the same grounds." *Perez et al. v. Lippold*, 198 P.2d 17, 23-24 (Cal. 1948).

13. *Reynolds v. United States*, *supra*; *Davis v. Beason*, 133 U. S. 333 (1890).

14. *E.g., Pace v. Alabama*, *supra*; *Stevens v. United States*, *supra*; *In re Paquet's Estate*, 101 Ore. 393, 200 Pac. 911 (1921).

15. "It is the individual who is entitled to the equal protection of the laws, . . ." 235 U. S. 151, 161-162 (1914).

16. "Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, . . ." 305 U. S. 337, 351 (1938).

17. "Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected. This contention does not bear scrutiny. . . . The rights created by the first-section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on the ground of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." 68 Sup. Ct. 836, 846 (1948).

augmented by the recent expressions in *Railway Mail Ass'n v. Corsi*¹⁸ and *Oyama v. California*,¹⁹ requiring that the constitutionality of state action be tested according to whether the rights of an *individual* are restricted *because of his race*. Such a construction makes it doubtful whether the "equal protection" clause would permit a statute involving a racial classification to be sustained, except under circumstances similar to those in *Hirabayashi v. United States*.²⁰

While the decision will have no drastic repercussions on its facts, since few will avail themselves of the opportunity to enter into miscegenous marriages, its significance lies in the fact that if this interpretation of the "equal protection" clause be correct, the question is raised as to the future of other types of segregation recognized to date.²¹ It would seem that the door is being opened to further application of this interpretation to public laws dealing with the more common and consequential segregational problems.²²

CRIMINAL LAW—INDEFINITE SUSPENSION IN IMPOSITION OF SENTENCE

Petitioner entered a plea of guilty to the charge of possessing and selling lottery tickets. On December 7, 1945, he was adjudged guilty, and the court ordered "that the passing of sentence herein be continued from day to day and from term to term until disposed of." Petitioner was thereupon released. Subsequently, on July 13, 1948, two years and seven months after the imposition of sentence was suspended, he was rearrested and, six days later, was sentenced to three years at hard labor. The court, before passing sentence, denied a motion of the petitioner that he be allowed a hearing to show that he did not violate any agreement or understanding made at the time of suspension. *Held*, appeal dismissed, since no conditions were imposed at the original trial, the hearing was not required. *Pinkney v. State*, 37 So.2d 157 (Fla. 1948).

Suspension of sentence cases must be closely scrutinized, for the courts have indiscriminately used this phrase in two situations; suspension of

18. "A judicial determination that such legislation (N. Y. STATE LABOR RELATIONS ACT, N. Y. CONSOL. LAWS, c. 31, Art. 20) violated the Fourteenth Amendment would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color." 326 U. S. 88, 94 (1945).

19. "There remains the question whether discrimination between citizens on the basis of their racial descent, . . . is justifiable. Here we start with the proposition that only the most exceptional circumstances can excuse discrimination on that basis in the face of the equal protection clause. . . ." 332 U. S. 633, 646 (1948).

20. 320 U. S. 81 (1943) (exigencies of war).

21. See, e.g., *McCabe v. Atchison, T. & S. F. Ry.*, *supra* (segregation on railroad trains); *Missouri ex rel. Gaines v. Canada*, *supra* (segregation in schools).

22. See note 21 *supra*.