Buchanan
v.
Warley
245 U.S. 60

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 231

CHARLES H. BUCHANAN

—VS.—

WILLIAM WARLEY

BRIEF FOR THE PLAINTIFF-IN-ERROR

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Counsel.

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In the Supreme Court of the United States

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[No. 614]

CHARLES H. BUCHANAN

v.

WILLIAM WARLEY.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is a writ of error to reverse a decision of the Court of Appeals of Kentucky (165 Ky. 559), affirming a judgment for the defendant entered by the Jefferson Circuit Court in a suit for the specific performance of a contract to buy a tract of land in Louisville.

The petition (Record, p. 1) alleged that the plaintiff in error (hereinafter referred to as "the plaintiff") was the owner in fee simple of the premises in question and that the defendant in error (hereinafter referred to as "the defendant") on November 2, 1914, entered into a contract to buy the premises, which contract contained the following proviso:—

> "It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence." (Record, p. 4.)

The petition further alleged that the plaintiff duly tendered a deed but the defendant refused to accept it or to pay the price.

The defendant's answer (Record, p. 4) alleged that he was a colored person and that the premises were in a block in which a greater number of houses were occupied as residences by white people than were occupied as residences by colored people, so that, if a house should be erected upon the premises, the defendant would be forbidden to occupy it by an ordinance of the City of Louisville adopted May 11, 1914.

This ordinance (Record, pp. 32–35) is as follows:—

"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 respectively.

"Be it ordained by the General Council of the City of Louisville:

"SECTION 1. It shall be unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly, any house upon any block upon which a greater number of houses are occupied as residences, places of abode or places of public assembly by white people than are occupied as residences, places of abode or places of public assembly by colored people.

"SECTION 2. It shall be unlawful for any white person to move into and occupy as a residence, place of abode or to establish and maintain as a place of public assembly, any house upon any block upon which a greater number of houses are occupied as residences, places of abode or places of public assembly by colored people than are occupied as

residences, places of abode or places of public assembly by white people.

"SECTION 3. The word 'block' as the same is used in this ordinance shall be construed to mean that portion of any street or public alley upon both sides of the same between two adjacent intersecting or crossing streets or public alleys, or between such streets or alleys, if extended. In determining the boundary of any given block for the purpose of complying with the provisions of this ordinance, there shall be taken as a basis of measuring the length of such block, the space between the intersecting streets or public alleys on that side of the street or alley on which the house numbers are even, if that side of the street be divided into blocks; otherwise, the block on the opposite side shall be taken as the basis. A 'residence' or 'place of abode' or 'place of public assembly' shall be counted in that block on which it faces and has its main entrance.

"SECTION 4. Nothing in this ordinance shall affect the location of residences, places of abode or places of public assembly made previous to the approval of this ordinance, and nothing herein shall be so construed as to prevent the occupation of residences, places of abode or places of public assembly, by white or colored servants or employees of occupants of such residences, places of abode or places of public assembly on the block on which they are so employed; nor shall anything herein contained be construed to prevent any person who, at the date of the passage of this ordinance, shall have acquired or possessed the right to occupy any building as a residence, place of abode or place of assembly, from exercising such a right. Nor shall anything herein contained prevent the owner of any building now leased, rented or occupied as a residence, place of abode or place of public assembly for colored persons, from continuing to rent, lease or occupy such residence, place of abode or place of public assembly for such persons, if the owner shall so desire; but, if such house shall after the passage of this act be at any time leased, rented or

occupied as a residence, place of abode or place of assembly for white persons, it shall not thereafter be used for colored persons, if such occupation would then be a violation of Section One hereof. Nor shall anything herein contained prevent the owner of any building now leased, rented or occupied as a residence, place of abode or place of assembly for white persons, from continuing to rent, lease or occupy such residence, place of abode, or place of assembly for such purpose, if the owner shall so desire; but if such house should, after the passage of this act, be at any time leased, rented or occupied as a residence, place of abode or place of assembly for colored persons, it shall not thereafter be so used for white persons, if such occupation would then be a violation of Section Two hereof.

"SECTION 5. Any person intending to build or erect for himself, or as agent for another, any building to be used as a residence, place of abode or place of public assembly, upon property situated on a block on which there are no buildings used as a residence, place of abode or place of public assembly, shall in the application for the permit to the Building Inspector declare for what purpose said proposed building for which the permit is asked, is to be used, whether as a residence or place of abode or place of public assembly for white persons or for colored persons. Upon the filing of said application, the Building Inspector shall, as soon as practicable thereafter, cause to be published twice a week for two successive weeks in one German and in one English daily paper of the city of Louisville, and at the cost of said applicant, the fact that a building of the character described is proposed to be built at the place indicated in the permit and to be used or occupied as a residence, place of abode or place of public assembly, as the case may be, for white or colored people; and he shall cause to be posted at some convenient place on or near the lot where such building is proposed to be erected a similar statement; and unless within five days after the date of the last publication thereof, protest be made in writing

to the Building Inspector by those owning more than fifty per cent of the foot frontage of said block against the use mentioned in said application, the permit desired shall, if in other respects said application be in conformity with the ordinances of the city, be granted. Thereafter, all buildings erected for residences, places of abode or places of public assembly on said block, and all buildings erected on said block for other purposes, but which it may be desired thereafter to use as residences, places of abode or places of public assembly, shall be so used either for white persons or for colored persons respectively, as may be determined by the permit granted in the manner hereinabove provided. If, however, the owners of more than fifty per cent of the foot frontage on said block in which the proposed building is to be erected and for which a permit is asked, shall protest against such building in the manner above provided, then in such case no permit shall be issued on said application for the erection of a building for the use set out therein. Whenever a protest is filed under the provisions of this ordinance, those signing the protest shall state the exact number of feet of their respective property that front on the block in question, and each signature to such protest shall be acknowledged before a notary public; and any signature not so acknowledged shall be disregarded by the Building Inspector.

"The provisions of this ordinance are intended to provide a method by which a block which is vacant may be improved and by which its use for either white persons or colored persons may be determined, but shall not be construed to abridge unlawfully any constitutional right which any owner of property may possess to use or occupy his property, subject to reasonable police regulations.

"SECTION 6. No person shall be granted a permit by the Building Inspector for the construction of any house or other building intended to be used as a residence, as a place of abode, or as a place of public assembly, unless he state in his application for a permit whether the house

or building to be constructed is designed to be occupied or used by white or colored people; and if upon the completion of said building or any time thereafter, the owner shall permit said building to be occupied in any manner other than as stated in said application, he shall at once file with the Building Inspector an affidavit stating the change in the manner of use or occupancy. Whenever the use or occupancy of any building as a residence, place of abode or place of assembly for white or colored people, whether erected before or after the passage of this ordinance, is changed from white to colored, or from colored to white, after the passage of this ordinance, the owner of said building shall at once file with the Building Inspector a sworn statement of such change. If the owner of any building used or occupied as a residence, place of abode or place of assembly, shall permit its use or occupation before there is a compliance with the provisions of this section, he shall be fined for each day of such use or occupation, not less than five dollars nor more than fifty dollars. But no permit issued by the Building Inspector shall authorize any person to use or occupy any property in violation of any section of this ordinance.

"SECTION 7. It shall be the duty of the Building Inspector as soon as practicable after the passage of this ordinance, to prepare and preserve for inspection in his office, maps of such blocks in the city of Louisville as are now occupied as residences, places of abode, and places of assembly for both white and colored people, and shall continue to make such maps from time to time as will enable his office and the public to determine the character of use or occupancy of any given block in the city. Such map so prepared and properly certified shall be prima facie evidence of the facts shown thereby. Any owner of property in the city of Louisville or any agent therefor, or any occupant thereof, who shall refuse upon request, to furnish to the Building Inspector, or anyone whom he may appoint to gather such information, with such informa-

tion as such owner, agent or occupant may possess, necessary to make up such map and to revise it from time to time, or who shall furnish any knowingly false information as to the character of use or occupancy of any residence, place of abode or place of assembly in the city of Louisville, shall be subject to a fine of not less than five dollars nor more than fifty dollars for each offense. But the failure of the Building Inspector to comply with the provisions of this section shall not operate to exempt or excuse any person from complying with the terms of this ordinance.

"SECTION 8. Any person who shall violate this ordinance either by himself or through his agent, or any agent for another violating any provision of this ordinance for which a penalty is not otherwise provided, shall be liable to a fine of not less than five dollars nor more than fifty dollars for each offense. Each day that property is occupied in violation of this ordinance shall constitute a separate offense for the purposes of this section.

"SECTION 9. The invalidity of any portion of this ordinance shall not affect the validity of any other portion thereof which can be given effect without such invalid part.

"SECTION 10. This ordinance shall take effect from and after its passage. (Approved May 11, 1914.)"

The plaintiff in his reply (Record, pp. 7–11) alleged that the ordinance was void for the reason, among others, that it was legislation forbidden by the Constitution of the United States and especially by the Fourteenth Amendment thereof, and showed in detail how the enforcement of the ordinance deprived the people of Louisville generally and the plaintiff in particular of rights secured by that amendment. Additional allegations to the same effect were embodied in an amendment to the reply (Record, p. 14).

On motion of the defendant, most of these specific al-

legations were stricken out, subject to the plaintiff's exception (Record, pp. 11, 15). The defendant thereafter demurred to the reply. The demurrer was sustained (Record, pp. 19, 31), and, the plaintiff having declined to plead further, it was ordered that the petition be dismissed (Record, p. 27). Upon appeal, this judgment was affirmed by the Court of Appeals (Record, p. 31), whereupon the plaintiff sued out this writ of error (Record, p. 43).

SPECIFICATION OF ERRORS.

The errors insisted upon in this brief may be summarized as follows:—

1. The refusal to reverse the action of the trial court in sustaining the defendant's demurrer to the plaintiff's reply, and to hold that the ordinance relied upon by the defendant is void because it deprives the plaintiff of property without due process of law, abridges the privileges and immunities of citizens of the United States including the plaintiff, and denies to the plaintiff and other persons within the jurisdiction of Kentucky the equal protection of its laws, and therefore is forbidden by the Constitution of the United States and especially by the Fourteenth Amendment thereof. (Assignments 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 14; Record, pp. 46–49.)

2. The refusal to reverse the action of the trial court in striking from the plaintiff's reply as immaterial allegations of fact which if proved would have shown that the ordinance relied on by the defendant in the circumstances existing in the City of Louisville deprived the plaintiff of property without due process of law, abridged the privileges and immunities of the plaintiff and other persons in like situation and denied to him and them the equal protection of the laws of Kentucky, and that it was therefore

void as forbidden by the Constitution of the United States and especially by the Fourteenth Amendment thereof. (Assignment 13; Record, p. 49.)

Among the allegations so stricken out are the following:—

> "That there are numerous lots of land located in the City of Louisville, with and without residences thereon, which are located in blocks wherein there are more residences occupied by white people than there are residences occupied by colored people and for which lots and improvements thereon there is no sale except to colored people. That as a result of the enforcement of the said ordinance the market value of the lots so located as aforesaid will greatly decrease, the value of the property will become greatly depreciated; said lots and the improvements thereon will not be in demand by white persons because of their proximity to residences occupied by colored persons, and the value of such lots and improvements will greatly depreciate. (Record, pp. 7–8, 15.)
>
> "That the corner lot described in the petition cannot be sold to a white person for any purpose; that said lot has only a frontage of 25 feet, and in the part of town in which it is located is not salable for any purpose except residence purposes and on account of its location is only salable to a colored person. That there is no sale for said lot to a colored person unless said colored person can occupy same as a residence, and there is no use to which said lot can be put except as a residence for a colored person, and said lot has no value whatever unless it can be used as a residence for a colored person. (Record, pp. 8, 15.)
>
> "Plaintiff states that there are now in the City of Louisville about 250,000 inhabitants, of this number there are about 200,000 white persons and about 50,000 colored persons. That for many years the white and colored inhabitants of the City of Louisville have lived in residences located in the same block and in perfect harmony and without discord. That a large majority of the colored inhabitants of the City of Louisville occupy undesirable

portions of the city, but that the better elements among the colored inhabitants of the City of Louisville, as they become more prosperous, better citizens and more able to have better homes and reside in better localities, have gradually removed to more desirable territory for residence sites in the city, and in this way the city has extended its boundaries, unused or partially used localities have become settled by the better class and more prosperous colored inhabitants, and the localities so settled by these more prosperous and better element of the colored inhabitants have become more valuable as residence sites than when same were unoccupied or only partially occupied by white people. That such occupancy instead of creating conflict and ill-feeling between the white and colored races has been welcomed and encouraged by the white inhabitants of the City of Louisville. That if the ordinance in question is enforced it will result in preventing the better and more prosperous element of the colored inhabitants from obtaining residences in a better locality, will have a tendency to confine those members of the colored race who are anxious to improve their condition to undesirable quarters of the city, where they and their offspring will be constantly thrown in close touch with and contaminated by the degraded and worthless class of negroes, which element predominates in those sections to which the colored race are now almost exclusively confined, and will thereby have a tendency to lower the standard of citizenship in the State among the colored citizens rather than raise it. (Record, pp. 8-9, 15-16.)

"That on the lot adjoining the lot described in the petition and in the same block with the lot described in the petition a colored man resides with his family, and by the terms of the ordinance the said colored man so occupying said lot as a residence is permitted to continue to live there and occupy said lot as a residence permanently without being subjected to the fines and penalties imposed by the ordinance in question, but that if the ordinance is valid then the defendant cannot occupy the lot described in the

petition as a residence without subjecting himself to the fines and penalties imposed by said ordinance." (Record, pp. 9, 16.)

The Court may be satisfied that these allegations state consequences of the ordinance which are inevitable, and that therefore they do not affect the case presented by the ordinance itself; but unless this is so we contend that they are material.

ARGUMENT.

The ordinance in question violates the Fourteenth Amendment to the Constitution of the United States.

1. IT DEPRIVES THE PLAINTIFF OF PROPERTY WITHOUT DUE PROCESS OF LAW.

2. IT ABRIDGES THE PRIVILEGES AND IMMUNITIES OF THE PLAINTIFF AND ALL CITIZENS OF LOUISVILLE AND DENIES TO HIM AND THEM THE EQUAL PROTECTION OF THE LAWS.

A. *The ordinance must be judged by its effect.*

The ordinance is 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" etc.

If the purpose thus alleged is the real purpose, the justification for the ordinance must be found in existing conditions.

But it produces among others these practical results:—

1. Where white and colored families are living in the same block they may continue to do so, but if the white

people being in the majority wish to move away, they cannot transfer to colored people the right to occupy their houses. (Sec. 4; Record, p. 33.)

2. If the residents of a block are half white and half colored, the ordinance does not apply so long as the equal division continues.

Thus in these cases the ordinance operates to continue that occupation of a block by both white and colored people, which its framers profess to consider dangerous, and so to perpetuate the conditions at which it is ostensibly aimed.

3. If in the last case a single transfer of property makes the division unequal, a use of premises which to-day is legal becomes a crime to-morrow.

4. Where a block is vacant, the owners of more than fifty per cent. of the foot frontage may by protest prevent any owner of land from building "a residence or place of abode or place of public assembly" for the use of white persons or colored persons as the case may be. (Sec. 5; Record, pp. 33, 34.)

This Court has decided again and again that it will look through the words to the facts—through the form to the substance.

As was said in the case of *Lochner* v. *New York*, 198 U. S. 45 (at p. 64):—

> "The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78. The Court looks beyond the mere letter of the law in such cases. *Yick Wo* v. *Hopkins*, 118 U. S. 356."

The language of the ordinance considered in *Yick Wo*

v. *Hopkins*, 118 U. S. 356, was apparently innocent on its face, but the Court considered the real purpose and effect and dealt with it accordingly.

So in *Guinn* v. *United States*, 238 U. S. 347 (at p. 364), the Court found in language which contained "no word of discrimination on account of race or color or any other reason" the clear purpose to discriminate on those grounds, and judged the law by its results.

The case of *Austin* v. *Murray*, 16 Pick. 121, illustrates the same principle. A by-law ostensibly passed to regulate burials in the interest of the public health, but operating in such a manner as largely to prevent the use of a Catholic burying-ground without affecting other burying-grounds, was held void, the Court saying (at p. 126):—

> "The illegality of a by-law is the same, whether it may deprive an individual of the use of a part or of the whole of his property; no one can be so deprived, unless the public good requires it. And the law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation. Now we think this is manifest from the case stated, in respect to the by-law in question. It is a clear and direct infringement of the right of property, without any compensating advantages, and not a police regulation, made in good faith, for the preservation of health. It interdicts, or in its operation necessarily intercepts, the sacred use to which the Catholic burying-ground was appropriated and consecrated according to the forms of the Catholic religion, and such an interference, we are constrained to say, is wholly unauthorized and most unreasonable."

The same rule was applied in *Bailey* v. *Alabama*, 219 U. S. 219 (at p. 238), where a statute in terms passed to punish fraud was judged by "its natural and inevitable effect."

Legislatures as well as individuals must be presumed to intend the necessary consequences of their own acts.

The ordinance in this case seeks to preserve the semblance of equality among the races by forbidding white men to reside in blocks where the colored residents preponderate, though the whole segregation movement rests on the assumption that white men will not live in such neighborhoods. This provision cannot disguise the purpose of the enactment which is to establish a Ghetto for the colored people of Louisville. It is an attempt to prescribe the district or districts within which they must reside and beyond which they cannot take up their abodes. After white and colored people have lived side by side all over the country for nearly fifty years since the Civil War, there has come an outbreak of race prejudice, and legislation like the ordinance under consideration has been attempted in various cities. It is a disease which is spreading as new political nostrums constantly spread from State to State.

B. *The ordinance destroys property rights which had become vested before it took effect.*

It is clear that the right to sell land, buildings or other property to any one who is willing to buy for any lawful purpose and the right to live upon one's own land are property and that any law which destroys these rights takes the very essence of property.

In this very case the allegation in the second paragraph of Section II of the plaintiff's reply (Record, p. 8) shows that if the plaintiff cannot sell his lot to a colored person he cannot sell it at all, since it is useful only for a residence and is so situated with reference to other colored men's residences that no white man would buy it for that purpose. The ordinance thus practically takes the value out of the plaintiff's land without due process of law.

The framers of the ordinance evidently had in mind the necessity of avoiding interference with the vested rights of those who owned real estate in Louisville when it took effect. It is asserted by the defendant that, in this respect, the ordinance is as fair as it is possible for such an ordinance to be. A brief consideration, however, shows that if this be true, it simply proves that it is impossible to draw a segregation ordinance that will not directly and unreasonably impair vested rights. If, for example, a lot in a particular lot is vacant when the ordinance takes effect, and there are in that block the same number of white and colored families, it may be practically impossible for the owner of the vacant lot to improve his land, since he has no way of knowing that, before he can finish his house, some white family will not be replaced by a colored family, or *vice versa*, in which case the character of the block will become irrevocably fixed and the intended use of the new house for white or colored occupants, as the case may be, rendered impossible. Again, a negro who had bought a lot in a "white block" before the passage of the ordinance and had begun a house upon it but had not finished it could neither occupy the house himself nor let it to one of his own race. Yet again, a house occupied by white tenants may be situated in a block where there are, for example, nine white families and seven negro families. If these white tenants move out, it will be unlawful to let the house to colored tenants and it may be impossible to secure white tenants, so that the house will stand idle indefinitely, although the letting of the house to colored tenants would in no substantial particular affect the contact between the races which it is the object of the ordinance to prevent.

Many other difficulties are pointed out in the plaintiff's reply; the allegations which the defendant moved to strike out tended directly to show the great hardship

and unfairness caused by the enforcement of the ordinance to those who had acquired property prior to its enactment and to meet any suggestion that such evil effects cannot be presumed. It was, therefore, error to grant the motion to strike these allegations from the reply. While this is in one sense a question of practice, it is open in this Court.

Rogers v. *Alabama*, 192 U. S. 226.

Even assuming that the motion was rightly granted, however, there is in the facts of which the Court takes notice more than enough to show the impossibility of working out an equitable scheme of segregation, and to show that the ordinance now in question is invalid, not only on the broad grounds discussed below, but on the narrower ground that it destroys without compensation rights which had become vested long before it took effect. In this respect it differs only in degree from the Baltimore ordinance held void in *State* v. *Gurry*, 121 Md. 534, and from the Winston and Atlanta ordinances overthrown in *State* v. *Darnell*, 166 N. C. 300, and *Carey* v. *Atlanta*, 143 Ga. 192, respectively. In the case last cited the Court said:—

> "In the course of the opinion [in *State* v. *Darnell*, supra] it was said: 'Besides, an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this 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 having power to take away. In *Bruce* v. *Strickland*, 81 N. C. 267, it is said: "The *jus disponendi* is an important element of property, and a vested right protected by the clause in the Federal constitution which declares the obligation of contracts inviolable." . . . This ordinance forbids a white man or a colored man to live

> in his own house if it should descend to him by inheritance and should happen to be located on a street where the majority of the residents happen to be of such different race. . . . Property of a person, whether as a member of a class, or as an individual, cannot be taken without due process of law' . . . The effect of the ordinance in question was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due-process clause of the constitution."

It would seem very difficult to frame a segregation. ordinance that would be of any practical effect without conflicting with the vested rights of those who owned land at the time the ordinance was enacted. Whether by an extreme of ingenuity such an ordinance could be devised need not be considered; it is enough to say that the Louisville ordinance does not meet the test.

C. *The ordinance abridges the privileges and immunities guaranteed by the Fourteenth Amendment and deprives the plaintiff and others of the equal protection of the laws.*

When an owner of land on one side of the street can sell only to one class of buyers and an owner on the other may sell to other customers the two do not enjoy the equal protection of the laws any more than two shop-keepers would if one was allowed to sell only to natives and the other only to foreigners.

It certainly raises a presumption against the validity of the ordinance that it seeks to accomplish one of the very things which the Fourteenth Amendment was passed to prevent. The familiar language of the Court may well be repeated in this connection:—

> "This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently

emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. . . . At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race, would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. . . . It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. To quote the language used by us in the *Slaughter-House Cases*, 'No one can fail to be impressed with the one pervading purpose found in all the amendments, lying at the foundation of each, and without which none of them would have been suggested,—we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over them.' . . .

"If this is the spirit and meaning of the amendment, whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States

(evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

Strauder v. *West Virginia*, 100 U. S. 303, at p. 306.

So in *Ex parte Virginia*, 100 U. S. 339 (at p. 344), the Court said:—

"One great purpose of these amendments [*i.e.*, the thirteenth and fourteenth] was to raise the colored race from that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color."

It cannot be doubted that if the framers of the Amendment had supposed that such legislation as is now in question might possibly be considered as not coming within

the general language adopted, a specific prohibition would have been inserted.

Light upon the true construction of the Amendment is thrown by the decision in *Washington, Alexandria & Georgetown Railroad* v. *Brown*, 17 Wall. 445. An Act of Congress, passed in 1863, authorized a railroad company to extend its line into the District of Columbia, provided that no person should be "excluded from the cars on account of color." It was held that, under this provision, a rule requiring white and colored passengers to ride in separate cars was void, even though the accommodation afforded to those of one race was equal to that furnished those of the other. Mr. Justice Davis said (at p. 452):—

> "The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but, on the contrary, has always provided accommodations for them.
>
> "This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense. There was no occasion in legislating for a railroad corporation to annex a condition to a grant of power, that the company should allow colored persons to ride in its cars. This right had never been refused, nor could there have been in the mind of any one an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carrier—south as well as north—to transport, if paid for it, all persons, whether white or black, who should desire transportation. It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its

road within the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality. This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it."

The startling possibilities which follow if the power to enact such an ordinance be assumed were pointed out by the Supreme Court of North Carolina in holding void an ordinance much like that now in question:—

"If the board of aldermen is . . . authorized to make this restriction, a bare majority of the board could, if they may 'deem it wise and proper,' require Republicans to live on certain streets and Democrats on others; or that Protestants shall reside only in certain parts of the town and Catholics in another: or that Germans or people of German descent should reside only where they are in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could also prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the prescribed race, nationality, or political or religious faith.

. . . .

"There is no reason why the power of the county commissioners to provide for the public welfare should not be as broad as those of the town commissioners, and if under such general authority similar regulations are prescribed for the country districts, one who should buy or inherit property in a section where the opposite race is in the majority could not reside on his own property, and he could not sell it or rent it out except to persons of such different race, since none other could reside there. Neither a white

manager nor any white tenants could reside on a farm where a majority of the tenants or hands are colored."

State v. *Darnell*, 166 N. C. 300, at pp. 302 and 303.

Indeed it has actually been proposed in North Carolina to limit the area within which negroes may own and carry on farms, and surely the right to pursue any vocation is not more sacred than the right to live on one's own land.

Subject to these preliminary considerations, the crucial question is whether the ordinance deprives colored citizens of "the enjoyment of all the civil rights that are enjoyed by white persons" (*Strauder* v. *West Virginia*, 100 U. S. 303, 306) or prevents them from occupying a position of "perfect equality of civil rights with all other persons" (*Ex parte Virginia*, 100 U. S. 339, 344).

We rest our case upon the fundamental principle that, while a State may make police regulations which forbid many acts which would otherwise be lawful and may add restrictions respecting the use of property to those existing at common law, such restrictions must affect all citizens without discrimination. *E.g.*, it will hardly be pretended that a State could require negroes to obtain licenses in order to practise medicine unless white persons were required to do the same, or could forbid the use of wooden buildings by negroes in a given area when the use of such buildings by white persons in the same area was permitted. Only a few authorities need be cited in support of this proposition.

In *Truax* v. *Raich*, 239 U. S. 33, this Court held void a statute forbidding with certain exceptions the employment of aliens and said in that connection (at p. 41):—

"It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in

legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 590; *Coppage* v. *Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved."

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held that the Fourteenth Amendment forbade an ordinance the effect of which was to prevent members of the Chinese race from carrying on laundries in wooden buildings while leaving other persons free from such a restriction. The Court said, with reference to the Fourteenth Amendment (p. 369):—

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of equal laws.

It is accordingly enacted by § 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.'"

In *Barbier* v. *Connolly*, 113 U. S. 27, the Court said (at p. 31):—

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

In consequence of the decisions of this Court, it was held by the Supreme Judicial Court of Massachusetts that a proposed statute imposing upon Chinese restaurant-keepers

certain restrictions not imposed upon restaurant-keepers of other races could not be sustained. The Court closed its opinion with these words:—

> "The fact that a man is white, or black, or yellow is not a just and constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of a different color."

Opinion of the Justices, 207 Mass. 601, 605.

Ah Kow v. *Nunan*, 5 Sawy. 552, is to the same effect.

It follows from the principles above stated that if the ordinance now in question simply provided that colored citizens should not occupy houses hereafter acquired in blocks where a majority of the residents were white, it would be manifestly void. The effect of the ordinance would be that, if the purchaser or devisee of a house in a "white block" happened to be colored, he would be liable to criminal proceedings if he occupied his own house, whereas he would be subject to no such penalty if he were white. A plainer case of racial discrimination could not well be imagined.

In re Lee Sing, 43 Fed. Rep. 359.

In the present case it is contended that the difficulty is met by the provision that white persons shall not occupy buildings in "colored blocks." The plain answer to this is that two wrongs do not make one right. The common law right of every landowner is to occupy his own house or to sell or let it to whomsoever he pleases. The ordinance, as it stands, forbids the owner of land in many parts of the city to live on his land if he happens to be a negro, although he would be free to live on the same land if he were white. This inequality is not removed by forbidding white owners to live on their own land in other parts of the

city. In the "colored blocks," there is a discrimination against an entirely different set of white owners from those in whose favor the discrimination is made in the "white blocks." In the same way, the owners against whom discrimination is made in the "white blocks" are entirely different from those who are left in the enjoyment of their rights in the "colored blocks."

The same inequality exists with regard to tenants. In one part of the city a large class of the citizens cannot exercise their right of contracting for the occupancy of any premises which the owners may be willing to let, although no such restriction is imposed upon the balance of the citizens. In other localities, a similar restriction is imposed upon a different class.

The result is that the ordinance cannot be upheld except on the theory that the equality required by the Fourteenth Amendment is attained by imposing a penalty upon negroes for doing something which white citizens are left free to do, provided negroes are left free to do some entirely different thing which is forbidden to white persons,—if, for example, negroes, but not whites, are forbidden to maintain laundries in wooden buildings, whereas whites, but not negroes, are not allowed to maintain bakeries in similar buildings. It is submitted that the Constitution cannot be satisfied by any such offsetting of inequalities and that a discrimination against one race is not one whit less a discrimination, because in some other matter a discrimination is made against the other race.

In the present case the nature of the right which is abridged gives special force to the foregoing considerations. In the cases of separate railroad accommodations and separate schools, more fully discussed below, it is possible to say that no harm is suffered through the separation of the races, if the facilities enjoyed by either race are the

same as those enjoyed by the other. In the case at bar no such argument can be made, because every parcel of land has qualities peculiar to itself. According to the elementary rule, the mere fact that a contract calls for the conveyance of land is enough to show that the subject-matter of the contract is a thing of unique character, so that a court of equity will decree specific performance instead of leaving the vendee to recover damages and therewith buy some other piece of land, as would be done if the subject-matter of the contract could be substantially duplicated. Hence, the fact that persons restrained by the ordinance from occupying particular lots are left free to occupy other lots does not show that the ordinance imposes equal burdens upon all citizens.

The vital character of the right affected is yet more important. One of the first essentials of a free government is the right of every citizen to establish his residence where he sees fit and to move from place to place at pleasure. Such an ordinance as that now in question does not affect simply the convenience and comfort of those citizens to whom it applies, but strikes at their right to live at all. The result of such enactments on any large scale might well be to compel the entire negro population to reside in the most unwholesome and otherwise undesirable parts of the several States and to reduce them, through being thus bound in effect to the soil in the designated localities, to a condition not far removed from slavery.

If the inquiry be confined to Louisville alone, the Court cannot but take notice of the fact that, in every city where the negroes form a large element of the population, those sections which are inhabited chiefly by negroes and which therefore become "colored blocks" under an ordinance like that in question are generally in the least healthful and least attractive parts of the city. The necessary effect of such an ordinance is, therefore, to confine a large part of

the citizens to these undesirable quarters, in spite of every effort they may make to better their condition. In other words, such an ordinance cannot fail to keep the negro in that condition of inferiority as respects his opportunities for advancement and self-improvement which it was the prime object of the Fourteenth Amendment to put an end to.

It may be said that if the quarters inhabited by negroes are undesirable it is because their inhabitants have made them so. In so far as this undesirability results from the natural features of the localities to which the negro population has been largely confined by extra-legal influences, the allegation is obviously untrue. In so far as it results from the habits of the less thrifty among the negro citizens the fact is irrelevant unless it be assumed that the Fourteenth Amendment warrants us in visiting the shortcomings of the fathers upon the children, not unto the third and fourth generation alone, but for all time.

It will be observed that the ordinance affects the rights not only of those who are now inhabitants of Louisville, but also the rights of negroes now residing elsewhere who may hereafter wish to settle in Louisville. The tendency of this ordinance must necessarily be to convert into "white blocks" such vacant areas as may from time to time be developed for building purposes and so either prevent negroes from establishing their residence in the city or produce in the "colored blocks" a condition of increasing congestion with all its attendant evils.

Again, what is permissible in Southern cities must be equally permissible in Northern cities. It may be that in Louisville, where the colored population is comparatively large, the "colored blocks" would occupy a considerable part of the city, so that a certain freedom of movement on the part of the colored population would remain. But in New York or Boston, where only a small fraction of the

population is colored, the restriction of the colored residents to those blocks where they are now in the majority would result in compelling them to reside in a very small area and would differ only in degree from imprisonment. Could it be seriously argued that a segregation ordinance producing these effects would be valid? And yet it must be valid if the Louisville ordinance can be upheld.

The plaintiff submits that the allegations stricken from the reply were pertinent to this branch of the case, as well as to that considered in the previous section of this brief, and that the granting of the defendant's motion was erroneous for this further reason. Even as the case stands, however, the effects produced by the ordinance cannot be questioned.

D. *The cases relied upon by the defendant are irrelevant.*

The defendant relies upon the cases upholding laws providing for separate railroad accommodations and for separate schools. None of these cases, however, are pertinent. The Fourteenth Amendment applies to such cases, if at all, only because some right which would otherwise exist is inequitably abridged. In the railroad cases the reason for upholding the law is not that it is competent for the legislature to impair the right which the colored man would otherwise have as against the carrier. Every man has, at common law, a right to require that a carrier provide him with reasonable facilities at reasonable rates and that the facilities furnished and the rates charged be as favorable as those offered the public generally. But if such accommodation is furnished at such rates the carrier may determine what vehicle the passenger shall occupy.

Chiles v. *Chesapeake & Ohio Railway*, 218 U. S. 71.

West Chester & Philadelphia Railroad v. *Miles*, 55 Penn. St. 209.

The Sue, 22 Fed. Rep. 843.

Hence a statute requiring separate accommodations is outside the prohibitions of the Fourteenth Amendment: such a statute does not impair any right that would otherwise exist. If, however, a statute purports to relieve the carrier from the obligation to furnish to colored passengers accommodation equal to that furnished to others, then it does inequitably impair a right which the colored passenger would otherwise enjoy and is void.

> *McCabe* v. *Atchison, Topeka & Santa Fe Railway*, 235 U. S. 151.

The cases of public schools are even more remote from that now under consideration. So far as the Fourteenth Amendment is concerned, the States are not bound to provide schools for anybody. The statutes regulating attendance at school do not, like police regulations, cut down rights previously recognized, but grant privileges which would not exist otherwise. If, therefore, the privileges granted to white and to colored children are in general similar, there is no ground for complaint.

As regards private schools, the situation is altogether different. It is true that a statute requiring segregation in private schools was upheld in *Berea College* v. *Commonwealth*, 123 Ky. 209, and that the judgment of the Court of Appeals was affirmed by this Court. (*Berea College* v. *Kentucky*, 211 U. S. 45.) But this result was reached only because a majority of this Court held that the statute might be construed as an amendment to the defendant's charter,—a point apparently not taken by counsel for the State. If the defendant had been an individual, it is plain that the statute must have been declared void and the judgment of the Court of Appeals reversed for the reasons cogently stated in the dissenting opinion of Mr. Justice Harlan (211 U. S. at p. 68).

The only other cases that give any appearance of support to the defendant's position are those upholding statutes which forbid the intermarriage of whites and negroes. The validity of these statutes has never been determined by this Court, so that the decisions of inferior courts on this subject are not of great weight for the present purpose. These decisions, moreover, are irrelevant. Marriage is primarily a matter of status and only incidentally a matter of contract. The interests of the State are vitally concerned, as well as those of the parties. The conditions upon which citizens may enter into this status have from the earliest times been held subject to be determined by the State, so that no argument can be drawn from marriage regulations in support of an ordinance which radically interferes with fundamental rights of liberty and property. Again, such marriage regulations are equal in their operation in the sense that no penalty is imposed upon the members of one race for doing that which is lawful for members of the other race, whereas in the ordinance now in question the avowed object is to prevent negroes from occupying land which it is lawful for whites to occupy.

Pace v. *Alabama*, 106 U. S. 583.

E. *Notwithstanding the title of the ordinance, its tendency is to provoke conflict between the races and to reduce negro citizens to a position of inferiority.*

In conclusion, reference may be made to the title of the segregation ordinance, wherein the purpose of the ordinance is declared to be "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." It is manifest that, far from promoting these laudable ends, the ordinance tends to stir up

conflict and ill-feeling. The effect of the ordinance cannot be other than to cause continual controversy as to whether particular houses may be occupied by white persons or by colored persons, as the case may be. Moreover, even after the mixed blocks have been eliminated by the gradual process indicated in the ordinance, the "colored" and "white" areas will meet at many points and the supposed harmful results of the juxtaposition of the races will continue. It is said that the Court cannot presume that the ordinance was not enacted in good faith for the purposes declared. That is true, but it is equally true that this presumption fails when it is obvious that the purposes were very different from those set out.

Bailey v. *Alabama*, 219 U. S. 219.

No one outside of a court room would imagine for an instant that the predominant purpose of this ordinance was not to prevent the negro citizens of Louisville, however industrious, thrifty, and well-educated they might be, from approaching that condition vaguely described as "social equality." This is not a restriction laid upon a specified class of citizens because they are dirty, shiftless, or otherwise objectionable in their habits. It puts in one class every colored man, no matter how free he may be from all these objectionable qualities, simply because he is colored, and it puts in the other class every white man, even though he may be in every way an "undesirable citizen," simply because he is white.

Counsel for the defendant are right in saying that the Fourteenth Amendment does not compel social equality, and that, as this Court said in the *Civil Rights Cases*, 109 U. S. 3, the negro under the Fourteenth Amendment "takes the rank of a mere citizen, and ceases to be the special favorite of the laws." But no one is complaining of the

ordinance because the negro is not treated more favorably than are other citizens. The ordinance was manifestly drawn with great ingenuity with a view to placing the negro citizens of Louisville in as inferior a position as possible with respect to their right of residence and directly violating the spirit of the Fourteenth Amendment without transgressing the letter. If one of those who enacted the ordinance were defending his course before his constituents he would ask their approval just because he had succeeded so well in establishing a permanent superiority for the white race. This court, it is apprehended, cannot shut its eyes to these obvious facts, but must recognize in the ordinance a palpable attempt to destroy those fundamental rights which the Amendment guarantees.

MOORFIELD STOREY.
HAROLD S. DAVIS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 231

CHARLES H. BUCHANAN,
Plaintiff-in-Error,

—vs.—

WILLIAM WARLEY,
Defendant-in-Error.

BRIEF FOR PLAINTIFF-IN-ERROR

CLAYTON B. BLAKEY,
For Plaintiff-in-Error.

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Supreme Court of United States

CHARLES H. BUCHANAN, - - - - *Plaintiff in Error,*

vs.

WILLIAM WARLEY, - - - - - *Defendant in Error.*

BRIEF FOR PLAINTIFF IN ERROR.

May it Please the Court:

This appeal involves the constitutionality of an ordinance of the City of Louisville known as the Segregation Ordinance.

The plaintiff in error, a white man, seeks the specific performance of a contract for the sale of realty. The defendant in error, a negro, admits the execution of the contract, but claims that it should not be enforced because it specifically provides that he should not be required to take the property unless under the law he could occupy it as a residence for himself, which, under the Segregation Ordinance in question, he is prohibited from doing. The contract in question contains the following clause:

> "It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence."

In his reply the plaintiff says that the Segregation

Ordinance is void because it is arbitrary, unreasonable and discriminatory, thereby conflicting with the Constitution of the State and Nation.

The case was tried on the pleadings, no evidence being introduced.

The Segregation Ordinance will be found copied in full on page 32 of the Record, and appears at page 666A of the Compilation of Louisville, Kentucky, City Ordinances for the year 1913.

SPECIFICATION OF ERRORS.

The errors complained of will be found on pages 46 to 49 of the Record and are as follows:

2.

"The Court of Appeals of Kentucky erred in holding and adjudging that the Ordinance passed by the General Council of the City of Louisville on the 11th day of May, 1914, and known as the Segregation Ordinance, was not in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, which section of the Constitution prohibits legislative bodies in the different states from making or enforcing any law which abridges the privileges and immunities of citizens, or which deprives any person of his property without due process of law, or which denies to any person the equal protection of the law. Plaintiff in error especially charges and avers that said ordinance was and has always been in conflict with Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the real and practical effect of enforcing the said Ordinance has and will deprive the plaintiff in error and other persons of property without due process of law, and has and will deny to plaintiff in error and persons within the jurisdiction of the City of Louisville the equal protection of the law."

4.

"The Court of Appeals of Kentucky erred in failing and refusing to hold that said Ordinance so passed by the General Council of the City of Louisville on the 11th day of May, 1914, and known as the Segregation Ordinance, was void and in conflict with Section 10, Subsection 1, of Article 1, of the Constitution of the United States, and with Section 1 of the Fourteenth Amendment to the Constitution of the United States, and with the Fifth Amendment to the Constitution of the United States, in that the enforcement of said Ordinance would impair the obligation of contracts, would deprive the plaintiff in error and other persons of their property without due process of law, would take from the plaintiff in error and other persons their private property for public use without just, or any, compensation, and would abridge the immunities and privileges of the plaintiff in error and other citizens of the United States, would deprive the plaintiff in error and other persons of property without due process of law, and would deny to the plaintiff in error and other persons within the jurisdiction of the City of Louisville of the equal protection of the law."

5.

"The Court of Appeals of Kentucky erred in failing and refusing to hold that said Ordinance was in conflict with the Constitution of the United States, and especially the Fourteenth Amendment to the Constitution of the United States, in that it was an unwarranted exercise of the Police Power on the part of the General Council of the City of Louisville."

6.

"The Court of Appeals of Kentucky erred in failing and refusing to hold that said Ordinance was in conflict with the Constitution of the United States, and especially the Fourteenth Amendment to the Constitution of the

United States, in that the said Ordinance by its terms and through its practical operation and enforcement will result in gross discrimination among the inhabitants of the City of Louisville and others, and will further result in gross discrimination among the same class of inhabitants as designated by the said Ordinance, thereby denying to the plaintiff in error and other persons and inhabitants of Louisville the equal protection of the law."

7.

"The Court of Appeals of Kentucky erred in failing and refusing to hold that said Ordinance was in conflict with the Constitution of the United States, and especially the Fourteenth Amendment to the Constitution of the United States, in that the effect of said Ordinance and the enforcement thereof will result in permitting white persons to reside in desirable sections of the City of Louisville, and will prohibit negroes from residing in desirable sections of the City of Louisville."

8.

"The Court of Appeals of Kentucky erred in failing and refusing to hold that said Ordinance was in conflict with the Constitution of the United States, and especially the Fourteenth Amendment to the Constitution of the United States, in that by the terms of said Ordinance and under the enforcement thereof, the said Ordinance will result in permitting some negroes to reside in desirable sections of the City of Louisville and on particular squares and blocks of the City of Louisville, and will prohibit other negroes of the same class, character and standing in the community from residing in the same sections, squares and blocks of the City of Louisville."

9.

"The Court of Appeals of Kentucky erred in failing and refusing to hold that said Ordinance was in conflict

with the Constitution of the United States, and especially the Fourteenth Amendment to the Constitution of the United States, in that the enforcement of said Ordinance will confine the negroes of the City of Louisville to undesirable quarters of the city, where they and their offspring will be constantly thrown in touch and intimate association with the degraded and vicious elements of the city, and will not so confine the white residents of the City of Louisville."

10.

"The Court of Appeals of Kentucky erred in failing and refusing to hold that said Ordinance was in conflict with the Constitution of the United States, and especially the Fourteenth Amendment to the Constitution of the United States, in that the Ordinance by its terms shows that the General Council were not convinced of the necessity for such a Police Regulation, the General Council having by the very terms of the Ordinance permitted some blacks and some whites to continue to reside on the same squares indefinitely."

12.

"The Court of Appeals of Kentucky erred in failing and refusing to hold that said Ordinance was in conflict with the Constitution of the United States, and especially the Fourteenth Amendment to the Constitution of the United States, in that said Ordinance was enacted solely to restrict the rights of the negroes, and does in reality restrict the rights of the negroes, and does not in any manner restrict the rights of white people or deprive them of any of their privileges."

13.

"The Court of Appeals of Kentucky erred in failing and refusing to hold that the trial court was in error in striking from the reply of plaintiff in error certain allega-

tions thereof, which allegations showed wherein the said Ordinance was in conflict with the Constitution of the United States."

14.

"The Court of Appeals of Kentucky erred in failing and refusing to hold that the trial court was in error in sustaining a demurrer of the defendant in error to the reply of the plaintiff in error."

PROVISIONS OF ORDINANCE.

(1) It is made unlawful for any colored person to occupy as a residence any house upon any block upon which a greater number of houses are occupied as residences by white people than are occupied as residences by colored people.

(2) It is made unlawful for any white person to occupy as a residence any house upon any block upon which a greater number of houses are occupied as residences by colored people, than are occupied as residences by white people.

(3) A "block" is defined as both sides of a street or alley between intersecting streets.

(4) Section 4 contains certain exceptions to the general rule, among which are the following:

(a) Negroes who, before the passage of the ordinance, occupied residences in white blocks are permitted to continue the occupancy of such residences.

(b) Negroes who owned residences in white blocks when the ordinance was passed, even though they did not occupy them, may thereafter move into and occupy them.

(c) Negro servants and employes of white persons have the right to occupy houses in a white block belonging to their employers.

(d) The owners of residences in white blocks, which residences were rented to negroes when the ordinance

was passed, may continue to rent them to negroes indefinitely and are not confined to the tenant in possession when the ordinance was passed. But should an owner rent to a white person a house in a white block, which had theretofore been occupied by a negro, he shall not thereafter rent same to a negro.

(e) Blocks upon which an equal number of negroes and whites reside are not affected by the ordinance.

(All of these exceptions are made equally applicable to white persons.)

(4) Section 5 of the ordinance permits fifty-one per cent of the owners of land in a block on which no residence has yet been built to determine whether the block shall be a white or a negro block.

(5) By Section 8, any person who occupies any residence on any block in violation of the ordinance is subject to a fine of from $5.00 to $50.00 for each day he so occupies such residence.

The preamble of the ordinance states that it was passed to prevent conflict between the white and colored races. If the ordinance can be maintained at all, it must be maintained under the Police Power of the State. The City's right to pass such a regulation will be found in Section 2783 of the Kentucky Statutes, which is as follows:

> "The General Council shall have power to pass, for the government of the city, any ordinance not in conflict with the Constitution of the United States, the Constitution of Kentucky and the statutes thereof."

At the outset it is important to determine what are the requisites of an ordinance which is intended to establish a Police regulation.

1st—It must concern an appropriate subject of Police regulation.

2nd—It must not discriminate among those affected by the ordinance, and similarly situated.

3rd—It must not be arbitrary or unreasonable.

DOES THE ORDINANCE CONCERN A SUBJECT TO WHICH THE POLICE POWER MAY BE EXTENDED?

The General Council of the City of Louisville may establish police regulations. It may establish fire limits, may require fire escapes to be placed on certain buildings, may require buildings in certain localities to be constructed of certain material. It may require vaccination, or declare a quarantine against the outside world. All these matters and numerous others pertain to the protection of the citizens against some act on the part of one or more persons which is either evil in itself or evil because of the manner in which it is done. Should a legislative body, however, enact an ordinance forbidding owners to paint their houses yellow because that color was not attractive to the eye, the Court would very promptly hold that by such enactment the Legislature was concerning itself with a subject outside the province of the Police Power.

This principle was announced in the recent case of *Coppage vs. Kansas,* 236 U. S. 1. 15. The Court there discussed the validity of a legislative enactment which imposed a penalty on any employer who should demand as a condition for an employe's remaining in his employ that he refrain from joining any labor organization. Mr. Justice Pitney, for this Court, said:

> "Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such * * * by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. 'Its true character cannot be changed by its collocation,' as Mr. Justice Grier said in the Passenger Cases, 7 Howard 283, 458."

Again Mr. Justice Pitney said:

> "Nor can a State by designating as 'coercion' conduct which is not such in truth, render criminal any

> normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard."

In the same case the following language is used:

> "But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of life, liberty or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as coexistent human rights, and bars the State from any unwarranted interference with either."
>
> "And since a State may not strike them down directly it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the Police Power in order to remove the inequalities, without other object in view. The Police Power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."

In the case of *Holden vs. Hardy*, 169 U.S. 366, this Court upheld a law limiting the hours which miners might be required to work underground. The reason given for upholding the law was that it was exceedingly injurious to the health of miners to be compelled to work for long hours. without intermission, underground. The Court therefore held that, exercising its Police Power, the State could protect its citizens against the ills which would come to them from their being required to work under ground for long hours.

A somewhat similar case came before the Court in the case of *Lochner vs. New York*, 198 U. S. 45. In that case a law of the State of New York which forbade employes of bakeries to work at their trade for a longer time than ten hours a day was drawn in question. The Court held that employes in bakeries were not wards of the State; that the character of work done by them was no more unhealthy

than work done by other laborers, and that the Police Power attempted to be exercised in that case was directed to a subject over which the Legislature had no control. In this connection the Court said:

> "It must, of course, be conceded that there is a limit to the valid exercise of the Police Power by the State. There is no dispute concerning this general proposition. Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the Police Power would be a mere pretext—become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint. * * *"
>
> "There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a drygoods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family."

The Justices of the Supreme Court of Massachusetts in a case reported in 207 Mass. 601; 34 L. R. A. (N. S.) 604, had before them for consideration the question of whether an act of the Legislature which excluded women from Chinese restaurants and hotels was within the Police Power of the State. In that opinion the Justices said:

> "This proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal

directly with any offense against order, decency, or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. This legislation does not refer to the character or condition of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of the Police Power. * * * The fact that a man is white or black, or yellow is not a just and constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of a different color."

And in the case of *Commonwealth vs. Fowler*, 96 Ky. 172, the Kentucky Court said:

"We agree with learned counsel that the doctrine of legislative permission as a condition precedent to the conduct of any useful or harmless business is grossly repugnant to the obvious principles of human right which lie at the foundation of just government among men. So, then, without governmental interference or consent, we say the farmer may till his soil, the merchant may buy and sell, the lawyer and the doctor practice their professions, and the druggists and pharmacists compound their medicines. * * * His pursuit being in itself harmless, and indeed useful, and capable of being conducted without harm to the public, cannot be prohibited, and this is true of every legitimate act going to make up or constitute his trade or profession."

John Stuart Mill in his great work on Liberty, said:

"As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences."

The foregoing citations clearly indicate that the exercise of the Police Power has its limitations, and that in order for the General Council to pass a valid ordinance of this nature it must have for its object the accomplishment of some end to which that power can be applied. Can the Police Power deny to a man the right to live in a certain neighborhood? And that, too, when the man in question is committing no nuisance, doing nothing to cause disorder and acting in no way differently from other reputable citizens? Is it not true that police regulations to be valid must confine themselves to prohibiting acts of one man or set of men which are harmful to the community generally, and of which acts the other inhabitants are not guilty? In the case at bar, the Legislature says to each white man in the land, "You may live in this house," and to each black man in the land, "You may not live in this house," not because white men are more orderly than black men, nor because black men are disorderly, or act differently from white men, but simply because they have a different color.

When the General Council attempts to prohibit what is in itself innocent, solely because some citizens oppose the doing of it, does it not then overstep the bounds set by the Constitution? Instead of legislating for the welfare of the community at large is it not legislating for the benefit of certain of its citizens? The Constitution was intended to prohibit the majority from taking away the rights of the minority, and whenever these rights guaranteed to the minority under the Constitution are threatened, it is the duty and the privilege of the Courts to protect them with all possible zeal. The General Council which enacted this ordinance was actuated by a desire to serve the majority, viz.: the white voters who had elected it to office.

The only reason given for making this regulation is that if the negro is permitted to live in a certain locality, conflict may arise between him and the white man. That there is

some conflict between the white and colored races is beyond doubt. That there is some conflict between the Irish and the Jews, between the Catholics and the Protestants, is beyond doubt. If the courts are bound to uphold this Segregation Ordinance because the Legislature has declared that conflict exists and that in the exercise of Police Power it is necessary to enact such an ordinance to prevent the continuance of such conflict, then whenever the Legislature declares that a sufficient conflict exists between the Irish and the Jews or between the Protestants and the Catholics to make segregation necessary, it will be the duty of the courts to uphold such a regulation.

The State of Kentucky has the same jurisdiction over Counties that the General Council has over the City. If the General Council can pass a valid ordinance of this nature, then the State of Kentucky can pass an Act prohibiting negroes from locating on a farm in any County in which more white persons occupy farms than colored persons. The Legislature can say that no negro shall hereafter be permitted to move into any incorporated village in which more white people reside than negroes.

The foregoing considerations are pertinent, not only as showing that the General Council was not addressing itself to a subject of Police regulation in the enactment of this ordinance, but also for the purpose of pointing out where such legislation may ultimately lead. There is no denying the fact that when a negro moves into a white square he is met with anything but welcome on the part of the white people living in that square. There is no denying the fact that some Gentile communities resent a Jew's moving into that community. And there is no denying the fact that some communities occupied exclusively by Jews resent a Gentile's moving into those communities. When legislation of this character is to be passed on, the Courts should not hesitate to declare that so long as a citizen does nothing

disorderly he shall have the right to live where he pleases and free from interference arising out of prejudice on the part of some of the community.

A short time ago I read the life of ex-Attorney General James Speed of Kentucky. Among the many letters reproduced in the book was one in which he described the election held in Louisville, Kentucky, in August, 1855, when the Knownothing riots occurred:

Here is a portion of that letter:

> "I know that the courthouse and courthouse yard was in the possession and under the control of Knownothing bullies from nine o'clock until night or until the foreigners were so frightened that they would not come about there.
>
> * * * *
>
> "About dinner time I saw a small German knocked from the front steps or from the upper platform to the bottom. I thought that the fall would kill him. They ran down, beat him with clubs as he got up, and as he ran pelted him with stones. A man met him and knocked him down. Captain Reauseau got up where they were and saved him.
>
> "When I was in the courtroom I heard that the Honorable Will P. Thomasson was struck when attempting to save an Irishman. I saw Mr. Thomasson soon after and saw the wound or bruise on his cheek. He told me that he had been struck for trying to keep the mob off of an Irishman they were pursuing."

This Court has common knowledge that no conflict such as that described in Mr. Speed's letter takes place between the whites and blacks in this day. And yet if in 1855 the General Council had ordained that "In order hereafter to prevent conflict between natives and foreigners no foreign-born citizen shall reside on a square where a majority of houses are occupied by native citizens," no court would have upheld such an ordinance.

For many years after the war between the States there were many Southern communities in which it was unsafe

*James Speed, A Personality; by James Speed, his grandson. Published by John P. Morton & Company.

for a "Yankee" to attempt to locate. He was looked upon as a social pariah. The prejudice against him was much more intense than it has ever been against the negro. Had some Southern city passed an ordinance in those days creating a Ghetto for Northerners it would have met with the ridicule it deserved. And yet the same reason advanced for upholding the ordinance under discussion would have been equally applicable to such an ordinance.

THE ORDINANCE DISCRIMINATES BETWEEN THE WHITE AND COLORED RACES.

In the reply the following charge is made:

> "If the ordinance in question is enforced it will result in preventing the better and more prosperous elements of the colored inhabitants from obtaining residences in better localities, will have a tendency to confine those members of the colored race who are anxious to improve their condition to undesirable quarters of the city, where they and their offspring will be constantly thrown in close touch with and contaminated by the degraded and worthless class of negroes, which element predominates in those sections to which the colored race are now almost exclusively confined, and will thereby have a tendency to lower the standard of citizenship in the State among the colored citizens rather than raise it. * * * Plaintiff further says that at the time of the adoption of the said Segregation Ordinance all of the blocks in the City of Louisville that were desirable and attractive for residence localities had more white inhabitants residing thereon than colored inhabitants, and that if said Segregation Ordinance is valid and enforceable, then it discriminates between the white and colored races in that it permits the white inhabitants to establish and occupy residences in desirable localities and sections of the city and denies to the colored inhabitants the right to establish and occupy residences in desirable localities and sections."

(Rec. p. 9-14.)

The Chancellor on motion struck out the language above quoted and therefore no proof was taken to establish or refute the charge there made. I assume the Court will

treat the above language as if a demurrer had been sustained thereto. In other words, the charge there made must be considered as true for the sake of this hearing.

That the Chancellor was in error in striking out this paragraph of the reply is apparent.

If the allegations and proof are not to be allowed to show wherein ordinances of this nature are unreasonable and vicious, legislative bodies may violate the Constitution any time they see fit by declaring that their acts are done under the Police Power.

In determining whether a legislative enactment of this character is or is not reasonable, courts will look to the "purpose" of the statute, and "determine from the natural effect of such statutes when put into operation, and not from their proclaimed purpose."

Lochner vs. New York, 198 U. S. 45-64.

St. Louis vs. St. Louis S. W. Ry. Co., 235 U. S. 350-362.

Coppage vs. Kansas, 236 U. S. 1-15.

Obviously the right of a city to exercise its Police Power must depend on the results produced by enforcing the regulation. The result of enforcing a particular Police regulation may prove so unreasonable, so arbitrary, so unnecessary, and so oppressive as to render the enactment wholly vicious.

Assuming for the sake of the present argument that the blocks located in desirable residence sections of the city are white blocks as defined by the ordinance, it necessarily follows that the colored man is not permitted the same privileges and opportunities under the ordinance as is the white man. Let us assume that a white man and a colored man both live in an undesirable section of the city, that their children come in contact with a degraded and vicious class of the community. Both of them have equal ambition for the welfare of their children and both struggle with might and main to improve their condition in life and to obtain for their children better surroundings,

better environment and better influences. Both succeed in their respective callings, both are able to remove from the section where their early life was spent. The white man very promptly buys a house in a better community and in the vicinity of schools, churches, parks and libraries. His children, instead of associating with vicious children, associate with children who have had instilled into them right principles and proper morals. The negro has prospered equally with the white man and is equally desirous to remove to a better residence section, but he is totally deprived of this opportunity. Every community open to him is of a character identical with that from which he wishes to remove. If hampered by no such law the negro would have an equal opportunity with the white man to improve his condition and that of his home and family. Left to himself, he will not move into a square where he will cause conflict. The ill effects of such conflict fall, not on the white man, but on the negro. He will in all probability choose a better community where already one or more negroes live. Take, for instance, the block involved in this case. The record shows that on one-half of the square are eight white residences, on the other half, two negro residences. These negro residences are near the corner, and the lot involved in this litigation is the corner lot. Warley, the defendant, is a negro, a letter carrier in the City of Louisville, a man who has passed the civil service examination of the United States Government. He presumably wants to better his surroundings. In the natural course of events more negro houses will be erected on the block involved in this litigation. The white people living on the square, if they are of the class that object to the proximity of negroes, will in all probability be the class who will prosper and desire to move into a better neighborhood. Their houses will be left vacant and this square will ultimately be occupied by a high class of industrious and ambitious negroes who will improve rather than de-

tract from the neighborhood. Their children will grow up free from the contamination of the vicious negroes who predominate in the territory to which the race will be confined if this ordinance is permitted to stand.

Separate Coach Laws (the only laws similar to the one involved here, which have been passed on by the courts) were enacted for the protection of the negro against the white man, a fact clearly brought out in the opinion of the Kentucky Court in the case of *Quinn vs. L. & N. Railroad Co.*, 98 Ky. 231, where it was said that these laws were enacted

> "as a police regulation, in order to prevent, as far as possible, these altercations upon railroad trains *and to check the disposition of those of the dominant race to oppress and humiliate those who were entitled to the protection of the law.*"

Irrespective of the allegations of the reply, the Court knows, and it is a matter of common knowledge, that the negroes of all Southern cities are confined to the undesirable sections of the city. It is doubtful if a single block in the City of Louisville in a desirable residence section can be found which is not a white block as defined by the ordinance. Of course, there are a great many negroes who live in white blocks and in localities which are more or less desirable. The law permits them to continue their residence on those blocks, but a negro who hereafter betters his condition and wants to move into a better locality is prohibited from so doing. He cannot become a neighbor of his fortunate brother who moved into that block before the ordinance was passed.

It is, of course, elementary that all persons affected by a Police regulation must be treated alike. There must not be any discrimination because of race or color. The ordinance itself seeks to avoid the charge of discrimination by declaring that no white man shall move on a colored block.

Whether the ordinance is valid or invalid must be de-

termined from the effect of its practical operation, and not from what it appears to be on its face.

The Court knows that as a matter of fact it is no deprivation to a white man to be prohibited from moving into a negro block. In other words, the law, while seemingly fair, in reality prohibits the negro from moving into a desirable section of the city, and prohibits the white man from moving into an undesirable section of the city. The same sort of equality exists here as would exist were the General Council of New York to prohibit all Jews from engaging in business on Fifth Avenue, and all Gentiles from engaging in business on Mott Street. *The ordinance is equally as vicious as if it had confined itself solely to prohibiting negroes from moving into any but certain city blocks (naming those blocks where the negroes now predominate).*

But this is only one of the unreasonable and discriminatory features of the ordinance.

By its terms the ordinance permits the following discrimination among members of the colored race:

(*a*) All negroes who lived on white blocks (desirable sections) at the time the ordinance was passed are permitted to continue their residence on those blocks indefinitely.

In other words, it is not intended to abate the conflict as to these blocks.

(*b*) All negroes who owned residences on white blocks when the ordinance was passed, even though they did not occupy them, might thereafter move into and occupy such residences.

As illustrating the viciousness of this provision of the ordinance, here are two lots belonging to two negroes in a white block. Both were purchased a year before the ordinance passed. One of the negroes completed his residence before the ordinance was passed, but had not moved into it. The other negro had his house only partly com-

pleted and, of course, had not moved into it. The first negro may at any time he sees fit, move into and occupy his house as a residence. The second negro has the earnings of his life's work invested in a house which he cannot occupy and from which he can get no return unless he can find a white person who will rent from him.

(*c*) The owners of residences in white blocks, which residences were rented to negroes when the ordinance was passed, may continue to rent them to negroes indefinitely.

(*d*) Blocks upon which an equal number of negroes and whites reside are not affected by the ordinance.

(*e*) Whether blocks upon which no residences have been erected shall be white or black blocks is to be determined by fifty-one per cent. of the owners of the land in such blocks.

In view of the foregoing provisions of the ordinance it is apparent that the ordinance discriminates among the same class of citizens, and is unreasonable and arbitrary in that it permits one negro to live on a white block and does not permit another negro to live on the same block.

Bearing in mind that the sole object of the ordinance as declared by the General Council was to prevent conflict between the white and the colored races, we have this anomalous situation:

Here is a white block in a fashionable part of Louisville without a single negro living on it. One of the residences, however, was owned by a negro when the ordinance was passed. That negro may on any day he sees fit move into this residence and occupy it as long as he lives.

Such a situation is the very one which would cause conflict to arise.

Here is another block in a part of Louisville where laboring people reside. It has on it fifteen residences, nine of them are occupied by white people, six by negroes. No conflict exists or ever existed on that square. One of the

white residences becomes vacant because of the removal of the owner to a better locality, and the owner's property remains idle because he has difficulty in renting it to another white man. Six negroes may live on that block but not seven. The seventh wishing to live there may be Booker Washington or any other respectable negro, but he is denied that right, not because he will keep a disorderly house, but solely because he is a negro, and did not move on the block before the ordinance was passed. The house in question is in every respect as good as and probably better than the other houses on the block. It may be located on the corner furthest away from the eight white residences, and yet any negro who dares move into it will be subjected to a fine of fifty dollars a day.

Take another case that actually exists in the City of Louisville at the present time and which is causing no little confusion. On Dumesnil Street, between Seventeenth and Eighteenth, is located the Davidson Memorial Methodist Episcopal Church (white). The members of the church desire to erect a parsonage on the vacant lot adjoining the church. The block now has, and had at the time the ordinance was passed, eight white and eight negro families residing on it. It is therefore neither a white nor a black block, nor is it affected by the ordinance in any way whatever. The church has purchased a lot and is ready to build the parsonage, but it fears that if it proceeds to do so, before the parsonage is completed and occupied as a residence some white man may move from the block, in which event the block will become automatically a colored block, and the pastor will not then be permitted to move into the parsonage.

Bearing in mind that a block is defined in the ordinance to mean both sides of the street, we have this anomalous situation, which may and probably does exist in the City of Louisville: On one side of the street fifteen white men reside and on the other side fourteen negroes. There is one

vacant house on the negro side of the street. Although a reputable negro desires to move into the vacant house, he is forbidden to do so because the block is a white block as defined by the ordinance. The house must therefore remain vacant and the owner of the property thereby be deprived of the value of his property. In time two white men remove from the white side of the street and the block then automatically becomes a negro block. Negroes may now be permitted to move into those two vacant houses on the white side of the street and live next-door to the white residents, a situation which the Council evidently wanted to forbid—a situation which will undoubtedly cause conflict if conflict ever arises among whites and blacks owing to their being next-door neighbors.

It is extremely doubtful whether, under the language used, the widow or children of a negro owning and occupying a residence on a white block will be entitled to continue to occupy such residence after the death of the owner.

It is thus apparent that the most aggravated character of discrimination and arbitrary regulation permeates this ordinance; that it is in conflict not only with the Bill of Rights and the Constitution of the United States, but with the spirit of the law. Police regulations, in order to be enforceable, must permit to all under like circumstances the enjoyment of the same rights and privileges. No lengthy citation of authorities is necessary in support of this principle, and I shall content myself with calling the Court's attention to the following brief excerpts from the opinions of this Court.

In the case of *Missouri vs. Lewis*, 101 U. S. 22, this Court said:

> "It (the Fourteenth Amendment) means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons of other classes in the same place and under like circumstances."

Minneapolis vs. Beckwith, 129 U. S. 26.

> "Equality of protection implies, not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind."

In the case of *Barbier vs. Connolly*, 113 U. S. 30, this Court, after determining that the Police regulation in question did not apply to all alike, said:

> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended * * * that equal protection and security shall be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

How can it be said that the ordinance now under consideration measures up to the requirements as laid down in the foregoing opinions? If it be insisted that the ordinance was really intended to place restrictions on whites as well as on blacks, then the blacks are not entitled to "acquire and enjoy property" to the same extent as are the whites. The whites can acquire property in a desirable section of the city and enjoy it. The deserving negro can acquire property only in an undesirable section of the city which he cannot enjoy. This ordinance imposes "greater burdens" on the negro "than are laid upon others in the same calling and condition." The burden laid on the

negro is not laid on the white man, and so far as the purposes of this ordinance are concerned the white man and the negro are in the same calling and condition.

As said in *Mallinckrodt Works vs. St. Louis*, 238 U. S. 41-55:

> "Classification must be reasonable; that is to say, it must be based on some real and substantial distinction having a just relation to the legislative object in view."

Again, the Attempted Police regulation contained in this ordinance *is said* to deal with two classes of citizens, one the white man, the other the negro. All white men are treated as one class, all negroes as another. There is no pretense that negroes of one particular trade or occupation may live in one house, and of another trade or occupation must live elsewhere. The ordinance permits one negro to have his residence on a certain block and denies that right to another. A negro who has the right to live on a white block may forfeit that right by moving away for one day. He shall never again be permitted to return to that block. This inhibition is not due to misdeed on his part, but solely to the fact that he saw fit to remove his residence elsewhere for a short time.

A negro who was fortunate enough to own a home in a good neighborhood may use his utmost endeavor to instill into his children right principles and shield them from contaminating influences, but before their maturity he dies and the law drives his widow and children back to the red light district, where every vestige of early training is wiped out through the degrading influences there predominating.

Such discrimination and such arbitrary and unreasonable regulations will not meet with the approval of courts in this day of enlightenment.

In the court below counsel for defendant practically admitted that the purpose of the law was to confine the negro to the undesirable sections of the city. Whether he will be so frank in this Court remains to be seen. Here are a few extracts from the brief used in the State Court by the City Attorney of Louisville (who represents defendant):

> "It is notorious that in a community such as Louisville only the most degraded and vicious element among the whites would be willing to live in a normally negro section of the city." (Page 11.)

Again:

> "It should be clearly kept in mind that segregation has naturally existed wherever the whites and negroes have lived in the same community in any considerable number, and this law only seeks to regulate that natural segregation which has always existed *and to prevent a few of each race from overstepping the racial barriers which Providence and not human law has erected.*" (Page 7.)

Again:

> "Where, however, there are one or two negroes on a block, but the other houses are occupied by whites, there will be no more negroes moving into that block, and *in the course of time those one or two negroes will in all probability disappear from that particular block and will seek homes among their own people.*" (Page 18.)

In the language above quoted counsel admits the existence of the three vital facts which plaintiff insists on as showing the discriminatory nature of the ordinance. These are:

(1) The "normal negro section" is a fit locality for only the "most degraded and vicious element" to reside in.

(2) The ordinance was passed to prevent a few from "overstepping the racial barrier which *Providence*" has erected—in other words, for the purpose of forever con-

fining to undesirable sections the few negroes who nourish an ambition to escape the contaminating influences of the degraded and vicious.

(3) The practical operation and enforcement of the ordinance will result in driving out those few negroes who were fortunate enough to establish homes in desirable localities before the ordinance was passed, thereby compelling even those few to "seek homes among their own people"—that is, side by side with the vicious and degraded.

But counsel says the negro has only himself to blame for the squalor which pervades the negro quarter—the natural inference from which being that each member of the race, however respectable and decent in thought and deed, should be forever condemned to remain in this quarter, even though the particular individual had no part or parcel in creating that condition.

Counsel also says (and the Kentucky Court of Appeals agrees with him) the best way to improve the environment of the negro—the best way to reform the vicious and degraded element of that race—is to compel the better element to live among the vicious and set them a good example. It is, of course, commendable for a respectable citizen to become a philanthropist and social worker and go among the slums in search of "souls to save," but should the law impose this duty exclusively on one class of citizens? We submit that no court is justified in upholding a law which forces some of its citizens to live in an undesirable locality, solely on the theory that such enforced residence may redound to the welfare of a more vicious element.

In this connection I hope I may be pardoned for copying into this brief an extract from an address delivered by Dr. William Pickens, former President of Talladega College and now Dean of Morgan College. This address was delivered before the National Conference of Charities

and Correction in Baltimore, May 13, 1915. I believe Dr. Pickens was honestly trying to present the negro view of the segregation question. He said in part:

"It is very probable that colored people know the opinions of white people much better than white people know the opinion of colored people; the Negro reads the white man's opinion in the daily, weekly and monthly press; he hears it reiterated in the debates of Congress and in a dozen State Legislatures; he hears the white man talk much oftener than the white man hears him talk. The inevitable result is that the Negro knows his own opinion and the white man's too, while the white man as a rule knows only his own opinion. * * *

"Now, as to segregating Negroes into restricted areas of our cities. Why are Negroes not willing to live by themselves? To live by themselves would be more comfortable for the Negroes, all other things being equal. But there's the 'rub;' all other things are not equal and will not be, wherever segregation opens the door and lays the temptation to inequality. We speak now of segregation by law; segregation *in fact* has existed since the day of the 'slave quarters.' Since emancipation this segregation has been more or less continued by buying out the Negro, outwitting his ignorance, and even by violently forcing him out. But against this economic and brute-force opposition the Negro had hope based on at least a fighting chance. He could 'fight it out on this line,' if it took generations. But the opponent, in spite of his overwhelming advantage in the struggle, has appealed for laws that will eliminate the negro from the contest altogether.

"And why does the Negro oppose legal segregation? Because a generation of experience has taught him the meaning of successful segregation: a general absence of improvements in the Negro sections—sometimes no pavements, no lights, no sewers, and no police protection against brothels and saloons. The Negro section is equally taxed; they must pay taxes on all the city improvements and bonded indebtedness. If he (the Negro) could live on any street anywhere, this discrimination would be impossible. * * *

"To ask the Negro to accept this ghetto and do these things for himself would be a capital joke if it were not so serious a matter. The Negro could only do that if his section were set apart as an independent municipality, with its own mayor and government and the control over its own taxes—and this will not be

> allowed. But, says the opponent, the law is just and equal and constitutional, is it not? It does not discriminate; it says that blacks shall not move in where there is a majority of whites, but it also says that whites shall not move in where there is a majority of blacks. This is constitutional in letter and equal in phraseology, but I believe it is unconstitutional in spirit and I know it is unequal in effect. The effect of a law, and not its rhetorically balanced phrases, should be the test of its constitutionality. It may be literally constitutional to make a law that the rich shall not lend to the poor, nor the poor to the rich—that the intelligent shall not teach the ignorant, nor the ignorant the intelligent. It should not make a law constitutional to thus simply convert its terms in successive phrases. * * * These are the opinions and the arguments of practically all of the most intelligent Negroes in the United States, many of whom I know personally."

Before dismissing this phase of the argument allow me to call the Court's attention to one other case: *State of New Hampshire vs. Pennoyer*, 65 N. H. 113 (5 L. R. A. 711). In that case the Court considered a Police regulation, wherein it was provided that no person should practice medicine without passing a certain examination, but excepted from its provisions all persons who had practiced medicine in one town without removing therefrom for a period of five years. The Supreme Court of New Hampshire, in declaring the Act in violation of the Bill of Rights and of the Constitution of New Hampshire and of the United States, held that it was not so much unconstitutional because of the qualification required, but

> "It is that, of those physicians who are declared by the statute, or under its provisions are found qualified to practice, some are and others are not subjected to the burden of obtaining a license. Exemption from the burden is made to depend, not on integrity, education and medical skill, but upon a continuous dwelling in one place for a certain time. It is an arbitrary discrimination permitting some and forbidding others to carry on their business without regard to their competency or to any material difference in their situation.

> *The test is not merit, but unchanged residence.* For the right to continue the pursuit of his profession one physician is not, while another, his neighbor, who may be his equal or superior in learning, experience and ability, is required to pay $5. This is not the equality of the Constitution. The magnitude of the unequal burden is not material."

So in the case at bar the right of a negro to reside on a white square does not depend on any material difference between that negro and another negro. "The test is not merit, but unchanged residence."

A Segregation Ordinance similar to the one now under consideration arose in Maryland in the case of *State vs. Guerry,* 47 L. R. A. (N. S.) 1087; 88 Atl. 546. Among other provisions of that ordinance was a section whereby owners of real estate in any particular block were permitted by unanimous agreement to take this block out from under the operation of the ordinance, in which event it could be occupied indiscriminately by white and colored people. Should the owners of property in such block exercise this right, then the very thing at which the ordinance aimed, namely, the prevention of conflict, would not be accomplished. The Supreme Court of Maryland said that in view of this section of the ordinance it could not be assumed that the General Council were convinced of the necessity for such a Police regulation.

> "Indeed, when we see such provisions as those in §7, which provide for a majority of the owners of either real or leasehold property in a block subject to the operations of §§ 1 or 2 having the inspector of buildings declare that said block is no longer subject to the operation of such section, it would be difficult to conclude from the ordinance itself that the mayor and council were so convinced of the necessity for such an exercise of the police powers as would justify such interference with vested rights."

In the case at bar the General Council permitted all blocks in which conflict was likely to arise, namely, blocks

on which both negroes and whites reside, to remain mixed blocks. Practically every condition, the continuance of which might bring about conflict between the races, is permitted by this ordinance to continue, and if any conflict does exist it is to continue without interference. This being true, it would certainly seem that the Council was not "convinced of the necessity for such an exercise of the police power as would justify interference with vested rights."

If living on the same block does cause such conflict between the races as to justify the Council in forbidding it, the Council has the right to forbid it. There is no doubt on this subject. The police power "makes no question" of vested rights. (See *Mugler vs. Kansas*, 123 U. S. 623.) If vested rights are to be considered, lessening the value of one man's land to the extent of one dollar would be as complete a defense to such an ordinance as would be the destruction of property valued at millions of dollars. If, therefore, the Council wants to prohibit this evil, let it pass an ordinance which will be effective, and not one which merely creates confusion and discrimination among its citizens, and under which one citizen is permitted to exercise a right which another citizen of the same color may not exercise.

SEPARATE COACH LAWS.

But it is said that the courts have upheld the segregation of whites and blacks in so far as passenger trains are concerned, and the Chancellor in upholding the present Segregation law based his conclusions largely on the reasoning of the courts which upheld these separate coach laws. In speaking of these laws, a District Court, in the case of *The Sue*, 22 Fed. 846, said:

> "The separation of the colored from the white passengers solely on the ground of race or color, *goes to*

> *the verge* of the carrier's legal right, and such regulation cannot be upheld unless bona fide and diligently the officers of the ship see to it that the separation is free from any actual discrimination in comfort, attention or appearance of inferiority."

When we come to dissect the opinions handed down by the courts, wherein Separate Coach Laws have been considered, we find that the laws where upheld have been so upheld:

1st—Because *equal accommodations* were provided by the carrier for both white and colored passengers.

2nd—Because the Court found them to be reasonable regulations for the convenience and comfort of passengers who are *compelled* to travel in a public conveyance, and who but for such regulation would be made uncomfortable by being compelled to sit on seats with persons of a different race or color.

3rd—Because the negro was *denied no property right* by being required to ride in a separate coach.

No citation of authority is necessary in support of the proposition that the accommodations furnished the negro by the carrier must be equally as good as those furnished white people. These Statutes, wherever they have been upheld, always expressly required the railroad to furnish such equal accommodations.

Long before any Separate Coach Laws were enacted the railroads and steamboats of the country established regulations whereby white people were given accommodations in one part of the train or boat and colored passengers in another part, and these regulations were upheld. For instance, in the case of *Westchester Railroad Co. vs. Miles*, 55 Pa. 213, the Supreme Court of Pennsylvania, in upholding a regulation of this kind, quoted the language used by Judge Story in his work on Bailments, where Judge Story said it was

"the duty of passengers to submit to such reasonable regulations as the proprietors may adopt for the convenience and comfort of other passengers as well as their own proper interest."

The case of *Day vs. Owen*, 5 Mich. 527, was a case in which a similar regulation was imposed by the proprietor. In that case the Court said:

"As the duty to carry is imposed by law for the convenience of the community at large and not of individuals, except so far as they are a component part of the community, the law would defeat its own object if it required the carrier, for the accommodation of particular individuals, to incommode the community at large."

Railroads are public carriers and quasi-public corporations. They must carry all passengers who offer to ride. Everyone, white and black, must travel on railroad trains. The railroad may establish regulations for the accommodation and convenience of its passengers, and the State may enact such regulations into laws, and, if they are reasonable and for the well-being of the community at large, these laws will be enforced. The Legislature, however, cannot forbid a private citizen the right to haul a negro in a private carriage unless he provides for such negro a separate compartment. The distinction is apparent; in one case the Legislature is dealing with quasi-public property; in the other it is dealing with private property and private rights.

The courts, therefore, in upholding Separate Coach Laws, have done so because without such laws white and colored persons might be *compelled* to sit on the same seat in a public conveyance, which situation might prove distasteful to one or both.

By this Segregation Ordinance the General Council was not trying to prevent conflict caused by reason of the fact that white and colored citizens were compelled to live in the same block. Before this ordinance was passed a man

might live where he pleased. If a white man did not wish to live on a block with a negro, he could move elsewhere. Not so on a train. He can travel only on the train furnished by the railroad company. The Separate Coach Laws forbid the *enforced* association of whites and blacks, while this ordinance forbids an entirely different thing, viz.: The right of a man to live where he pleases so long as the doing so "affects the interest of no person besides himself or needs not affect them unless they like."

Another reason why these Separate Coach Laws were upheld is stated by this Court in the case of *Plessy vs. Ferguson,* 163 U. S. 549.

> "It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property,* in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property."

The Separate Coach Laws, therefore, did not deprive any citizen of his property. The ordinance in the case at bar, if enforced, will not only deprive the plaintiff and thousands of other property owners of their property, but will deprive the negroes of the City of Louisville of their inalienable right to acquire and enjoy property.

In the case at bar the plaintiff in his reply charges

> "That the corner lot described in the petition cannot be sold to a white person for any purpose; that said lot has only a frontage of 25 feet, and in the part of town in which it is located is not salable for any purpose except residence purposes, and on account of its location is only salable to a colored person. That there is no sale for said lot to a colored person unless said colored person can occupy same as a residence, and there is no use to which said lot can be put except as a residence for a colored person, and said lot has no value whatever unless it can be used as a residence for a colored person." (Rec. p. 8.)

The Court struck out this portion of the reply.

The Separate Coach Laws are different from this Segregation Ordinance in that the Separate Coach Laws do not deprive anyone of vested rights in property, whereas the Segregation Ordinance not only deprives the appellant of his property, but will deprive thousands of others of their property.

This Court said, in the case of *Barbier vs. Connolly, supra,* that the Fourteenth Amendment protected the citizens in their right to "acquire and enjoy property."

In the case of *Allgeyer vs. Louisiana,* 165 U. S. 590, the Court said that the Fourteenth Amendment

> "is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; *to live* and work where he will."

In the case of *Strauder vs. West Virginia,* 100 U. S. 303, the Court held that the Fourteenth Amendment prohibited a State from depriving negroes of the right to serve on juries. It was held that the right to be tried by a jury and to serve on a jury was a valuable property right, and the denial of that right was a denial of equal protection of the laws. In this connection the Court said:

> "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctly as colored—exemption from legal discriminations, implying inferiority in civil society, *lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.*"

Whenever the railroads have made regulations, and whenever Separate Coach Laws have been enacted which denied equal rights to the negro, those laws have been de-

clared unconstitutional. In the recent case of *McCabe vs. Atchison*, etc., *Railroad Co.*, 235 U. S. 151, a question arose concerning the right of a negro to demand a berth on a sleeper and a seat in a dining-car. It was contended by the Attorney General of Oklahoma (an Oklahoma law being contested) that only a few negroes wanted to ride on a sleeper or take meals in a dining-car, and that railroads should not be required to furnish a separate sleeper and a separate dining-car for the accommodation of those few. This Court, answering the argument, said:

> "This argument with respect to volume of traffic seems to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. * * * It is the individual who is entitled to the equal protection of the laws, and if it is denied by a common carrier, acting in the matter under the authority of a State law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

In that case, therefore, Your Honors held that the property right referred to in the Fourteenth Amendment was sufficiently broad to entitle a negro to the same accommodations in a sleeping-car or a dining-car as those furnished the white man. The ordinance here denies to a negro rights of so much greater importance to him, that in comparison the question of traveling accommodations sinks into utter insignificance.

The only point of similarity between the Separate Coach Laws and Segregation here under discussion lies in the fact that in both cases a separation of the whites and blacks is sought.

Now, a law might be passed requiring owners of factories to provide separate rooms for whites and blacks to work in or compelling farmers to require their white em-

ployes to work in one field and their black employes in another, or requiring private citizens to refrain from allowing a negro to ride in a private wagon or conveyance with a white man. The similarity between such laws and Separate Coach Laws would be that all required the separation of the races, and yet the reason for upholding the one would not apply to the other. And the same is true in the case at bar.

A great deal was said in the lower court about the rights of legislative bodies to separate white and colored children into different schools, and to prevent the intermarriage of whites and blacks. Laws of this nature have no bearing on the question here at issue. The Legislature can, of course, prohibit whites and blacks from intermarrying, and this right is based on the sound principle that intermarriage between whites and blacks tends to weaken the vitality of the citizen. The separation of white children and negro children in schools was upheld for a somewhat similar reason.

The declared object for enacting this ordinance was "to prevent conflict and ill feeling between the white and colored races." *Your Honors will not be justified in upholding the Segregation Ordinance as a Police regulation to prohibit the amalgamation of the races. The Council did not fear amalgamation, it feared non-amalgamation or conflict.*

SEGREGATION LAWS CONSIDERED BY OTHER COURTS.

Five States, namely, Kentucky, Virginia, Maryland, North Carolina and Georgia, have had before them Segregation Laws similar to the one now under consideration.

The Virginia Courts (*Hopkins vs. Richmond,* 86 S. E. Rep. 139) and the Kentucky Courts (*Buchanan vs. Warley,* 165 Ky. 559) upheld the law in part. Generally speaking these Courts declared that the law was a reasonable exer-

cise of the Police Power, and that those members of the colored race who had sufficient pride to desire an improved environment should be required to live in the slums in order to preach reform to théir degraded brother. In other words, these Courts say that a law is valid which compels some of its citizens to become missionaries, and that too although the inevitable result will be to drag down into the mire the family of the missionary, very possibly the missionary himself.

In the Maryland case (*State vs. Guerry*, 47 L. R. A. [N. S.] 1087; 88 Atl. 546), the ordinance was similar to the one involved in this case. The Court there held that the City had ample Police Power to pass a Segregation Ordinance, but that the ordinance then before them was invalid; that it was unreasonable to forbid an owner of a residence to occupy it because of his color. The Baltimore ordinance would have in a measure prevented conflict had it been enforced. The ordinance confined itself to squares which were occupied exclusively by negroes or by whites. Those squares were to remain white or black, as the case might be, and as to the squares which were occupied in part by whites and in part by negroes no attempt was made to interfere with the continued use of such squares by whites and blacks indiscriminately.

In the North Carolina case (*State vs. Darnell*, 51 L. R. A. [N. S.] 332; 81 S. E. 338), the ordinance was practically identical with the ordinance in the case at bar. The Supreme Court of North Carolina discussed at great length the questions raised on this hearing, and I respectfully call the opinion of the Court in that case to this Court's attention.

In the Georgia case (*Carey vs. Atlanta*, 84 S. E. 456; Advance Sheets, March 27, 1915), the ordinance was declared void because it was unreasonable and deprived property owners of their vested rights in property, without due process of law.

I assume Your Honors will wish to read what the courts of these States have said concerning these ordinances, and therefore I refrain from a further discussion of the opinions.

GENERAL CONSIDERATIONS.

The Fourteenth Amendment to the Constitution was enacted solely to protect the negro against hostile legislation on the part of the white man. And so it was declared by this Court in the case of *Strauder vs. West Virginia,* 100 U. S. 303.

> "The colored race, as a race, was abject and ignorant, and in that condition was unfitted to command the respect of those who had superior intelligence. * * * They especially needed protection against unfriendly action in the States where they were resident. It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to secure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. * * * 'We doubt very much whether any action of a State, not directed by way of discrimination against the negroes, as a class, will ever be held to come within the purview of this provision.'"

It is not to be disguised that this ordinance was enacted to prevent the negro from moving into a white block as defined by the ordinance. If this is discrimination against the negro then he is entitled to protection under the Fourteenth Amendment.

The Congress of the United States, to further protect the negro in the rights granted him under the Constitution, enacted Section 1977 of the Revised Statutes (Section 6700 Civil Code), which provides as follows:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit

> of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

In a case involving an ordinance intended to separate the whites and blacks, the Kentucky Court handed down an opinion in which the principles announced very nearly touch those involved in the case at bar. I refer to the case of *Boyd vs. Frankfort,* 117 Ky. 199. In that case the City Council of Frankfort sought to prevent the erection of a negro church in a white neighborhood on the theory that conflict might arise. The Court held that the negroes could not be prevented from erecting the church in question; that if after the church was erected it was so conducted as to create a nuisance, the nuisance could be abated, but that the negroes could not be denied the right to erect a building and use it as a church so long as they committed no nuisance. The Court therefore held the ordinance invalid, and in so holding said:

> "The questions arising upon this record present no disturbing social problem. The matters to be adjudicated are purely legal in character. Undoubtedly, it can be shown that the presence in a neighborhood of a church for colored people is not desirable to the surrounding property holders of the white race, but it can not be more disagreeable than the near presence to one's residence of a noisy manufactory, beer garden, dancing hall, or other obnoxious trades, which are so generally tolerated in all cities. 'One living in a city must necessarily submit to the annoyances which are incidental to city life. It is a difficult matter at all times to strike the true medium between the conflicting interests and tastes of people in a densely populated city. It requires the merchant, mechanic, manufacturer, baker, butcher and laborer, as well as the wealthy employed or unemployed citizen, to constitute a city. They all have rights, and the only requirement of the law is that each shall so exercise and enjoy them as to do no injury in that enjoyment to others, or the rights of others.' * * * The further fact is not to be disguised that this objection to the erection of the

> building is largely based upon race prejudice. However natural this prejudice may be, when it superinduces unjust discrimination in the adjustment of mere legal rights, it becomes obnoxious to the law."

In the case of *In re Sing Too Quan, et al.*, 43 Fed. 359, the District Court at San Francisco considered an ordinance of the City of San Francisco wherein all of the Chinese inhabitants of the city were required to remove to and live in one section of the city, and prohibited them from living in any section of the city other than that designated. The Court very properly declared the ordinance void in that it required the Chinese, indiscriminately and irrespective of all other considerations, to live at one place, and permitted the other inhabitants of San Francisco to live wherever they pleased. It does not appear that the ordinance in question prohibited the other inhabitants from living in the Chinese Quarter, but even had it declared that Chinese might live on certain streets but on none others, and that the other inhabitants might only live on certain other streets, the courts, I assume, would have held that the object of the law was to confine the Chinese to certain sections and was not intended to impose like restrictions on the other inhabitants. No other inhabitants would desire to live in the same section with the Chinese and therefore it would amount to no restriction on any inhabitant except the Chinese.

Irrespective of the palpable objections to the ordinance, the fact remains that legislation of this character creates more friction than could possibly be prohibited if the ordinance was otherwise so drawn as not to conflict with the Constitution.

As said in the case of *State vs. Darnell, supra*:

> "In Ireland there were years ago limits prescribed beyond which the native Irish of Celtic population could not reside. This was called the "Irish Pale," and one of the results was continued disorder and unrest

in that unhappy island, which had as one of its consequences that more than half its population came to this country. That policy has since been reversed. But in Russia, to this day, there are certain districts to which the Jews are restricted, with the result that vast numbers of them are emigrating to this country."

We appreciate the fact that many white people are opposed to having a negro for a next door neighbor, and we concede that conflict arises on this account at times. But such sporadic conflict is of small moment, and the enforcement of this ordinance, instead of preventing it, will only aggravate it. As a rule the negro does not move into a neighborhood where only white people reside. He establishes his residence on a block where one or more negroes live, and in this way the less desirable white blocks gradually become occupied by negroes. For a certain period the property in such a block becomes less valuable, but when entirely converted into a negro block it becomes more valuable than before.

But assume that without segregation negroes will move into certain localities and will thereby depreciate the value of property in those localities, is that a sufficient reason for upholding an ordinance, the enforcement of which will necessarily and admittedly destroy other property rights? The destruction of a vested right should not be permitted solely in order that values in other property may be maintained.

Again, when we consider that the State of Kentucky has on all occasions so legislated as to maintain inviolate the rights of property, such legislation as this would not seem to conform to the general spirit pervading the laws of the State. This situation was emphasized by the North Carolina Court in the case of *State vs. Darnell, supra,* when it said:

"We can hardly believe that the legislature, by the ordinary words in a charter authorizing the alderman

to 'provide for the public welfare,' intended to initiate so revolutionary a public policy. Had this been intended, there would certainly have been a thorough discussion and a full consideration by the general assembly of the question whether, under the Constitution of the United States and of this State, the legislature could establish a policy which would deny to the owners of lands, either in the country or town, the right to dispose of them by sale or renting to whomsoever they saw fit, as of ancient right they had been long accustomed to do, or to restrict any class of citizens from buying or renting where they wished."

WHAT AMERICA OWES TO THE NEGRO.

The negro did not ask to come to America. He was forced here. His master placed him in bondage and for the most part exercised over him such authority as utterly prohibited his developing a sense of responsibility—in some instances extending to him the affectionate protection bestowed by a parent on a helpless child, in others brutalizing him with wanton cruelty. During these years he could not but remain a child. With emancipation came a change. The negro suddenly found himself projected into man's estate. The authority of his parent-master was removed. He ran riot with sudden excess of freedom. He took no thought of the morrow. All manner of bestial excesses were indulged in, bringing the race so low in the strata of society that it was only fit to be herded in those quarters of the city where the scum and offscouring of the land plied their nefarious callings. But by sure degrees came a change. The negro, growing more accustomed to man's estate, and naturally imitative, sprouted an ambition to pattern after the white man—the man full-grown, dignified and responsible. As a necessary part of this ambition there sprang up in his soul a desire to escape from the slums and to give his children the advantages of environment which had been denied to him. Gradually the better element acquired homes in better localities, until finally it was no unusual thing for each locality to number among its residents many negroes

whose lives were as exemplary and whose homes were as respectable as those of their white brothers. At this stage of his development he is met with a law, passed by the white man who caused his degradation, which drives him back to the slums to escape from which the good that is in him has struggled for generations. We insist that the Constitution was intended to protect the negro from just such treatment on the part of the majority. This nation has toward him a great responsibility, comparable to the responsibility of the parent toward the child. Petty considerations of present convenience should not govern the legal decisions by which his future life is to be controlled, his opportunities to be limited, his development to be most profoundly affected. In legislating for him the ultimate good should be the dominating consideration, and to attain this ultimate good the same treatment must prevail in the case of the negro as brings the best results in the case of the child in the home, the recalcitrant in the reformatory, the student in the school, every individual of whatever status in whatever society. He must be encouraged to aspire! Each of us is prone to give what is expected of us. If the negro is made a pariah he will assume the pariah's disqualifications. He will hamper where he might help—and in the long run, greatly help. His race has in it all the essential forces of good. Our own selfishness should not let us ignore and destroy these forces. The law that represses ambition and self-respect in a large mass of people, insisting upon permanent inferiority, is a terrible law, with possibilities in it to do vital harm. The broadest minded thinker and most just-spirited man that America has had speaks of the "preference which man gives to the society of superiors over that of his equals." He says: "All that (a man) has will he give for right relations with his mates, all that he has will he give for an erect demeanor in every company and on every occasion. He aims at such things as his neighbors prize and

gives his days and nights, his talents and his heart, to strike a good stroke to acquit himself in all men's sight as a man."*

This is a natural and laudable aspiration, from which springs all the achievement of the human race. For the negro in this country the white man represents an enviable high example whom he wishes to imitate with the hope of equaling. For the sake of the good that is in him he should be made to feel the possibility of final fellowship, not thrown contemptuously back upon himself, segregated as a contamination, obliged to slink and creep, his legitimate longing to "acquit himself in all men's sight as a man" forever annihilated.

We respectfully submit that the judgment should be reversed.

CLAYTON B. BLAKEY,
For Plaintiff in Error.

NOTE.—The Record in the case of Harris vs. Commonwealth is copied as an exhibit with this record. A stipulation will be found at page 27 of the Record touching the connection between these two cases. The Record in the Harris case was used in the lower court, and is to be used here to show what the Criminal Court did in that case, and for no other purpose.

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*Emerson: New England Reformers.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915

No. 33

CHARLES H. BUCHANAN, *Plaintiff,*

—vs.—

WILLIAM WARLEY, *Defendant.*

BRIEF FOR DEFENDANT IN ERROR

STUART CHEVALIER,
PENDLETON BECKLEY,
Counsel for Defendant in Error.

SUBJECT INDEX.

GENERAL STATEMENT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1915.

(No. 614.)

CHARLES H. BUCHANAN, - - - *Plaintiff in Error,*

vs. BRIEF FOR DEFENDANT IN ERROR.

WILLIAM WARLEY, - - - - *Defendant in Error.*

GENERAL STATEMENT.

This is a writ of error to reverse the decision of the Court of Appeals of Kentucky (165 Ky. 559) holding valid the so-called segregation ordinance of the City of Louisville, which seeks to prevent negroes in the future from moving into white residence neighborhoods and whites from moving into negro residence neighborhoods, and thereby to relieve the situation caused by the close association of the races under the congested conditions found in modern municipalities. Upon the filing of the petition in the lower court by the plaintiff in error, a white man (hereafter called the plaintiff), the defendant in error, a negro (hereafter called the defendant) invited the writers of this brief as attorneys for the City of Louisville to come in and defend the action for him, as the sole question involved was the validity of the abovementioned ordinance.

This case was heard and decided by the Court of Appeals, together with the case of Harris v. City of Louisville, in which Harris was fined for a violation of this ordinance, and took an appeal on the ground of the invalidity thereof. The record in that case is filed as an exhibit in this case, and a single opinion was rendered by the Kentucky Court in affirming the two judgments of the lower courts upholding the ordinance.

The determination of the validity of this ordinance will also settle the constitutionality of similar ordinances now in operation in Baltimore, Md., Richmond, Va., St. Louis, Mo., and other cities and towns. In the first two cities mentioned, such legislation has been in full operation since 1911; and in St. Louis an ordinance similar to the Louisville ordinance was approved by an overwhelming popular vote of three to one on February 29 last, under the referendum clause of that city's new charter. The State of Virginia also passed an act in 1912 enabling cities and towns of that State to enact by ordinance such legislation.

The title to the Louisville ordinance is as follows:

> "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." (Record, p. 56.)

This ordinance is, therefore, a police regulation, having in view the purposes stated in its title and having, as

will further appear, a reasonable, appropriate and immediate relation to that purpose. There can be no question as to the entire good faith of the council in passing this measure; and the relation existing between the white and colored races being an appropriate matter for legislation, as this court has often held, no question can be properly raised hereunder as to the wisdom or expediency of or necessity for such legislation in the particular community, this being distinctly a question for legislative rather than judicial determination. The actual relation existing in the City of Louisville between the white and colored races, the danger to race integrity and race harmony which results from their too intimate social intermingling, the disastrous effects upon property values and impairment of the security and enjoyment of the home where negroes move into white blocks, and the consequent bitter antagonism and even conflicts that this must and does produce—all these are facts which the court must presume were sufficiently canvassed before the council passed this ordinance. They are furthermore facts of ordinary human experience, are matters of almost everyday observation in any Southern or even Northern community where there is any considerable number of negroes, and are facts of which the court may well take judicial notice, independently of any facts appearing in this record.

Waiving for the moment the fact that plaintiff in error is a white man and not in a position, therefore, to complain of discrimination against members of the colored race, the only question presented on this submis-

sion is the purely legal one, whether the court can say that as to the members of either race, the ordinance is so arbitrary and unreasonable in its provisions, and its real purpose so remote from its declared purpose, that it plainly violates the constitutional guaranties; and more specifically, whether it denies to the plaintiff the equal protection of the laws, or deprives him of his property without due process of law.

It is the contention of the defendant in error (and of the City of Louisville) that the ordinance is not only fair and equal on its face, but in fact, meeting all the requirements of the constitutional guarantee of the equal protection of the laws; that it deprives no one of his property without due process of law; that it is impossible by the minutest scrutiny, to discover the slightest discrimination for or against either race; what is denied to one is denied to the other and what is permitted to one is permitted to the other; and that looking to its practical operation, and even to its policy or wisdom, it is clearly and fairly designed to accomplish the purpose expressed in its title. The policy of this law and the necessity therefor (which as above stated are not properly matters for judicial inquiry), we will nevertheless take the liberty of discussing at some length herein before referring to the cases, since a fair understanding of the provisions of the ordinance as applied to facts and conditions within the knowledge of the court, will, we are confident, remove every legal and every practical objection which has been advanced against it.

The Provisions and Practical Operation of the Law.

It would have been difficult to have framed an ordinance which would have been milder in its limitations upon personal and property rights and which would at the same time, have accomplished its purpose, than the one under review.

This ordinance *will not affect in the slightest the great mass of the white people in the city or the great mass of the negroes,* who will continue to live in the neighborhoods in which they are living at the present time unaffected by its provisions. The ordinance will only affect that relatively small percentage of white people who may seek to move into normally negro neighborhoods, and that relatively small percentage of negroes who, to gratify their new-born social aspirations, seek to move into white neighborhoods. *The ordinance does not move a single negro or a single white person from the home in which either may be living* at the time of the enactment of this ordinance. They may continue to live in those places until the end of time, so far as this ordinance is concerned; *nor will it even prevent negroes from moving into houses now occupied, but later vacated by white people,* or *vice versa.* The ordinance provides that where a minority of the houses on a block are occupied by white people, those houses when they become vacant may be rented to either white or colored people, and *vice versa* as to a block where a minority are occupied by negroes. Nor is there anything in this ordinance which interferes in the slightest degree *with the ownership or the devolution of prop-*

erty. Only the occupancy is sought to be regulated. Nor can it be stated, as is stated by opposing counsel, that this ordinance forbids an owner *from occupying his own property previously acquired.* That right is fully preserved and protected under the qualification stated in Section 4 of this ordinance in the following words:

> "nor shall anything herein contained be construed to prevent any person who, at the date of the passage of this ordinance, shall have acquired or possess the right to occupy any building as a residence, place of abode or place of assembly from exercising such a right."

It was the absence of a provision similar to this that vitiated the first Baltimore ordinance, and (as would appear from a reading of the opinion) the Winston-Salem ordinance; and it is one of several objections that might have been urged to the crudely drawn Atlanta ordinance. This section in the ordinance effectually disposes of every case on which plaintiff's counsel have relied, and completely removes every constitutional objection thereto as an undue interference with the rights of property. Not only is there this clear provision to protect existing rights, but the ordinance goes further than probably the law might strictly require (but does so in order that the existing status in the occupancy of property may be interfered with to the slightest degree possible), and provides that where a negro occupies a house on a block on which a majority of the houses are occupied by whites and that negro tenant or owner moves out, *the owner of the property may continue to lease it to negroes,* with the proviso

only that in the event he switches to white tenants, the majority of the residences on the block being white, he shall not thereafter lease the property to negro tenants; and conversely as to whites.

The present case furnishes an excellent illustration of the situation before and after the enactment of this law, and of the good which it will accomplish, although it is an extreme illustration of the hardship that might result in an isolated case.

It should be kept in mind that under the terms of the ordinance a "block" consists, not of the four sides of a square, but of the two sides of a street facing one another and between two intersecting streets or alleys. Plaintiff alleged in his pleading that on the block on which his property was situated there were *eight* houses occupied by whites and *two* by colored; that his unimproved lot was a corner lot next to two houses occupied by negroes *and that, therefore, no white person would be willing to live on the property.* In other words, he admits that white people, if they can possibly avoid it, will not live next door to negroes. *It is this fundamental and admitted fact, not only in so far as property is concerned, but with respect to the relation of the races, that fully justifies this law.*

When, therefore, a negro moves into a white block, either one of two things must happen. He must be induced to move again, either through persuasion or compulsion, or else one house after another on that block will be turned over to the negroes until it becomes a negro block; for the fact is universally recognized that on account of the antipathy that exists between the white

and colored races, they can not continue to live together in the intimate social association of neighbors on the same block, without ill-feeling and conflict, on the one hand, and without endangering race purity and integrity on the other.

Keeping in mind this plain fact of human nature, it is easy to see how the present ordinance will operate, the good it will accomplish and the evils which it may be expected to cure. Where, therefore, when this law went into effect, there were no negroes on a white block, that block would be entirely free from this dread invasion in the future; and a man, whether he be rich or poor, could feel a security in the possession and enjoyment of his home which he had never before known. The same thing will be correspondingly true of a block on which all the houses are occupied by negroes. Where, however, there are one or two negroes on a block, but the other houses are occupied by whites, there will be no more negroes moving into that block, and in the course of time those one or two negroes will in all probability disappear from that particular block, and will seek homes among their own people, although the law does not compel them to do so.

Where, again, a large number of houses on a block are occupied by negroes, although not a majority, it is probable that in the usual course of things the whites on that block, recognizing that it is unlikely that the negroes will all move out, will themselves move one after another, until a majority of the occupied houses remaining are occupied by negroes. The block will then automatically

become a negro block, and finally all the whites on that block will have deserted it for a white neighborhood, thus leaving a large number of houses formerly occupied by whites for the use of the negroes.

And finally, when a majority of houses on a block are occupied by negroes, although a large percentage of the houses remaining may have white occupants, no more white occupants can move in, and those living on the block will sooner or later seek a white neighborhood and the block will finally become a wholly negro block. Thus the law will work gradually with the least amount of hardship to any property holder or to either race until there will be a fairly well-defined separation of the races in the city in the matter of homes, accomplishing the purpose sought by the ordinance. The disposition always is for the whites to retire from the vicinity of negro residences, *so that there will be a constantly widening area for the negroes to inhabit.* Even a solidly white block immediately adjoining a negro block will sooner or later become undesirable for white residents, and even that block may ultimately be thrown open to negroes. How can any reasonable person claim, therefore, that such a law unduly restricts the rights of either race with respect to the matter of homes; or, as plaintiff so unfairly says, that it is designed to or will limit the negroes to undesirable sections?

Advantages Accruing Hereunder to Both Races.

It seems to be assumed by opposing counsel that this ordinance itself segregates for the first time the whites

from the negroes, and that there was no actual segregation among the races before its enactment.

In the first place, as we have pointed out before, this ordinance does not move a single white or negro from the place in which he is now living, but it only seeks to prevent whites and negroes respectively from encroaching upon property now normally negro or white, as the case may be.

In the second place, it should be clearly kept in mind that segregation has naturally existed wherever the whites and negroes have lived in the same community in any considerable number, *and this law only seeks to regulate that natural and normal segregation which has always existed and to prevent a few of each race from overstepping the racial barriers which Providence and not human law has erected, and which, whenever they are overstepped, result inevitably in most serious clashes, and often bloodshed, and in this particular instance also in the most destructive consequences to the white man's property, thereby only accentuating the existing race antagonism.** The ordinance will deal, in other words, only with what may be termed the "twilight zone," and where the conflicts would most likely arise.

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*"City councils have thought it wise to promote race purity and race harmony by separating insofar as is possible to do so by law the lower elements of both races. Voluntary segregation has fixed the residence of most of the white people and negroes into distinct districts. Segregation by legislation will, therefore, affect only those who live in the twilight zone between the distinctly white and the distinctly colored communities.

"If the city council by laying down a definite way of determining the color of a block can let the people know which shall thereafter be white blocks and which colored they can do a great deal toward clearing up this twilight zone and this will in time do much to allay race prejudice and promote race harmony." G. A. Stephenson in the "National Municipal Review" (Philadelphia, July, 1914), in an article on Municipal Segregation.

This is all that this law attempts to do, and it is all that the various other types of segregation laws (which have been uniformly upheld by the courts) have ever attempted to do. Can it be that a negro has the constitutional right, which can not be restricted in the slightest degree, whatever the consequence, to move into a block occupied by white families, even though it can be shown that thereby he would absolutely destroy a third or a half of the property values on that block, and even though he may thereby endanger the peace and good order of the community and disrupt the cordial relations previously existing between the two races, simply to gratify his inordinate social aspirations to live with his family on a basis of social equality with white people? It is shown by philosophy, experience and legal decision, to say nothing of Divine Writ, that it is for the best that the races of the earth shall preserve their racial integrity by living socially to themselves. To live in social intimacy with the members of another race as distinct as the negro and the white, which to the average mind is repugnant, and which is certainly not a natural right, ceases to be a constitutional right the moment it threatens the peace and good order of society.

The various courts, State and Federal, as we shall hereafter show, have uniformly recognized the right of the law-making power to segregate the white and colored races when they deem such segregation necessary to the preservation of the welfare of the community.

The argument for the plaintiff is based on the wholly false assumption that in an organized society, and es-

pecially in a congested urban community, a man has the absolute right to live where he pleases and how he pleases, and to do what he pleases with his own property; and on the equally false assumptions, as we shall also endeavor to show, that the Federal Constitution guarantees social equality, as distinguished from political and civil equality, to the negro; that the guarantee of the equal protection of the laws, enforces absolute economic equality; and that equality of privileges (if guaranteed by the Constitution) can only be satisfied by an identity of privileges.

It is also assumed by opposing counsel that this law will compel negroes to live in only the most vicious and least desirable parts of the city. If this is so (which we emphatically deny), it will be because they had before this law was enacted voluntarily chosen such sections of the city in which to live, for, as previously stated, this law does not disturb the negro where it finds him; *nor does it restrict him to that place.*

But the sophistry of this argument lies in the deeper fact which is entirely overlooked that the character of houses in a given district is determined not by legal but by economic conditions, and that there is no reason in law why the negro sections should not be the finest parts of the city. And it is equally absurd to attempt to make the morals of the negro a matter dependent upon geographical location. We all know that the shiftless, the improvident, the ignorant and the criminal carry their moral and economic condition with them wherever they go. If in fact the negro sections are the least desirable

sections of the city, and they are not so by any means, the negroes have made them what they are themselves; and this irrespective of the law, for we are speaking of conditions as they existed before this law went into effect. If the negroes carry with them a blight wherever they go (and that seems to be the burden of plaintiff's argument), on what theory do they assert the privilege of spreading that blight to white sections of the city? Is this a constitutional privilege of the negro, even though it may involve the most bitter and violent racial antagonism on the part of the whites whose homes are thus in a peculiar sense invaded and destroyed? Instead of invoking such imaginary rights under the Constitution, would it not be much wiser for the negroes to follow the advice which has often been given by the greatest member of their race, to be content to live among their own people and to endeavor to make their own parts of town attractive and livable? None have been or will be more ready to co-operate in such a work than their white neighbors in these Southern communities.

It approaches the ludicrous to attempt an analogy between the old Jewish pale or ghetto and the operation of this segregation ordinance. It would seem to be a sufficient answer to the ghetto argument to say that the law will have precisely the same effect on the whites as on the negroes; they are treated the same way under the law. "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of

a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.'' (*Civil Rights Cases,* 109 U. S. 6.) But if it is meant that negroes will be compelled to live in less desirable residence sections of the city, we must again insist that the question of the kind of houses or the character of their occupants is an economic and moral question and not a question of legislative *fiat.* If this were not so, all that would be necessary to abolish the slums, whether white or colored, would be a law prohibiting anybody from living therein. But the difficulty is that the people make the slums, not the slums the people. The truth is that the dwellings of the negroes, *like those of the whites,* graduate from alley hovels and tenements to remarkably good houses in once fine residence sections; and we find attractive, newly built suburbs for the negroes just as for the whites, the character of their houses being determined by the extent of their financial ability or home-making desires; and this will always be so. With equal logic, therefore, might those whites who are now living in the squalid white sections (and they far exceed the squalid negro sections because the white population is much larger) complain because this law forbids *them* from moving into any of the handsome homes now occupied by colored people on Walnut or Chestnut streets.

It should not be forgotten that this ordinance does not limit the negroes to any given section of the city, but they will be free to live anywhere .members of their own race

are found in any considerable number, and also to open up new subdivisions whenever the economic demand makes it advisable to do so. We assert without fear of contradiction that the supply of good negro houses will always be equal to the demand. The white property-owners, as well as the more thrifty negroes themselves, as a matter of business, if not of philanthropy, will see that the negroes get as many and as good houses as they demand or need.

The negroes, like the whites, must therefore continue to work out their moral and economic salvation as heretofore; but we believe by bringing them together as a race there will be supplied a new incentive to have them improve their condition. Let us mention at least two distinct advantages accruing to the negro from the operation of this law, aside from the elimination of friction with the whites, which seem generally to have been overlooked by its opponents.

1. The negro race at this time has reached a point in its upward progress where it ought to look to its own members for leadership; and under the operation of this law the better class of the race, instead of moving into white sections where they are not needed and not wanted, will continue to live among their own people, setting them an example of industry, good morals and good citizenship which the negro so much needs, and thus there will be supplied an incentive to right living and racial pride, which was lacking before. Apparently there are a few negroes who object to this law on the ground that it compels them to live with the members of their own race.

But common experience and the record in this case show that it is impossible for them to get away from their own people for any great length of time, unless they keep on moving. If they move into a white block, the white residents will soon begin to move away and the negroes are again surrounded by the members of their own race, in the meantime having created much racial bitterness and played havoc with the white man's property. Would it not be infinitely better, therefore, for them to be content to remain among their own people as leaders and examples of good citizenship? As said by the court below (Record, p. 41): "Much has been done in the years gone by, much is being done to-day by the white people of the nation for the uplift of the colored race. But those who have studied the future of the race (and in fact its leading member in the country today) declare that he must ultimately rise largely through the co-operation, the earnest efforts and the loyal service of his own more fortunate and more enlightened brothers. *For those of the race who are doing their full duty in this respect, municipal segregation will simplify the problem; and, if there be those more fortunate members of the race who in the day of their good fortune would abandon their less fortunate fellows and be false to the duties and responsibilities laid upon them by virtue of their own success, municipal segregation will indirectly enforce their acceptance of those responsibilities and coerce their performance of the duties thereby imposed; and thus, in the end, it will justify that enlightened civic spirit by which it is demanded.*"

2. Furthermore, opposing counsel seem to overlook the fact that, so far from this law operating to compel the negroes to live among only the vicious, it will on the contrary be a most useful weapon to rid their community of the more vicious class of whites usually found therein. It is notorious that in a community such as Louisville, only the more degraded and vicious element among the whites (barring those who own the homes they live in and can not sell) seem willing to live in a predominantly negro section of the city; and if the negroes are in a majority on such a block (as they would be), they can not only prevent any other whites from moving therein, but can ultimately under this law oust this vicious element, and thereby purify their own community. Nor are we here reasoning merely from the probable to the actual, for such has been the actual operation of this law in Louisville, as shown by more than one instance which we might mention. In other words, those whites who seek to move into negro sections are almost invariably the worst element of the race; those whites who seek to move therefrom are of the better class.

Booker T. Washington in a recent article in "The New Republic" shows the same misapprehension of these laws as do opposing counsel, for his only tangible objection thereto is not that the negro is required to live among his own people (which he says they are quite willing as a rule to do), but because "the 'undesirables' of other races will be placed near him, thereby making it difficult to rear his family in decency." But the influx of such undesirables is precisely the thing which this law

will make impossible; for as it prevents negroes from moving into white sections, *so it prevents whites from moving into negro sections.* The psychological objection to segregation that it humiliates the negro is an objection that could be equally urged against separate school, coach and marirage laws, but which has never met with judicial favor; nor has it any basis in common sense.

It seems impossible for opponents of segregation laws to understand that they do not spring from hatred or enmity to the negro, but from a sincere desire to preserve, as far as possible, the cordial relations that should exist between the races by preventing the inevitable friction and ill-feeling which result when they are brought into social contact. Counsel calls these laws a disease. He might with more accuracy and candor have called race prejudice the disease, for which these laws attempt to provide a palliative, if not a cure. N.o one at this late day questions that among the best friends of the negro are the people in the Southern States. And of these States, probably none has shown more genuine and intelligent friendship for the negro than has the State of Virginia; and yet as far back as 1911, a number of cities including Richmond, the largest in the State, passed segregation ordinances similar to our own. Those ordinances have been in effect ever since and have worked only for the good of both races and of their harmonious co-operation. In 1912 this same State passed an act giving to every municipality within its bounds the right to enact such ordinances, previous experience with the actual operation of the law in that Commonwealth fully

justifying its legislative sanction. The preamble to the Virginia Act begins: "Whereas, the preservation of the public morals, public health and public order in cities and towns of this Commonwealth is endangered by the residence of white and colored people in close proximity to one another," etc. We may safely assume, therefore, that this legislation is not inspired by any desire to injure or degrade the negro, as opposing counsel assert, or to deny him any rights to which he may be entitled under the Constitution or otherwise. We believe we may also say that none of the evils which counsel have so industriously conjured up, have shown the slightest promise of realization during the *five* years that these ordinances have been in operation in the cities of Richmond and Baltimore, nor during the *two* years of enforcement in the City of Louisville.

The problem which confronted the South upon the abolition of slavery of caring for the millions of negroes upon whom had been conferred civil and political rights equal to those of their white neighbors, but with whom amalgamation was unthinkable, was the most solemn and the most tremendous problem that ever confronted our Anglo-Saxon civilization. It was the duty of the white people to preserve the integrity of their own race and the peace of their own communities, while they at the same time recognized those privileges recently conferred upon their former slaves; and this court in construing the "war amendments" to the Constitution has fully recognized, as we shall later show, that the South had the right, as it was its duty, to work out this great problem

in the light of the knowledge which it possessed of the negroes' limitations and of the sentiments of its own people toward them.

All of the various forms of segregation legislation, of which the present ordinance is but an example, are the outgrowth of an instinctive race consciousness often expressing itself in the strongest social or racial antipathy between the white and negro, and which, however much to be regretted, must be dealt with as a settled fact. It is an antipathy which knows no geographical limitations. If anything, it is even stronger in certain sections of the North than in the South. The daily papers furnish frequent illustrations of it from one end of the country to the other. Even race riots are not limited to Southern towns with their large proportion of negro population. The riots in Coatesville, Pa., might be mentioned as a recent illustration. In Baltimore, the immediate cause of the enactment of the segregation ordinance of that city was a bloody riot provoked by negroes moving into its white sections. In fact, as we have shown in the discussion of the cases below, some of the strongest authorities in support of the right under the police power to segregate the races are to be found in the reports of Northern courts like those of New York, Pennsylvania and Massachusetts. All such laws are but the formal recognition of the color line as a social fact, and of the necessity of establishing metes and bounds for the protection of the worthy and well disposed of each race against the aggressions of the undesirable and the selfish of the other. It may be true as Mr. Justice Harlan said

in one of his dissenting opinions (163 U. S. 559) that the Constitution is color blind. But unfortunately, the vast majority of human beings are not; and laws have to deal with human beings.

As the President of the United States said in November, 1914, to a delegation of negroes protesting against a form of segregation in Washington City:

> "This is a human problem and not a political problem. While the American people want to support the advancement of the negro, as practical men, everybody knows that there is a point at which friction is apt to occur, and the question must be stripped of sentiment and viewed in its facts, because the facts get the better of the individual whether one desires it or not."

We may dismiss, therefore, as without merit the contention of opposing counsel that this ordinance seeks to do any injustice to the negro, and limit the remainder of this brief more largely to a consideration of the cases bearing on the legal questions here involved.

ARGUMENT.

In discussing the legal questions raised by this appeal we will consider, *first,* the rules laid down by this court governing the scope of judicial inquiry in construing the constitutionality of a police regulation; and *secondly,* the extent of the police power of the State in the enactment of race segregation laws such as that now under consideration; and under this head we will endeavor to show that there is nothing new in the present ordinance, nothing which has not been repeatedly and universally recognized as valid by all the courts before which the questions have arisen—by this court and by the State courts, northern and southern; and further that this police regulation is not such an interference with either personal or property rights as to justify the courts in declaring it unconstitutional; that in the very nature of things every police regulation must interfere with such rights to some extent, and the question whether the value of the right sought to be abridged is not more than compensated and counterbalanced by the good accomplished is a matter of which the Legislature is the exclusive judge, where it appears that the law has a legal relation to the end sought to be accomplished; that even looking to the practical operation of the law (if the court should see fit to open that inquiry), it is apparent from the facts of which the court may take judicial cognizance that the present law is necessary, not only as a protection of property from the most serious depreciation, but to insure the purity and integrity of the races, and to furnish an

additional safeguard to the community from lawlessness and breaches of the peace, which are the inevitable result of too intimate contact between the white and negro races —a danger which is only accentuated by the fact that the negro by moving into white neighborhoods seriously impairs the enjoyment and the value of the white man's home; that this is true only in a lesser degree when the white moves into a negro section; that this law, therefore, can be justified under all the usually enumerated heads of the police power, "the preservation of the peace and security, and the promotion of the health, safety, morals and welfare of those subject to its jurisdiction," and upon which, in the language of Mr. Justice Miller, "depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." (16 Wall. 62.)

I.

However great the hardship which may result in a particular case, the Court will not declare invalid a police regulation, unless it clearly appears from the law itself or from facts of which the Court may take judicial cognizance that it violates the constitutional guaranties. Whether the legislation is wise, expedient or necessary, or the best calculated to promote its object, is a legislative and not a judicial question, a question of policy and not of power.

Opposing counsel in arguing the present case, apparently despairing of demonstrating that the law in question violates a single provision of the Fourteenth Amendment, insist upon raising an issue as to the policy, the wisdom of or necessity for its enactment, and they also seek to exalt the hardship which may be suffered by the plaintiff into a sufficient reason for its unconstitutionality.

Plaintiff sought to raise the same questions by his pleadings in the Circuit Court, alleging among other things that there is no friction between the races in Louisville, that this law would increase, rather than decrease, such friction, that in its operation it will affect the negroes injuriously, that it was not enacted in good faith by the municipal legislature, that the negro sections of the city are less desirable than the white sections—and many other matters on which witnesses might well differ in opinion. The lower court very properly struck out such allegations from the plaintiff's pleadings, not on the theory that the defendant admitted them to be

true, but, on the contrary, that they were either untrue or, if not matters of which the court could take judicial notice, were matters for legislative and not judicial inquiry; and further that the issue sought to be made of discrimination against the negro race was obviously not an issue which the plaintiff, a white man, could be heard to raise. "The denial of equal rights and privileges by discriminating legislation can be pleaded only by those *who can show that they belong to the class discriminated against.*" (8 Cyc., 791.)

For instance, we could not admit as true even on a demurrer the statement in the reply that there is no conflict or ill feeling between the white and colored races where they are thrown into immediate social association. If there is anything well settled by the courts in upholding legislation separating the races in public and private schools and in public conveyances, it is that friction inevitably results where the races come into close social contact. But we submit that even if the court could not take judicial notice of the relation between the races, as it has so often done, it would still be its duty to presume that the legislative branch had made inquiry thereinto, and had found the facts sufficient to justify this legislation; and the court would not now re-open the inquiry at the instance of a particular litigant who feels himself aggrieved thereby, or who would question the wisdom of the legislation. His appeal must be to the Legislature and not to the court.

Nor, for the same reason, could we admit as true or open to evidential inquiry the extraordinary statement

that this law was passed for the vicious motive of oppressing the negro (*Soon Hing* v. *Crowley,* 113 U. S. 710), or that it will have the effect of increasing instead of decreasing the ill feeling between the races, or that it will at some future time have the effect of degrading instead of helping the members of the race.

On public questions the courts very properly allow themselves a wide field of inquiry into matters of common knowledge, but this inquiry does not and can not take the form of evidence introduced by a particular litigant to show that in his view the law is unjust, oppressive or unreasonable, or that there was no public necessity therefor; else there might result that in one case where a litigant was particularly diligent in securing evidence, the court would have to find the law unconstitutional, while in another case under a different state of facts shown by the record, the court would be compelled to reach a different conclusion, and there would be no certainty in a law which applies to all members of the community alike. "They (the courts) must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be equivalent to such finding." Cooley, Const. Lim., 7th Ed., p. 257.

The admission of such testimony would also imply that the constitutionality of a law must be made to depend upon the preponderance of evidence in a particular

case, and not upon the language of the law itself read in the light of facts within the judicial cognizance, and we would have the anomaly mentioned above of a law being at the same time both constitutional and unconstitutional under the rulings of the same court.

If, however, out of abundant caution, the court should permit evidence to be introduced on such subjects, such evidence can only serve as *specific illustrations* of facts of which in general outline the court can take judicial notice. On this point apparently the Circuit Court in the companion case of Harris v. City of Louisville (the record in which is filed as an exhibit in the present case), permitted certain evidence to be introduced, and to which reference is made in the opinion of the Court of Appeals rendered in these two cases, which were heard together.

But while, as above stated, we respectfully submit that the scope of judicial inquiry is thus limited, we have not hesitated throughout this brief to meet the challenge of the plaintiff, and to discuss the practical reasons justifying this legislation, and its operation in municipalities such as Louisville, since he has insisted upon injecting this issue into the argument.

But before leaving the present subject, we will refer to a few of the many cases which support the statement of law contained in the caption above.

In *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 568, this court by Mr. Justice Hughes said, referring to the freedom of contract:

"It is subject, also, in the field of state action, to the essential authority of government *to maintain peace and security,* and to enact laws *for the promotion of the health, safety, morals, and welfare* of those subject to its jurisdiction."

And after citing a long list of decisions in illustration of this statement the court continued (p. 569):

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but *where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review.* The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."*

The court in the same opinion quotes with approval the following language from *McLean* v. *Arkansas,* 211 U. S., pp. 547, 548, construing statutory restrictions upon contracts for the payment of coal miners:

"The legislature, being familiar, with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public

policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power [cases cited]. * * * If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

In *Noble State Bank* v. *Haskell,* 219 U. S. 575, 580, it was said by Mr. Justice Holmes in response to a petition for rehearing:

> "We fully understand the practical importance of the question, and the very powerful argument that can be made against the wisdom of the legislation, but on that point we have nothing to say, *as it is not our concern.*"

In the leading case of *Munn* v. *Illinois,* 94 U. S. 113, it is stated by Chief Justice Waite:

> "For our purpose, *we must assume that if a state of facts could exist that would justify such legislation, it actually did exist* when the statute now under consideration was passed. *For us the question is one of power, not of expediency.* If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State, but, if it could, *we must presume it did.* Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

The same rule is announced in *Powell* v. *Pennsylvania*, 127 U. S. 678, involving the legality of certain legislation against oleomargarine, in which the court said:

> "As it does not appear *upon the face of the statute, or from any facts of which the court must take judicial cognizance*, that it infringes rights secured by the fundamental law, the *legislative determination of those questions is conclusive upon the courts.* It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions. The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has, in the employment of means to that end, is very large. * * * If all that can be said of this legislation is that it is *unwise, or unnecessarily oppressive* to those manufacturing or selling wholesome oleomargarine, as an article of food, *their appeal must be to the legislature,* or to the ballot box, *not to the judiciary.* The latter can not interfere without usurping powers committed to another department of government."

And in *Tenement House Department* v. *Moeschen,* 179 N. Y. 325 (affirmed in *Moeschen* v. *Tenement House Department,* 203 U. S. 583), the New York Court of Appeals, referring to an effort to defeat a police regulation by showing the hardship resulting to a particular litigant, said:

> "It is well settled in this court and in the Supreme Court of the United States that the constitutionality of a statute may be determined *by consid-*

> *ering its language and the material facts of which the court can take judicial notice.* People, *ex rel.*, Kemmler v. Durston, 119 N. Y. 569, 578; Health Department v. Trinity Church, 145 N. Y. 32, 50; Powell v. Pennsylvania, 127 U. S. 678, 684, 685; Schollenberger v. Pennsylvania, 171 U. S. 1, 8. *It is not the hardship of the individual case that determines the question,* but rather the general scope and effect of the legislation as an exercise of the police power in protecting health and promoting the welfare of the community at large."

The Court of Appeals of Kentucky in *Hyman* v. *Boldrick,* 153 Ky. 77, 79, involving an ordinance regulating secondhand dealers, said:

> "The police power is not confined to those classes of business which are essentially illegal, for, if illegal, in the sense that they are prohibited by law, it is not easily understood how they could be regulated at all. *It is of the very essence of the exercise of police powers that citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right.* Hopper v. Stack, 69 N. J. L. 562. * * * *However, the question of the reasonableness of the regulation is one of fact, of which the city council is the best judge.*"

We will show in another connection also that this court has repeatedly declared that however great the hardship to the individual, this furnishes no reason for declaring an otherwise valid police regulation unconstitutional.

An illustration of the method of the courts in dealing with the reasonableness in the judicial sense of legislation of the character now under consideration is admirably furnished by the *Berea College Case,* 123 Ky. 209, 211

U. S. 45. In that case the court held to be a valid exercise of the police power a provision prohibiting whites and negroes from attending the same college or school, but held unreasonable another section which provided that white and negro schools should not be allowed *within twenty-five miles* of one another. Clearly this latter provision was arbitrary and unreasonable, and it could be said, as a matter of law, that it was not necessary to the accomplishment of the plain purpose of the act and had no just or reasonable relation thereto. But we assert with absolute confidence that it is judicially impossible for the court here to declare that the ordinance under review has not a just, reasonable and immediate relation to the purpose sought to be accomplished, as declared in its title. We repeat, there is no legal or practical distinction between this form of segregation, and the several other forms which have been upheld by this court. If anything, the reasons in its favor apply here with redoubled force.

II.

Legislation segregating or separating the white and colored races has universally been recognized by the Courts as a constitutional exercise of the police power.

It may not be without interest to mention that the first racial segregation case in the United States was decided by the Supreme Court of Massachusetts. In *Roberts* v. *City of Boston,* 5 Cush. 198, decided in 1849, it was held that the school committee of Boston had the power under

the Constitution and laws of that Commonwealth to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon other schools. This decision was rendered in the face of the fact that at that time the colored population of Boston constituted *less than one-sixty-second part* of the entire population of the city, it appearing from the statements of fact that this school was established because of the strong prejudice existing in that city against the negro. Charles Sumner appeared for the negroes, and the opinion of the court was delivered by the great Chief Justice Shaw.

> "It is urged," the court said in its opinion, "that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. *This prejudice, if it exists, is not created by law and probably can not be changed by law.* Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling the colored and white children to associate together in the same schools may well be doubted; at all events it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence. We can not say that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and sound judgment."

And again the court said (as quoted with approval by this court in 163 U. S. 544):

> "The great principle advanced by the learned and eloquent advocate of the plaintiff is, that by the Con-

stitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. * * * But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

In *People* v. *Gallagher*, 93 N. Y. 438, 450, decided in 1883 and involving the same question, the court said:

> "*A natural distinction exists between these races which was not created neither can it be abrogated by law,* and legislation which recognizes this distinction and provides for the peculiar wants or conditions of the particular race *can in no just sense be called a discrimination against such race or an abridgment of its civil rights.* The implication that the Congress of 1864, and the State Legislature of the same year, sitting during the very throes of our civil war, who were respectively the authors of legislation providing for the separate education of the two races, were thereby guilty of unfriendly discrimination against the colored race, will be received with surprise by most people and with conviction by none. Recent movements on the part of the colored people in the South, through their most intelligent leaders, to secure Federal sanction to the separation of the two races, so far as the same is compatible with their joint occupation of the same geographical territory, afford strong evidence of the wishes and opinions of that people as to the methods which in their judgments will conduce most beneficially to their welfare and improvement."

It is a matter of history that the first separate coach regulation was enacted in the city of Boston, the term "Jim Crow" having orignated in that city. We simply mention these facts to show that so-called race prejudice is by no means a fault peculiar to the South, if indeed it is a fault.

The right of the State or city to establish separate *public schools* for the negroes and whites has been universally recognized by every State court before which the question has arisen, and by this court. In a large majority of States in the Union *intermarriage* between the whites and negroes is not only forbidden, but in most of these States is made an infamous crime. Certainly the right to choose a mate is as fundamental as the right to choose a home; and yet the State steps in and annuls a contract of association of this sort, although both parties thereto are entirely willing to enter upon the relation, and apparently no one is concerned but the parties themselves; yet for the good of society it is recognized as a valid exercise of the police power to prohibit such relations. As said in *Plessy* v. *Ferguson,* 163 U. S. 545:

> "Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State. State v. Gibson, 36 Ind. 389."

Again, many of the States, North and South, have enacted *separate coach laws,* and the courts have recognized their validity where the accommodations provided are equal for the whites and colored.

The original separate coach case, like the original separate school case, comes not from a Southern but from a Northern court, in this instance the Supreme Court of Pennsylvania. That court in 1867, in *West Chester, etc., R. R. Co.* v. *Miles,* 55 Pa. St. 209, upheld the right of a railroad company, even in the absence of a statute on the subject, to segregate its white and colored passengers. The reasoning of the court in that case, which has been cited with approval by this court, squarely fits the facts in the case at bar. In the course of the opinion it is said:

> "It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnancies, which are likely to breed disturbances by a promiscuous sitting. * * *
>
> "The danger to the peace engendered by the feeling of aversion between individuals of the different races can not be denied. It is the fact with which the company must deal. *If a negro takes his seat beside a white man or his wife or daughter, the law can not repress the anger or conquer the feeling of aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation, than to punish afterwards the breach of the peace it may have caused.* * * * The right to separate being clear in proper cases, and it being the subject of sound regulations, the question remaining to be considered is whether there is such a difference between the white and black races within this State, resulting from nature, law, and custom, as makes it a reasonable ground of separation. *The*

question is one of difference, not of superiority, or inferiority. Why the Creator made one black and the other white, we know not; but the fact is apparent, and the races distinct, each producing its own kind, and following the peculiar law of its constitution. Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which He always imparts to his creatures when He intends that they shall not overstep the natural boundaries He has assigned to them. *The natural law which forbids their intermarriage, and that social amalgamation which leads to a corruption of the races, is as clearly Divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races.* The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. *The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature.* From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either; it is not to declare one a slave and the other a freeman—that would be to draw the illogical sequence of inferiority from difference only. *It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The* RIGHT *of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection* AS A RIGHT. *When, therefore, we declare* A RIGHT *to maintain separate relations, so far as is reasonably practicable, but in a spirit of kindness and*

charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.''

But the leading case on this subject is that of *Plessy* v. *Ferguson*, 163 U. S. 537, in which there is a full review of the rights of the negro under the 13th and 14th Amendments, with respect to laws which seek to segregate him from the whites and which simply recognize those social barriers which nature itself has long ago erected between the white and colored races. The Supreme Court, speaking by Mr. Justice Brown, says (pp. 544, 550):

> ''The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things *it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.* Laws permitting, or even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. * * *
>
> ''So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable

regulation, and with respect to this there must necessarily be a large discretion on the part of the Legislature. In determining the question of reasonableness it is at liberty to act *with reference to the established usages, customs, and traditions of the people, and with a view of the promotion of their comfort, and the preservation of the public peace and good order.* Gauged by this standard, we can not say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more obnoxious to the 14th Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of the State legislatures.

"*We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority.* If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the State legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that *social* prejudices may be overcome by legislation, *and that equal rights can not be secured to the negro except by an enforced commingling of the two races. We can not accept this proposition.* If the two races are to meet on terms of *social equality,* it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallagher,* 93 N. Y. 438, 448, '*this end can neither be*

> *accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate.* When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized, and performed all of the functions respecting *social* advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so *can only result in accentuating the difficulties of the present situation.* If the civil and political rights of both races be equal, one can not be inferior to the other civilly or politically. If one race be inferior to the other *socially,* the Constitution of the United States can not put them upon the same plane.''

The court also in the opinion answers the fantastic argument which is probably advanced whenever a regulation of this sort is proposed, that if the negroes can be made to accept separate accommodations, ''then the State might require people whose hair is of a different color, or who are aliens, or who belong to certain religions to be separated in the same manner; or to require the whites and negroes to paint their houses or places of business a certain color,'' etc. But each police regulation must stand or fall on the ground of its own reasonableness and purpose, and in spite of the possibility of some freak legislation, which an illogical mind might in the future deem justified by the precedent which it establishes.

To give ear to such reasoning in this case would be to close one's mind to the gravity of the race problem as it exists in our country today, and especially to those

phases of it most intimately concerned with congested municipal conditions. So we find that these time-worn sophistries (which are trotted out once more by opposing counsel herein) are thus disposed of by this court in the Plessy case (p. 550), citing *Yick Wo* v. *Hopkins,* to which counsel also appeal for comfort:

> "The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. Thus in *Yick Wo* v. *Hopkins,* 118 U. S. 356, it was held by this court that a municipal ordinance of the city of San Francisco to regulate the carrying on of public laundries within the limits of the municipality violated the provisions of the Constitution of the United States if it conferred upon the municipal authorities *arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term,* to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race."

Certainly in the case at bar it can not be said, in the light of ordinary human experience, that this ordinance is not reasonable in the purpose which it aims to accomplish, or that it was not enacted in good faith for the promotion of the public good, or that it was enacted for the annoyance of a particular class; or that it vests any department of the city government with the arbitrary power in its enforcement to discriminate against any particular

race; on the contrary it is clear that the ordinance has in view as much the good of the negro as the good of the white, for both are benefited by any law which seeks to perpetuate or preserve the good feeling that should exist between the races, and the prevention of friction or conflict.

It will be kept in mind that the ordinance under consideration provides essentially equal advantages for each class and treats each class, white and colored, in precisely the same way in every detail of its provisions—what is forbidden to one class is forbidden to the other. Granting this, it is logically impossible to say that the law is discriminatory on its face or in fact. Is it then enacted in good faith for the public good? The Legislature is to be allowed a large discretion in the matter. Is it clearly unreasonable? Under the reasoning of *Plessy* v. *Ferguson,* and similar cases, and in the light of the facts of human nature therein recognized, how can the court possibly say that the ordinance is unreasonable?

The leading case from Kentucky on the subject of race separation, and one which seems to us to be conclusive of this question, is that of *Berea College* v. *Commonwealth,* 123 Ky. 209, affirmed in *Berea College* v. *Kentucky,* 211 U. S. 45. In this case the Court of Appeals and this Court held valid a statute which made it unlawful for white persons to attend any educational institution where negroes received instruction, and for negroes to attend any institution where white persons received instruction; an exception being made as to penal institutions. In other words, the State, in exercise of its police

power, steps in and prevents negroes from attending a school attended by white people and *vice versa*, even though such institution be a private institution, and even though all the parties concerned, the white students, the negro students and the instructors, are all entirely willing to be thus associated.

It was sought to distinguish this case from the separate coach law cases and the public school cases, on the ground that in the cases of common schools and railroad travel, the State was merely preventing an *enforced* association by the two races, while by the statute under consideration the power was attempted to be extended to prevent their *voluntary* association. But the court refused to recognize this as a ground of distinction, saying that the thing aimed at by all this legislation was not that of volition, but something deeper and more important than a matter of choice. In considering the fundamental justification for segregation laws, we find this profoundly philosophical discussion of the matter in the opinion of the Kentucky Court, which we will quote somewhat at length as reflecting "the general sentiments of the community upon whom such laws are designed to operate." Speaking by Judge O'Rear,* that court says:

> "The separation of the human family into races, distinguished no less by color than by temperament and other qualities, is as certain as anything in nature. Those of us who believe that all of this was divinely ordered have no doubt that there was wis-

*It may not be out of place to mention that Judge O'Rear was the only Republican member of the court at that time, thus showing that, happily for both races, their legal rights can be fairly considered quite apart from presumed political bias.

dom in the provision; albeit we are unable to say with assurance why it is so. Those who see in it only nature's work must also concede that in this order, as in all others in nature, there is an unerring justification. There exists in each race a homogenesis by which it will perpetually reproduce itself, if unadulterated. Its instinct is gregarious. *As a check there is another, an antipathy to other races, which some call race prejudice. This is nature's guard to prevent amalgamation of the races.* A disregard of this antipathy to the point of mating between the races is unnatural, and begets a resentment in the normal mind. It is incompatible to the continued being of the races, and is repugnant to their instincts. So such mating is universally regarded with disfavor. In the lower animals this quality may be more effective in the preservation of distinct breeds. But among men conventional decrees in the form of governmental prescripts are resorted to in aid of right conduct to preserve the purity of blood. No higher welfare of society can be thought of than the preservation of the best qualities of manhood of all its races. *If then it is a legitimate exercise of the police power of government to prevent the mixing of the races in cross-breeding, it would seem to be equally within the same power to regulate that character of association which tends to a breach of the main desideratum—the purity of racial blood. In less civilized society the stronger would probably annihilate the weaker race. Humane civilization is endeavoring to fulfill nature's edicts as to the preservation of race identity in a different way. Instead of one exterminating the other, it is attempted to so regulate their necessary intercourse as to preserve each in its integrity."*

Again, the court says:

"The maxims of liberty and the pursuit of happiness which are familiar to the common law, where-

from the idea found in our Bill of Rights is probably borrowed, are the principles worked out by the Anglo-Saxon race for its own government. In no other country has it ever been attempted before, at least on so important a scale to apply such principles alike to so many different races, types, and creeds of men. The experiment is great in its importance. It forms now one of the biggest questions being worked out by this great North American republic. That much bitterness has appeared, and some oppression has been practiced, are among the inevitable attendants upon the adjustment by people of different races of the rights justly belonging to each. Clashing of antipathies resulting in outbreaks of violence tends to disturb the public peace; threatens the public safety, and so disrupts the serenity of common purpose to promote the welfare of all the people, that the question is become one of the first importance to the section where the two races live in the greatest numbers. *That it is well within the police power of government to legislate upon this question so far as to repress such outbreaks and to prevent disturbances of the public tranquility, we have no sort of doubt.* The seriousness of the situation is not new. Even before the abolition of slavery it was keenly and intelligently anticipated. Since the emancipation of the negro it has not been the least of the grave problems of government which have been presented to some of the States for solution. As the outcome of discussion, of agitation, of too frequent conflicts, of violent turbulence that set even the law at defiance in some localities and in times of great popular excitement, *this species of legislation has been evolved as tending to a solution of the trouble by removing as far as possible its cause. Is not this situation one, if ever there was one, which calls for and amply justifies the exercise of police power of the government?* Or should this irritating cause be left without restraint or control, till by the exhaustion of one side or the other it is settled by the sheer force of super-

iority of numbers or physical power? It is idle to talk of controlling ideas by legislation, or even by force. You can not bind an idea by a statute. *The attempt should be made, and we believe is being made in good faith to so control this situation through the law that neither race can have just cause for complaint; so that each may have every lawful privilege and right that the other has; so that equality of rights before the law shall be a fact, as well as a high-sounding theory; yet so as to conserve the very best of the characteristics of each race, to develop its idea of morality, its thrift, independence and usefulness.* Observation and study at close hand of both the theory and practical working of this problem of social existence, of the collaboration of two races so different as the white and black in the same State upon a plane of legal equality, where the government is by the people for the people, it has been found, so the legislative department declares, as evinced by the public policy indicated by the statutes discussed in this opinion, that *at the very bottom of all the trouble is the racial antipathy to the destruction of its own identity; and, that, if that danger is removed, the friction practically disappears. A separation of the races under certain conditions is therefore enforced, where it is believed that their mingling would tend to produce the very conditions which it is found, lies at the base of the trouble.* In its application it becomes all the more necessary that the overmastering principles included in the police power of the government be firmly recognized, so that a clashing of race prejudices, or race destruction, may be lawfully averted. * * *

"It has two great objects. One, the preservation of the identity and purity of the races; the other, the avoidance of clashes between the races by preventing their most fruitful sources."

The court had occasion in this opinion also to answer the stock argument that to uphold the law then in ques-

tion, would be to justify any type of foolish legislation that might be proposed. The court says:

> "Counsel resort to conjecture concerning other legislation of this character which they fear might follow that now involved. It is suggested that the State might attempt to regulate, under the same power, the right of the races to work together in the same fields or factories, or to mingle together at all. A sufficient present answer to this is that each proposed application of the power is to be determined upon the cicumstances under which it is sought to be applied. If it is arbitrary, unreasonable, or oppressive, it will be denied. *Nor is it a legitimate argument to prove a negation of power by showing wherein it may be abused.* If it be conceded, as we think the fact is, that the ultimate object of this legislation providing separate schools for the two races was to separate the youth of each during the most impressible and least responsible period of their lives and until ripened judgment and observation can have set them well in the safe ways of thinking, much of the dangers of the shame and distress which errors of immaturity might entail would be avoided."

We might add that precisely the same facts which make it wise to separate children and adults in the schools exist for separating them as immediate neighbors. *If there is danger of conflict, and of peril to the preservation of the purity of the race, where there is merely the brief and temporary and almost casual association in the schools and in the vehicles of public travel, how much greater must be this same danger where the relation is the fixed and permanent and uninterrupted one of immediate neighbors on the same block; the negro with his family living side by side with the white man's family,*

day after day and year after year? And there must be added to the element of the natural antipathy of the races, the further fact that the negro by moving into the white man's neighborhood, to a large extent destroys the enjoyment and value of his home, and may even ostracize him and his family from associating with those of his own race.

Finally in *Chiles* v. *C. & O. R'y Co.*, 218 U. S. 71, after referring to the Plessy case, this court, evidently tiring of the persistency on part of the members of the negro race (or their friends) in bringing before it questions similar to those in the case at bar, uses this language:

> "*The extent of the difference based upon the distinction between the white and colored races which may be observed in legislation or in the regulation of carriers has been discussed so much that we are relieved from further enlargement upon it.*"

Mr. Justice McKenna further said in that case:

> "Mr. Justice Brown reviewed prior cases and not only sustained the law, but justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true the power of a legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared to be, '*the established usages, customs and traditions of the people,*' and the '*promotion of their comfort and the preservation of the public peace and good order,*' this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. *Regulations which are induced by the general sentiment of the community for whom*

they are made and upon whom they operate can not be said to be unreasonable. See also C. & O. R'y Co. v. Ky., 179 U. S. 388."

Opposing counsel (Mr. Storey) says on pages 32 and 33 of his brief herein that the condition aimed at by this legislation is social equality, and that it seeks to establish a permanent superiority in that respect for the white race, he thus making the mistake of assuming that social separateness implies the social superiority or inferiority of either race. Even if that were the purpose of the ordinance (and evidently Mr. Storey's co-counsel thinks otherwise), we do not understand that such would be a constitutional or a political heresy. The great emancipator himself, who certainly knew something of the negro character, said on more than one occasion:

> "I have no purpose to introduce political and social equality between the white and black races. There is a physical difference between the two, which, in my judgment, will probably *forever* forbid their living together upon the footing of perfect equality, and inasmuch as it becomes a necessity that there must be a difference, I, as well as Judge Douglas, am in favor of the race to which I belong having the superior position." ("Abraham Lincoln, Speeches, Letters and State Papers." Nicholay & Hay, Vol. 1, pp. 458, 457, 470. See also Vol. II, pp. 222-225.)

Political equality was conferred upon the negro after Mr. Lincoln's death, but the war amendments to the Federal Constitution, notwithstanding the angry period out of which they grew, do not go to the romantic extent of attempting to secure or guarantee to the negro social

equality with the whites. (*Plessy* v. *Ferguson*, 163 U. S. 544, 552.) Lincoln even advised and sought to carry out as a solution of the problem, an extreme form of segregation, to-wit, colonization beyond the bounds of this country. ("Abraham Lincoln, a History," Nicolay & Hay, Vol. VI, pp. 354-66, 400.) But no one has ever accused the South of a desire to expatriate the negro. On the contrary, we need and want him here and he needs the South. As Booker Washington has said, "It is in the South that the negro is given a man's chance in the commercial world," where, he said, "there is no *industrial* prejudice against the negro, such as is found in most Northern communities."* One Southern State at least (North Carolina) has even passed a law penalizing any one who should induce negro farm laborers to leave that State. It being clear, therefore, that the negro is here to stay, it is imperative for the good of both that the two races arrive at some reasonable *modus vivendi* such as this law has to offer them.†

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*"Up from Slavery," pp. 219, 220; "Future of the American Negro," pp. 76, 78, 79, 202.

†The following excerpt from Lincoln's "Address on Colonization to a Deputation of Colored Men," August 14, 1862, has something more than an historical interest in the present connection:

"You and we are different races. We have between us a broader difference than exists between almost any other two races. Whether it is right or wrong, I need not discuss; but this physical difference is a great disadvantage to us both, as I think. Your race suffer very greatly, many of them, by living among us, while ours suffer from your presence. In a word, we suffer on each side. If this is admitted, it affords a reason, at least, why we should be separated. You here are freemen, I suppose?"

A voice: "Yes, sir."

The President: "Perhaps you have long been free, or all your lives Your race is suffering, in my judgment, the greatest wrong inflicted on any people. But even when you cease to be slaves, you are yet far removed from being placed on an equality with the white race. You are cut off from many of the advantages which the other race enjoys. The aspiration of men is to enjoy equality with the best when free, but on this broad continent not a single man of your race is made the equal of

Lincoln once said that because he advocated the civil rights of the negro, it did not follow that he must take a negro woman for his wife. Conversely, because the Southern man is unwilling to marry a negro, or otherwise associate on a basis of social equality with the members of the race (which is all the present law involves), it does not follow that he is therefore indifferent to the physical, moral, educational and economic welfare of the negro, or that he would deny him full and equal privileges in all these matters, or, as counsel very unjustly says, would seek to degrade him or keep him down. The fact that "about $155,000,000, or one-sixth of the entire amount spent by Southern communities for public schools

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a single man of ours. Go where you are treated the best, and the ban is still upon you. I do not propose to discuss this, but to present it as a fact with which we have to deal. I can not alter it if I would. It is a fact about which we all think and feel alike, I and you. We look to our condition. Owing to the existence of the two races on this continent, I need not recount to you the effects upon white men, growing out of the institution of slavery.

"I believe in its general evil effects on the white race. See our present condition—the country engaged in war—our white men cutting one another's throats—none knowing how far it will extend—and then consider what we know to be the truth. But for your race among us there could not be war, although many men engaged on either side do not care for you one way or the other. Nevertheless, I repeat, without the institution of slavery, and the colored race as a basis, the war could not have an existence. It is better for us both, therefore, to be separated. I know that there are free men among you who, even if they could better their condition, are not as much inclined to go out of the country as those who, being slaves, could obtain their freedom on this condition. I suppose one of the principal difficulties in the way of colonization is that the free colored man can not see that his comfort would be advanced by it. You may believe that you can live in Washington, or elsewhere in the United States, the remainder of your life as easily, perhaps more so, than you can in any foreign country; and hence you may come to the conclusion that you have nothing to do with the idea of going to a foreign country.

"This is (I speak in no unkind sense) an extremely selfish view of the case. You ought to do something to help those who are not so fortunate as yourselves. There is an unwillingness on the part of our people, harsh as it may be, for you free colored people to remain with us. Now, if you could give a start to the white people, you would open a wide door for many to be made free. * * *" ("Abraham Lincoln, Speeches, Letters and State Papers," Nicholay & Hay, Vol. II, pp. 222, 223.)

between 1870 and 1906, has gone to support schools for negroes,'' (19 Enc. Brit, 348), is one of many facts that might be mentioned to refute this ungenerous statement. Those citizens of Louisville who, from the most Christian and unselfish motive, have given thousands of dollars for the support of the splendid Presbyterian Colored Mission in that city, could scarcely be accused of a desire to degrade the negroes because they do not invite them to their own churches and Sunday Schools, but have instead established for the negroes separate places of worship and study among their own people.

Let us add that the simple explanation of the difference of treatment accorded the negro in the North and in the South, mentioned by Booker Washington, may be this: Between races as distinct as the Caucasian and the negro, social equality can not co-exist with economic equality; the attainment of the one must mean the sacrifice of the other.

But what the negro needs is not social, but industrial equality. If this law did nothing more, therefore, than to shatter the negro's foolish dream of social equality with the whites, and thereby open up greater opportunities for his industrial improvement, the wisdom of its passage would be more than justified.

III.

The Federal Constitution does not prohibit a State from abridging under its police power privileges and immunities of citizens of the State; nor does the fact that privileges thereby regulated may not in fact be equal or identical amount to a denial of the equal protection of the laws; nor does the Federal Constitution attempt to guarantee social or economic equality.

A fundamental mistake of the plaintiff in this case is in supposing that under the Fourteenth Amendment the State is without power in the enactment of a proper police regulation to abridge the privileges and immunities of a citizen of a State, and in further assuming apparently that equal protection of the laws means economically equal privileges, and also that equality of privileges means necessarily identity of privileges.

Plaintiff in effect argues that as the "separate coach laws" do and must provide equal accommodations for both races in order to be constitutional (*McCabe* v. *Atcheson, etc., R. Co.,* 235 U. S. 151), therefore, any law affecting the races which does not affirmatively provide for equal accommodations, or which in its operation does not insure affirmatively equal accommodations or advantages, is unconstitutional; that as this law deprives the negro of the "advantage" of living on white blocks with white neighbors, or of living on certain streets where the whites have made their homes more attractive than some of the homes in the negro sections, he is thereby denied the equal protection of the laws.

But little reflection is sufficient to expose the sophistry of this contention. In the first place, as we shall later endeavor to show, plaintiff is in error in assuming that it is an advantage to live in social intimacy with the whites; and in the second place, Mr. Blakey at least fails to distinguish between those conditions or advantages which the law, because of the public nature of the employment, compels to be furnished to all alike, as in the case of common carriers and innkeepers, and those advantages which the individual must achieve for himself, and which the law, however paternal, does not attempt to bestow upon him, as in the case of churches, clubs, homes, private schools, etc. Would anyone seriously contend, for instance, that a law such as that upheld by this court in the *Berea College Case* (211 U. S. 45), separating the races in private schools, was unconstitutional because that law actually deprived the negro of the privilege of attending the best, if not the only, schools for higher education in the State? The University of Louisville is the only school for higher education in that city. Is a negro unlawfully discriminated against because such a law closes the doors of the only university in the city which might otherwise have been open to him? And yet it is surely a more important matter to the individual to get a sound education than to live on a block with the people of a particular color or in houses of a particular type. Why is this then not an unconstitutional discrimination? Simply because these things—private schools, colleges, homes, churches, clubs—are things which the individual must achieve for himself, whether he be black or white,

and which the State, however paternal, can not attempt to bestow; because, whatever advantage there might be in attending a school for whites, or living in homes with whites, is overcome by the corresponding disadvantage and danger which the State recognizes must result from the social commingling of the two races. The State, the city can provide and do provide against the building or maintenance of unsanitary dwellings, for fire and police protection, for sewers, for the lighting and cleaning of streets, for public schools; but the rest of the incidents of living, whether economic, social, educational, or moral, the individual must achieve for himself. For economic equality is not guaranteed by the Federal Constitution, nor by the laws of the State, whatever may be the dream of those who would establish a socialistic Commonwealth.

So, although incidentally this law may deprive the negro of the "advantage" or privilege of living on certain white squares, it can not be said that it deprives him of any advantage or privilege which he is at liberty to achieve for himself. His opportunities are precisely and mathematically the same as those of the whites under this ordinance. He may make his own community just as attractive and his houses just as clean and well-built and desirable as he is able or disposed to make them. He must build himself churches, private schools, clubs and homes and achieve any other community advantages and improvements, just as must the whites, by individual effort as heretofore. For instance, when excluded from Berea College, the negroes, having no other such school

to which to go, built with the hearty co-operation and assistance of the whites another splendid school for their own people, known as Lincoln Institute.

Even if it were true, as plaintiff asserts, that the negro sections are uniformly undesirable (and they most certainly are not), then the negro should proceed to make them desirable through the same human agencies that made them otherwise, to-wit, themselves. For, we repeat, there is nothing in this law to keep the negro sections from being the most moral, orderly, prosperous and intelligent sections in the city, and nothing to keep the houses therein from being the cleanest, most comfortable, and most attractive to be found. We have heretofore pointed out how this law will even encourage the accomplishment of these ends by bringing the best members of the colored race together, and by eliminating therefrom the more vicious and shiftless class of whites, the only whites who would drift into the predominantly negro sections.

The negro, therefore, must work out his own salvation along economic, social and moral lines, as must the white man who is restricted in identically the same manner. If, after fifty years from slavery, the negro is still unable to stand alone, he at least can not complain that *the law* during all that time has not afforded him equal rights and opportunities with the white man. There must be some period when he ceases to be the mere ward of the State; for, as was very strikingly said by Mr. Justice Bradley in the *Civil Rights Cases,* 109 U. S. 6

(and the statement is doubly true at this time, more than half a century after emancipation):

> *"When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."*

And the court added significantly:

> "There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essential rights of life, liberty and property the same as white citizens; yet no one, at that time, thought it was any invasion of their personal *status* as freemen because they were not admitted to all the privileges enjoyed by white citizens, or because they were subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discrimination on account of race or color were not regarded as badges of slavery."

"Privileges and Immunities," and the "Equal Protection of the Laws."

That the phrase "equal protection of the laws," does not mean equal privileges under all conditions, and that the "privileges and immunities of citizens of the United States" are in nowise affected or abridged by legislation of this character, is conclusively established by the opinion of this court in the *Slaughter House Cases*, 16 Wall.

36, and in many subsequent decisions following that case. It was insisted in that case that the business of carrying on the slaughtering of animals was a privilege of a citizen of the United States which could not be abridged by the State, even in the enforcement of a wise police regulation; and the court, therefore, had occasion to consider the meaning of these various phrases in the Fourteenth Amendment. The statute was denounced, not only as creating a monopoly and conferring odious and exclusive privileges upon a small number of persons at the expense of the great body of the community of New Orleans, but it was asserted that it deprived a large and meritorious class of citizens, the whole of the butchers of the city, of the right to exercise their trade, the business to which they had been trained and on which they depended for the support of themselves and their families. The court spoke as follows of the police power:

> "This power is, and must be from its very nature, incapable of any very exact definition or limitation. *Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property"* (all of which, we might add, precisely describes the character and purpose of the ordinance now under consideration).

The court then proceeds to dispose of the contention that the privilege thus abridged by the Louisiana statute was a privilege of a citizen of the United States:

> "The language is: 'No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States.' It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the words 'citizen of the State' should be left out when it is so carefully used, and used in contradistinction to 'citizens of the United States' in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

"Of the privileges and immunities of the citizens of the United States, and of the privileges and immunities of the citizen of the State, and what they respectively are, we will presently consider; but we wish to state here that it is only the former which are placed by this clause under the protection of the Federal Constitution, and that the latter, whatever they may be, are not intended to have any additional protection by this paragraph of the amendment."

The court then quotes with approval the following description of the fundamental privileges and immunities of citizens *of the several States* as contradistinguished from those of citizens *of the United States:*

> "What these fundamental principles are, it would be more tedious than difficult to enumerate. They may all, however, be comprehended under the following general heads; protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole."

The opinion concludes with this very impressive statement (pp. 77, 78, 82):

"Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? * * *

"And still further, such a construction followed by the reversal of the judgments of the Supreme Court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt. * * *

"*Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers*

for domestic and local government, including the regulation of civil rights, the rights of person and of property, was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation."

This language is fully approved in the later cases of *Maxwell* v. *Dow,* 176 U. S. 581, holding that trial by full juries is a matter of State and not of national citizenship; and *Twining* v. *New Jersey,* 211 U. S. 96, holding that exemption from self-incrimination is not a privilege of a citizen of the United States.

Practical Inequalities Inevitable.

It seems too clear for argument, therefore, that even though under the actual operation of an otherwise valid police regulation, it may happen that certain citizens enjoy privileges which others do not, such a law is not for that reason a violation of the Fourteenth Amendment.

Possibly the most recent illustration of this principle is the case of *Hadacheck* v. *Los Angeles,* 239 U. S. 394, where under the police power the plaintiff was denied the right to carry on a long established business of brickmaking in a certain district of the city, and wherein it was claimed that the effect of the law was to foster a monopoly and protect others engaged in that business in Los Angeles while preventing him from entering into competition with them. But this court held the plaintiff was denied no rights or privileges which he could claim under the Constitution.

Coming more specifically to illustrations of this principle affecting the negro race, cases might be multiplied where in the operation of an otherwise valid law, the negro, because of economic, educational, or other conditions, might suffer greater hardship than his white neighbor. For instance, to take an illustration from the Fifteenth Amendment covering the subject of suffrage: This court very recently held in *Guinn* v. *United States,* 238 U. S. 347, that the literacy test enacted by a State as a qualification of suffrage is valid where it can be separated from an invalid provision; and in *Myers* v. *Anderson,* 238 U. S. 368, decided on the same day, it was held that a property tax would also be valid under the same circumstances, the court saying (p. 379):

> "We put all question of the constitutionality of this standard out of view as it contains no express discrimination repugnant to the Fifteenth Amendment, and it is not susceptible of being assailed *on account of an alleged wrongful motive on the part of the lawmaker or the mere possibilities of its future operation in practice,* and because, as there is a reason other than discrimination on account of race or color discernible upon which the standard may rest, there is no room for the conclusion that it must be assumed, because of the impossibility of finding any other reason for its enactment, to rest alone upon a purpose to violate the Fifteenth Amendment."

The court held unconstitutional the "grandfather clause" involved in these cases, since, of course, the fact that a man or his ancestors did or did not take part in a particular war some fifty years ago could have no pos-

sible relation to his present fitness to vote, and the clause was, therefore, transparently a device to exclude illiterate negroes while including illiterate whites. On the other hand, however, it is abundantly clear from the opinions that the literacy and property tests are to be upheld, even though it might appear that in their actual operation a great body, or even all, of the negroes in a given community, might be entirely excluded from the franchise because of their illiteracy or poverty, or even though it might appear that the very motive of the Legislature in enacting such tests was to exclude the negroes from the ballot. These cases, therefore, would seem to go very much further in our favor than is necessary to sustain our contention in the case at bar, where, as we shall later show, the negro is not denied any opportunities or advantages open to the whites under similar circumstances.

Again, in the matter of intermarriage between the two races, the laws prohibiting such intermarriage have universally been upheld, although it is quite conceivable that a negro might well claim that being denied the privilege of marrying a white person, he or she is denied because of color, a valuable and very desirable privilege which is not denied to others. To be more specific, would this court hold invalid such a law because it might be alleged or proved that in a given community the only women living therein were white, or that most of the negro women living therein were vicious or otherwise "undesirable" as wives, and that therefore the negro men living in such a place were illegally discriminated against thereby? And yet that is substantially the sort of rea-

soning (and practically the only ground) on which the plaintiff asks this court to set aside the judgment of the State Court and to annul all this character of legislation!

An unusually clear and convincing discussion of the Fourteenth Amendment in this aspect will be found in the case of *Ex parte Kinney,* 3 Hughes, 9, decided in 1879. The court after referring to the Fourteenth Amendment said:

> "Here is a distinction between citizens of the United States and 'any person' whether citizen or alien residing or happening to be within the borders of a State. The declaratory clause forbids any abridgement of the rights of citizens of the United States. The remedial clause gives equal protection to all persons whatever while within a State's borders. *The amendment does not provide that the privileges shall be equal, but it does provide that protection shall be equal.* It establishes equality between all persons in their right to protection, *but does not confer equality in the privileges they enjoy.* It provides that whatever privileges the Constitution and laws of the United States confer upon a citizen as a citizen of the United States shall be enjoyed without abridgement; and it provides that all persons within a State, whether citizens of the United States, or of the State, or aliens, shall be equally protected by the laws in whatever privileges, whether equal or unequal, they may have from the United States, or from the State. However unequal their privileges respectively, yet a foreigner, a citizen of another American State, and a citizen of the State, shall have the benefit equally in the State of all remedial laws for the recovery of rights and of all legal safeguards ordained for the protection of life, liberty and property.
>
> *"I think it plain from this review that an equality of privilege is not enforced by the Constitution upon*

> *a State in respect to its domestic laws for the government of its own citizens as such*, while they are within its jurisdiction. But even if it did require an equality of privilege I do not see any discrimination against either race, in a provision of law, forbidding any white or colored person from marrying any other person of the opposite color or skin."

As the ordinance in the present case operates with precise and mathematical equality as to both the races, and no discretion, legal or otherwise, is vested in any official in its enforcement, there, of course, can be no contention that the negro thereunder is denied the "equal protection of the laws."

Again, it might be argued that in the matter of *public* schools the State, if it provides schools, must make the accommodations or privileges precisely equal, or else the law providing therefor would be invalid. But even here we do not find any such Utopian principle laid down by the courts for upholding or annulling such laws. In *Cummings* v. *County Board of Education*, 175 U. S. 528, this court held that a school board could not be compelled to withhold assistance from a white high school because of the failure to provide a high school for colored children, the funds formerly used for a colored high school having been turned to the use of the primary schools for colored children. In that case sixty negro children were left to seek a high school education in existing *private* institutions. The opinion of the court is by Mr. Justice Harlan.

And in *People* v. *Gallagher*, 93 N. Y. 438, where a mandamus to compel the principal of a public school to

admit a negro pupil was refused, the court in a lengthy opinion upholding the separate school law, held that the geographical inequalities incident to such a law afforded no ground of complaint, citing the *Slaughter House Cases* (p. 451).

The effect of the foregoing decisions is that the Federal government is not made a "perpetual censor" of the wisdom of the particular method of expenditure of state funds in the education of the negro,—whether that money should be spent for primary schools, high schools, or universities; that the negro is denied no constitutional privilege, even though no universities or high schools might be established for his children, provided he secures his share of educational advantages in the common schools; that a "separate school law" which would deny him the privilege of attending such white high schools or universities would not deny him any privilege as a citizen of the United States; nor would it deny him the equal protection of the laws.

It is clear, therefore, that the Fourteenth Amendment does not prohibit a State from abridging the civil rights of the negroes *in the same manner as the civil rights of the whites*, irrespective of the economic, social or moral condition or geographical location of the two races; else many police regulations to be valid would have to expressly except from their operation the members of the negro race. As said by this court in *Standard Oil Co.* v. *Tennessee*, 217 U. S. 413, 420, in answer to a contention similar to that in this case: "The foregoing argument is one of the many attempts to construe the Fourteenth

Amendment as introducing a factitious equality without regard to practical differences that are best met by corresponding differences of treatment." And see *Magoun* v. *Ill. Trust, etc., Bank*, 170 U. S. 296.

The Chinese Laundry Cases.

We repeat that the fact that in the operation of a police regulation it may press with greater hardship upon some than upon others, or may even deny to some privileges enjoyed thereunder by others as in the *Slaughter House Cases,* is no valid objection thereto; for we believe it can be safely stated that there is scarcely a single police regulation that does not restrain, limit or destroy certain personal or property rights, or both, of some of the citizens of the State to whom it applies. This, of course, does not make the law unequal in the legal sense, the inequalities arising from matters with which the law has no concern, such as geographical location, economic condition, etc. The California Chinese Laundry cases furnish further illustration of this principle.

In *Barbier* v. *Connolly,* 113 U. S. 27, it was held that a municipal ordinance prohibiting from washing and ironing in public laundries and washhouses *within defined territorial limits* from ten o'clock at night until six o'clock in the morning was a valid police regulation, in spite of the hardships which might result to many in its enforcement; and further that "of the necessity of such regulations the municipal bodies are the exclusive judges; at least any correction of their action in such

matters can come only from state legislation or state tribunals." On page 31, it was said by Mr. Justice Field, referring to the Fourteenth Amendment:

> "But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. *From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts,* such as for draining marshes and irrigating arid plains. *Special burdens are often necessary for general benefits,* for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. *Regulations for these purposes may press with more or less weight upon one than upon another,* but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; *but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."*

Again, in *Soon Hing* v. *Crowley,* 113 U. S. 703, the ordinance involved differed from that in the previous case only in the designation of the limits of the district

to be covered thereby. The court, however, in this opinion had occasion to answer the contention that *the motive in passing the ordinance* was to oppress or discriminate against the Chinese. This opinion is especially applicable, therefore, to the situation here, for underlying the several contentions of the plaintiff in error is the assumption that the ordinance now in question is aimed unjustly at the negro race, and that its motive was to humiliate or oppress that race, although the plaintiff is unable to point to a single sentence of its provisions, or to a single plausible fact to warrant such an assumption, and although he admits that the corresponding legislation for separate coaches was designed to *protect* the negro from humiliation and oppression resulting from close association with the whites (Mr. Blakey's brief, p. 18).

The court said on page 710:

> "The principal objection, however, of the petitioner to the ordinance in question is founded upon *the supposed hostile motives of the supervisors in passing it.* The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation, and residence there, and not for any sanitary, police or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general, with reference to the enactments of all legislative bodies, that the courts can not inquire into the motives of the legislators in passing them, except as

> they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. *The motives of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body.* The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, *even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense.*" (Nor is there any such pretense advanced in the case at bar.)

These two cases are reviewed by this court in *Yick Wo* v. *Hopkins,* 118 U. S. 356, and the distinction is made between that case and the foregoing cases which plaintiff in relying on the Yick Wo case ignores or overlooks. Referring to the ordinances involved in the latter case, the court said:

> "They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecu-

> tion of his business, apply for redress by the judicial process of mandamus to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confined to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The court then points out that no such arbitrary power or discretion existed or was exercised in the two previous cases, as "in both of these cases the ordinance involved was simply a prohibition to carry on the washing and ironing of clothes in public laundries and washhouses, within certain prescribed limits of the city and county of San Francisco, from ten o'clock at night until six o'clock in the morning of the following day." See also *Gundling* v. *Chicago,* 177 U. S. 183, distinguishing the Yick Wo case.

So in the case at bar, no official of the city is vested even with a "discretion in the legal sense" in the enforcement or suspension of the provisions of the ordinance, but they operate with precise and mathematical certainty as determined from the very plain language thereof. Clearly, therefore, there is not the slightest opportunity for any public authority to administer the ordinance with the evil eye or unequal hand denounced in the Yick Wo case.

An excellent illustration of an ordinance which does come within the condemnation of the Yick Wo case can be found in one of the decisions of our own Court of Appeals, that of *Boyd* v. *Board of Council,* 117 Ky. 199.

In that case an ordinance gave the City Council of Frankfort the naked and arbitrary power to grant or refuse a permit for a building as it might will, with no rule laid down to govern the exercise of such unlimited power. In the exercise of that power, the council arbitrarily refused a permit to build a negro church in a white neighborhood, and our Court of Appeals very properly held, following the Yick Wo case, that such an ordinance was absolutely void. There was no attempt made by the ordinance to define and prescribe the rights of the citizen, to treat the members of both races alike, or to divest the council of the power of unjust discrimination in its enforcement, or even to guide the official discretion, but quite the contrary. "The consent of the council could be given or withheld at its arbitrary pleasure." The same court which held void that ordinance upheld the ordinance in the present case, the difference between the two being perfectly plain.

We have said that the ordinance here involved does not in its terms vest any official with the power to enforce or to suspend it. But if it be argued that, in spite of the fairness of the law as thus drawn, it is possible that in the future it might be unequally enforced, and the negro thereunder discriminated against, our answer to this is twofold; first, this court will not hold such a law unconstitutional because it might in its future operation be used as an instrument of discrimination (*Williams* v. *Mississippi*, 170 U. S. 213); and secondly, even if a case actually arises where there is such discrimination in the enforcement, the appeal of the injured party still lies

first to the highest court of the State, and if that court denies the protection sought, then to this court. (*Gibson* v. *Mississippi*, 162 U. S. 565; *Bush* v. *Kentucky*, 107 U. S. 110.)

In the remote contingency, therefore, of this law being used as an instrument of discrimination by being unequally enforced (and we do not see how under the very clear language of the law, such a case can possibly arise), the remedy will still be ample to right the wrong at the suit of the person so aggrieved. This, however, does not go to the constitutionality of the law. *Williams* v. *Mississippi*, 170 U. S. 213.

The Limits of Economic Inquiry.

But another serious objection exists to the effort to make economic equality a test of constitutional equality. Such a rule would impose upon this court the duty of perpetual review of the operation of any given police law, upholding or annulling it according to the varying conditions found in different communities, or even in the same community at different times. If, for instance, under this law, in a given town the houses occupied by the whites and negroes respectively were found to be substantially "equal," the law would be upheld; if the negro section was found later to be less "desirable," it would be held unconstitutional as a discrimination against the negro; and if in another town the white section was less desirable than the negro section,* then it would be held

* And the Negro Year Book, 1914-15, p. 298, enumerates some 50 or 75 towns which are populated and governed entirely or almost entirely by negroes, and wherein the white sections might be very "undesirable."

unconstitutional as a discrimination against the whites.

Furthermore, opinion as to what is or is not a desirable house, block or section would doubtless vary with the pocketbooks and the architectural or aesthetic taste of the particular witnesses called; and the decisions of the court might accordingly vary "with the length of the Chancellor's foot."

The truth is that the court has no means for conducting such investigations, even if they were otherwise pertinent. What was said by this court in *Hadacheck* v. *Los Angeles,* 239 U. S. 394, 413, ought to be conclusive against this remarkable contention of the plaintiff that this law is unconstitutional because the negro sections are "less desirable" than the white:

> "In other words, petitioner makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination, and upon which, nevertheless, we are expected to reverse legislative action exercised upon matters of which the city has control. * * *
>
> "It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides, we can not declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions, or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action."

But This Law Denies no Advantage to the Colored Man.

The foregoing argument goes beyond the needs of the present case in that it assumes for the purpose thereof that the negro is denied some valuable privilege or advantage which is not denied to others. We respectfully insist, however, that neither race is denied any advantage, either in the legal or practical sense, when it is denied the "privilege" of close social contact with the members of the other, as neighbors on the same block. *If this is not a legal advantage in the case of public and private schools, of coaches, and of marriage, it is not an advantage here.*

The Circuit Court below (which must be deemed to be reasonably familiar with actual conditions in Louisville), in its opinion shatters completely the argument that in this aspect the ordinance is discriminatory; counsel having contended, as here, that there was discrimination both because it prohibits the negroes from moving into white blocks in the future, and because, being prospective in operation, it does not disturb those negroes who are now living on such blocks. We quote as follows from the opinion of Judge Quarles (Record, pp. 24-26):

"It must, as a preliminary, be remarked that counsel is mistaken when he says that the '*sole*' reason advanced why the ordinance should be upheld is that it will tend to prevent conflict between the races. That is indeed one of the purposes declared in the title, but it is not the only purpose, nor is it the only reason for upholding the ordinance advanced by counsel for the defendant.

"But, whatever may have been the object sought to be achieved in the passage of the ordinance, counsel maintains that it will not effectuate it, inasmuch as by its terms the ordinance does not disturb existing conditions in cases where members of both races resided on the same block at the time of its passage.

"In reality this objection seems to be based upon the ground that the ordinance is not so radical as it might have been framed. But certainly the fact that it is prospective only in its operation, and that it aims to accomplish its purpose without molesting any present occupant, are not in themselves sound reasons for holding the ordinance invalid. But, is counsel correct when he insists that these saving features of the ordinance render it ineffectual? It seems to the court that he is not; for even were it conceded that the ordinance will fail of its purpose as regards blocks on which both white and colored persons resided when it became a law, *it is a matter of common knowledge that such blocks are quite limited in number as compared with the total of residential blocks* in the city, and if the ordinance did no more than prevent an increase in the number of blocks where those conditions exist it would seem to justify itself, so far as its efficacy and a field for its operation are concerned. But it seems to the court that it is not extravagant to say that, under the working of the ordinance, even existing mixed blocks eventually will cease to be such. * * *

"In his fourth point counsel holds that the ordinance 'is unreasonable and discriminatory in that it per-

mits some of the same class advantages which it denies to others.'

"Here again reference is had to the mere fact that the ordinance operates prospectively only, and does not provide for a sweeping immediate separation on blocks where both white and colored people happened to be living when it was passed.

"The 'advantage' referred to by counsel is the privilege or opportunity of colored persons to live on the same block with white persons, and of white persons to live on the same block with colored persons; and it is insisted that, as the ordinance does not molest those already so established but does, for the future and only as to blocks whose residents are not mixed, forbid a white person from taking up his abode on a block where colored people occupy a majority of the houses, and *vice versa,* the person thus forbidden is denied an 'advantage' which, under the law, he is entitled to enjoy.

"Whether or not the ordinance is open to the objection here urged, it seems to the court must depend upon whether in the eye of the law it is an 'advantage' to, or for the good of, the members of either race to live on the same block with members of the other. *All enactments looking to the separation of the races, presumably at least, are founded upon the proposition that experience has revealed that certain evils result from the too constant and promiscuous commingling of their members, which evils such enactments are in theory calculated to prevent. In other words, the philosophy upon which all such legislation rests, is that, so far from its being an advantage to*

the members of either race to be brought into close social contact, the reverse is true. If the various laws which have been enacted on this general subject do not establish that as a principle of public policy, then the laws of a people are no safe criterion of their public policy. It must be concluded, therefore, that in the view of the law the 'advantage' here contended for *is not in truth an advantage, even when considered only from the standpoint of the one who seeks it.* * * *

The last objection urged against the ordinance is that it is unreasonable and discriminatory in that the 'opportunity is given the white man to improve his condition and his surroundings by moving into a better locality, whereas this right is denied the colored man.'

"It seems to the court a sufficient answer to this objection to say that it is founded upon the false assumption that the only way, or at least one of the best ways, for a colored man to improve his condition and his surroundings is to move into a block a majority of the houses on which are occupied by members of the white race. *To admit the soundness of this assumption would be to ascribe to the negro race a lack of capacity for self-development, a want of self-respect and of thrift, and a degree of dependence upon the white race which, it seems to the court, the history, past and current, of that people does not sustain.* Besides, of course, in determining whether the right thus contended for is one which the law could recognize and enforce, *regard must be had also to the correlative rights of those members of the other race who would be most directly affected by its exercise.* * * *

"The evidence adduced in the case of City of Louisville v. Harris, filed as an exhibit in this case is, as it seems to the court, quite convincing upon the point that the ordinance was passed, not upon the basis of any mere abstract theory, nor for the mere purpose of adding legal and artificial distinctions to those so plainly indicated by the Creator, but because there was real need for such a measure in the interest of both races.

"It is shown that serious conflicts and breaches of the peace have resulted from members of one race coming to live on the same block with members of the other; that race hostility has been engendered even where no violent demonstration of it occurred; that social ostracism has been occasioned by it; and that serious property losses have been sustained as a result of it. Each of these tends to a disruption of the cordial relations which should subsist between the two races, if not to recurrent conflicts and breaches of the peace.

"And if it is competent at all to the city to pass a segregation ordinance, it seems to the court that it must be held that the one in question is valid, for it is as fair, reasonable and just in its provisions as such a measure could well be made."

And the Court of Appeals added in the same case (Record, p. 40):

"In view of the fact that this legislation is upheld partly in recognition of the peril to race integrity induced by mere propinquity, we see but little difference in the prevention by law of the association of white and colored pupils in the schools of the State and in the pre-

vention of their living side by side in their homes. It is said by appellant that 'in a man's house no such association and contact is necessary' as in the schools or on public conveyances. But the court will not close its eyes to the fact that, under the congested conditions of modern municipal life, there is practically as much, if not a greater degree of, association among the children of white and colored inhabitants when living side by side than there would be in mixed schools under the direct observation of teachers.''

IV.

The use of property and the liberty of contract are always subject to reasonable police regulations and their enforcement does not deprive a person of property without due process of law. The present ordinance, so far from destroying or impairing such rights, will have the effect of protecting property from the most serious and destructive results.

Strictly, the only assignment of error which the plaintiff is in a position to urge before this court upon the record herein is that this ordinance deprives him of his property without due process of law. As we have before stated, the plaintiff in error is a *white* man and therefore neither can nor does make any claim that *he* is being discriminated against because of his color. The defendant in error, who is a negro, is, of course, making no such contention.

Opposing counsel (Mr. Blakey) in his brief (p. 30) apparently concedes that if this ordinance is otherwise valid, its restrictions upon property would not be a constitutional objection to it, saying:

"If living on the same block does cause such conflict between the races as to justify the council in forbidding it, then the council has the right to forbid it. There is no doubt on this subject. The police power 'makes no question' of vested rights. (See Mugler v. Kansas, 123 U. S. 623.) If vested rights are to be considered, then lessening the value of one man's land to the extent of one dollar would be as complete a defense to such an ordinance as would be the destruction of property valued at millions of dollars."

Mr. Blakey's co-counsel, however, still urges this question in his brief before this court, and we shall therefore, endeavor to show, not only that Mr. Blakey is correct in his statement of the law, but that the property argument is in fact the weakest possible ground of objection to this ordinance, since its general effect will be to protect and stabilize the great mass of residence property in the city.

Plaintiff in error admits in his pleadings that a white man will not live with his family next door to a negro, and it is this fundamental fact which furnishes the key to this case. But plaintiff owns a vacant lot on a block on which there are only two negro families but eight white families, and he asks the privilege of putting a negro in this property in order to save immediately a few dollars on it, although by so doing he will seriously depreciate all the rest of the property on the entire block. If, however, the plaintiff could be prevented, as he would be by this law, from giving up the occupancy of his lot to a negro, the negroes next to him, being the only negroes on the block, would in all probability soon move,

and the block would then not only become a white block, but the plaintiff himself would be entirely free to sell or rent to whites and thereby get a much better return from his property. And of course, there are other purposes to which property can be put than that of a site for a residence. There can scarcely be said to be anything in plaintiff's claim on this score, therefore, that deserves the especial sympathy of the Chancellor. The maxim, *Sic utere tuo ut non alienum laedas,* expresses a sound principle that may well be applied here. As was well said in *Tenement House Department* v. *Moeschen* (N. Y.), 70 L. R. A. 704 (affirmed in 203 U. S. 583):

> "*It is not the hardship of the individual case that determines the question,* but rather the general scope and effect of the legislation as an exercise of the police power in protecting health and promoting the welfare of the community at large."

Counsel (Mr. Storey) in an effort to illustrate the hardship of this ordinance imagines a case where there are *nine* white families and *seven* negro families living on a block and where one of the white families moves out. He says that as it would be unlawful to allow a negro to live in the house, and as it might be impossible to secure a white tenant, the house would stand idle indefinitely. If counsel were more familiar with conditions in Louisville, he would have hit upon a happier illustration. The fact is that in such a case, for the very reason which he admits, to-wit, the impossibility of securing white tenants to live among negroes, it would be only a short time before two or three of these white families will have

deserted the block, thus changing it automatically into a negro block and making it entirely lawful to occupy the vacated house with negro families; and the remaining white families will also sooner or later move to white neighborhoods. Counsel also imagines that it would be impossible for the owner of a vacant lot to improve his land since he would not know whether the block would ultimately be white or colored. In the first place, this is a difficulty which existed before this ordinance went into effect, and is one of the evils which it is intended to remedy, by enabling the owner of the property to feel secure in the fact that the block will continue to be for a long time to come either white or colored, as the case may be. But, if, in the second place, counsel has in mind one who is improving property to rent instead of for use as a home, we are still unable to see where the hardship comes in; for the character of the house will doubtless be determined chiefly by the character of other houses in the neighborhood, and after finishing it he could rent it to either white or colored, as the situation might determine. And again, it should be kept in mind that this law does not prevent the owner from occupying his own property, irrespective of the fact that the rest of the block is white or colored, where he acquired that property before the law went into effect.

Nor could the sad case imagined by Mr. Blakey of the "widow and children" of a colored owner of a home occupied by them on a white square, being compelled by this law to move therefrom upon the death of the owner, possibly arise. Mr. Blakey simply shows again his lack

of knowledge of the plain provisions of the ordinance. For, so far as this law is concerned, the aforesaid widow and children, their heirs and assigns, could continue to live in that property to the end of time. (Sec. 4.)

But taking a broader view of the property conditions which are sought to be remedied by this legislation, the following are a few of the many evils that have existed as a consequence of the absence of such a law: Property declines in value from one-third to one-half in white neighborhoods as soon as negroes move into them; many attractive and prosperous sections have gone into neglect and ruin and the income therefrom has been practically destroyed by reason of the real or threatened influx of a few negroes; home owners having mortgages to pay have lost their property in such sections from inability to renew their loans; many persons have blackmailed their neighbors by threatening to install negro tenants, and unscrupulous real estate agents have extorted great profits in the same manner; much bad feeling has been engendered leading to riots and personal encounters because of these things, and members of the negro race who are worthy and self-respecting have suffered along with the others from the general condemnation; the rich man whose money enables him to live where he pleases or in sections where the deeds restrict against negro occupancy has suffered less than the poor man whose neighbor is always with him, and who can not easily replace his home which has been thus invaded or largely destroyed; and even a negro who has moved into a city block among neighbors who shun his society and who

one after another steal away as if from a pest or a blight, is still a homeless man, even though he might be occupying a mansion.

The effect of this law, on the other hand, will be not only to cure, as far as legislative enactment can cure, such evils, but it will give a settled character to property, white and colored, and will raise the dignity of the negro home to an established and standard thing. Instead of occupying houses which have been abandoned by fleeing neighbors and left to go into decay and ruin, the negro will find many blocks of houses prepared and equipped for his use, with such comforts and conveniences as are commensurate with his income.

Facts Appearing in the Harris Record.

There is filed as a part of the record in this case the record of the proceedings in the companion case of Arthur Harris v. City of Louisville, which was decided by the Court of Appeals jointly with the present case; it being agreed that the record in that case "may be considered by the Court of Appeals as evidence in this case of what was done in the case of City of Louisville v. Harris and the proceedings therein," etc. (Record, pp. 6, 27). We consider the facts brought out in that record pertinent as merely illustrative of what the court may in general outline take judicial notice. A few extracts which we will give in narrative form from the testimony admitted in that case will make clearer some of the reasons which induced and which justify this legislation,

in so far as property and the relation of the races are concerned.

Mr. Trevor H. Whayne (Record, p. 67), who has had a very wide experience in the real estate business in Louisville since 1881, and who was for eighteen years with the Fidelity Trust Company, testified in substance: Property is depreciated from 25 to 50 per cent by a negro moving into a normally white neighborhood. It only takes a family or two in a block to bring about a depreciation on the block (p. 68). Where colored people have thus gone into a neighborhood it has caused a good deal of feeling in the locality (p. 68). * * * At First and Kentucky, a good medium resident neighborhood, the effect of a single negro family moving into a block by purchase caused considerable feeling in the neighborhood among the white people and had a very depressing effect upon the property adjacent and immediately in the neighborhood. I don't think you could have sold the property next door to this house after the purchase by a negro for within 40 per cent of the value you could have sold it for before (p. 69). * * * In the Highlands in my opinion the negroes occupying the property on the alley in the rear of the Broadway property have affected its value from $20 to $40 or $50 a foot. When I moved in Broadway nine years ago the property was worth about $100 a foot which is now worth about $60 in the neighborhood of these negroes. Four blocks away from the negro tenants, property which at that time was worth $50 a foot, today is selling for $110 a foot (p. 70). * * * You can go on Chestnut Street between Thirteenth

and Fourteenth on the north side of the street and some of those splendid residences along there which formerly sold for $8,500 have sold down as low as $3,500 and $4,000. I think you will find four or five right in that block (p. 71). * * * When I entered the real estate business in 1881 property on Chestnut from Twelfth, Fifteenth and Twentieth streets had been selling for more than it was on Third Street to Ormsby [the most fashionable residence streets] out south; now it is entirely changed. It began at Ninth and Chestnut with the occupancy of this particular property by colored tenants and has then gone down Chestnut Street; it has depreciated the value of property all the way down as far as Twentieth and Chestnut. It is practically impossible to sell houses along there for residence purposes any more (p. 72). * * * Chestnut Street was opened up as the first asphalt street through to Shawnee Park, but nevertheless we advised our clients to sell their property on this street and get out as quickly as possible because we believed the property was being affected by the negroes in the neighborhood (pp. 72-73). * * * There is a negro family at Brook and Breckinridge and that property has been dead for years as a consequence. The white people would have moved out if they could have sold their property (p. 75). * * * On Sixth Street houses that cost $10,000 to $20,000 to build have sold as low as $4,000. Several of them were sold only four years ago. The white people began to move out on account of a piece of property being sold to a negro just north of Broadway. After the sale the white people as fast as they could sell and get out were moving

out, making a sacrifice to get away. I don't think you could have found a man between Chestnut and Broadway on Sixth Street after that first negro bought in there that his property was not on the market in the next ten days after the purchase. They all wanted to sell, but it took time and when they did sell they had to sell at a very great sacrifice (pp. 75-76). * * * You take the best negro in town, and I say this with all respect, and let him go out today on Third Street [the finest residence street in the city] between Ormsby and Burnett and buy a lot there, or buy a house that is already built, and he will depreciate the value of the property throughout that square at least 40 per cent (p. 77). * * * Nor is this depreciation at all explainable by the fact that some people want to move further out. Many prefer to be conveniently located with reference to their business and would, therefore, prefer being nearer in (p. 78.) * * * If I had a house in a white neighborhood I would not rent it to the best negro in town for the simple reason that the minute I put him in white property he would depreciate the value of the entire neighborhood around and get the enmity of all the white people about him. In this section of the country I have never seen any white people who wanted to put themselves on a social equality with a negro (p. 80).

Mr. John Buechel (p. 81), for five years city assessor, testified that when negroes move into a block, the property owners at once apply to get their property assessments reduced and this is always granted. The witness mentions also instances of serious outbreaks and breaches

of the peace due to negroes moving into white neighborhoods. Negroes moved into the neighborhood in which witness was living and he would have moved but for the fact that he owned his property and could not find a purchaser (pp. 82-83).

Mr. J. Guy Nevin (p. 84) testified: Our property cost more than $7,000, and we were glad to take $3,800. We had to take a house in trade even then. The street was lighted and paved with everything that a modern street has, a thoroughfare to Shawnee Park (p. 85). * * * Houses ranged from $5,000 to $15,000, averaging $7,500. It is now one of the most aristocratic colored portions of the city. At the same time there is a depreciation of 30 to 60 per cent. I have a good many houses in view that sold from $2,500 to $4,000 that ten years ago could not be purchased for less than $5,000 or $6,000 (p. 85). * * * One negro moving in depreciated the property and created such a feeling of unrest and fear of influx of negroes that the property was sacrificed (p. 88).

Mr. E. H. Wedekind (p. 89) testified in substance: When the negroes began moving in I remained because my wife liked the home and I kept the place up to the minute with all the conveniences of the latest plumbing, hardwood floors, gas heating system, etc. I spent $10,000 or $12,000 on the house within the past fifteen years. Now I can not get half the value of it. The depreciation was due to negroes moving in (p. 89). * * * My family was really compelled to move away from there in order to have any friends come to see them on that square. I bought a vacant lot next door to me in order to keep a

negro from occupying it, but finally had to move because my family would not be visited by their friends, and the negro children passing the house would throw slurs at my children playing in the yard, calling them "nigger lovers." My business is in that part of the town and I wanted to stay down there, and I wanted the house as a home. I have not any prejudice against the negro race whatever. I will do everything I can to uplift them. I have always done so and I will do so today (pp. 90-91).

Surely a city has the right under the police power to put reasonable limits upon the power of a few of its citizens thus to destroy the property of their neighbors and to endanger the peace and good order of the community. The building codes of cities impose many important and serious restrictions upon the free use and improvement of property in order to protect such property from *possible* loss by fire, prohibiting, for instance, the erection of any frame building within the fire limits, or the use of more than a cretain percentage of a lot, or the erection of buildings beyond a certain height (*O'Bryan* v. *Highland Apartment Co.*, 128 Ky. 282; *Welch* v. *Swasey*, 214 U. S. 91). As was said in the first case cited: "*The idea of absolutism in the use and enjoyment of our property has long since been exploded, and the now well-recognized doctrine is that that use and enjoyment of our property guaranteed by the Constitution, State and Federal, means such use and enjoyment as will not unnecessarily endanger or destroy the property of others.*"

This is all that we would ask in the present case. Can it be possible that the city has full power to impose these many restrictions upon the use of property in order to protect it from the remote possibility of a loss by fire, and yet that it is utterly helpless to prevent the most complete and certain and immediate destruction by an adjoining occupancy such as the ordinance now under consideration would regulate? This record shows that where even a single negro moves into a white block the destruction wrought to property values therein *is as immediate and as great as if an incendiary had gone from house to house with a torch in his hand and set them all on fire.*

Property Rights and the Police Power.

The contention of plaintiff's counsel is based on the wholly false assumption that neither property rights nor personal rights can be restricted under the police power. As a matter of fact, we do not believe a single illustration of its exercise can be given where one or the other of these classes of rights is not either restricted, or entirely taken away. Viewed as a personal or property right, what is the difference between prohibiting the use of a building as a school for those of a particular race, as in the Berea College case, and prohibiting its use as a residence by those of a certain race?

The great case on this subject is that reported under the style of *The Slaughter House Cases,* 16 Wall. 36. This was the first case to involve the construction of the Four-

teenth Amendment of the Federal Constitution, and the court declared that:

> "No questions so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other, and to the citizens of the States, and of the United States, have been before this court during the official life of any of its present members."

The Supreme Court then proceeded to hold that a law which required all the slaughtering of animals in the city of New Orleans to be done in one abbatoir, and absolutely prohibited the operation of the then existing slaughter houses, was a legitimate exercise of the police power, although it in effect took away the property and occupation of all the men engaged in the slaughter house business in that city and did so without compensation. It was not even claimed that the slaughter houses thus put out of business could not be conducted in a sanitary manner.

In *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, the company under express legislative authority, had established a factory outside of the then limits of the city of Chicago, and in a territory in which there was no population. Later the village of Hyde Park, which had grown around the works of the company, passed an *ordinance* to suppress these works, and a bill was filed in the State Court to restrain the enforcement of that ordinance. Although there was a charter right to maintain these works, and although when established they were located in a territory in which there was no population, yet when popula-

tion gathered around them, the police power of the town was held sufficient to stop their existence, and that without any compensation to the owner. The pecuniary injury which directly resulted to the company from the stoppage of its works was held no bar to the exercise of the police power of the State.

A still more striking illustration is afforded by the case of *Mugler* v. *Kansas,* 123 U. S. 623, which has been often followed since. In that case Mugler had established a brewery in Kansas, when such an institution was authorized by the laws of the State. The buildings and machinery were of little value except for the purpose of manufacturing beer. Yet, when Kansas, in the exercise of its police power, determined that the manufacture of beer should cease, it was ruled by this court that the pecuniary loss to Mugler did not justify any restraint of the legislative acts prohibiting such manufacture; that not only could his property thus be taken from him, but it could be done without compensation.

The right to carry on a particular business is, if anything, even more fundamental than the right to live where one pleases. For it is out of the income of one's business that one is able to build or rent or provide for a home, and yet we have thus seen that the law reserves the right to impose many restrictions, and even prohibitions upon a man's business. And even our building laws, our quarantine and health laws furnish many illustrations of the fallacy of the assumption that one can live where one pleases.

If, therefore, it must be admitted that the right to live where one pleases is not by any means an absolute right, can there be any question of the power of the State or city, when the welfare of the community so demands, to pass any reasonable regulation or restriction upon the right of white and colored persons to live wherever they please?

The objection that in the working out of a segregation law some property may be somewhat impaired in value, or that some individuals may not be able to live where they please, seems to be fully answered by the Supreme Court in *L'Hote* v. *New Orleans,* 177 U. S. 587, where there was involved the validity of a city ordinance prescribing the limits within which women of immoral character could live, and which it was claimed, depreciated the plaintiff's property unfairly as between himself and owners of property outside the district. But the court denied relief on the ground that the injury was merely incidental to the city's right to segregate. The court said:

> "Whatever course of conduct the Legislature may adopt is in a general way conclusive upon all courts, State or Federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature. * * *
>
> "*Some must suffer by the establishment of any territorial boundaries.* We do not question what is so earnestly said by counsel for plaintiffs in error in respect to the disagreeable results from the neighborhood of such houses and people; but if the power to prescribe territorial limits exists, the courts can not say that the limits shall be other than those the legislative body prescribes. If these limits hurt the

> present plaintiffs in error, other limits would hurt others. But clearly the inquiry as to the reasonableness or propriety of the limits is a matter of legislative consideration, and can not become the basis of judicial action. The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. *Because the legislative body is unable to protect all, must it be denied the power to protect any?*
>
> "It is said that this operates to depreciate the pecuniary value of the property belonging to the plaintiffs in error, but a similar result would follow if other limits were prescribed, *and therefore the power to prescribe limits could never be exercised, because, whatever the limits, it might operate to the pecuniary disadvantage of some property-holders.*
>
> "The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that *the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character.*"

It seems to us that the general principle above announced governs the case at bar. In the *L'Hote* case, the segregation was for the protection of the public morals; in the case at bar, the segregation is also for the protection of the public peace, safety and comfort, and the promotion of the general welfare.

Counsel may object to the foregoing cases, however, on the ground that regulations of things that are themselves unlawful distinguish them from the case at bar, but it is well settled that the police power extends to the regulation of all matters, whether they be lawful or unlawful. As was said in *Hyman* v. *Boldrick,* 153 Ky. 77, 79:

"The police power is not confined to the regulation of those classes of business which are essentially illegal, for, if illegal, in the sense that they are prohibited by law, it is not easily understood how they could be regulated at all. It is of the very essence of the exercise of police powers that citizens may, for the public good, be constrained in their conduct with reference to matters in themselves lawful and right."

Laws in the Interest of the Stability and Protection of the Home.

There is an interesting line of cases which bear a close analogy to the question here involved which uphold the constitutionality of legislation which attempts to secure to dwellers in crowded cities the right to live in a peaceful, quiet neighborhood free from the invasions of business and of industry and with the "amenities of civilization." California, Michigan, New York, Wisconsin, Minnesota, Missouri, Illinois, and possibly other States have legislation of this nature, which seems generally to have been upheld by the courts.

In *Hadacheck* v. *Los Angeles,* 239 U. S. 394, this court upheld an ordinance of the city of Los Angeles which "segregated" brick-making from a designated area, while allowing such business to be conducted in other parts of the city. The petitioner asserted that he was the owner of a tract of land upon which was a very valuable bed of clay worth about $800,000 for brick-making purposes, but not exceeding $60,000 for any other purpose; that he had made excavations covering a large part of the property and that on account thereof the land could

not be utilized for any other purposes than that of brick-making; that he purchased the land because of such bed of clay; that at the time of the purchase it was outside of the limits of the city and distant from other dwellings; that he had erected expensive machinery for the manufacture of bricks of fine quality; that the business was conducted so as not to be in any way a nuisance; that the ordinance as enforced would discriminate against him and in favor of others engaged in the manufacture of bricks in the city who were his competitors; that the boundaries of the district were arbitrarily determined for the sole purpose of suppressing the business of petitioner and one other brick yard; that there were and are many other brick yards in more thickly settled residence sections of the city which were not attempted to be prohibited by the city.

The court follows and approves the very similar case of *Reinman* v. *Little Rock,* 237 U. S. 171, where an ordinance prohibiting livery stables within certain designated areas in Little Rock was upheld. The court in the Hadacheck case speaks as follows of the Reinman case:

> "The circumstances of the case were very much like those of the case at bar, and give reply to the contentions of petitioner, especially that which asserts that a necessary and lawful occupation that is not a nuisance *per se* can not be made so by legislative declaration. There was a like investment in property, encouraged by the then conditions; a like reduction of value and deprivation of property was asserted against the validity of the ordinance there considered; a like assertion of an arbitrary exercise of the power of prohibition. Against all of these con-

> tentions, and causing the rejection of them all, was adduced the police power. There was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brickyard here. They differ in particulars, but they are alike in that which cause and justify prohibition in defined localities—that is, the effect upon the health and comfort of the community."

In *Fischer* v. *St. Louis,* 194 U. S. 361, and *Schefe* v. *St. Louis,* 194 U. S. 373, certain ordinances segregating stables and dairies from residence districts of the city were held constitutional; and in *Welch* v. *Swasey,* 214 U. S. 91, certain city planning acts which prohibited the erection of tall buildings in the residence section of Boston were upheld, although plaintiff in error contended that their real purpose was of an esthetic nature, designed purely to preserve architectural symmetry and regular sky lines; that the infringement upon property rights by such acts was unreasonable and disproportioned to any public necessity; that the distinctions between 125 feet for the height of buildings in the commercial districts described in the acts, and 80 to 100 feet in residential districts was wholly unjustifiable and arbitrary, having no well-founded reason for such distinction, and was without the least reference to the public safety and, therefore, not a proper exercise of police power. But this court concurred in the view of the Massachusetts court that "regulations in regard to the height of buildings, and in regard to their mode of construction in cities, made by legislative enactments *for the safety, comfort, or convenience of the people, and for the bene-*

fit of property owners generally, are valid"; and it was added: "We are not prepared to hold that this limitation of 80 to 100 feet, while in fact a discrimination or classification, is so unreasonable that it deprives the owner of the property of its profitable use without justification." And further referring to the asserted relation of such restrictions to fire protection it was said (p. 108):

> "These are matters which, it must be presumed, were known by the Legislature, and whether or not such were the facts was a question, among others, for the Legislature to determine. They are asserted as facts in the brief of the counsel for the city of Boston. * * * That, in addition to these sufficient facts, considerations of an esthetic nature also entered into the reasons for their passage, would not invalidate them."

In *Ex parte Quong Wo* (Cal.), 118 Pac. 714, an ordinance prohibiting a laundry in residential districts was upheld; in *Ex parte Montgomery,* 125 Pac. 107, a similar prohibition was upheld as to a lumber yard; in *People* v. *Erickson* (Ill.) 105 N. E. 315, an ordinance was upheld which prohibited the location of public garages in residence districts of the city of Chicago; and in *Cusack Co.* v. *Chicago,* 108 N. E. 340, an ordinance prohibiting the erection of bill boards on a residence block was sustained.

It will thus be seen that the courts go far in upholding legislation which has for its object the protection, enjoyment and *stability* of the home, recognizing, no doubt, that the strongest assurance of the safety of the State is to be found in the safeguards that can be thrown around

the home. Even the Socialists, who oppose private ownership of income-producing property, insist upon the private ownership of the home as essential to the good of the State, and to the development, and perpetuation of a sound and substantial citizenship.

Obviously there is very little encouragment to purchase or own a home in a city when the owner might wake up any morning to find that its value, its desirability as a home for himself and his family, has been practically destroyed by a negro moving next door with his family, or by the establishment of a laundry, livery stable, or a garage on the adjoining lot. The absence of such laws as these makes a city of renters and flat-dwellers, of a shifting, unstable and indifferent citizenship; a city of houses but not of homes.

At most, the privilege of carrying on a business or of living where one pleases (which is limited or abridged by such laws), is but a secondary or qualified privilege; for it must be remembered that neither the white man nor the negro has ever had the absolute right to live where he pleases. Aside from the many existing police regulations of places and manner of living illustrated above, if it should happen that the owner of the particular property is unwilling to lease or sell it to the applicant, there is no law under the sun which could compel him to do so; but the owner abridges no natural or con stitutional right of the applicant in thus denying him the privilege of living in that property, however desirable it may be and however much the applicant might be willing to pay therefor. (1 Kings, 21.) Is the negro denied

any constitutional privilege by a building restriction running with the land which seeks to prohibit members of his race from occupying the property so restricted?

And it should be kept in mind especially with regard to the ownership of real estate that the ultimate title to all such property is vested in the State, and that the highest possible title that can be carved out of any landed estate in favor of a citizen is after all but a right to its use, subject to such conditions and regulations as the State, its ultimate owner, may see fit from time to time to impose for the common good. Indeed, without these important rights reserved to the State and the intelligent exercise thereof upon proper occasion, the value of such property to the owner of the fee or other estate therein would be very greatly impaired. As was said by Chief Justice Shaw in the great case of *Commonwealth* v. *Alger*, 7 Cushing, 53, 84:

> "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. *All property in this Commonwealth,* as well that in the interior as that bordering on tide water, *is derived directly or indirectly from the government, and held subject to those several regulations which are necessary to the common good and general welfare.* Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from

> being injurious, and to such reasonable restraints and regulations established by law as the Legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

If it be urged that the purposes sought to be accomplished by this ordinance can be accomplished by private building restrictions without invoking the power of government, the answer is that such restrictions (with a few conspicious exceptions in new and wealthier suburbs) have proven wholly inadequate as is well shown by the fact of such legislation as that illustrated above. The reasons are obvious. The restrictions to be effective would have to cover a very large amount of contiguous property on both sides of the street; and often those restrictions, being a matter of private contract, are dissolvable by mutual agreement, and many courts have held also, by a mere change in the neighborhood conditions. It has also been held that they do not inure to the benefit of adjoining property owners, but can only be enforced by the grantor, who may in the meantime have lost all interest therein.

The Jus Disponendi and the Freedom of Contract.

But counsel here invoke the so-called *jus disponendi* as a sufficient answer to legislation of this kind. If the value of this right of disposition can not be impaired by police regulations, then few such regulations would stand; for it is plain that any such limitation upon the use of property must necessarily impair the value of the *jus*

disponendi. The Court of Appeals herein thus disposes of this outworn argument (Record, p. 38):

> "The *jus disponendi* has but little place in modern jurisprudence. The advance of civilization and the consequent extension of governmental activities along lines having their objective in better living conditions, saner social conditions, and a higher standard of human character has resulted in a gradual lessening of the dominion of the individual over private property and a corresponding strengthening of the regulative power of the State in respect thereof, so that today all private property is held subject to the unchallenged right and power of the State to impose upon the use and enjoyment thereof such reasonable regulations as are deemed expedient for the public welfare. There is nothing in the ordinance here under consideration which takes away from any person the right to acquire property anywhere in the city; but the ordinance does prohibit the occupancy of property under certain circumstances, by an owner who acquires same after the adoption of the ordinance; and such restraint upon the use of property acquired with notice of a regulatory ordinance is valid as a competent declaration of the municipal legislature."

This court had occasion to answer the same contention in *Crowley* v. *Christensen,* 137 U. S. 86, where it was said by Mr. Justice Field:

> "The right to acquire, enjoy and dispose of property is declared in the constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the Legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property. What contracts respecting its acquisition and disposition shall be valid and what void or voidable; when they

> shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged,—are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non laedas* is a maxim of universal application."

We have probably cited sufficient cases to dispose of the contention of the plaintiff that this legislation is an undue interference with the rights of property. But he further insists that under the police power it is impossible to interfere with the freedom of contract, and that the present ordinance unduly restricts the right of the individual to contract with reference to his property. It is now elementary that if a law is otherwise valid, the fact that it restricts the right of contract is no objection thereto. For instance, in the *Berea College Case*, 211 U. S. 45, the effect of the statute there involved was not only to prohibit the owners of a private school from using that property in a given manner, but also to prohibit them from entering into contracts with students of a certain race, who might have contributed a considerable income to the school. The fact that this right was entirely taken away by the law in question was not regarded as a constitutional objection thereto.

Very recently in *Schmidinger* v. *Chicago*, 226 U. S. 578, it was said:

> "This court has had frequent occasion to declare that there is no absolute freedom of contract. * * * So long as such action has a reasonable relation to the exercise of the power belonging to the local legis-

> lative body, and is not so arbitrary or capricious as to be a deprivation of the due process of law, freedom of contract is not interfered with in a constitutional sense."

Again, in *Northern Pac. R'y Co.* v. *Duluth*, 208 U. S. 583, the same court, after citing a long line of decisions, concluded:

> "The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained *unhampered by contracts in private interests*, and that uncompensated obedience to laws passed in its exercise is not violative of property rights protected by the Federal Constitution."

Legislation not Discriminatory Because Prospective Only and Not as Drastic as it Might be Made.

Counsel also raise the very novel objection that this legislation is unconstitutional because it is not more drastic in character, and is not retroactive as well as prospective in its operation. This objection seems to us so utterly without merit that we feel some hesitation in attempting to answer it. We might multiply illustrations of the exercise of the police power in which the regulations are made to operate only as to the future, but which have nevertheless been upheld by the courts. Building codes, for instance, generally provide that no frame building shall *in the future* be erected within the so-called fire limits therein prescribed. It would seem little short of the absurd to contend that such laws are unconstitutional because they do not also provide that all of the frame

buildings already erected within the fire limits should be torn down and replaced by brick or stone buildings; or that, because they do not extend such limits to all parts of the city or to other sections where the buildings may be equally close together, they thereby discriminate unfairly against those sections within the limits. It was not considered a valid objection to the acts upheld in the *Welch case,* 214 U. S. 91, that they did not provide that buildings already erected in the sections of the city covered should be reduced in height to the limit prescribed by the law, or that just across the street in the business district, buildings of a greater height were permitted to be erected; nor are the various tenement house regulations, now common to all our larger cities, invalid because they distinguish between houses previously erected and houses to be erected, and do not provide that the old houses shall be torn down and rebuilt to conform with the lot area, dimensions and other details regulating new buildings.

Counsel insist that this ordinance is unconstitutional because it does not attempt to move every negro now living in a white neighborhood, and every white person from a negro neighborhood, and because it makes certain exceptions as to servants, etc. Counsel for plaintiff in error (Mr. Blakey) asked in his brief in the court below: "What would be thought of a police regulation which declared that all bawdy houses located in the city between Main and Broadway should be suppressed and abated, leaving all others to remain as they were?" The answer to this question will be found in *L'Hote* v. *New Orleans,*

177 U. S. 587, where substantially this same thing was done by a city ordinance prescribing the limits within which women of immoral character could live, and which the Supreme Court upheld, the court saying:

> "But clearly the inquiry as to the reasonableness or propriety of the limits is a matter for legislative consideration, and can not become the basis of judicial action. The ordinance is an attempt to protect a part of the citizens from the unpleasant consequences of such neighbors. *Because the legislative body is unable to protect all, must it be denied the power to protect any?*
>
> "It is said that this operates to depreciate the pecuniary value of the property belonging to the plaintiffs in error, but a similar result would follow if other limits were prescribed, *and therefore the power to prescribe limits could never be exercised,* because, whatever the limits, it might operate to the pecuniary disadvantage of some property-holders."

It has never been considered a valid objection to the validity of the various state separate coach laws that they have excepted street cars therefrom, or because they make an exception of employes, servants of white passengers, etc., as in the *Plessey* case; nor was the Act involved in the *Berea College Case* rendered invalid because it excepted certain penal institutions of the State; nor do such exceptions raise any question of the good faith of the Legislature in enacting such legislation.

What was said by Mr. Justice Holmes, speaking for the Supreme Judicial Court of Massachusetts, in *Rideout* v. *Knox,* 148 Mass. 368, is applicable here also in justification of making a police regulation less drastic than it might be made:

"It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain." See also to the same effect *Hudson County Water Company* v. *McCarter,* 209 U. S. 349.

There is, therefore, a curious inconsistency in the argument for the plaintiff that, on the one hand, the law is unconstitutional because so drastic in its interference with his property, and, on the other, that to be constitutional, it should be more drastic and should immediately segregate the races into separate districts, irrespective of the existing status. We have in another connection (p. 75) quoted the language of the lower court also in answer to these remarkable contentions.

V.

The right to enact a law providing for reasonable residential segregation similar to that now under consideration has been sanctioned by the Courts of other States where the question has squarely arisen.

Although having only a persuasive value, it may not be out of place to refer briefly to the decisions of several of the State courts which have passed upon the validity of ordinances segregating negroes and whites in their residences, etc. We find that thus far there have appeared, in addition to the case at bar, four reported cases

on the subject, to-wit: *State* v. *Gurry* (Md.), 88 Atl. 546; *Hopkins* v. *City of Richmond* (Va.), 86 S. E. 139; *State* v. *Darnell* (N. C.), 81 S. E. 338; and *Carey* v. *City of Atlanta* (Ga.), 84 S. E. 456.*

(1) In the *Gurry* case was involved the validity of a residence segregation ordinance passed by the city of Baltimore in 1911. The court, after holding that it was clearly within the charter power of the city of Baltimore to pass such an ordinance, goes on to discuss the various objections raised to its constitutionality. In answer to the claim that it was a discrimination against the negro, the court says:

> "As we have seen, the avowed object of the ordinance is to preserve peace, prevent conflict and ill-feeling between the two races, and thereby promote the welfare of Baltimore; * * * and, whatever other objections may be urged against it, *it can not be truly said that there is any discrimination in the ordinance against the colored race. Indeed, in its practical operation it would be more burdensome on white people than on colored people, for it is well*

* The court may find it of interest to have before it the total and the negro population, with the percentage of negroes, in the various cities which have been mentioned in this brief. We take the figures from the 1910 census:

	Total	Negro	Per Cent Negroes
Atlanta	154,889	51,902	33.5
Baltimore	558,485	84,749	15.2
Boston	670,585	13,564	2.
Louisville	223,928	40,522	18.1
Richmond	127,628	46,733	36.6
St. Louis	687,029	43,960	6.4
Washington	331,069	94,446	28.5

The same census also gives the population of Louisville, white and negro respectively, by wards as follows:

(1st) 17,146 and 1,250; (2d) 17,445 and 820; (3d) 22,816 and 4,161; (4th) 8,184 and 3,261; (5th) 14,410 and 3,980; (6th) 9,566 and 1,981; (7th) 10,000 and 1,122; (8th) 8,040 and 3,059; (9th) 5,738 and 4,038; (10th) 5,746 and 7,999; (11th) 25,393 and 6,526; (12th) 38,422 and 2,325.

known that white people own the great bulk of property in Baltimore City, and hence, where the property of one colored person would be affected by such an ordinance, those of many more white people would be. What is denied one class is denied the other; what is allowed one class is allowed the other. There is, therefore, no such discrimination as is prohibited by the Constitution or statutes securing civil rights, and it is not necessary to discuss that question further."

Passing then to a consideration of the purpose sought to be accomplished by the ordinance, the court says:

"No intelligent observer in communities where there are many colored people can fail to notice that there are sometimes exhibitions of feelings between members of the two races which are likely to, and occasionally do, result in outbreaks of violence and disorder. It is not for us to say what this is attributable to; but the fact remains—however much it is to be regretted—and if a segregation of the races to such extent as may be permissible under the Constitution and laws of the land *will have a tendency, not only to avoid disorder and violence, but to make a better feeling between the races, every one having the interests of the colored people as well as of the white people at heart ought to encourage rather than oppose it.* Mr. Justice Brown said in Plessy v. Ferguson, 136 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256: 'The object of the amendment (fourteenth) was undoubtedly to enforce the absolute equality of the two races before the law; but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.'

"If the welfare of the city, in the minds of the council, demanded that the two races should be thus, to this extent, separated, and thereby a cause of con-

flict removed, the court can not declare their action unreasonable. It was acknowledged by the counsel for the appellee, both in the brief and in verbal argument, that for years there had been more or less friction resulting from the occupancy by colored people of houses in blocks theretofore occupied wholly by white people. *With this acknowledgment, how can it be contended that the city council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?* * * *

"Penalties in criminal laws are not only imposed to punish violators, but to deter the commission of crime. *If, as is practically conceded in this case, the living in such close proximity produces friction that is liable to result in open clashes and disorder,* why should not the governing body take cognizance of it, and *legislate to avoid it,* and thereby promote the general peace? It seems that it would be the better exercise of their discretion, for the public welfare, to discourage by removing the cause than to trust to deterring by the fear of punishment. * * *

"Without giving other illustrations of the exercise of the police power, we are of the opinion that the object sought to be accomplished by this ordinance is one which properly admits of the exercise of the police power. It only remains for us to determine whether the ordinance *as drawn* should be sustained."

The court in the latter part of the opinion, points out that the ordinance was defective in that it wholly ignored all vested rights, which existed at the time of its passage, as it prohibited an owner of property from living in his own house acquired *before* the law went into effect; that whatever might be the power of the *Legislature* to enact

such a prohibition, it could not be done by *ordinance.* The court, for the guidance of those who might draft a future ordinance, points out in what particulars the ordinance then before it could be improved. Immediately upon the rendition of this opinion the council of Baltimore passed another ordinance, which has now been in effect for several years in that city, the courts having thus far upheld it. We had this latter ordinance before us in drafting the ordinance for Louisville, and we copied therefrom the language found in Section 4, in order to protect all vested rights and thus remove the constitutional objection mentioned by the Maryland Court; the language being as follows:

> "Nor shall anything herein contained be construed to prevent any person, who at the date of the passage of this ordinance, shall have acquired or possess the right to occupy any building as a residence, place of abode, or place of assembly from exercising such a right."

(2) In *Hopkins* v. *City of Richmond* (Va.), 86 S. E. 134, the Virginia Court upheld an ordinance almost identical with the one now before this court.

Every objection which has been raised by counsel in the case at bar seems to be covered by the exhaustive opinion rendered in that case. The following summary given by the court is applicable to the ordinance now under consideration:

> "The central idea of the ordinance under consideration seems very manifest. It is to prevent too close association of the races, which association results, or tends to result, in breaches of the peace, immoral-

ity and danger to the health. The history of legislation on this subject heretofore adverted to, as well as the phraseology of the ordinance itself, confirm this view. The attainment of the objects in view is one much to be desired, and if the ordinance is not necessarily oppressive, or unreasonable, it is the duty of the court to hold it valid, provided it does not conflict with the limitations placed upon legislative bodies by the Constitution of Virginia, or that of the United States (which proposition will be considered later). An analysis of the ordinance, in the light of the facts agreed upon, should determine this question. The ordinance is prospective in its application. It does not effect rental contracts existing at the time of its passage. It does not divest any person of his property or rights therein, at the time of the passage of the ordinance. Any white person owning property and occupying it in a street, or block, at the passage of the ordinance, known, after the passage of the ordinance as a colored block, is not affected by the ordinance either as to his ownership, or occupancy, but he may, if he wills, continue to own and occupy his property as before its passage. The same thing applies to colored persons, under like circumstances. Under the ordinance, either colored or white persons may, after the passage of the ordinance, purchase and hold property wherever they may desire within the corporate limits. The only right affected by the ordinance is the right to occupy houses in certain streets, or blocks, as residences, and this regulation of the use of property applies without discrimination to all white and colored persons alike within the town of Ashland.

"It would seem that, if a municipal corporation has authority to provide for separation of the races within its limits, no more reasonable, or less oppressive, ordinance could be devised than the one under consideration."

Continuing the court says:

> "The court would take judicial notice of the fact that 'the preservation of public morals, public health and public order in the cities and towns of this State is endangered by the residence of white and colored people in close proximity to one another.' Acts, 1912, page 330."

(3) In *State* v. *Darnell* (N. C.), 81 S. E. 338, the court held invalid an ordinance of Winston, N. C., adopted in 1912, and which, as clearly appears in the opinion, was open to the same constitutional objection as that pointed out in the Maryland case, to-wit, that there was no provision made for the protection of vested rights existing at the time the ordinance went into effect.

The case, however, principally turns on the extent of the charter powers of the town of Winston, N. C., which, of course, was a local question, and construing that charter in the light of other decisions in North Carolina, the court reaches the conclusion that it was beyond the charter power of Winston to pass such a law. But the court expressly refrained from passing upon the power of the State to authorize such an ordinance, saying:

> "Whether if the General Assembly had passed a statute conferring on town or county commissioners the authority to make such an ordinance as this, it would have been constitutional, is not now before us."

In the light of this deliverance, any language in the opinion that may seem to indicate that *any* segregation law of this character might be an unconstitutional inter-

ference with private property, must be accepted as mere *dictum,* and of course would be at variance with the decisions of the Maryland and Virginia courts, as well as with the other authorities which we have herein cited.

The court seems to find a declaration of public policy of North Carolina in an Act of the Legislature which penalizes any one who might seek to induce colored farm laborers to leave the State, and jumps to the conclusion that an ordinance of this sort might tend to drive farm hands out of North Carolina. As a matter of fact, the effect, if any, would more likely be to encourage the negroes, who now flock to the towns, where they often degenerate, to remain in the country where they prosper and improve morally and physically (as strikingly shown by the 1910 census report), and where their wisest leader has always advised them to remain. "More and more each year, I feel that * * * the salvation of my race will largely rest upon its ability and willingness to secure and cultivate properly the soil."*

We have endeavored to show in a former part of this brief that it approaches the ludicrous to attempt an analogy, as does Chief Justice Clark, between the old Jewish pale or ghetto and the operation of this segregation ordinance, and that such an effort must result from a gross misunderstanding or misconstruction of its provisions.

The North Carolina Court seems also to have been largely influenced in its decision by the importance attached by previous decisions in that State to the so-called *jus disponendi,* a doctrine which has been long since ex-

* See Stone, "Studies in the American Race Problem," p. 171.

ploded both in Kentucky and by the decisions of this court, as we have previously pointed out.

(4) In *Carey* v. *City of Atlanta,* 84 S. E. 456, decided by an intermediate court in the State of Georgia, the court held void an Atlanta ordinance which was said to have been modeled after the first invalid Baltimore ordinance, but which had in addition the remarkable provision that a person of one color occupying a house in a mixed block could object to one of another color moving next door to him. Consequently the court found that under the ordinance the following startling result might be brought about:

If on one side of a house the occupant was white and on the other side was colored the white person might object to a negro moving into the middle house and the negro might object to a white person moving therein, so that by the mere caprice of abutting proprietors the owner might be deprived for all time of the right to reside on his property or to substitute a tenant of *either color* therein. The court found no difficulty in holding invalid an ordinance so obviously unconstitutional and even absurd, but in the concurring opinion of Lumpkin, Judge, we find this very excellent discussion of the constitutional power to enact such segregation legislation in general:

> "The right of an owner to use his property is important, but it is not so absolute that he may, at all times and under all circumstances, use it as he pleases, regardless of the public welfare, morals or safety. The statute books contain many laws restricting the use of property by the owner of it, and prohibiting him from using it for certain purposes.

Laws prohibiting the erection of wooden buildings within the fire limits of a city restrict the owner's use of his property, although he may contend that a wooden building which he desires to erect would be safe, and that he has not the means to build one of brick or stone. Laws which prevent an owner from using his property for the storage of dynamite, powder, oil or other dangerous substances in populous communities, likewise place limitations upon the owner's right to use his property as he sees fit. The right to contract has been treated as a part of the liberty of a citizen, and yet it is subject to certain limitations for the public good. Thus usurious contracts have long been prohibited. Many other illustrations might be given in addition to those arising under laws relating to the segregation of the white and negro races in cars and schools. I can not subscribe to the apparent idea that classification has nothing to do with such laws. Classification as to the particular use to which property is to be put, having in view its location and surroundings, may be an important element in considering laws of this character." (The court after quoting from Plessy v. Ferguson, 163 U. S. 537, continues):

"Suppose that an owner of property in the best residential portion of a city should claim the right to build upon his lot a large boarding house or rooming house, in which he should receive indifferently boarders of both races and sexes, producing a situation of great irritation and calculated to bring about unfortunate results. It is quite possible that the sacred right of property might be subject to regulation for the public safety (which has been declared to be the supreme law) by a reasonable pre-existing ordinance.

"In Plessy v. Ferguson, *supra,* the law involved was one requiring railway companies carrying passengers in their coaches in the State of Louisiana to provide equal but separate accommodations for the

> white and colored races, by means of separate cars or by dividing the passenger coaches by a partition. Such a law necessarily interfered to some extent with the right of the owner of the property to use it as it saw fit."

The foregoing cases are all reviewed at length in the opinion of the Kentucky Court of Appeals herein (Record, pp. 36-39).

CONCLUSION.

In conclusion, let us say that in our presentation of this case, we have felt it our duty as counsel for the City of Louisville to state as fully and fairly as possible to the court the claims of all of its citizens, both white and colored, who might be affected by this legislation. We have endeavored to do exact justice to the negro as well as to the white in everything that is said herein. We have sought to show what we believe to be true, that this ordinance will work for the good of both races and to the harm of neither; that it rests on the same principles, legal and practical, which justify all similar segregation legislation; that its object is to promote and preserve the peace, comfort and safety, morals and general welfare of the community, and that it is well calculated to accomplish this purpose.

As has well been said: "In the long run the economic interests of a community must prevail; for law is nothing but the crystallization of economic and social imperatives."* The court will realize that we are here deal-

* Prof. E. R. A. Seligman, 25 Political Science Quarterly, 217.

ing with social and economic imperatives of the most solemn and impressive character,—imperatives which, if they are not crystallized into law, will nevertheless find expression in such lawless and violent outbreaks as our daily papers have made only too familiar. The alternative to this kind of legislation seems unfortunately to be those extra-legal or positively illegal methods which only too many communities, North and South, have employed to prevent the negro from living among them, and where, instead of giving him a fair and equal chance, have forced the negro at the point of a shotgun to move on. We might mention a number of towns just north of the Ohio, in Illinois and Indiana, where just this thing is constantly done; but this record leaves no doubt as to the fundamental motives, grounded in the deepest prejudices of the human mind, which prompt such lawless action. If ever there was a case for the intervention of the police power of the State, this is one.

Keeping in mind the statement of this court that such police regulations can not be said to be unreasonable when they are the expression of the "established usages, customs and traditions of the community upon whom they are to operate," and when they are designed for the "promotion of their comfort and the preservation of the public peace and good order," may we be permitted finally to quote the language of this court in *Welch* v. *Swasey,* 214 U. S. 91, 105:

> "The particular circumstances prevailing at the place or in the State where the law is to become operative,—whether the statute is really adapted,

regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare,— are all matters which the State court is familiar with; but a like familiarity can not be ascribed to this court, assuming judicial notice may be taken of what is or ought to be generally known. For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people are to be affected by the operation of the law. The highest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course, intend to say that, under such circumstances, the judgment of the State court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong."

The far-reaching importance to the City of Louisville of the ordinance here involved is our apology for the length of this brief. We have felt under an especially solemn responsibility also because a determination of this case will settle the constitutionality of similar ordinances in a number of other cities in other States, as well as the statute of the State of Virginia on the subject, none of which jurisdictions are now before this court. But we submit the case in full confidence that the court will find no difficulty in upholding a law so necessary to the public welfare, and the wisdom of which is so fully justified by

the facts which appear in this record and in the cases which have been cited herein.

Respectfully submitted,

STUART CHEVALIER,
PENDLETON BECKLEY,
(Attorneys for City of Louisville.)
Counsel for Defendant in Error.

(March 27, 1916.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 33

CHARLES H. BUCHANAN, *Plaintiff in Error,*

—vs.—

WILLIAM WARLEY, *Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS IN THE STATE OF KENTUCKY.

BRIEF AMICUS CURIAE

Filed by leave of Court in behalf of The Baltimore Branch of the National Association for the Advancement of Colored People.

W. ASHBIE HAWKINS,
Counsel for the Baltimore Branch, N.A.A.C.P.

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In The

Supreme Court of the United States

October Term, 1916.

(No. 231.)

CHARLES H. BUCHANAN,
Plaintiff in Error,

vs.

WILLIAM WARLEY,
Defendant in Error.

In Error to the Court of Appeals in the State of Kentucky.

BRIEF AMICUS CURIAE

Filed by leave of Court in behalf of The Baltimore Branch of the National Association for the Advancement of Colored People.

The History of Segregation in Baltimore.

The first ordinance on this subject known as the West Ordinance was passed by the Mayor and City Council of Baltimore in the year 1910, and upon a test case heard in January, 1911, before Judges Harlan and Duffy in the Criminal Court it was declared invalid.

A second ordinance, thought to avoid the errors of the first which, the opinion of Judges Harlan and Duffy revealed, became a law of the City of Baltimore, April 7th, 1911. Fearing, however, that some irregularity had attended the passage of this ordinance (No. 654) by the City Council, it was repealed and re-enacted as Ordinance No. 692, and was approved and became a law May 15th, 1911.

The City Solicitor of Baltimore is in error when he says that the first ordinance was passed in 1911; the fact is that this was the third.

Within a few weeks after the passage of the first ordinance in 1910, twenty or more violations thereof were discovered and the offenders haled into Court. These cases were settled as a matter of course, by the ruling of Judges Harlan and Duffy above referred to. Under each successive ordinance cases have now and then arisen, and all except the ones now pending under the Ordinance involved in the case of Jackson vs. State of Maryland, awaiting decision by the Court of Appeals of the State, were settled by the ruling either of Judges Harlan and Duffy, or by the Court of Appeals in the Gurry case, 121 Md. 534.

Following the decision of the Court of Appeals of Maryland, in the Gurry case (121 Md. 534), the Mayor and City Council passed the ordinances known respectively as Ordinance No. 339 and Ordinance No. 355. They are set out in another part of this brief.

Baltimore is generally supposed to be the first city of any size to attempt by law to segregate its citizens in the matter of their residences, churches and schools along the lines of race or color, and all the ordinances which municipalities, including Louisville, have passed on this subject, have followed in form and purpose the Baltimore ordinances.

ARGUMENT.

In the brief filed by the City Solicitor of Baltimore by permission of this Honorable Court, the attempt is made to show that there is universal acquiescence in Baltimore with its Segregation Law, that the colored people, at whom the law is aimed, are themselves satisfied with its operation, that they are by reason of it establishing "aristocratic" neighborhoods in which they take great "pride," and that the Court of Appeals of the State has affirmed the validity of such legislation, and in each instance the learned City Solicitor is in error.

Did the Court of Appeals of Maryland endorse the theory of segregation as attempted in this legislation, and if it did, does this new ordinance drawn by City Solicitor Field, meet the legal objections pointed out by the Court in the Gurry case?

All that the Court said was this:

> "If, then, the Legislature could pass a statute under the police power of the State, providing for the segregation of the races, as we think it could, there would seem to be no doubt that the Mayor and City Council of Baltimore can pass a valid ordinance having the same end in view."

With this qualified endorsement of the theory of segregation, the Court admitted later on in the opinion that there is some distinction to be made between statutes passed by the Legislature and ordinances passed by a municipality under the police power.

State vs. Gurry, 121 Md. 541;
State vs. Hyman, 98 Md. 618.

The Court finally decided that the ordinance was void on the ground that it was so unreasonable as to be unauthorized

under the general welfare clause of the City Charter, setting up as serious objections to the provisions of the ordinance, that it ignored all vested rights existing at the passage of the ordinance, and the lack of any provision for sufficient public notice of what blocks are affected, which are to be white and which colored.

State vs. Gurry, 121 Md. 551.

On this latter objection the Court had this to say:

> "Unless there be some public record giving the necessary information there would probably be great confusion in the examination of title and passing on the rights of purchasers, even if no difficulty arise in the enforcement of such sections."

State vs. Gurry, 121 Md. 551.

The Court of Appeals, in the Gurry case, 121 Md. 551, says with great clearness:

> "A practical difficulty in the enforcement of Sections 1 and 2 which occurs to us is the lack of any provision in the ordinance for some definite public notice of what blocks are affected, which are to be white and which colored. Unless there be some public record giving the necessary information there would probably be great confusion in the examination of title, and passing on the rights of purchasers. even if no difficulty arise in the enforcement of such sections."

Notwithstanding this perfectly plain criticism by the Court of a manifest defect in the Ordinance involved in the Gurry case, and notwithsatnding the eminent draftsman of the present Ordinance had this opinion before him, as well as the Virginia Ordinance, which he seems to prize so highly, he ignores the ruling of the Court of Appeals and the example of notice set him in the Virginia Ordinance, and pro-

ceeds to draw his ordinance leaving out of it what our Court and the Virginia law makers regarded as a necessary averment.

It would appear from the brief of the learned City Solicitor, filed in the Court of Appeals of Maryland, that he had before him at the time he drew the present Ordinance, Chapter 157 of the Acts of Virginia of 1912, from which he claims to have "copied almost vebatim" the language of section No. 10. Had he used the same care in following the Court's instructions in the Gurry case, regarding *notice* he might have copied further from the Virginia Ordinance Sections 3, 6 and 7.

THE VIRGINIA ORDINANCE.

SEC. 3. That the council of each such city or town shall provide for, and have prepared, within six months after such council shall have adopted the provisions of this act, a map showing the boundaries of all such segregation districts, and showing the number of white and colored persons residing within such segregation district, on a date to be designated in the ordinance of adoption, but which shall be within sixty days of the passage of such ordinance; and such map shall designate as a white district each district wherein there are, on the date so designated, more residents of the white race than there are residents of the colored race, and shall designate as a colored district each district so defined, in which there are on the said date as many or more residents of the colored race, as there are residents of the white race.

SEC. 6. That the said map shall be certified by the clerk of the council of such city or town, and shall be at all times kept open to inspection by the public in the office of such clerk, etc., etc.

SEC. 7. That the map so prepared and certified and corrected shall be *prima facie* evidence of the boundaries and racial designation of such districts.

This Ordinance undertakes to show conclusively and by means at once accurate and definite the lines within which the different races might reside.

Field's Ordinance, now operative in Baltimore City, makes no provision for this notice, although the Court of Appeals in the Gurry case, heretofore referred to, calls his attention to this manifest error in the Curtis Ordinance, and though as he proudly proclaims it, he had before him the Virginia Ordinance, he argues at great length the unwisdom of any such notice preferring what he terms "the actual facts as they exist at the time."

In the face of the Court's explicit statement on the matter of notice, the learned City Solicitor has the temerity to say:

> "It is submitted, therefore, that the failure of the Baltimore ordinance to direct some record to be kept of what blocks are white and what colored and what mixed, in no way affects the validity of the ordinance."

THE NORTH CAROLINA CASE.

The learned City Solicitor in discussing the Darnell case, 166 N. C. 300, 5 L. R. A. (N. S.) 332, says that "the real point passed on was whether or not the Legislature had given the City Council the power to pass such an ordinance. While this is true, he failed to point out the reasons given by the Court. Of these, let the Court itself speak:

> "In Ireland there were years ago limits prescribed beyond which the native Irish or Celtic population could not reside. This was called the 'Irish Pale,' and one

of the results was continued disorder and unrest in that unhappy island which had as one of its consequences that more than half of its population came to this country. That policy has since been reversed. But in Russia, to this day, there are certain districts to which Jews are restricted, with the result that a vast number of them are emigrating to this country. We can hardly believe that the Legislature by the ordinary words in a charter authorizing the Aldermen to 'provide for the public welfare' intended to initiate so revolutionary a public policy. Had this been intended there would certainly have been a thorough discussion and a full consideration by the General Assembly of the question whether under the Constitution of the United States and of this State the Legislature could establish a policy which would deny to the owners of lands, either in the country or town, the right to dispose of them by sale or renting to whomsoever they saw fit as of ancient right they had been long accustomed to do, or to restrict any class of citizens from buying or renting where they wished.

"Judging by the experience of the 'Irish Pale' and of the similar restrictions upon the Jews in Russia, the result of this policy might well be a large exodus and naturally of the most enterprising and thrifty element of the colored race, leaving the unthrifty and less desirable element in this State on the taxpayers. Such a result would be contrary to the above cited statutes by which the Legislature indicated a public policy of retaining the colored laborers in this State. The initiation by this ordinance of a public policy so little in accord with the above legislation cannot reasonably be inferred from the general expression in the charter relied upon.

"There is a wide distinction between suffrage, which is not an inherent right, but which is conferred by con-

stitutional prescription and which is usually extended from time to time, and the inalienable right to own, acquire and dispose of property which is not conferred by the Constitution, but exists of natural right. There is no question that legislation can control social rights by forbidding intermarriage of the races, and in requiring Jim Crow cars and in similar matters. It was also held in Mugler vs. Kansas, 123 U. S. 623, that as the State had the right to regulate or forbid the sale of liquor that one who had devoted his property to such purpose could not object that he is forbidden longer to so use it; but none of these interfere with the fundamental right of every one to acquire and dispose of property by sale. The right to devise is statutory and therefore can be modified. In re Garland, 160 N. C. 555.

"Whether if the General Assembly had passed a statute conferring on town or county commissioners the authirty to make such an ordinance as this it would have been constitutional, is not now before us. We simply hold that an act of this broad scope so entirely without precedent in the public policy of the State and so revolutionary in its nature cannot be deemed to have been within the purview of the Legislature from the use of the words conferring authority to make ordinances for the general welfare.

"There was a similar restriction of the Jews to certain quarters of the towns in the middle ages and the quarters assigned them were called 'Ghettoes.' If the intention of the Legislature had been to establish such policy as to the colored people either in our towns or country districts, there would certainly have been some provision prescribing the methods to be used in selecting these districts. The selection would not have been left to the arbitrary and irreviewable power of the majority of the board elected without any reference to this

matter. A man whose property might be made unsalable, or reduced in value by forbidding him to sell or rent it to a white man because the majority of the houses in such district were occupied by negroes, certainly should have some compensation from the public for his loss. The same would be true of property just across the street from one of these Ghettoes, which might be established to the depreciation of his property. Then, too, both in town and country the owners of property who might be deprived of the opportunity of renting it to laboring people of color, because the majority in that section or block were white people who did not wish to rent or buy, might make an objection to the demarkation adopted. Then, too, the designation of these localities surely would not be left to a majority of the Aldermen or the county commissioners without some right to have the facts found by a jury and a review of the proceedings by a court of justice.

"The absence of such provisions is further evidence that the General Assembly did not intend to confer so broad and arbitrary a power upon the Aldermen of Winston.

"We therefore hold that the ordinance was adopted without authority of law, and the indictment should have been quashed."

Legislation Not in the Interest of People Generally.

There is nothing in this case from the inception of the first segregation ordinance—to show that this legislation is in the interest of the public generally, but there is every indication that it was enacted in the interest of a particular class, an element of white people who for purely aesthetic reasons, or those inspired by race prejudices, are averse to living in close proximity to persons of color.

THE QUESTION OF POLICE POWER APPLIED.

In a carefully prepared thesis submitted to the Faculty of the Baltimore Law School in 1913, Mr. Charles Morris Balder discusses the nature, origin and extent of the Police Power in a manner so lucid and able that extracts from it without further credit, are given in this brief in the hope that it may serve some purpose in helping to solve the vexed questions involved in this litigation. The article in its entirety is published in the Daily Record, Baltimore, June 4th, 1913:

> "Police powers of a State, like all other portions of State sovereignty, are subject to certain constitutional limitations. Entrusted as they are to local communities, commissioners and other public officers, they are liable to be grossly abused, and under color of them the most serious invasions of private rights may at any time occur. The cautious exercise of these powers by the Legislature and their strict interpretation by the courts in view of the constitutional guarantees of life, liberty and property, afford the only safe-guards against the degeneration by apparently legal methods, of a popular government into the worst of despotisms Regan vs. Farmers' Trust Co., 154 U. S. 362; In re Jacobs, 98 N. Y. 98; *Ex parte* Whitwell, 98 Cal. 73; State vs. Julow, 129 Mo. 163; State vs. Goodville, 33 W. Va. 179.
>
> "These constitutional limitations upon the police power may be properly divided into two distinct classes known as specific and general limitations. The principal specific limitations are those which are directed against legislation establishing a religion or abridging its free exercise, abridging the freedom of speech, press and lawful assembly, restraining the right to keep and bear arms and authorizing unreasonable searches and seizures.

"Retroactive legislation is restrained by the prohibition of '*ex post facto* laws,' and laws impairing the obligation of contracts, and the power of eminent domain is restrained by the requirement of compensation.

"In so far as the general limitations are concerned, the courts must rely on the general fundamental laws of the Constitution to prevent oppressive legislation. These limitations are directed against legislation which deprives a person of his life, liberty or property without due process of law, which denies the equal protection of the law to any person, or which attempts to interfere with the power which is vested exclusively in the Federal government, such as the regulation of commerce. Frorer vs. People, 141 Ill. 171; Frorer vs. People, 142 Ill. 387; Godcharles vs. Wigeman, 113 Pa. 431; Rockwell vs. Nearing, 35 N. Y. 302; Watertown vs. Mayo, 109 Mass. 315; Yickwo vs. Hopkins, 118 U. S. 356; State vs. Ashbrock, 48 L. R. A. 265.

"It has been said by some of the courts that the authority of the Legislature in the exercise of its 'Police Power' is not absolute even in those cases where the Constitution fails to impose a restriction and that the courts would be justified in striking down any law which violates the fundamental principles of free government. Calder vs. Bull, 3 Dall. 386; Wilkinson vs. Leland, 2 Pet. 657; Ross' Case, 2 Pick. 169; Griffith vs. Comm., 20 Ohio, 609.

"The contrary view is, however, supported by the weight of authority; the courts holding that under the liberal construction which the National and State constitutions are receiving, all fundamental rights are well protected without the necessity of looking to any other source. Sinking Fund cases, 99 U. S. 709; Fletcher vs. Peck, 6 Cranch, 87; State vs. Wheeler, 25 Conn. 290; Reeves vs. Corning, 51 Fed. 774; Berholf vs. Oriely,

74 N. Y. 509; Munn vs. Illinois, 94 U. S. 125; Missouri Pac. Ry. Co. vs. Humes, 115 U. S. 512; Hallinger vs. Davis, 146 U. S.; Chicago, Burlington & Quincy R. R. Co. vs. Chicago, 200 U. S.

"Under these specific and general limitations the courts have prevented many unjust and arbitrary invasions of private rights, which were attempted to be made under the pretense of police regulations.

"In Frorer vs. People, 141 Ill. 171, the Court pronounced a law unconstitutional which prohibited the keeping of truck stores by certain manufacturers. The Court in this case saying: 'The privilege of doing business in a privilege and a property right, and if A is deprived of the right to contract and acquire property which he has hitherto enjoyed under the law, and which B and C are thus allowed by law to enjoy, it is clear that he is deprived of both liberty and property to the extent that he is thus denied the right to contract. State vs. Loomis, 20 S. W. Rep. 332; Godcharles vs. Wigeman, 113 Pa. 431.

"In Pennsylvania a statute was passed which imposed on employers of alien labor a tax of three cents per day for each day that they worked and authorzed the employer to deduct the same from the wages of the employes. Held: That this act was unconstitutional in that it deprived the laborers of the equal protection of the law in violation of the Fourteenth Amendment. Fraser vs. McConvay & Torley Co., 82 Fed. 257.

"In Rockwell vs. Nearing, 35 N. Y. 302, an act of the Legislature of New York which authorized the seizure and sale without process, of all animals found trespassing within a private enclosure was held to be invalid as obnoxious to the constitutional provision that no person shall be deprived of his property without due process of law.

"The case of Welch vs. Stowell, 2 Dougl. (Mich.) 332, presents an interesting question as to the validity of an act providing for the destruction of property in the exercise of the Police Power.

"The City of Detroit passed an ordinance providing for the demolition of all buildings used for the purpose of prostitution. In this case there was no doubt as to the good motives which induced this act, but it was clearly unconstitutional as being an unreasonable interference with private property beyond what was necessary to remove a nuisance, and such was the opinion of the Supreme Court of Michigan, which said: 'It is said that the house was a nuisance. This may be true, but it was a nuisance in consequence of its being the resort of persons of lewd character. That which constitutes or causes a nuisance may be removed; thus if a house is used for a trade or business by which the health of the public is endangered, the nuisance may be abated by removing whatsoever may be necessary to prevent the exercise of such business. But the authority given to a town to suppress bawdyhouses does not authorize and support an ordinance directing the demolition of buildings in which such nuisance is committed State vs. Saunders, 66 N. H. 39; *In re* Jacobs, 98 N. Y. 98.

"Much has been said and written concerning the 'Police Power' of the State. Thousands of cases have arisen and been adjudicated, both pro and con, where this power was in issue, but in no case has the Court dared to attempt to fix any specific extent to which it may proceed.

"It may be observed from what has been said in this paper that this power is of such peculiar nature, that no definite limitation can possibly be established, but it must necessarily be co-extensive with the necessities of each case and the safeguards of society.

"This is as it should be. If society is to exist and prosper, the interest and welfare of the many who constitute society should be foremost in the minds of men.

"From a careful examination of this subject, however, a rule has been deduced, the proper application of which, should in all cases determine whether a police regulation is valid or not. This rule may be stated as follows: Each law relating to the police power involves three questions: 1st, is there a threatened danger; 2nd, does the regulation involve a constitutional right; 3rd, is the regulation reasonable.

"If danger is threatening the State, which the particular act is attempting to avert, if the regulation does not involve a constitutional right, and if it is a reasonable regulation it will be upheld by the courts. Should the act fail to meet with the above requirements it will be struck down by the courts as beyond the power of the State to pass."

Applying the rules just mentioned to the facts involved in this cause, and to the general scheme of segregation, it may be asked what is the threatened danger? It is respectfully submitted that there isn't any. The fact that there has never been any other than the most trivial outbreaks, and they local to some restricted city area, that there are hundreds of so-called "mixed blocks" throughout the city where white and colored people live peaceably and quietly together, each race pursuing its own way without thought or regard for any so-called social equality, and that this condition has obtained from the time Baltimore became a city, is proof clear and definite that there is no danger either to whites or blacks involved in any proximity of their homes, their churches or their schools. The only "danger" which the most ardent segregationist can find in the propinquity of the races in Baltimore is from their ill-founded fear of

social equality—the social equality which the eminent City Solicitor chooses to describe in these words:

> "The object of the ordinance (as far as it goes, it does not apply to mixed blocks) is to prevent white and black in the warm weather on door steps, side by side; and white children coming out of one door, and black out of the next door, to meet, and possibly play, and probably fight, in the street in front of their respective doors."

Outside of the minds of a certain grade of politicians and their retainers there is no thought by either whites or blacks anywhere in Maryland of any notion of social equality, or social admixture of the races.

CONSTITUTIONAL RIGHTS INVOLVED.

Of an ordinance similar in many of its terms to the one now under consideration, the North Carolina Supreme Court in State vs. Darnell, 166 N. C. 300, has this to say:

> "Besides an ordinance of this kind forbids the owner of property to sell or lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from so doing where they can make the best bargain. Yet this 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 having power to take away. In Bruce vs. Strickland, 81 N. C. 267, is is said: 'The *jus disponendi* is an important element of property and a vested right protected by the clause in the Federal Constitution, which declares the obligation of contracts inviolable.' The same doctrine is fully held and discussed in Hughes vs. Hodges, 102 N. C. 239, and in the numerous citations to those two cases, which will be found in the Anno. Ed."

The Atlanta Segregation Ordinance.

The Atlanta Segregation Ordinance, adopted in conformity with the Baltimore one, was before the Supreme Court of Georgia in the case of Curry vs. Atlanta, reported in 84 S. E. 456, and in L. R. A. 1915, D. 684. The Court said:

> "In sections 1 and 2 of the ordinance of the City of Atlanta, adopted June 6th, 1913, and the corresponding sections thereto, adopted Nov. 3rd, 1913, prohibiting white persons and colored persons from residing in the same block, deny the inherent right of a person to acquire, enjoy and dispose of property, and for this reason are violative of the due process clause of the Federal and State Constitutions."

Commenting on this constitutional question, the Court says further:

> "Under the operation of sections 1 and 2 of the original ordinance and the corresponding sections of the amendment, the following result could be brought about: Assuming that in any mixed block, that is, one occupied by both white and colored persons, there are three adjacent lots owned by separate persons, each of whom resides on his lot and that the proprietor of the middle lot be a white person and that the proprietor on one side be a white person and the proprietor on the other side be a colored person; if the middle proprietor should desire to move out and substitute a colored tenant, he could not do so if the adjacent white proprietor objected; or if he should sell to a colored person the purchaser could not move into the house to reside, or substitute another colored person to do so, if the adjoining white proprietor objected. So also if the middle proprietor were a colored person and should desire to move out and substitute a white person to reside in his dwell-

ing, he could not do so if the colored adjoining proprietor objected; or if he should sell to a white person the purchaser could not move into the dwelling to reside, or substitute a white tenant to do so if the colored adjoining proprietor objected. In each of such instances, an owner of property could, by mere force of the ordinance and caprice of an adjoining proprietor, without any compensation or process of law be deprived for all time of the right to reside on his property or to substitute a tenant or grantee to do so. The right of the owner of property to reside on it is inherent, and permanent deprivation of that right is in substance a taking of the property itself. Deprivation thereof, in the manner above indicated, without any symbol of legal procedure, is opposed to the guaranty as embodied in the due process clauses of the State and Federal Constitutions."

Curry vs. Atlanta, 84 S. E. 456.

THE UNREASONABLENESS OF THE ORDINANCE.

Is this ordinance reasonable? It is decidedly unreasonable both in its terms and in its application. It is unreasonable in its terms in that no provision is made, as the Court of Appeals of Maryland points out in the Gurry case, for notice to prospective purchasers or tenants of what city blocks are white, colored or mixed, and in the effort to square this legislation with the Federal Constitution by exempting from its operations the so-called mixed blocks. In practice it is unreasonable in that it permits the living together in a mixed block of white and colored people, for the only reason that they lived there prior to the enactment of the ordinance, and restrains their living together in any other block, though the pretended "menace" to the good order

and peace of the community is as likely to manifest itself in the one as the other. If the presence of the negro in a block is a "nuisance," such as it would seem under the law, he would have to be proved to sustain this ordinance, it is hard to understand why the white people in the mixed blocks should be forced to endure this "nuisance" and so much thought and energy be expended by the city government in saving his brother in a white block from a similar fate.

This ordinance is further unreasonable in that it has forced an over-crowding in the sections where colored people can reside, in the exorbitant prices charged for rent or purchase of properties in those sections; in the increasing number of untenanted houses in other sections, where under the terms of this ordinance colored people cannot reside, and where for reasons of their own white people do not seem to care to live. This ordinance has brought about an unusual and sustained demand for houses and apartments in the colored sections, with consequent hardship on the colored people, morally, physically and financially, and it has operated against the sale or tenancy of property in other sections—scores and scores of houses remaining unoccupied for the reasons just advanced.

The Limit of the Police Power Reached and Passed.

In the case of the Baltimore and Ohio Railroad Company vs. Waters, 105 Md. 421, the Court of Appeals cited with its aproval the case of Dobbins vs. Los Angeles, 195 U. S. 223, and said:

> "It was contended upon the supposed authority of Munn vs. Ill. 94 U. S. 113, that the Legislature is the exclusive judge of the propriety of police regulation when the matter is within the scope of its power, but the Court then said: 'The observations of Mr. Chief

Justice Waite in that connection had reference to the facts of the particular case and were certainly not intended to declare the right of either the Legislature or a city council to arbitrarily deprive the citizen of rights protected by the Constitution under the guise of exercising the police powers reserved to the State. It may be admitted that every intendment is to be made in favor of the lawfulness of regulations to promote the public health and safety, and that it is not the province of the courts except in clear cases to interfere with the exercise of the power for the protection of local rights and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this Court that municipal by-laws and ordinances, and even legislative enactments, undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view of determining whether the law or ordinance is a lawful exercise of the police power, or whether under the guise of enforcing police regulations there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business, to make contracts, or to use and enjoy property.' "

In the same case, our Court of Appeals, quoting the language in Lawton vs. Steele, 155 U. S. 133, says:

"To justify the State in thus interposing its authority in behalf of the public, it must appear: first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and second, that the means are reasonably necessary for the accomplishment of the purposes and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose

unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.' "

And again, repeating the language in Lochner vs. New York, 198 U. S. 45, the Court says:

> "It is impossible for us to shut our eyes to the fact that many of the laws of this character while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are in reality, passed from other motives. We are justified in saying so when from the character of the law, and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is, or is not repugnant to the Constitution of the U. S. must be determined from the natural effect of such statutes, and not from their proclaimed purpose."

After this exposition of the authorities mentioned, our Court of Appeals makes use of this language:

> "The evidence in this case not only wholly fails to show that the interests of the public generally require the enactment of this law, but it satisfies us that it has been enacted in the interest of a particular class, viz., the property will undoubtedly be rendered less desirable by the construction and operation of the road. If the public welfare, and the general advancement and prosperity of the territory described in the Act were really at stake, it would have been an easy matter to bring a cloud of witnesses in proof of this fact, in addition to

> the plaintiff himself and the two gentlemen whom he produced. It is not denied that there is a limit to the valid exercise of the police power by the State. If there were not such a limit, the claim of the power 'would become another and delusive name for the supreme sovereignty of the State to be exercised free from constitutional restraint,' and we are forced to the conclusion that 'the limit has been reached and passed in this case.' "

This rule seems to have been applied by the courts in a great many cases, as evidenced by the opinion of Judge Harlan in the case of Mugler vs. Kansas, 123 U. S. 623, where he said:

> "In order to properly sustain police legislation, the courts must see that its object to some degree at least, tends toward the prevention of some offense or manifest evil, or has for its aim the preservation of the public health, morals, safety or welfare, and if a statute purporting to have been passed to protect the public health, morals or safety, has no relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

State vs. Ashbrook, 48 L. R. A. 265;
Hennington vs. Georgia, 163 U. S. 299.

In view of the rule stated, it has been held that the judiciary has at all times the power and duty to determine whether certain laws passed by the Legislature are reasonable, and if they are unreasonable and such as to work a destruction of private rights and property, the courts may restrain their operation.

Regan vs. Farmers Loan & Trust Co., 154 U. S.;
Michigan & Southern R. R. Co. vs. Smith, 164 U. S. 578.

Opportunity to Purchase Property Limited.

All or nearly all the vacant property in or near the City of Baltimore available for residence purposes is now in the ownership and control of white people, and without the restraint of this ordinance many, if not all, of the owners of this property refuse to sell it to colored people, or have it improved for occupancy by them. The contention of the City Solicitor that "there is open to the colored people an unlimited opportunity to build up vacant blocks into residence property for colored people," shows that he is either unacquainted with the facts in the case, or is deliberately misrepresenting them to this Court.

Ordinance Unequal in its Application.

This ordinance while fair on its face, and so worded as to show no discrimination between the races, yet in its application it is unequal, and cannot be otherwise, for the conditions surrounding the races are unequal. To begin with, the land for the most part is owned by the whites, the great majority of the houses are owned and occupied by whites, all of the property on the wider and more important streets under process of improvement for residence purposes are intended for occupancy by white people, and except in one or two remote instances no suburban development has been undertaken for colored people. It is a fact not to be disputed, that the great City of Baltimore has been built up with a view to the wants of white people, in the matter not only of their residences, but in every other way. What colored people have there in the way of homes particularly, is in large measure what they have secured because their previous white owners sought other localities, or homes more suitable to their tastes, or to their changed conditions in life. No white man in Baltimore seeking a home need consult anything other than his financial ability to buy or maintain,

he doesn't need to give himself any care or concern as to whether the block he enters is inhabited by white or blacks; on the contrary, the colored man must consult not only his financial ability, but he must ascertain at the risk of imprisonment whether the block he desires to enter is a mixed or a colored block, and there are no public records to guide him.

This ordinance is general in its terms, and on its face there is an apparent effort to have it apply to both the white and black races alike, but in practice it falls far short of any such realization.

> "Though a law be not discriminating in terms, yet if it is applied and administered by public authority so as practically to make unjust discriminations between persons similarly circumstanced in law, in matters affecting their substantial rights, the law will be held invalid as being, in operation, such a denial of equal protection as is within the prohibition of the Constitution."

Art. 23, Declaration of Rights;
Ency. of Law (2nd Ed.), Vol. 6-79;
Yick Wo vs. Hopkins, 118 U. S. 356;
Henderson vs. New York, 92 U. S. 250;
Chy Lung vs. Freeman, 92 U. S. 275;
Exp. Virginia, 100 U. S. 339;
Neal vs. Delaware, 103 U. S. 370;
Soon Hing vs. Crowley, 113 U. S. 703;
Ah Kow vs. Nunan, 5 Sawy. (U. S.), 552.

It is immaterial, therefore, that legislation is general in terms, and that the persons at whom it is directed are not particularly designated. If the intent of the law was that it should affect a certain class with unusual harshness, which object is accomplished in its operation, it is void.

Ah Kow vs. Nunan, 5 Sawy. (U. S.), 562;
Ency. of Law (2nd Ed.), Vol. 6-79.

No Opportunity Given to Reach Sentiment of City.

The learned City Solicitor says in so many words that the prevailing sentiment of this community is in favor of segregation, and yet no opportunity has ever been given to the people of the community to decide the question one way or the other. The City Council is a political body, and as a purely political measure, passed the present ordinance, and all the previous ones on the same question, by a strict party vote, all democrats voting in favor of it and all republicans voting against it. It was signed by a democratic mayor in each instance, and in this way became an administration measure. Several so-called improvement associations adopted resolutions favoring segregation, they took the lead in arousing enthusiasm in its favor, and furnishing delegations for hearings had before council committees. The Baltimore Sun espoused the cause of the segregationists, endorsed the idea, and gave utterance to some gratuitous advice to the colored people as to the uselessness of appealing to the courts for a judicial determination of the matter. The Baltimore News strongly opposed the notion, and the other city papers either opposed it or kept silent. One improvement association, composed wholly of white people, passed resolutions opposing it. Outside of these instances and the letters appearing in the columns of the daily press, there has been no effort made to ascertain the sentiment of the people of this city on this question, and from what course, except it be his fertile imagination, the learned City Solicitor gets authority for his sweeping statement, it is hard to understand.

Opinion of an Ex-Attorney-General of the United States.

Some of the leading men of the city noted their opposition to the idea in the public press, and as probably the clearest expression of this opposition was written by one so

eminent as the Hon. Charles J. Bonaparte, at one time Attorney-General of the United States, excerpts from it are given place in this brief:

TWO BAD KINDS OF SEGREGATION.

By Charles J. Bonaparte.

(Published in the Evening Sun of August 16, 1913.)

If Baltimore were in Russia, it would not be so hard for Messrs. West and Dashields, and the other broad-minded statesmen engaged in the same noble work to which these eminent persons have devoted their powerful intellect for so long a time, assisted by the imposing array of learned counsel they have called to their aid, to prepare "valid Segregation" Ordinances. Russia, indeed, is almost, if not altogether the only country now calling itself Christian, and now claiming to be civilized, which still believes in "ghettos;" and very appropriately, it is also, the country among those entitled at least by courtesy, to be called Christian and civilized, where regard for personal or property rights constitutes the least serious impediment to arbitrary and fantastic experiments in legislation or administration.

Consequently, if we lived on the banks of the Dnieper, or the Volga, instead of on those of the Patapsco, our great men would have to expend far less "Sweat of the brain" in turning out an enactment of this character which might perhaps hold water.

It is not, however, necessary to go quite so far as Russia to attain the practical end sought by such an ordinance. If we were in full sympathy with statesmen like Senator Vardaman and Governor Blease, and others of the same exalted type, who have shed such lustre on our Southern States, and particularly on the enlightened communities which maintain them in office, no "segregation ordinance" would be needed.

Any "Sassy Nigger" who had the timerity to buy or lease a house in the cleanly, healthy, orderly and generally decent neighborhood, would be promptly and satisfactorily lynched "by persons unknown" to the coroners' jury (although very well known to every one else), with the edifying incidents common to such salutary vindication of the manifest superiority of the Caucasian civilization.

Inasmuch, however, as we neither live in Russia, nor own Vardaman or Blease, and their peers as our fellow Marylanders, the problem which faces our municipal law-makers is sufficiently arduous to make a few words own its inherent difficulties appropriate at this moment.

In the recent case of Holbrook vs. Morrison (100 N. E. p. 1111) the defendant, a woman, owned a tract of land near to other tracts which the plaintiffs, a firm of real estate agents, were trying to sell. She erected on her land a large sign, saying, "For Sale. Best Offer from Colored Family." This sign interfered very seriously with the plaintiffs' business, and they sought an injunction against its further maintenance. It appeared that the defendant had a grudge against the plaintiffs, and wished to injure them, but it also appeared that she really wished to sell her land. The injunction was refused, the Court saying of the defendant: "If she had put up the sign * * * without any intention of selling her property, but solely with the purpose of injuring the business and property of the complainants, there can be no doubt that such action on her part would have been actionable."

And the Harvard Law Review (Vol. 24, p. 742) commenting on this case, says: "The justification is the right to sell property as a necessary incident of beneficial ownership. Assuring to individuals the benefit of ownership is considered so important, that motive has always been disregarded."

Now, if property owners are forbidden by law to rent or sell their property to a class of tenants or purchasers who will pay more for it than any other, and who may be often the only class willing to buy or lease it at all, it is obvious that this benefit of ownership, which is considered "so important" by the law, may be so very gravely impaired as to become wholly illusory; especially is this true in a community where taxes are very high, and are imposed with no regard to whether the property taxed is, or is not, productive, and it is a very serious question whether such powers of virtual confiscation ought to be vested in vote hunting, petty politicians, like the men who usually make up our City Council. Just now, they may wish to meet the views of voters, who would (if they could) thrust back the Negroes into barbarism. Sometimes they may try to curry favor with the Anti-Semites, and therefore "legislate" against Jews, or angle for the ballot of A. P. A.'s, with the bait of laws against Catholics, or seek the support of foes to immigration through arbitrary discrimination against Jews, Chinese or Italians, or Greeks or Russians. In Jim Crow Laws, the cost of all these sops to prejudice falls in last resort upon common carriers, but in the cases under consideration, the burden is laid upon the unfortunate owners of real property, already staggering under the heavy load he now carries.

The truth is, that as the writer pointed out in the first three or four articles of his series published in February, 1911, Baltimore is shown by the last census to be following the bulk of great American cities, through lack of capital and consequent inferiority to rivals more clearly abreast of the times; through perhaps toleration of misgovernment and consequent inferiority to rivals better able to rid the municipal administration of graft, spoils-mongering, and narrow partisanship.

As one result of this comparatively stunted growth, it may be true that Negroes have become the best, indeed the only purchasers or tenants, of houses in certain parts of the city which were formerly in demand at fair prices, by white people; the reasonableness of an ordinance which virtually obliges the owners of such houses to keep them empty while paying full taxes on them to the same city government, prohibiting their only profitable use, will hardly seem self-evident to a Court obliged to find a municipal law reasonable in order to uphold it as a law at all.

For us the word "segregation" has unpleasant associations besides recalling clumsy attempts to foster race hatred through defective ordinances. It also reminds of alleged chronic and glaring disregard of plain legal duties in past years by public officials, paid and sworn to discharge their duties.

AGAIN THE SEGREGATORS.

By Charles J. Bonaparte.

(Evening Sun, Sept. 20th, 1913.)

Both classes of these worthies have had their innings since the writer last paid his respects to them in these columns. The Solons of the Committee which has had under consideration a proposed ordinance prepared, if the writer remembers aright by Mr. Dashields as soon as the latter heard the so-called West Ordinance was knocked out by the Court of Appeals, finally decided to report it and it has been started on its way to enactment.

Comment on its provisions would be at least premature, especially since, according to current reports, it will be probably held back from final passage until the opinion of the Court of Appeals is received, and will then be so re-cast as to conform, if possible, to the terms of that opinion.

These difficulties arise very largely from the fact that the 14th Amendment prevent these inactments from saying plainly what these authors mean, and oblige the latter to profess a purpose which they do not really entertain. What they wish is to keep negroes out of desirable neighborhoods, if they, could prove, by law, that within the city limits, no negro should live in a highway more than twenty feet wide or own or rent a house of more than twelve feet front, this would perfectly satisfy them and they would pay no more heed to the question whether white people also lived on these alleys as the negroes neighbors than has ever been paid by our municipal government since it had such a government in Baltimore. Unfortunately for their charitable and enlightened ends, they can't now banish by law, the "niggers" to the slums, as they might have done fifty years ago, and this lamentable condition of affairs compels them to affect a ridiculously insincere solictude, less the same proximity to black people, which the white people of Baltimore have endured, without apparent injury for more than a century should suddenly become disastrous to the moral and manners of these very same white people.

Now, it is well settled that the 14th Amendment does not forbid the consideration of race differences in legislation, relating to such subjects as inter-marriage, co-education or even conveyance by common carriers, provided such legislation is not discrimnatory against one of the races affected by it, and the author of our "segregation ordinances" has tried to bring them within the class of laws thus upheld by imposing the same, or strictly analagous prohibitions to residence upon white men which they do upon negroes.

Under the first of Mr. Dashields' ordinances, a white woman was actually prosecuted for coming back to live in her own house after a colored tenant had given it up.

The writer understands the Court of Appeals to have intimated that the City has power under its charter to prohibit

persons of different races from living within the same designated areas, if (and this is a rather large "if") it can manage to do this without infringing the vested rights of property owners within the several areas thus designated, these vested rights of property being protected by other language in the 14th Amendment and by our State Constitution as well. Doubtless it will not prove impossible for competent counsel to prepare an enactment which may run the gantlet of this test; but to do this will not be child's play and is rendered the more difficult by the well established rule of law which obliges the Court to pass on the reasonableness of municipality's exercise of its charter powers.

The writer has no apology to make to anybody for describing the whole business as petty, impolitic, midaeval in conception, injurious to the best interests of the city, worthy perhaps of Russia, certainly of Governor Blease and Senator Vardaman and the committees which admire and trust these great men, but unworhty of Maryland, and especially of Baltimore. If anyone from the south, north, east or west doesn't like this description, he is at liberty to dislike it.

City Solicitor Has No Authority to Speak for Colored People.

The effort of the City Solicitor to show to the Court that the people most vitally concerned in this litigation would be content with segregation and that no protest against it would have been made by them except for the speech of Senator Moses E. Clapp, set out in detail with glaring newspaper headlines in his brief is entirely without warrant or authority. The colored people feeling, as they have a right, founded upon sad experience, to feel that this ordinance, as well as its predecessors, is intended to embarrass them in their struggles at uplift, to increase the cost of their living expenses, and to render it harder for them to secure homes.

or desirable property for investment, have striven in every legitimate way to have it stricken from the statute books of the City of Baltimore. They have appealed to the regularly constituted authorities of the State—the Courts—for a judicial determination of the matter, and to say of them that they needed the words of Senator Clapp, or any one else, to inspire them to seek redress of their grievances in the manner provided by the law, is to mark the learned City Solicitor as one entirely ignorant of the character of one-sixth of the City's population.

The meeting referred to was only one of a series of meetings held throughout the city by an organization brought into existence by the colored people to fight segregation—and Senator Clapp was merely one of the invited speakers. Neither he, nor any other man out of the city, had anything to do with stirring up the colored people—they knew from the incipiency of segregation that it is aimed at them, and they have bitterly opposed it from the start by every means at their command, not because they want to "invade" white residence districts, or court social equality with their white neighbors, or to do anything else to disturb the harmony of the relations between the races, but because they know as citizens of Baltimore that all such measures as these are harmful in their final results to every interest of the community enacting them.

THE PURPOSE OF THE ORDINANCE IS IN EFFECT TO PROTECT PROPERTY VALUES.

The notion at the basis of all of their segregation ordinances is the preservation of property values, and such an intent is not included with the province of the police power.

Balto. & Ohio R. R. Co. vs. Waters, 105 Md. 421.

The attempt to bring it under the general welfare clause is an after consideration, and a consideration without a basis of fact. To sustain this legislation it is necessary to establish by legal and constitutional method that the colored man is a public nuisance, or that he is a menace to the public health, morals or well being of the community. In what way has this been done? If it has not been done, in what way can it be done? The most virulent advocate of this newly devised scheme of adding burdens to the already overburdened shoulders of black men, could hardly be brought to the point of making such claims.

The constitutional provisions as to personal freedom and the acquiring and use of property may in certain ways be limited by the police power of a State or municipal corporation when the use of such freedom or property becomes a nuisance or a menace to the public good. It is only as to the use that the ordinance can refer and such legislation cannot amount to confiscation or to class or race discrimination. As to the first point, that is whether it is a reasonable exercise of the police power to deprive a land owner of the right to reside upon such land if the same be within a forbidden district, raises another constitutional point.

> "The difficulty in the application of the constitutional principle arises in the main in respect to that class of legislation not infrequent, which while it does not in a strict sense deprive an individual of his property or liberty, does, nevertheless in many cases, by the imposition of burdens and restrictions upon the use and enjoyment of property, and by restraint put upon personal conduct seriously impair the value of property and abridge freedom of action. The validity of legislation of this kind to some extent and within certain limits is questioned by none. But such legislation may overpass the boundaries of legislative power and violate the constitutional guaranty, for it is now an established principle

> that this guaranty protects property and liberty not merely from confiscation or destruction by legislative edicts, but also from any essential impairment or abridgement. This Court has recently, in several notable instances vindicated the rights of individuals against unjust and arbitrary legislation restraining freedom of action, or imposing conditions, upon private business not warranted by the Constitution. *In re* Jacobs, 98 N. Y. 98; People vs. Marxson, 109 N. Y. 399, 12 Cent. Rep. 616."

Under the present ordinance, a white person owning a house in a block which, after the passage of said ordinance became what is known as a colored block or negro block, would be prohibited by this ordinance at a future time from residing upon the premises so owned by him—in other words, such white person would be compelled by law to rent said premises to a negro; no other path would be opened to him and *vice versa*. The Supreme Court in the case of Holden vs. Hardy, 169 U. S. 366, says:

> "The question in each case is whether the Legislature has adopted the statute in the exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoilation of a particular class"

Is this a reasonable declaration of the police power under the conditions as above stated? It cannot be claimed that the ownership of property within districts where the owner would be forbidden to live is a nuisance; if a citizen has the right to own property within a block, by what reasonable exercise of its discretion has the City Council the power to deprive the owner of the right of residence upon the land and premises so owned by him, so long as that residence is orderly, and not a nuisance? Is not the right of residence,

so long as it does not become a menace to the public health, morals, or safety, an inalienable right, incident to the ownership of real property? Such inalienable rights are preserved by the Constitution and limit all legislation in respect thereof.

State vs. Radmon, 14 L. R. A. 229.

As the ordinance stands, it is confusing to any colored man about to rent a residence; in other words, before a residence in any section of the city can be rented or occupied as a residence, it is incumbent upon the party about to occupy said residence to obtain by some legal means a determination whether the block wherein they are about to reside, is a black or a white block or mixed block, in order not to make themselves susceptible to a risk and severe fine. How is this to be accomplished? The law gives no way; innocent persons are susceptible to fine and imprisonment under this ambiguous ordinance, enacted under the guise of the police power. If the blocks of the City of Baltimore are to be determined black or white or mixed, according to the residence or non-residence of each race in each block at the time of the passage of the ordinance, then there should be some means included in the ordinance for the determination as to the status of each block, and public record thereof, so that citizens of Baltimore would not be susceptible of unnecessary and unintentional infraction of the law or made liable themselves for needless and unnecessary arrest, imprisonment and fine.

State vs. Gurry, 121 Md.

There remains to be said in conclusion that the segregation ordinances adopted in Baltimore, Virginia, North Carolina, Georgia and Kentucky are substantially similar in terms, and in the purposes of their enactment. Already one of them has been stricken down by the Court of Appeals

of Maryland as an unreasonable exercise of the police power. The Supreme Court of North Carolina declared the one adopted by the Board of Aldermen of Winston inoperative and void because there was no authority given the board either express or implied to pass such a measure. In the case of the Atlanta ordinance, the Supreme Court of Georgia decided that it was in violation of the due process clause of the Federal Constitution. The Supreme Court of Appeals of Virginia has upheld the Virginia ordinance, and so has the Supreme Court of Appeals of Kentucky upheld the Louisville ordinance. It is in this latter case that this Honorable Court is asked to determine the validity of this character of legislation.

W. ASHBIE HAWKINS,
Counsel for the Baltimore Branch N. A. A. C. P.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 33

CHARLES H. BUCHANAN, *Plaintiff,*

—VS.—

WILLIAM WARLEY, *Defendant.*

BRIEF OF WELLS H. BLODGETT AND FREDERICK W. LEHMANN AS AMICI CURIAE

WELLS H. BLODGETT,
FREDERICK W. LEHMANN,
Amici Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916

No. 231

CHARLES H. BUCHANAN, PLAINTIFF IN ERROR,

vs.

WILLIAM WARLEY, DEFENDANT IN ERROR.

BRIEF OF WELLS H. BLODGETT AND FREDERICK W. LEHMANN AS *AMICI CURIAE.*

The undersigned beg leave to submit this brief as *amici curiae* herein, being interested to do so because they are of counsel in a case of essentially the same nature, pending in the Eastern Division of the Eastern District of Missouri. The city of St. Louis has enacted two so-called segregation ordinances inspired by and patterned after that of the city of Louisville, which is assailed as unconstitutional in the case at bar. The suit

in Missouri was instituted by persons of color, residents, citizens and property owners of St. Louis, against the city, its mayor and other officials charged with the enforcement of the ordinance. A temporary injunction was issued against putting the ordinance into effect.

In this brief we shall deal exclusively with the Louisville ordinance.

Its title is:

> "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."

There are provisions of the ordinance for protecting the existing status of occupancy, which we will not consider and only call attention to the fact that the right of occupancy is by these provisions recognized as a right of property.

The implication of the title of the ordinance is, that unless the white and colored people live in separate blocks, ill feeling will be engendered between them and conflicts will result and so it is assumed that a segregation of the races is necessary for the preservation of the public peace and the promotion of the general welfare. There is evidence in the record that prior to the enact-

ment of the ordinance there were instances of colored people moving into white blocks and efforts by the white people to drive them out by violence. So to preserve the peace, the ordinance was enacted not to repress the lawless violence, but to give the sanction of the law to the motives which inspired it and to make the purpose of it lawful.

The population of Louisville numbers two hundred and fifty thousand, of whom about one-fifth are colored. The ordinance, almost upon its face, and clearly by the evidence submitted and the arguments offered in support of it is a discriminating enactment by the dominant majority against a minority who are held to be an inferior people. It can not be justified by the recitals of the title, even if they are true. Many things may rouse a man's prejudice or stir him to anger, but he is not always to be humored in his wrath. The question may arise, "Dost thou well to be angry?"

The answer in the present case, is that the anger is righteous, because the proximity of the colored man to the white is a menace to race integrity and lowers the market value of property in the neighborhood, and to prevent these evils the ordinance was enacted.

It is pertinent, then, to consider the nature of the segregation proposed, its immediate effects and its necessary tendencies. It is a segregation by blocks. And not even that. It is only by blocks as defined by streets. The residences of colored and white may abut

on the same alley, that is back to back, but not upon the same street, front to front. The segregation is not even by streets, but only by front streets. So far as side streets are concerned, colored people may live upon one side and white upon the other. And yet another limitation is to be noticed. Either race may live as servants in the household of the other. It is only the independent residence of white and colored people in the same block that is prohibited.

So "the close association of the races under the congested conditions found in modern municipalities" is not prevented, and "the danger to race integrity" remains, if indeed, it is not enhanced, for the apprehended miscegenation is an evil that comes in by the back rather than by the front door, and where the relation of the races is not that of independence, but upon the one side is menial and servile.

So far as the depreciation of the property is concerned is it the fact of depreciation or the cause of it that justifies the segregation?

It is a fact of common knowledge that property in a city is depreciated by many causes. There are institutions and individuals other than negroes whose presence has the same effect. An immoral institution like a bawdy house, is not a welcome addition to a residence neighborhood, and bawdy houses may be segregated because they are immoral and they may be prohibited altogether. Institutions not immoral, and absolutely essential to civilized life, may and do depreciate the value of adjoining property, because they

make it undesirable for residence purposes. A factory, whose product is useful in the highest degree may be offensive in its operations to near neighbors, and we need not question the propriety of laws and ordinances assigning factories to places where they will give least offence. Hospitals, infirmaries and undertakers' establishments, are objectionable to many people when located next door and how far the state may go in segregating these we need not inquire. A street car line is essential to the life of a great city, and while we all like to have it nearby, we do not like it at our front door. We desire the convenience, but would avoid all its incident discomforts and annoyances. Retail stores, boarding houses, flats and apartments depreciate the value of the property, if they invade a fashionable neighborhood. Even a public school is not always welcome when it comes very near, as the quiet of the home may be disturbed by the noisy glee of the children at their play. Sometimes even a man seeking a home, must meet the inquiry of how many children he has, and finds himself rejected as a tenant, because he has too many. The condition in life or the descent of those who live in a neighborhood affects the value of property. The cry has been heard in the land: "No Irish need apply." There were those who did not like the "Dutch." The Italians and the Greeks, descendants of the proudest nations of antiquity, are not welcome everywhere. And even the native American, who can trace his ancestry to a passenger of the Mayflower, may simply because of his humble condition of life be *persona non grata* to his more fortunate neighbor.

There is unfortunately prejudice of race, of nationality and of condition of life. A condition of humble service is to some as offensive as a previous condition of servitude. There are classes in our social structure dividing even white people from each other. "Man's inhumanity to man, makes countless thousands mourn," was the song of a bard who had never seen a negro, and who found the sad material of his lay among his own people and in a land where there was no division of nationality, much less of race.

Distinction of social rank or class exists and incident to it is often indifference to the rights of the less fortunate. That indifference may become dislike or even hatred. The voluntary segregation which exists in all our large cities, is in part a yielding to this class feeling and in part the result of a tendency of those who have a strong common bond to live together.

But the law does not recognize these various social strata and undertake to fix them immutably. And so we see changes everywhere and in every city are to be found streets which were once the scenes of its highest fashion invaded by and given over to humbler uses and occupants and this, too, where never a colored man has lived upon them save as a servant.

Segregation may be maintained and often is by voluntary agreement. A section of a city may be laid out, in which the character of the structures and the occupants are determined by covenants running with the land, but beyond this segregation based upon social distinctions may not go.

True, no right of property is absolute. Its use must not be injurious to the neighbor. But the injury inhibited is one necessarily resulting. It is not a mere wounding of pride, or offence to prejudice. It must be in the nature of a nuisance. It must be productive of such material inconvenience, discomfort or hurt that the law will presume a consequent damage.

In virtue of its police power, the State may protect its people against neighbors who are conducting immoral vocations; it may segregate as between public or quasi-public structures and those devoted to purely private uses; and it may assign the factory to one quarter and the home to another. But when it has done all this, may it go farther and enforce segregation between the homes of people who are moral and law-abiding, because of difference in social condition? May it segregate as between white men, natural born citizens and naturalized citizens? Or because of difference in descent? Or is this sort of segregation applicable only to the negro?

We insist strenuously in these days upon a single and undivided American citizenship—no hyphens. Do we make an exception of the Afro-American? We impose upon him equal duties and burdens; he may wear the uniform of his country and in its defense, follow his white leader to his death; but as to his rights and privileges, is he *under the law*, an inferior being?

And if he may be segregated, how far may the segregation go? Confessedly it will not stop with the limitations

of the ordinance. Those limitations will not "protect the integrity of race," nor the market value of real estate.

For the protection of race integrity this ordinance does nothing. It does not deal at all with the exceptional individuals who would impair that integrity, and imposes a useless as well as unmerited condemnation upon a great mass of unoffending people.

That the ordinance will not protect the market value of real estate, counsel concede and this is obvious. Counsel say on page 9 of their brief:

> **"The disposition always is for the whites to retire from the vicinity of negro residences, so that there will be a constantly widening area for the negroes to inhabit. Even a solidly white block immediately adjoining a negro block will sooner or later become undesirable for white residents, and even that block may ultimately be thrown open to negroes."**

So a city will not be divided into white and colored blocks, but into white and colored quarters or sections, with broad belts of demarcation, which must be either unoccupied, or be occupied by railroad yards and factories, and the colored quarters will be on the bad side always. In no city of this land is the colored man the law-maker, nor will he be, for so long as human wisdom may anticipate, and discriminating legislation once countenanced, may go to the exclusion of the negro altogether. The prejudice of race grows by what it feeds upon. Its appetite is insatiable. "The disposition of the whites to retire from the vicinity of negro residences" will change to a determination to force

the negro from the vicinity of white residences, for the white man will make the laws and the negro must bear the hardships they impose.

Once entered upon segregation will not be simply local, but it will be industrial as well. The colored man will be restricted in the field of his labor as well as in the field of his residence. Property values may not be so much imperilled here, but the integrity of race is as much threatened. If they may not live in the same block, they should not toil at the same tasks. The logical outcome of it all, would be the existence among us of millions of people, in a degraded and hateful relation, a condition which can be productive only of evil to both races.

Absolute and complete segregation, or, rather, exclusion is insisted upon in some communities today. John Hay's ballad of "Banty Tim" illustrated an actually existing condition in a county of Illinois. That such a condition is not general, is happily true, but this ordinance will serve only to extend it. Its discrimination means degradation, it means that the negro is only to be tolerated and as a menial. So long as the white man maintains his superiority by force of his natural endowments, the colored man must bear it. The tools to him who can use them best. But may the law add to the hardship of his lot?

The ordinance, however, it is contended, deals equally with white and colored people. That a colored man may live only as a servant of the household to a white person

in a white block, is compensated by the provision that a white person may live only as servant of the household to a colored person in a colored block. This is not even a specious argument, unless we close our eyes to the facts of life. The answer to it is in the heart of man. Propose segregation as between the descendants of Northern and Western Europe and those of Southern and Eastern Europe, and it will be indignantly resented by those of the South and the East. No suggestion of reciprocal restrictions would make such an ordinance anything other than an assertion of superiority by the older strains of our population and a mark of degradation upon the newer ones. When lines of race, or nationality or religion are drawn, it is in the spirit of bigotry and prejudice—never in the spirit of charity and equity. The Know Nothing propaganda in this country was felt as an indignity as well as an injustice by those against whom it was directed. It does not answer to say that pride may be met with equal pride upon the other side No prouder people ever lived than the Jews, none more self-reliant or resourceful, none more resilient against oppression, but they resented justly the spirit that enforced upon them the gaberdine and constrained them to the ghetto. They knew that these were designed for their degradation and that the ghetto was the open door to the pogrom.

The rights of the white and the colored races, it is said, are equal under this ordinance because while the negro may not live in the white quarter, the white man

may not live in the negro quarter. Consistently with this sort of similarity of latitude and restriction, there may be and will be the greatest possible differences in fact. And this can not be otherwise when the dominant majority determines the ordinances and the development of the city. This, it is said, is a confession of inferiority on the part of the negro, his quarter will be what he makes it. But he may well confess that, emerged from the status of chattel slavery only fifty years ago, he is not the equal of the white man in initiative, invention enterprise and aggression. And every discrimination by the law does but hold him back the more. Apply it to our immigrants, coming from lands where individual opportunity is not so great as here, would it serve to fit them more rapidly for the duties of our citizenship, and would the resentment of the discrimination be properly condemned as a confession of personal inferiority?

The selection of a home or place of residence is the exercise of an economic or legal right. There need be and often are not social relations between people living in the same block, even when they are of the same complexion and descent, speak the same language and profess the same religion. And a man is no more the social equal of another because his residence fronts upon the same street, than because it backs upon the same alley.

If personal proximity constitutes social equality, then to avoid that equality the negro must be banished from the land.

It is no doubt true, as the Kentucky Supreme Court said (R. 39), that "economic equality is not created by statutory declaration nor guaranteed by the Fourteenth Amendment," but it is equally true that opportunity for economic equality may not be hindered by state enactments nor by city ordinances.

Mr. Lincoln, at Springfield, on July 17, 1858, speaking not of the legal rights of the negro, for he had none, but of his natural rights which were denied him, said:

> "The Declaration of Independence may not mean that all men were created equal in all respects, but I suppose it does mean that all men were created equal in some respects; they are equal in their rights to "life, liberty and the pursuit of happiness." The negro is not our equal in color—perhaps not in many other respects, still, in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man, white or black. What I ask for the negro is, that if God gave him but little, that little let him enjoy."

Civil war was necessary to get recognition of these simple truths. The moral achievements of that war were expressed in three amendments of the Constitution of the United States and in acts of Congress passed to give practical effect to those amendments.

The amendments and statutes imply that left to themselves the States would impose servitude upon the negro and otherwise deny to him or restrict the fundamental rights of life, liberty and property. The white man could not be

trusted to deal fairly with the negro when he dealt with him as a negro. The mental habitude which recognized no right in the negro which the white man was bound to respect, was persistent, having its roots deep in race pride and race prejudice. Abiding constitutional guarantees were necessary to protect the negro against the injustice of the superior race. That this is so, this Court has declared in the Slaughter House Cases, 16 Wall. 36, Strauder vs. West Virginia, 100 United States 303, and the Civil Rights Cases, 109 United States 3.

When the superior deals with the inferior as such it is usually for and to his own advantage. The Indian has had experience of this. He owned a continent when he made the acquaintance of the white man and now he is reduced to a few reservations and he is not secure in these, although the white man has pledged his faith that he shall hold them as long as grass grows and water runs. There will soon be nothing left to him of the land of his fathers, except the happy hunting grounds of their dying hope. Small wonder that the gifted Helen Hunt should write across the chapter of our history dealing with Indians, the title and the condemnation, "A Century of Dishonor."

We could not deal with the black race as we did with the red. There were too many of them for such wardship as that in which the Indians were held. And, moreover, they had a capacity for labor which it was desired to turn to good account. Servitude was abolished and service took its place with all its incidents of compensation. No longer the subject of property, the negro might now become the

owner of property. No favor was given him but he was guaranteed equal opportunity. The Civil Rights Bill of 1866, this court said in the Civil Right Cases, did not assume "to adjust what may be called the social rights of men and races in the community, but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship;" and these included "the same right to make and enforce contracts, to sue, be parties, give evidence and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens."

It was a saying of Mr. Lincoln that no man is good enough to govern another without that other's consent. We have abundant warrant in the judgments of this court for saying that the improved status of the negro was not cheerfully accepted by the superior race. In spite of emancipation, a form of apprenticeship was instituted which made necessary the prohibition of the thirteenth amendment against involuntary servitude. Restrictions upon legal and civil rights called forth the fourteenth amendment. And even this was not deemed sufficient for the protection of the negro and so by the fifteenth amendment he was given the ballot, which he has found to be an instrument of quiet potency, that executes the white man's will "as lightning does the will of God."

Prejudice of race does not limit itself to protection of race integrity, but seeks race advantage always. It has no regard for constitutional limitations. It will undertake to nullify political power plainly granted by the Constitution. A recent example of this is found in Guinn vs. United

States, 238 U. S. 347, and Myers vs. Anderson, 238 U. S. 368. And even the lesser prejudice of nationality will go so far as to deny the right to toil to an alien people, as we may see in Truax vs. Raich, 239 U. S. 33.

The marriage laws of the several States were in nowise affected by the amendments nor by the Acts of Congress. The States may, as they think proper, prescribe the conditions of valid marriage and do so as to age, mental condition, degrees of consanguinity and affinity, race and solemnization. No right of citizenship and no right of property is infringed by the prohibition of the intermarriage of the races.

The Supreme Court of Kentucky in Berea College vs. Commonwealth, 123 Kentucky, 129, ruled that "the right to teach white and negro children in a private school at the same time and place is not a property right." The judgment of the State Court was affirmed here in Berea College vs. Kentucky, 211 U. S. 45, but that ruling was neither approved nor disapproved. Mr. Justice Harlan in a dissenting opinion disapproved the ruling, holding the right to teach to be a right of property. What he said, however, had "no reference to regulations prescribed for public schools, established at the pleasure of the State and maintained at the public expense." In the case of Cummings vs. County Board, 175 U. S. 528, the Court expressly refrained from passing on the validity of the Georgia law requiring that the white and the colored children of the State be educated in separate schools A number of State cases hold that attendance upon the public schools is not a

privilege or immunity of a citizen of the United States and that separate schools for white and colored children do not violate the Constitution if equal advantages are accorded to each class.

These cases were referred to approvingly in Plessy vs. Ferguson, 163 U. S. 537, but they are in no sense decisive of the question here involved. We must recur to the amendments and the statutes enacted to give them effect and from them ascertain whether the right here infringed is one protected by them.

And so as to the separate coach cases. In Plessy vs. Ferguson, *supra,* the law under consideration required equal but separate accommodations for the white and colored races by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations. White and colored had the equal right to equal accommodations upon the train. There was simply separation of the races during the journey. Colored and white were equally entitled to the service of transportation with equal accommodations and colored and white got that service upon the same terms. The court held that no right of property was infringed.

We are not dealing here with a day's ride for which equal conveniences are provided, but with the acquisition of a home, the concern of a lifetime.

A right of property is here involved. This is recognized by the ordinance itself, for existing rights are excepted from its operation.

By way of appropriate legislation to enforce the Amendments Congress enacted in 1866, Chap. 31, Sec. 1, 14th Stat. 27, that:

> "All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, sell, hold and convey real and personal property."

And in 1870, by Chap. 114, Sec. 16, 16th Stat. 144, that:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind and no other."

Here are statutory declarations of rights secured by the Amendments. These declarations were not intended as a complete enumeration, but they are sufficient for the present purpose. They include the right to make and enforce contracts and to inherit, purchase, sell, hold and convey real and personal property.

The scope of the right of contract is without limit so far as race is concerned. It extends to every legitimate subject of contract. Would it be valid if made by a white man? Then it would be valid if made by a negro. He may therefore make a contract of lease, and he may in that contract be either lessor or lessee, land-

lord or tenant, and he may make that contract with either white man or colored.

The right of property is protected in express terms by the Act of 1866. The right is to inherit, purchase, sell, hold and convey real and personal property. This we submit was designed to be inclusive of every mode of acquiring, using and disposing of property, without limitations so far as race is concerned. As to acquiring property, the Act says only that the negro may inherit and purchase. Will any one say he may not take by way of devise or gift? It says only that he may hold, but surely it meant that he might use while he held. It says he may sell and convey, and he may also bequeath by his last will and testament or he may dedicate to public uses.

The ordinance limits only the right of use, but it might as well limit the right of purchase and sale. The right to hold is given in terms as broad as the right to purchase and sell. No conditions whatever are imposed by the statute, and no conditions may be imposed by the state which do not fall equally upon all property regardless of the color of the owner. To say that he may not himself occupy while he holds, or that he may not let to another person of his own color, and that he must lease to a white man or let it stand idle, is certainly to limit his right to hold. Every argument in support of the present ordinance could be made in support of one that denied the right of a colored man to acquire property in a white block. Prejudice of race would resent

his ownership, less only than his occupancy. The superior would resent having an inferior as his landlord. The denial of the right of property, when acquisition is denied, is perhaps more obvious, but not more real than when occupancy is prohibited.

Deprivation of the use of property, this Court said in Pumpelly vs. Green Bay, 13 Wall. 166, was equivalent to taking it. And the Supreme Court of Missouri in State vs. Julow, 129 Mo. 163, said that to "deprive an owner of property of one of its essential attributes, is depriving him of his property within the Constitutional provision."

That this ordinance does work a deprivation of property is perhaps not intended to be denied, the contention being that the deprivation is the consequence of a limitation which the State in the exercise of its police power may impose upon the use.

It is particularly to be noted that the Civil Rights Act makes and allows no division and distribution of the right of property between the white man and the colored. The right is not a similar or corresponding right with reciprocal limitations as to the races. The statute does not contemplate that a State or city may divide its territory in the proportion of the races, which make up its population, and assign to each class the place of its habitation. And it matters not how fairly this may be done in quality as well as quantity. For the Act of Congress and the Amendments protect not the

race in the aggregate, but the individuals of the race. As this Court said in McCabe vs. The Railway Company, 235 U. S. 151, "it is the individual who is entitled to the equal protection of the laws"; and it is the individual who may not be deprived of his property without due process of law.

The Civil Rights Act provides that all citizens of the United States *shall have the same right,* in every State and Territory, in respect of property, *as is enjoyed by white citizens thereof.* Not an equivalent nor even an equal right, and much less that which the dominant majority may say is an equivalent or equal right, but *the same right.* To permit a division of property between the races, with reciprocal limitations upon the right of each, the framers of the Amendments and the Statutes knew would result in the grossest inequality. And so they provided for *the same right.* If the rights are the same, there can be no discrimination upon any pretence. The white citizens of Louisville have the right any of them to acquire and occupy property under this ordinance in at least four-fifths of the residence portion of the city. The white citizens have that right as individuals. The colored citizens have a right to acquire and occupy property under this ordinance in not more than one-fifth of the residence portion of the city and every individual colored citizen is so restricted. Measure the right of the individual colored man in this respect with the right of the individual white man, and are they the same? And yet the statute assures the same right to all citizens as is enjoyed by white citizens. "All citizens" includes every

citizen whatever his color, and as between all citizens of every color there is established the same right, the identical and not a racially, reciprocally restricted right "to inherit, purchase, sell, hold and convey real and personal property."

This right not even the police power of the state may destroy or impair. If it is to be curtailed or abrogated, it must be by the Supreme national authority which conferred it. The Amendments were designed to give equal industrial and economic opportunity. And to parcel out the land as is here sought to be done violates that equality as much as a partition of occupations among the races. It is as unequal as to say that white men shall not carry the hod and colored men shall not lay the brick. The reciprocal restrictions do not make equality. It would not be equal between the races to enact that white physicians should not minister to colored people in case of sickness, and reciprocally that colored physicians should not minister to white people in like case. And it does not remove the inequality to say that the complaint of it is a confession of inferiority. To prevent the wrong that results from these reciprocal racial limitations—which spell nothing else than race antagonism, the statute enforcing the Amendments declared that the fundamental rights of all citizens and of every citizen of the United States should be THE SAME.

There is a serious problem presented by the racial differences in our population, but injustice will not help to their solution. Rather charity in feeling and forbearance in conduct and who can so well afford to manifest these as the representatives of the superior race.

The pride that scorns factitious advantage will do more to bring about the right way of living between these different peoples than the prejudice which denies opportunity to those whose need is greatest. Speaking of slavery before the war, Mr. Lincoln said that "if all earthly power were given me, I should not know what to do as to the existing institution." But what he did and what he refrained from doing, he did and refrained from doing in the faith that slavery was wrong and that liberty to live and to toil under conditions of equal opportunity was as much the right of the humble as of the most exalted. What we may do or refrain from doing with the problem before us, we must do or refrain from doing in the same spirit. We can not see the distant scene and step by step we must go, but we will not stray far from the true path if we follow the lead of that kindly light in which the rights of others are luminous as our own.

Respectfully submitted,

WELLS H. BLODGETT, AND,
FREDERICK W. LEHMANN.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 33

CHARLES H. BUCHANAN,

—VS.—

WILLIAM WARLEY.

BRIEF OF AMICI CURIAE

WELLS H. BLODGETT,
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Note.— **This brief was prepared by counsel for complainants in a case now pending, in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, to enjoin the City of St. Louis from enforcing the provisions of an ordinance segregating the white from the colored population of that city.**

The issues in both cases being substantially the same counsel in the St. Louis case, by leave of court, respectfully submit, in this case, their brief as prepared in the St. Louis Court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

CHARLES H. BUCHANAN, vs. WILLIAM WARLEY.	No. 231

BRIEF OF AMICI CURIAE.

STATEMENT. *

This is a bill filed by colored persons who are citizens and owners of real property to enjoin the city of St. Louis and its officials from enforcing the provisions of two ordinances recently adopted, providing for the segregation of the white from the colored population of the city.

The ordinances are long and we will not insert them here at length, but will endeavor to state briefly their substance.

(* See note on cover.)

The ordinance designated in the bill as ordinance "No. 1" makes it unlawful for complainants, or any other colored persons, to hereafter acquire and use as a residence, or place of abode, the whole, or any part, of a house or building in any block of the city in which white persons are residing and in which no colored person's are residing, *excepting such as are employed as servants by white persons residing in such blocks.*

The ordinance designated in the bill as ordinance "No. 2" makes it unlawful for complainants, or any other colored persons, to hereafter acquire and use as a residence or place of abode, or place of public assembly, any house or building situated in any block of said city on which 75 per cent. or more of such houses or buildings are occupied as residences, or places of public assembly, by white people, and 25 per cent. or less of such houses or buildings are occupied as residences or places of public assembly by colored people.

THE NATURAL RIGHTS OF ALL MEN.

Lying at the very threshold of the case is the question of whether under the constitution and laws of the country one citizen, or one class of citizens, can, under any circumstances, assert a better right to labor, acquire, own and enjoy property than another citizen, or class of citizens. To determine that question is the chief object of this discussion.

We assert that *all the citizens* of this country, without regard to color, have equal rights to labor and equal rights to acquire, use and enjoy the property they have earned and own. We assert that the right of every man to labor, and enjoy the fruits of his own

industry, is a gift from the Almighty and does not depend on race or color. We do not derive those rights from city ordinances or State legislation; they are God-given rights, and the fathers who framed the Declaration of our National Independence made the proposition clear when, in that instrument, they said:

> "We hold these truths to be self-evident that all men are created equal and endowed by their Creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness, and to secure these rights governments are instituted among men."

They did not merely declare that all men possessed certain inalienable rights among which were life, liberty and the pursuit of happiness, but they also declared *that to secure and preserve these inalienable rights, governments were instituted among men.*

So, in the constitution of our own State, we find it written in Section 4 of Article 2:

> "That all constitutional governments are intended to promote the general welfare of the people; that all persons have a natural right to life liberty and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government, and when government does not confer this security it fails in its chief design."

We have not quoted here the words of the Declaration and the words of our State constitution merely because they sound well; but because they breathe the spirit that should guide the judgment of all who enact or administer the laws of a free people. And, we ask,

should those declarations be treated as mere rhetoric, possessing no weight or legal significance in determining the issues in a case like this?

History shows that these very questions, respecting the *natural rights* of all our citizens, were brought before our courts for consideration at an early day.

In the great opinion of Justice Miller, in the Slaughterhouse cases, (16 Wall. 36) he quoted with approval the words of Justice Washington in Corfield v. Coryell, in which the court defined the privileges and immunities that all our citizens were entitled to enjoy. In that case Justice Washington said:

> "The court has no hesitation in defining those words to mean, those privileges and immunities which were *in their nature fundamental;* which belong *of right* to citizens of all free governments and which have at all times been enjoyed by the citizens of the several States which compose the Union from the time of their becoming free, independent and sovereign.
>
> "Perhaps it would be more tedious than difficult to enumerate them, but they might be all comprehended under the following general heads:
>
> "Protection by the Government; the enjoyment of life and liberty *and the right to acquire and possess property of every kind* and to pursue and obtain happiness and safety."

Again, no one ever defined the *natural rights* of all men to the fruits of their own labor more clearly, or in less words, than did Mr. Lincoln in a speech made by him at Springfield on July 17, 1858. Mr. Douglas had changed that Mr. Lincoln was in favor of negro equality, and in reply to the charge Mr. Lincoln said:

> "The Declaration of Independence may not mean that all men were created equal in all respects, but I suppose it does mean that all men were created equal in some respects; they are equal in their rights to 'life, liberty and the pursuit of happiness.' The negro is not our equal in color—perhaps not in some other respects, still, in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man, white or black. * * * What I ask for the negro is, that if God gave him but little, that little let him enjoy."

Now, in the light of the foregoing declarations and Opinions, we think we may confidently assert that the primary purpose for which this Government was established, was to protect all its citizens in the exercise of their *natural right* to seek happiness by laboring, acquiring, owning and occupying their homes as property.

DUE PROCESS OF LAW.

We come next to consider the charge made in the bill, to the effect that these particular ordinances are void because they violate the express provisions of the Fourteenth Amendment to the Federal Constitution, which provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside, and that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of * * * property without due process of law, or deny to any person within its jurisdiction the equal protection of the law."

The language of the Constitution is: "That no State" shall deprive any person of property without due process of law, or deny to any person within its jurisdiction the equal protection of the law, and it has been repeatedly held by the courts that this prohibition upon the States applies to and includes State legislatures, State courts, State executives, *municipal corporations,* and all other persons who exercise or attempt to exercise any authority under a State constitution or a State statute.

But what do the words "due process of law" mean? We find them constantly appearing in constitutions, in statutes, in court opinions, and in the text books. Mr. Justice Story defined their meaning as follows:

> "The words 'due process of law' mean the administration of the law in its regular course through courts of justice."

Again, in the case of Embury v. Conner, the Court said:

> "Due process of law, as used in the Constitution, cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or for determining the title to property."

In Pennoyer v. Neff, (95 U. S. 714) the Court defined the words "due process of law" to mean:

> "A course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights."

In Simon v. Craft, 182 U. S., the court (on page 436) said:

> "The essential elements of due process of law are notice and opportunity to defend. * * * But the 'due process' clause of the 14th Amendment does not necessitate that the proceedings in a State court should be by a particular mode but only that there shall be a regular course of proceeding in which notice is given of the claim asserted and an opportunity afforded to defend against it."

WHAT IS PROPERTY?

Having seen that to take one's property by "due process of law" means that the owner shall have a hearing and an opportunity to defend in some established court or tribunal, our next inquiry is as to the meaning of the word "property".

No one will deny that the Constitution does, in clear terms, prohibit the State, and every one acting under its authority, from taking the "property" of any person without "due process of law". But the question at once arises as to what is "property". Or, in other words, what is embraced within the meaning of the word "property" as the word is employed in the Constitution?

Chief Justice Shaw defined the legal signification of the word as follows:

> "The term 'property' standing alone, includes everything that is the subject of ownership. It is a *nomen generalissimum,* extending to every species of valuable right and interest, including things real and personal, easements, franchises, and other corporeal hereditaments."

As we do not suppose anyone will question the correctness of the foregoing definition, our next inquiry is: *Will these ordinances, if enforced, deprive the complainants of "property" without due process of law?*

We are told that these ordinances do not interfere with the right of any man to purchase and own property wherever he pleases: that they only make it unlawful for the complainants to *occupy* the property they may purchase, in case it shall be found that some white person is already residing in the block. To that extent, however, it is agreed *that colored persons are to be excluded from the use of property they may at any time hereafter acquire in the city.*

And having now seen that in order to take the property of a person by "due process of law" there must be a trial, or hearing, in some established court or tribunal before which every person whose rights are to be affected may be heard before he shall be deprived of his property"; and, having also seen that the word "property" includes every right and use incident to the ownership of lands or other things, we come next to a consideration of the paramount question in this case, which may be briefly stated as follows:

Can the city of St. Louis by the mere adoption of an ordinance, or can the State of Missouri by the mere enactment of a statute, deprive a citizen, either white or black, of the right to use and occupy the property he owns? Or, in other words, does an ordinance or a statute that deprives a person of the "use of his property," deprive him of his property?

Our contention here is, that if the city of St. Louis can deprive one of the "use" of his property by the mere enactment of an ordinance, declaring that it shall be unlawful for him to reside in the home he owns, then the city might by the same token deprive him of the use of his property by erecting a high wall or fence in front of his lot in such way as to prevent him from entering or leaving his premises from the street. It is not a question of *how* one shall be deprived of his property, as we here make the broad contention that the State can only deprive a person of the property he owns in one way, and that is "by due process of law," as the meaning of those words have been so often defined by the courts.

We do not suppose any one will contend, that a person has a better right to the use of the street *in front* of his lot, than he has to the use of the lot itself. And yet we find that the courts have over and over again decided that a person cannot be deprived of the *use of the street* in front of his lot, except by "due process of law" which requires a hearing and the payment to him of a just compensation.

In the case of *Lackland* v. *North Missouri Ry.*, (31 Mo. 180), the city of St. Charles had authorized a railroad company to lay its tracks in a street in such manner as to exclude Mr. Lackland from the use of his lot. In passing upon the question of whether the city could, in that way, deprive Mr. Lackland of the use of his property, the court said:

> "The right of the owner of a lot in a town to the use of an adjoining street is as much property as the lot itself, and the legislature can no more deprive a man of one than the other without compensation."

In the case of *Pumpelly* v. *Green Bay,* (13 Wall., 166), a dam had been erected by the city in such manner as to overflow the land of plaintiff and thereby prevent his use of it. In that case Justice Miller in his opinion referred to the case of Lackland, among others, and on page 179 said:

> "There are numerous authorities to sustain the doctrine that a serious interruption of the common and necessary use of property may be, in the language of Mr. Angell in his work on Water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that land should be absolutely taken."

The court then cites a large number of cases in support of its opinion.

In discussing the right of a lot owner to the use of adjoining streets Judge Dillon, in his work on Municipal Corporations, says:

> "That these rights, whether the bare fee of the streets is in the lot owner or in the city, he (the lot owner) has property rights which are as sacred from legislative invasion as his right to the lot itself, * * such rights being property rights are like other property rights under the protection of the constitution."

In the case of *Yates* v. *Milwaukee* (10 Wall, 497), the legislature of Wisconsin had authorized the city of Milwaukee to establish dock lines and remove obstructions from the river. The plaintiff, Yates, owned a lot on which he had constructed a wharf that projected into the river, and the Common Council passed

an ordinance declaring the wharf a nuisance and ordering its removal. In deciding that case Justice Miller said:

> "Whether the title of the owner of such a lot extends beyond the dry land or not, he is certainly entitled to the rights of a riparian owner whose land is bounded by a navigable stream, and among these rights are access to the navigable part of the river from the front part of his lot. * * This riparian right is property, and is valuable. * * * It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

So, in *Indiana, etc., Ry. Co.* v. *Eberle,* (110 Ind., 445) the court said:

> "Whatever may be the rule of decision elsewhere, nothing is better settled in this State than that the owners of lots abutting on a street may have a peculiar and distinct interest in the streets in front of their lots. This interest includes the right to have the street kept open and free from any obstructions which prevent or materially interfere with the ordinary means of egress from and ingress to the lands, * * * to the extent that the street is a necessary and convenient means of access to the lot, it is as much a valuable property right as the lot itself. It cannot, therefore, be perverted from the uses to which it was originally dedicated nor devoted to uses inconsistent with the street purposes without the abutting owners' consent and until due compensation be first made according to law for any injury or damage which may directly result from such interference."

In the case of *State* v. *Julow,* (129 Mo., 163) the court had under consideration a State statute alleged to be unconstitutional, because it interfered with the free use of property by its owner. After quoting that provision of the Federal Constitution which declares "that no person shall be deprived of his life, liberty, or property without due process of law," the court said:

> "It will be noted that the rights of life, liberty and property are grouped together in the same sentence; they constitute a trinity of rights, and each as opposed to unlawful deprivation thereof, is of equal constitutional importance. With each of these rights, under the operation of a familiar principle, every auxiliary right, every attribute necessary to make the principal right, effectual and valuable in its most extensive sense, pass as incidents of the original grant.
>
> "The rights thus guaranteed are something more than the mere privilege of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of right.
>
> "The terms 'life, liberty and property' are representative terms and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may—all our liberties—personal, civil, and political; in short, all that makes life worth living; and of none of these liberties can anyone be deprived, except by due process of law.
>
> "Now, as before stated, each of the rights heretofore mentioned, carries with it as its natural and necessary coincident, all that effectuates

> and renders complete and full the unrestrained enjoyment of that right. * * * From these premises it follows that, depriving an owner of property of one of its essential attributes, is depriving him of his property within the constitutional provision."

The point decided in all the foregoing cases is, that "the use of property" is itself property, and that you take from me my property when you take from me *its use.*

So, it comes at last to this: That when the city of St. Louis attempts, *by an ordinance,* to deprive a person of the right to *use his property as a home,* or for any other lawful purpose, the action of the city amounts to an attempt "to take the property" of such person (be he white or black), without "due process of law," and, as the Constitution does in terms, forbid such action, these ordinances are necessarily void and the defendants should be enjoined by a decree of this Court, from enforcing them.

AS TO THE POLICE POWER.

It has been asserted at the bar that States and Cities may, in the exercise of their "police power", adopt and enforce statutes and ordinances of this character: and that contention presents an immediate inquiry as to the circumstances under which, and the purposes for which, the city or the state may, in the exercise of the "police power" take my property or deprive me of its use.

We do not here question the right of the State to deprive a citizen of his life, liberty, or his property, whenever that right is exerted by the state in subordination, to its own, and to the Federal Constitution. We

all know that a person may be deprived of his life, after having been fairly tried and convicted in a court of justice; we all know that one may be deprived of his liberty as a punishment for crime whereof he has been duly convicted; and we all know that a citizen may be deprived of his property for a public use, on receiving just compensation.

What we here assert is, that under the Federal Constitution and statutes, all citizens are entitled to the same measure of protection, and that no person, white or black, can be deprived of his property or his life, without due process of law". And in this connection we believe we may assert, without fear of successful contradiction, that never in the history of the world (prior to the adoption of ordinances of this character in some of our own cities) has it been made or held unlawful in any court or country, for any persons, either white or black, *to use the property he has acquired and owns, as a home and shelter for himself and family.*

Offensive occupations may be excluded from localities, but the Federal Constitution makes the right of exclusion depend on the "occupation" and not on the nationality of the proprietor.

We agree that States and cities may, in the exercise of their "police power", adopt and enforce all such general laws and ordinances regulating the personal conduct of their inhabitants and the use to be made of their property, as may be necessary in order to preserve and promote the public peace, health and morals.

We also agree that in the exercise of its "police power" a State or city may *segregate occupations,* and that offensive ones may be excluded from designated dis-

tricts. But we contend, nevertheless, that so long as the Federal constitution continues to be the supreme law of the land, all such statutes and ordinances must apply alike to the conduct of *all persons without regard to their color,* and to the use of all property, within the prescribed limits, *without regard to its ownership.*

In other words we say, that while certain occupations, like slaughterhouses and soap factories may, on account of their character, be lawfully excluded from given localities in a city, yet every state statute, or city ordinance, that would exclude slaughterhouses and soap factories, from given districts, when operated by *colored persons,* but would authorize them within the same limits when operated by *white persons,* would be utterly void. The line must be drawn on the *occupation,* and not on the color or nationality of the person owning or operating the plant.

The following cases illustrate our contention:

In one case it was held (*Barbier* v. *Connolly,* 113 U. S. 27) by the Supreme Court of the United States, that an ordinance was constitutional and valid which prohibited *all persons* from operating laundries within certain prescribed limits of the city; while, in another case in the same court, it was held (*Yick Wo* v. *Hopkins,* 118 U. S. 356) to be a violation of the Constitution and laws of the United States for the officials of a city and county to authorize and permit persons of *one race* to operate laundries within certain limits, and *refuse to permit* persons of another race to operate laundries within the same limits and under like conditions.

There is a vast difference between an ordinance that prohibits an offensive use of property, within certain prescribed limits, by *all of the people*, and an ordinance that prohibits a like use of the same property, within the same limits, by *some of the people.*

In *Barbier* v. *Connolly,* (113 U. S. 27), the court had under consideration an ordinance adopted by the city of San Francisco, which prohibited the washing and ironing of clothes in public laundries within certain limits of the city and county of San Francisco from ten o'clock at night to six o'clock in the morning of the following day. The validity of that ordinance was upheld as a proper "police regulation" in a city composed largely of wooden buildings, because in its application there was no invidious discrimination against any one within the prescribed limits—all persons engaged in the same business being treated alike, and subject to the same restrictions and entitled to the same privileges under similar conditions. In holding that such an ordinance was not in violation of the Fourteenth Amendment, the court said:

> "It (the 14th Amendment) was undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be

> interposed to the pursuit of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no difference or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. * * * Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment."

But in Yick Wo vs. Hopkins, (116 U. S. 356), the court had under consideration another ordinance of the city of Can Francisco, that made it unlawful "for any person to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without first having obtained the consent of the Board of Supervisors, excepting when the same should be located in a building constructed either of brick or stone."

It was agreed in that case that petitioner was a native of China and a subject of the Emperor of that country; that he had presented his petition in due form to the Board of Supervisors and the board had refused its consent.

It was alleged in his petition that he, and more than one hundred and fifty of his countrymen, had been arrested, fined and imprisoned, on the charge of having operated laundries without having obtained the required consent of the board, while more than eighty

persons, who were not natives of China and who were carrying on the same business in said city without having obtained the required consent, were left unmolested and free to enjoy the enhanced trade and profits arising from that hurtful and unfair discrimination.

The petitioner, having been tried and convicted under the ordinance, applied in a Federal Court for discharge, on the ground that he was being deprived of his liberty in violation of the Constitution of the United States.

In deciding the questions presented the court referred to its former opinion in Barbier vs. Connolly (from which we have just quoted), and said:

> "The ordinance drawn in question in the present case is of a very different character. It does not prescribed a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform. It allows, without restriction, the use for such purposes of buildings of brick or stone; but as to wooden buildings, constituting nearly all those in previous use, it divides the owners or occupiers into two classes, not having respect to their personal character and qualifications for the business, nor the situation and nature and adaption of the buildings themselves but merely by an arbitrary line, on one side of which are those who are permitted to pursue their industry by the mere will and consent of the supervisors, and on the other, those from whom the consent is withheld, at their mere will and pleasure. * * *

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are universal in their application, to all persons within the territoral jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by Section 1977 of the Revised Statutes, that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.' The questions we have to decide and consider in these cases, therefore, are to be treated as involving the rights of every citizen of the United States equally with those of the strangers and aliens who now invoke the jurisdiction of the court. * * * * * Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York, 92 U. S., 259; Chy Lung v. Freeman, 92 U. S.,

275; Ex parte Virginia, 100 U. S., 339; Neal v. Delaware, 103 U. S., 370; and Soon Hing v. Crowley, 113 U. S. 703. * * * *

"The fact of this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."

In *Strauder* v. *West Virginia,* (100 U. S. 303), the court had under consideration a statute of West Virginia that prohibited colored persons from serving as jurors in the courts of that State. In discussing the constitutionality of such a statute the court, among other things (commencing on p. 306), said:

"It (the 14th Amendment) was designed to assure to the colored race the enjoyment of all of the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. * * * It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities, of citizens of the United States. * * * It ordains that no State shall deprive any person of life, liberty or property with-

out due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

"What is this but declaring that the law in the States shall be the same for the black as for the white, that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, (for whose protection the Amendment was primarily designed), that no discrimination shall be made against them by law because of their color? * * *

"The Fourteenth Amendment makes no attempt to enumerate the rights it designs to protect. It speaks in general terms and those are as comprehensive as possible. Its language is prohibitory; but every prohibition implies the existence of rights and immunities, prominent among which is an immunity from inequality, of legal protection either for life, liberty or property. Any State action that denies this immunity to a colored man is in conflict with the Constitution."

In *Virginia* v. *Rives* (100 U. S. 313) the court held, that the object and purpose of Sections 1977 and 1978 of the United States Revised Statutes (the sections quoted and relied upon in the bill filed in this case) and of the Constitution that authorized the enactment of these sections, was to place the colored race *on a level with the white race* with respect to their civil rights, and that these statutes made the rights and responsbilities, civil and criminal, *of the two races exactly the same.* To the same effect was the opinion of the court in Ex-parte Virginia, 100 U. S. 339.

In conclusion on this point, we respectfully submit that if the rule announced in the cases from which we have just quoted shall be here applied, then these or-

dinances should be held void because they not only deny to complainants, who are colored citizens, "the equal protection of the law," but also because they deprive complainants of their property "without due process of law," by excluding them from the use of their homes without a hearing and simply *on account of their color.*

POLICE REGULATIONS CANNOT IMPAIR CONSTITUTIONAL RIGHTS.

Passing for the present, the question of whether the court should or should not consider what is *stated in the titles* of these ordinances as evidence of their necessity in order to prevent conflict between the white and colored races, we assert the broad proposition that all State statutes and city ordinances, without regard to the purpose for which they are enacted, are void in so far as they conflict with the Constitution and laws of the United States.

The case of *Traux* v. *Raich* (239 U. S., 33), arose under a statute of Arizona, which provided that not less than eighty per cent. of all persons employed by every person or corporation in that State *should be qualified electors or native born citizens* of the United States. Raich (the appellee) was an Austrian and not a qualified elector. He was employed by Traux as a cook in a restaurant, and upon the passage of the law Truax informed Raich that, on account of its passage and the heavy penalties imposed for its violation, he would have to discharge him. Thereupon Raich filed his bill in the District Court of the United States in which he made Traux, and the necessary county and State officials, defendants. In his bill he prayed for an injunction restraining the defendants from enforc-

ing the statute, on the ground that the statute was in violation of the Federal Constitution because it denied to Raich "the equal protection of the law."

After a statement of the facts, the court reaffirmed (p. 39) its opinion in *Yick Wo.* v. *Hopkins,* (118 U. S., 356) from which we have already quoted, and then continued (p. 41) as follows:

> "It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 762; *Barbier* v. *Conolly,* 113 U. S. 27, 31; *Yick Wo.* v. *Hopkins, supra; Allgeyer* v. *Louisiana,* 165 U. S., 578, 589, 590; *Coppage* v. *Kansas,* 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. * * * It must also be said that reasonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power."

In the case of *Lake Shore Railway Co.* v. *Smith,* (173 U. S. 684), the court was considering the constitutionality of a Michigan statute, which the defendant alleged was within the proper exercise of the police power of the State. In disposing of that question the court said:

> "This power (the police power) must, however, be exercised in subordination to the provisions of the Federal Constitution. If in the assumed exercise of its police power the legislature of a State directly and plainly violate a provision of the Constitution of the United States, such legislation would be void."

In *Jacobson* v. *Massachusetts* (197 U. S., 11) the court, in discussing the nature of "police regulations" and the exercise of the power by municipal governments, said:

> "It is true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument. A local enactment or regulation, even if based on the acknowledged police powers of a State, must always yield in case of conflict with the exercise by the General Government of any power it possesses under the Constitution, or with any right which that instru-

ment gives or secures. *Gibbons* v. *Odgen,* 9 Wheat, 1; *Sinnot* v. *Davenport,* 22 How. 227, 243; *Missouri, Kansas & Texas Ry. Co.* v. *Huber,* 169 U. S. 613, 626."

So, *In re Neagle* (39 Fed., 844), the question was, as to whether a State statute was valid that contravened a valid law of the United States. The case was heard before two judges (Sawyer and Sabin), and in deciding the question, the court said:

> "A State law which contravenes a valid law of the United States, is, in the nature of things, necessarily void. It must give place to the 'supreme law of the land.' In legal contemplation, there can no more be two valid laws, which are in conflict, operating upon the same subject-matter at the same time, than, in physics, two bodies can occupy the same space at the same time."

And in this connection, and on this point, we beg to repeat here the words of the court in *State* v. *Julow,* wherein it was declared:

> "That the State will not be allowed, under the guise and pretence of a 'police regulation' to encroach or trample on any of the just rights of the citizens, which the Constitution intended to secure against diminution or abridgment."

And so, without further resort to court opinions in support of our contention, we will in conclusion quote the words of the Constitution itself, wherein it is declared:

> "That this constitution and the laws of the United States which shall be made in pursuance thereof and the treaties made or which shall be made under the authority of the United States,

> shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The point ruled in all the cases from which we have just quoted is, that the Federal Constitutions and laws made in pursuance thereof are "the supreme law", and that no right of any citizen, white or black, that is either conferred or protected by the Federal Constitution or by a Federal statute, can be impaired or abridged by any State statute, or city ordinance enacted under the name of a "police regulation," or under any other name or pretext whatsoever.

NEITHER STATUTES NOR ORDINANCES BECOME "POLICE REGULATIONS" BY CALLING THEM SUCH IN THEIR TITLES.

We have already said that we do not question the right of States and cities to adopt and enforce, *in the exercise of their police power,* all such reasonable laws and ordinances as may, in the judgment of the courts, be necessary to preserve the public peace, health and morals; but where is the evidence that such ordinances as these are necessary in order to preserve or promote either the morals, health, or safety of any citizen? Is the need of such ordinances a matter of such public notoriety that the courts should, without proof, take judicial cognizance of their necessity in order to prevent conflict, rioting and bloodshed between the white and colored races?

But Counsel for defendants, point to the titles of these ordinances that sound so full of conflict that we shudder as we read. But outside their titles, there is

nothing, to suggest, that such ordinances are necessary in order to preserve the peace, health or safety of any one.

The title to the ordinance designated as "No. 1" is as follows:

> "An ordinance to prevent ill-feeling, conflict and collisions between the white and colored races in the city of St. Louis, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring the use of separate blocks for residence by white and colored people respectively."

Now, as a legal proposition, is any Court bound by that recital? Is any Court required to find and decree that these ordinances are necessary in order to preserve the public peace and prevent conflict between the white and colored races, because it is stated in the titles that they are intended for that purpose? If so, where can we find authority for that contention?

In the case of *Yates* v. *Milwaukee,* from which we have already quoted, that very question was raised and discussed. The Common Council of Milwaukee was authorized by an act of the Wisconsin legislature to remove obstructions and prevent encroachment upon the channel of the river. In pursuance of that statute the Common Council of Milwaukee passed an ordinance declaring that a wharf owned by Yates, and extending into the river, was an obstruction and ordered its removal as a nuisance. In determining the question thus presented Mr. Justice Miller said:

> "The mere declaration of the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character."

He then added, that it was a doctrine not to be tolerated in this country that without resort to any court, in which it could be shown that a given structure was or was not a nuisance, a municipal corporation could, by its mere declaration that it was one, subject such structure to removal at the instance of any person supposed to be aggrieved, or even by the city itself. And in conclusion, on that point, the court said:

> "This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities. Yet this seems to have been the view taken by counsel who defendant this case in the Circuit Court; for that single ordinance of the city, declaring the wharf of Yates a nuisance and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public."

The case of *Coppage* v. *Kansas* (236 U. S. 1.), arose under a statute of Kansas entitled as follows: "An act to provide a penalty for coercing or influencing, or making demands upon, or requirements of employees, servants, laborers and persons asking employment."

The act made it unlawful, for any employer, to require any person to enter into an agreement, either written or verbal, not to join any labor organization

as a condition to being received into, or continuing in, any employment. Coppage was superintendent of the "Frisco" lines in Kansas, and one Hedges was employed by the company, for no fixed or agreed period, as a switchman. Coppage requested Hedges to agree to resign his membership in the "Switchmen's Union" as a condition to his remaining in the service; and as Hedges refused to do so he was discharged. Coppage was then arrested and fined in the State Court, but a writ of error to the Supreme Court of the United States was granted on the ground that the Kansas statute deprived Coppage of that freedom to enter into, contracts that was guaranteed to him and all other citizens, under the Federal Constitution.

In support of the statute, it was argued by counsel that the State might, in the exercise of its "police power," prohibit an employer from "coercing" an employee and that the main purpose of the statute, *as shown by its title,* was to prevent an employer of labor from "coercing" his servants.

In answer to that contention the court said:

> "Now, it seems to us clear that a statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. * * It is equally clear, we think, that to punish an employer or his agent for simply proposing certain terms of employment, under circumstances devoid of coercion, duress, or undue influence, has no reasonable relation to a declared purpose

> of repressing, coercion, duress, and undue influence. Nor can a State, by designating as 'coercion' conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights; for to permit this would deprive the Fourteenth Amendment of its effective force in this regard."

So, in the case of *State at the relation of Chouteau* v. *Leffingwell,* (54 Mo., 458), with which Your Honor is familiar, it appeared that the State constitution of Missouri adopted in 1865 prohibited the legislature from creating any corporation by special act "except for municipal purposes." The legislature, later on, passed an act in which it declared that the corporation created by it was "for municipal purposes." But in determining that question the court said:

> "The declaration that the corporation is for municipal purposes does not make it so. * * If the legislature can do this, it is difficult to set any bounds to their power. The constitution never contemplated such an exercise of power, but sought on the contrary to place a prohibition on it. Its language, fairly and properly interpreted, does not countenance it. The ingenious arguments that have been made to sustain the validity of the act resolve themselves into plausible pretexts for violating the plain meaning of the constitution."

So, in the later case of *State* v. *Julow* (129 Mo. 163), the court not only considered the question of whether it was bound to accept and act upon the title of a legislative enactment, but also the question of whether the "police power" of a State or city was paramount to the Federal Constitution. In passing on these questions the court said;

"Nor can the statute escape censure by assuming the label of police regulation. It has none of the elements of attributes which pertain to such a regulation, for it does not in terms or by implication promote, or tend to promote, the public health, welfare, comfort or safety; and if it did, the State would not be allowed under the guise and pretense of police regulation to encroach or trample upon any of the just rights of the citizen, which the constitution intended to secure against diminution or abridgement."

SIMILAR ORDINANCES HELD VOID IN STATE COURTS.

City ordinances, similar in character to the ones here under consideration, have been before the courts of Georgia, North Carolina and Maryland.

In *Carey* v. *City of Atlanta,* (143 Ga. 192), an ordinance of the City of Atlanta was held void, that prohibited white and colored persons from residing in the same block, because "it denied the inherent right of a person to acquire, enjoy and dispose of property", and was for that reason violative of the "due process of law" clause of the Federal constitution.

In *State* v. *Darnell,* (166 N. C. 300), an ordinance of the city of Winston was held void, that made it unlawful for any colored person to occupy as a residence any house upon any street or alley between two adjacent streets on which a greater number of houses were occupied as residences by white people than were occupied as residences by colored people.

In *State* v. *Gurry* (121 Md. 534), the court held, that an ordinance of the City of Baltimore was unconstitutional and void that prohibited a party, either white or black, from occupying property owned by him before the adoption of the ordinance.

The McCabe Case.

We have not, in the presentation of this case, overlooked or failed to consider anything that was said by the Supreme Court in the case of *McCabe et al.* v. *Atchison Ry. Co., et al.,* (235 U. S. 151).

In that case the statute of Oklahoma, which was under consideration, required all railroad companies, doing business in that State, to provide separate coaches for the use of the white and negro races, "which separate coaches should be equal in all points of comfort and convenience." In that case the Circuit Court of Appeals had expressed the opinion, that if the number of colored passengers to be carried was so small as to make it a burden on the railroads to provide separate coaches for their use (that should be equal in all respects to the coaches provided for white passengers), then the railroad companies were not required to comply with the statute.

In reply to that part of the opinion of the Court of Appeals, the Supreme Court in its opinion said:

> "Whether or not particular facilities shall be provided may, doubtless, be conditioned upon there being a reasonable demand therefor, but if facilities are provided substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a State law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded."

The judgment in the above case (McCabe v. The R. R. Co.) was, however, affirmed only on a question of practice, the Supreme Court holding that complainants had not in their petition shown themselves entitled to relief in a court of equity.

In that case, the court had nothing before it that required a discussion of any question presented under these ordinances, or that required the court to either affirm or disaffirm any of its former opinions from which we have quoted, or to express any opinion respecting the meaning of Sec. 1987 of the Revisted Statutes (which was expressly passed to give effect to the Fourteenth Amendment) and which provides:

> "That all citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real property."

CONCLUSIONS.

The Fourteenth Amendment to the Federal Constitution declares:

> "That all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside."

And in Section 5 of that amendment it is provided that Congress shall have power to enforce by appropriate legislation all the provisions of that article. In pursuance of that power, it was many years ago enacted by Congress (Sec. 1978 Rev. Stats. U. S.) that:

> "All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real property."

And now, if it be true that the Constitution of the United States and laws made in pursuance thereof are the supreme law of the land; if it is true that, under the Constitution, all colored persons born in the United States are citizens thereof; if it be true that Section 1978 of the Revised Statutes of the United States expressly provides that all *colored citizens* of the United States shall have the same right in every State and Territory to purchase, hold and convey real property, that is enjoyed by *white citizens;* and if it be true, as stated by the court in *Strauder* v. *West Virginia* (100 U. S., 303), "that the laws of all the States must be the same for the black as for the white, and that all persons, whether colored or white, shall stand equal before the law," and that no discrimination shall be made *against any "on account of their color,"*—then how can it be said that the city of St. Louis may, by such ordinances as these, be divided into "white blocks" and "black blocks," wherein the rights of citizens to purchase and occupy real property, *shall depend upon their color?*

The great question here is: Do these constitutional provisions, these Federal statutes and court opinions, mean that in case some white man already resides in a designated portion of the city, then all colored citizens may, by such ordinances as these, be excluded therefrom? Can it be said that a "supreme law of the land" (which forbids discrimination against

any citizen on account of his color) can, under the guise of "police regulation," be completely nullified by such city ordinance as these? Or shall it be said that these "supreme laws" mean exactly what they say, and that all white citizens and colored citizens shall have "equal rights to own, and enjoy real property," not only in all the blocks of this city, but wherever the flag of the country floats and the Federal Constitution, and laws enacted in pursuance thereof, are supreme?

Mr. Lincoln was not a prophet, but he did understand human nature and he knew the disposition of the strong to oppress the weak; and it would seem that the very questions we are here discussing were in his mind when, in speaking in 1858 of those who had in 1776 framed the Declaration of Independence, he said:

> "Wise statesmen as they were, they knew the tendency of posterity to breed tyrants and so they established those great self-evident truths that when in the distant future some men, some faction, some interest, should set up the doctrine that none but rich men, or none but white men, or none but Anglo-Saxon white men, were entitled to 'life, liberty and the pursuit of happiness,' their posterity might look up again to the Declaration of Independence and take courage to renew the battle which their fathers began, so that truth and justice and all the humane and Christian virtues may not be extinguished from the land; so that none should hereafter dare to limit and circumscribe the great principle on which the temple of liberty was being built."

In conclusion we submit that in view of the character and effect of these ordinances, as we have endeavored to point them out, a writ of injunction should now issue out of this court as prayed for in the bill, for reasons that may be briefly stated as follows:

First. Because, if those ordinances shall be enforced, they will deprive complainants of these *natural rights* to labor and acquire property and enjoy the use thereof, for the protection of which rights "governments are instituted among men."

Second. Because, if these ordinances shall be enforced they will, in violation if the Federal Constitution, deprive complainants of their property and the use of their property "without due process of law;" and

Third. Because, to deny to complainants *on account of their color* (as provided in these ordinances), the right to occupy the property they may own, will be to deny to them and each of them (on account of their color) the equal protection of the law, as secured to them by the Federal Constitution and the statutes from which we have quoted.

Fourth. Because no rights conferred by the *Federal constitution* upon citizens of the United States can be impaired or taken away by any state or city, in a pretended exercise of its "police power".

It is not important to inquire here whether we do or do not like colored persons as neighbors. The great question is: Should the courts, that have in

their keeping our lives, our liberties, and our property, by their judgments and decrees preserve or surrender the broad principles of human liberty on which this Government was established?

WELLS H. BLODGETT,
CHARLES NAGEL,
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SELDEN P. SPENCER,
SIDNEY F. ANDREWS,
W. L. STURDEVANT,
PERCY WERNER,
EVERETT W. PATTISON,
JOSEPH WHELESS,
Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 33

CHARLES H. BUCHANAN, *Plaintiff,*

—vs.—

WILLIAM WARLEY, *Defendant.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

BRIEF AMICUS CURIAE ON BEHALF OF THE DEFENDANT IN ERROR

H. R. POLLARD,
City Attorney.

In the Supreme Court of the United States

OCTOBER TERM 1916

NO. 231

CHARLES H. BUCHANAN, Plaintiff in Error,

vs.

WILLIAM WARLEY, Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Motion to Allow the City of Richmond to file a Brief Amicus Curiae on Behalf of the Defendant in Error

Comes the City of Richmond, a municipal corporation created under the laws of the State of Virginia, by counsel, and moves this Honorable Court to allow it to file a brief *amicus curiae* on behalf of the defendant in error.

..........................,

City Attorney.

FOR THE CITY OF RICHMOND.

In the Supreme Court of the United States

OCTOBER TERM 1916

NO. 231

CHARLES H. BUCHANAN, Plaintiff in Error,

vs.

WILLIAM WARLEY, Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

NOTICE

To CLAYTON B. BLAKEY and MOORFIELD STOREY, Attorneys for the Plaintiff in Error, and PENDLETON BECKLEY, City Attorney for the City of Louisville, Attorney for the Defendant in Error:

You are hereby notified that the City of Richmond, a municipal corporation created and existing under the laws of the State of Virginia, will, on Monday the 5th day of March, 1917, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit the foregoing motion to grant to the City of Richmond leave to file a brief *amicus curiae* on behalf

of the defendant in error herein, which brief is hereto attached.

.............................,

City Attorney.

FOR THE CITY OF RICHMOND.

Service of the foregoing notice of motion, with the said motion and the brief therein referred to, is hereby acknowledged this .... day of ...., 1917.

.............................,

.............................,

Attorneys for the Plaintiff in Error.

.............................,

Attorney for the Defendant in Error.

In the Supreme Court of the United States

OCTOBER TERM 1916

NO. 231

CHARLES H. BUCHANAN, Plaintiff in Error,

vs.

WILLIAM WARLEY, Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

Brief Amicus Curiae on Behalf of the Defendant in Error.

GENERAL STATEMENT.

The City of Richmond, Virginia, as far as we are advised, is the first municipality in the Union since the Civil War, that has undertaken to separate and regulate by law, under the police power, domiciliary occupancy of property as between the white and colored races.

To that end the City of Richmond adopted an ordinance approved April 19, 1911, which is in the following language:

"AN ORDINANCE

(*Approved April* 19, 1911).

"*To secure for white and colored people, respectively, the separate location of residences for each race.*

Be it ordained by the Council of the City of Richmond:

"1. That it shall be unlawful for any white person to occupy as a residence or to establish and maintain as a place of public assembly, any house upon any street or alley between two adjacent streets on which a greater number of houses are occupied as residences by colored people than are occupied as residences by white people.

"2. That it shall be unlawful for any colored person to occupy as a residence or to establish and maintain as a place of public assembly, any house upon any street or alley between two adjacent streets on which a greater number of houses are occupied as residences by white people than are occupied as residences by colored people.

"3. That no person shall construct or locate on any block or square on which there is at that time no residence, any house, or other building intended to be used as a residence, without declaring in his application for a permit to build, whether the house or building so to be constructed is designed to be occupied by white or colored people, and the Building Inspector of the City of Richmond shall not issue any permit in such case unless the applicant complies with the provisions of this section.

"4. That nothing in this ordinance shall affect the location of residences made previous to the approval of this ordinance, and nothing herein shall be so construed as to prevent the occupation of residences by white or colored servants or employees, on the square or block on which they are so employed.

"5. Every person either by himself or through his agent violating, or any agent for another violating, any one or more of the provisions of this ordinance, shall be liable to a fine of not less than one hundred nor more than two hundred dollars, recoverable before the Police Justice of the City of Richmond, and, in the discretion of the Police Justice, such person may, in addition thereto, be confined in the city jail not less than thirty nor more than ninety days.

"6. This ordinance shall be in force from its passage."

By comparison of this ordinance with the ordinances under review in the instant case, found on pages 56-59 of the Record, it will be seen that the substantive parts of each are practically the same.

The constitutionality of the Richmond ordinance was brought under review in the State Courts and by a judgment of the Supreme Court of Appeals of Virginia, entered September 9, 1915, a judgment of the Hustings Court of the City of Richmond sustaining the constitutionality of said ordinance was affirmed. (117 Va. 692; S. C. 86 S. E. 139).

The courts in which this litigation was conducted undoubtedly, as was their duty, took cognizance of the social and economic conditions which prevailed in the City of Richmond, largely growing out of the rapid increase of population immediately preceding and following the year 1910. By the census for 1900 the population of the City of Richmond was 85,050, and by the census of 1910 the population was 127, 628, showing an increase of approximately 50 per cent. within the decade. During the same period the increase in the prosperity and wealth of the negroes practically segregated and residing in one ward, formerly known as Jackson Ward in the City of Richmond, had kept pace with the numerical increase. This prosperity enabled many negroes to seek to become owners of their homes rather than tenants, and brought them into the market to purchase real estate. The section then mainly occupied by negroes as stated, and several other sections of smaller proportions, were already more densely populated than any other sections of the city,

which situation stimulated the purchase of homes by negroes in white sections of the city wherever property was upon the market for sale, and as a consequence in many blocks, which before that time had been exclusively occupied by white people, negroes purchased property and occupied the same with their families. As a result racial antagonism arose which endangered the peace and good order of the community, and as another result the values of properties were depreciated, thus entailing serious losses on property owners. To arrest such evils and prevent the possibility of the continuance of the same, the ordinance of the City of Richmond was adopted and enforced. Against its enforcement there was no little opposition, especially by negroes, the origin of which opposition, as we believe, is the same as that which has opposed the other segregation laws which this Honorable Court has declared to be constitutional and valid. We know that the leaders of a well directed propaganda against the enforcement of racial segregation law in general resent the imputation that the cause of this resistance is a desire for social equality, and we are loth to suggest anything which would be a misjudgment or in the least offensive to the negro race or any one of them, in whose elevation and prosperity we feel a deep interest, yet we feel constrained to say that every other reason which we have heard assigned as justifying such opposition seems to us puerile, if not ridiculous.

CASE ARGUED.

FIRST: *That the ordinance in question is reasonable in its terms.*

Mr. McQuillin, in his work on Municipal Ordinances, in Sec. 432, in discussing the exercise of the implied powers of municipal corporations, says:

> "The Legislature may determine the exigency, that is the occasion for the exercise of the police power, but under our constitutional system, the judiciary determines what are the subjects and objects upon which the power is to be exercised *and the reasonableness of that exercise.*"

With the latter clause of this enactment, we are concerned under this head.

Further on in the same section Mr. McQuillin says:

> "Laws, whatever may be the intent of the framers, which authorize the confiscation of private property for the mere protection of private rights will be condemned as unconstitutional. * * * But it is universally admitted that however broadly these constitutional principles may be expressed 'there exists *ex necessitate rei*, in every government, the power to impose restrictions upon individual life, liberty and property, which it is not within the meaning and intent of such provisions to prohibit or restrain. So universal and long continued has been this construction of constitutional inhibitions against governmental deprivation of life, liberty and property of citizens *that it may now be considered as written in every constitution.*'"

The same author at Section 186, says:

> "It has been well said that, the legal rule that by-laws must be reasonable is perhaps as definite as it can be made with safety. * * * It must appear from the inherent character of the act, or by evidence of the operation of the ordinance, that it is unreasonable. * * * The ordinance must be reasonable as applied to the particular subject-matter. Judicial authority to declare an ordinance unreasonable is a power to be cautiously exercised. The rule is generally recognized that municipal corporations are *prima facie* the sole judges respecting the necessity and reasonableness of their ordinances, and hence the legal presumption is in their favor, unless the contrary appears on their face or is established by proper evidence. * * * In question of doubt the courts are inclined to defer to the discretion and judgment of the municipal authorities. To arrive at a correct decision whether the by-law be reasonable or not, regard must be had to its object and necessity. Minute regulations are required in a great city which would be absurd in

the country. Likewise a reasonable regulation, intended to operate in a densely populated part of a city, might be unreasonable as applied to parts of the same city sparsely populated. Therefore, all of the surrounding conditions must be carefully considered. It is thus manifest that, as a rule, the municipal authorities are more competent to pass on such questions than judicial tribunals. In recognition of this fact, the rule is of universal application that a clear case should be made out to authorize the court to interfere with the exercise of the police power of a municipal corporation on the ground of unreasonableness."

This same author in his work on Municipal Corportions, in section 732, volume II, in discussing this question says:

"The court will have to regard all the circumstances of the particular city or corporation, the object sought to be obtained, and the necessity which exists for the ordinance. Implied power springs from necessity. That which may be necessary for a large city, may not be necessary for a small city or borough. That which is not necessary cannot be implied.

"Likewise a reasonable regulation, intended to operate in a densely populated part of a city, might be unreasonable as applied to parts of the same city sparsely populated. Therefore all of the surrounding conditions must be carefully considered. It is thus manifest that, as a rule, the municipal authorities are more competent to pass on such questions than judicial tribunals. In recognition of this fact the rule is of universal application that a clear case should be made out to authorize the court to interfere with the exercise of the police powers of a municipal corporation on the ground of unreasonableness."

In *Adams* v. *Milwaukee*, 228 U. S. 572, 581, Mr. Justice McKenna said:

> "The requirements are not unreasonable; they are properly adaptive to the conditions. They are not discriminatory; they have *proper relation to the purposes to be accomplished;* that purpose and the necessity for it we cannot question." Citing many cases on this particular point.

In *Schmidinger* v. *Chicago*, 226 U. S. 578, Mr. Justice Day, delivering the opinion of the court, said:

> "This court has had frequent occasion to declare that there is no absolute freedom of contract. * * * So long as such action *has a reasonable relation to the* exercise of the power belonging to the local legislative body, and is not so arbitrary or capricious as to be a deprivation of the due process of law, freedom of contract is not interfered with in a constitutional sense."

Directly related to the class of cases here under discussion is the case of *Plessy* v. *Fergusson*, 163 U. S. 537, 550. In this case Mr. Justice Brown says:

> "The case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable or more abnoxious to the 14th Amendment," etc.,

which deliverance is quoted and approved by Mr. Justice McKenna in the case of *Childs* v. *C. & O. Ry.*, 218 U. S. 71, 77.

Indeed we do not understand the learned counsel for the plaintiffs in error in either of the cases as seriously contend-

ing that the ordinance in its operation could be pronounced illegal because of its unreasonableness, but as relying upon its unreasonableness only as an ingredient of its unconstitutionality—that is, in being violative of certain rights secured under the State and Federal Constitutions.

Under this head we beg to quote from the able opinion of the *nisi prius* judge, who heard and decided the case of *Coleman* v. *Town of Ashland*, disposed of along with the case of *Hopkins* v. *City of Richmond*, 117 Va. 692, which opinion was adopted and approved as their own by the Supreme Court of Appeals of Virginia. It was there said:

"Whether a particular ordinance is unreasonable, and therefore void, is a question for the court, but in determining it the court will have regard to all the circumstances of the city and the object sought to be attained, and the necessity which exists for the ordinance. I Dillion Mun. Corp., sec. 327; *Toledo &c. R. Co.* v. *Jacksonville*, 16 AM. Rep. 611; *Miller* v. *Fitchburg*, 180 Mass. 32.

"The central idea of the ordinance under consideration seems very manifest. It is to prevent too close association of the races, which association results, or tends to result, in breaches of peace, immortality and danger to the health. The history of legislation on this subject heretofore adverted to, as well as the *phraseology* of the ordinance itself confirm this view. The attainment of the object in view is one much to be desired, and if the ordinance is not necessarily oppressive or unreasonable, it is the duty of the court to hold it valid, provided it does not conflict with the limitations placed upon legislative bodies by the Constitution of Virginia, or that of the United States (which proposition will be considered later). An analysis of the ordinance, in the light of the facts agreed upon, should determine this question. The ordinance is prospective in its application. It does not affect rental contracts existing at the time of its passage. it does not divest any person of his property, or rights therein, at the time of the passage of the ordinance. Any white person owning property and occupying it in a street, or block, at the passage of the ordinance, known after the passage of the ordinance as a colored block, is not affected by the ordinance

either as to his ownership, or occpancy, but he may, if he wills, continue to own and occupy his property as before its passage. The same thing applies to colored persons, under like circumstances. Under the ordinance, either colored or white persons may, after the passage of the ordinance, purchase and hold property wherever they may desire within the corporate limits. The only right affected by the ordinance is the right to occupy houses in certain streets, or blocks, as residences, and this regulation of the use of property applies without discrimination to all white and colored persons alike within the town of Ashland.

"It would seem that, if a municipal corporation has authority to provide for separation of the races within its limits, no more reasonable, or less oppressive ordinance could be devised than the one under considération.

"In the case at bar there is no evidence of any sort whatever appearing in the record to show that the ordinance complained of was unreasonable or unnecessary. On the contrary, the court would take judical notice of the fact that 'the preservation of public morals, public health and public order in the cities and towns of this State is endangered by the residence of white and colored people in close proximity to one another.' Acts 1912, p. 330.

(Quoted from the preamble of an act approved March 12, 1912, entitled, "An Act to provide for designation by cities and towns of segregated districts for residence of white and colored persons; for the adoption of this Act by such cities and towns, and for penalties for the violation of its terms.")

"Upon the facts in this case, John Coleman, a colored man, in spite of the fact that he knew, or ought to have known, the law, after its passage, purchased the residence, and, in violation of the ordinance, occupied it. If the ordinance is valid in other respects, he is hardly in a position now to take advantage of his own wrong, upon a plea that he is being unreasonably deprived of the use of his property.

"There is no question about the authority of a municipality invested by its charter or by general statute with power to preserve the peace and health, to restrict the use of private property in the interest of the public, provided

the restriction is reasonable. I Dillon Mun. Corp., sec. 144 and note; *Slaughterhouse Cases*, 83 U. S. 62 (21 L. Ed.), 404; *Tameton* v. *Taylor*, 116 Mass. 254; *Watertown* v. *Mayo*, 109 Mass. 315; *Brown* v. *Keener*, 74 N. C. 714; *Pool* v. *Trexler*, 76 N. C. 297; *Com.* v. *Alger*, 7 *Cush.* 84; *Town* Council *of Summerville* v. *Pressley* (S. C.), 8 L. R. A. 854. In the last named case an ordinance passed by the town council, in the exercise of police power, prohibited the cultivation for agricultural purposes of more than one-eighth of an acre by any family or household within the corporation limits except for flowers, etc., was held valid and declared to be a reasonable exercise of the police power. Every citizen holds his land subservient to such police regulation as the legislature in its wisdom may enact for the general welfare. *Brown* v. *Keener*, *supra; Pool* v. *Trexler*, 76 N. C. 297.

" 'Every citizen holds his property subject to the proper exercise of this (police) power either by the State legislature directly, or by municipal corporations to which the legislature may delegate it. Laws and ordinances relating to the comfort, health, convenience, good order and general welfare of the inhabitants are comprehensively styled "Police Laws or Regulations"; and it is well settled that laws and regulations of this character, though they may disturb the enjoyment of individual rights, are not unconstitutional though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner; if he suffers injury, it is either *damnum abseque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever without his consent, nor for any public use without compensation. Still he owns it subject to this restriction, namely, that it must be so used as not to injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally. Those regulations rest upon the maxim, *salus populi suprema est lex.* This power to restrain a private injurious use of property is very different from

the right of eminent domain. It is not a taking of private property for public use,' etc. 1 Dillion Mun. Corp. (3rd ed.), Sec. 141.

"In the great leading case upon the subject of *Com.* v. *Alger*, 7 Cush. 85, Chief Justice Shaw said: 'Rights of property like all other social and conventional rights are subject to such reasonable limitations in their enoyment as shall prevent them from being injurious, and to such reasonable restraints and elections established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient. This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use whenever the public exigency requires it—which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the public power—the power vested in the legislature by the Constitution to make, ordain and establish all manner of wholesome and rasonable laws, statutes and ordinances, either with penalties, or without, not repugnant to the Constitution as it shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same.'

"As has been heretofore said, police power extends to the protection of the lives, limbs, health, comfort, morals and quiet of all persons, and it has been seen that in promoting these benefits of the public, any reasonable restrictions may be placed upon the use of private property, and that such restrictions do not constitute condemnation of private property for public use. It is the declared policy of this State that close association of the races tends to breach of the peace, unsanitary conditions, discomfort, immorality and disquiet. Hence the legislature has seen fit to confer express authority upon the cities and towns of the Commonwealth to enact segregation ordinances. It has provided for separate coaches on the railroads of the State, and separation on the street cars, separate waiting rooms at railroad stations, and sepatate schools, all because these things promote peace, good order, health and morality.

"In view of all this there appears to be nothing unreas-

onable in placing the restriction above set out on the use of property to the same end."

We, therefore, come to the consideration of the Constitutionality of the ordinance.

SECOND: *We submit that the ordinance in question is constitutional and valid.*

The police power is defined in 8 Cyc. 863, as "The name given to that inherent sovereignty which is the right and duty of the government or its agents to exercise whenever public policy, in a broad sense, demands for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure anything respecting such economic conditions as an advancing civilization of a higher complex character requires."

In *Louisville, etc.*, v. *Mississippi*, 133 U. S. 587, an act of the Legislature of Mississippi, requiring all railroads carrying passengers in that State to provide equal and separate accommodations for white and colored races was upheld. Mr. Justice Brewer, in delivering the opinion of the court, said:

> "So far as the first section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the State is attached a separate car for colored passengers. This may cause an extra expense to the railroad company, but no more so than State statutes requiring certain accommodations at depots. * * * All that we can consider is whether the State has the power to require the railroad trains within her limts to have separate accommodations for the two races."

In *C. & O. Ry. Co.* v. *Ky.*, 179 U. S. 388, Mr. Justice Brown delivering the opinion of the court reviewed all of the cases up to that time which had been brought to the Supreme Court, and re-affirmed the holding of that court in *Hall* v. *Decuir*, *supra*, *Louisville* v. *Miss.*, *supra*, and *Plessy* v. *Fergusson*, *supra*.

In *Berea College* v. *Ky.*, 211 U. S. 45, a legislative act of

the State of Kentucky made it unlawful for any person, corporation or association to maintain or operate any college, school or institution where persons of white and negro race are both received as pupils for instruction, and imposed a fine on any person who violated said provision. Berea College undertook to receive for instruction both white and negro children and was indicted for a violation of the statute. The defense was that the Kentucky statute was unconstitutional, and that it prohibited the right to follow a lawful pursuit, it being, as contended, an inalienable right of every citizen to do so. Mr. Justice Brewer, delivering the opinion of the court, said:

> "We need concern ourselves only with the inquiry whether the first section can be upheld as coming within the power of a State over its own corporate creatures. We are of opinion, for reasons stated, that it does come within that power, and on this ground, the judgment of the court of appeals of Kentucky is affirmed."

It was sought, when this case was before the Supreme Court of Kentucky (123 Ky. 209) to distinguish it from the separate coach law cases, and the public school cases, on the ground that in the cases of common schools and railroad carriers the State was merely preventing an enforced association by the two races, while by the statute under consideration the power was attempted to be extended to prevent their *voluntary association.* But the court refused to recognize this as a ground of distinction, saying that the thing aimed at by the legislature was not that of volition, but something deeper and more important.

The singularly striking language of O'Rear, Judge, delivering the opinion of the court, speaking on this subject, is fully quoted by Mr. Stuart Chevalier on pages 43-47 of his able brief, and need not be repeated.

It is not amiss to say in connection with this deliverance of the learned judge that if there is danger of conflict and of peril to the preservation of the purity of the race, where there is merely the brief and temporary and almost casual association in the schools and in the vehicles of public travel, how

much greater must be this same danger where the relation is the fixed and permanent and uninterruped one of immediate neighbors on the same block.

Coming now to a consideration of the cases which have passed on the validity of ordinances which segregate the races in their residences, we find that thus far there have appeared three reported cases on the subject: *State* v. *Gurry*, 121 Md. 534; S. C. 47 L. R. A. (N. S.) 1087; *Town of Ashland* v. *Coleman* and *Hopkins* v. *Richmond*, 117 Va. 692; S. C. 86 S. E. 139, and *State* v. *Darnell*, 166 N. C. 300; S. C. 81 S. E. 338.

(1) In the Gurry case was involved the validity of a residence segregation ordinance passed by the City of Baltimore. The court, after holding that it was clearly within the charter power of the City of Baltimore to pass upon such an ordinance, goes on to discuss the various objections raised to its constitutionality. In answer to the claim that it was a discrimination against the negro, the court says:

> "As we have seen, the avowed object of the ordinance is to preserve peace, prevent conflict and ill-feeling between the two races, and thereby promote the welfare of Baltimore; * * * and, whatever other objections may be urged against it, it cannot be truly said that there is any discrimination in the ordinance against the colored race. Indeed, in its practical operation it would be more burdensome on white people than on colored people, for it is well known that white people own the great bulk of property in Baltimore City, and hence, where the property of one colored person would be affected by such an ordinance, those of many more white people would be. What is denied one class is denied the other, what is allowed one class is allowed the other. There is, therefore, no such discrimination as is prohibited by the Constitution or statutes securing civil rights, and it is not necessary to discuss that question further."

Passing, then, to a consideration of the purpose sought to be accomplished by the ordinance, the court says:

"No intelligent observer in communities where there are many colored people can fail to notice that there are sometimes exhibitions of feeling between members of the two races which are likely to, and occasionally do, result in outbreaks of violence and disorder. It is not for us to say what this is attributable to; but the fact remains—however much it is to be regretted—and if a segregation of the races to such extent as may be permissible under the Constitution and laws of the land will have a tendency, not only to avoid disorder and violence, but to make a better feeling between the races, every one having the interest of the colored people as well as of the white people at heart ought to encourage rather than oppose it. Mr. Justice Brown said in *Plessy* v. *Fergusson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256: 'The object of the amendment (fourteenth) was undoubtedly to enforce the absolute equality of the two races before the law; but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either.'

"If the welfare of the city, in the minds of the Council, demanded that the two races should be thus, to this extent, separated, and thereby a cause of conflict removed, the court cannot declare their action unreasonable. It was acknowledged by the counsel for the appellee, both in the brief and in verbal argument, that for years there had been more or less friction resulting from the occupancy by colored people of houses in blocks theretofore occupied wholly by white people. With this acknowledgment, how can it be contended that the City Council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power when it enacts a law which, in their opinion, will tend to prevent the conflict? * * *

"Penalties in criminal laws are not only imposed to punish violators, but to deter the commission of crime. If, as is practically conceded in this case, the living in such close proximity produces friction that is liable to

> result in open clashes and disorder, why should not the governing body take cognizance of it, and legislate to avoid it, and thereby promote the general peace? It seems that it would be the better exercise of their discretion, for the public welfare, to discourage by removing the cause than to trust to deterring by the fear of punishment. * * *
>
> "Without giving other illustrations of the exercise of the police power, we are of the opinion that the object sought to be accomplished by this ordinance is one which properly admits of the exercise of the police power. It only remains for us to determine whether the ordinance as drawn should be sustained." (121 Md. 534).

The court in the latter part of the opinion points out that the ordinance was defective in that it wholly ignored all vested rights, which existed at the time of its passage, as it prohibited an owner of property, for instance, from living in his own house. The court, for the guidance of those who might draft a future ordinance, points out in what particulars the ordinance then before it could be improved. Immediately upon the rendition of this opinion the council of Baltimore passed another ordinance, which has now been in effect for several years and, according to recent information received by the writer, has not even been contested, but has been uniformly enforced by the police court of Baltimore.

(2.) We beg to quote further from the opinion in the case of *Hopkins* v. *Richmond*, and *Coleman* v. *Ashland*, where it was said:

"The theory on which such legislation is based cannot be better illustrated than by the liberal quotation from the case of *West Chester & P. Co.* v. *Miles*, reported in 55 Pa. 209, involving the legality of a separate law on public conveyances. 'To assert separateness is not to declare inferiority in either race. It is not to declare one a slave and the other a freeman. That would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine Providence,

human authority ought not to compel these widely separated races to intermix. The right of each to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice or caste, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts.'

"In *Munn* v. *Illinois*, 4 Otto, 113, C. J. Waite, in commenting upon the definition of police powers by C. J. Tawney in the *License cases*, to the effect that they are nothing more or less than the powers of government inherent in every sovereignty—that is to say, the power to govern men and things—said; 'Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulations become necessary for the public good.'

"In the well-considered case of *Barbier* v. *Connolly*, 113 U. S. 27, there was involved the validity of a municipal ordinance prohibiting from washing and ironing in public laundries and wash-houses within defined limits, from ten at night to six in the morning. Justice Field said on p. 31: 'The Fourteenth Amendment, in declaring that no State shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights: that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have all access to the courts of the country for the protection of their persons and property, and prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be in-

terposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be placed upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences. But neither the amendment broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one another, but they are designed, not to impose unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.

"In the execution of admitted powers necessary proceedings are often required which are cumbersome, dilatory and expensive, yet, if no discrimination against any one be made and no substantial right be impaired by them they are not obnoxious to any constitutional objection. The inconvenience arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied by the State. In the case before us,

the provision requiring certificates from the health officer and the Board of Fire Wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any sustantial right of the individual.'

"Mr. Justice Holmes goes still further in the case of *Noble State Bank* v. *Haskell*, 219 U. S. 104, and after citing *Camfield* v. *U. S.* with approval, declares on p. 111: 'It may be said in a general way that the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality and strong preponderant opinion to be greatly and immediately necessary to the public welfare.'

"In *C. B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, involving the validity of an Iowa statute imposing a liability on railway corporations for damages occasioned by negligence and providing that no contract which restricts such liability shall be legal or binding, the Supreme Court of Iowa held the statute constitutional, which decision was affirmed on appeal to the United States court. In discussing the right to make contracts, Justice Hughes said, on p. 568: 'It is subject also, in the field of State action, to the essential authority of government to maintain peace and security, and to enact laws for the promotion of the health, safety, morals and welfare of those subject to its jurisdiction.' Then, after citing numerous and various cases in which such right was denied, the distinguished jurist proceeded: 'The principle involved in these decisions is, that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review. The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether

it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.'

"It is apparent from these citations that the exercise by a State of its police power is not prohibited by anything contained in the Fourteenth Amendment so long as such exercise is reasonable and not merely arbitrary. As was well said in *Barbier* v. *Connolly*, as well as in the latter decisions: 'Though in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.'

"If the ordinance in question meets this test, it is valid, if not it is invalid. Let us then proceed to examine the ordinance and apply the test.

"It will be noted that the ordinance is expressly declared to be prospective only in its application. It deals with conditions as they should thereafter arise, and does not seek to disturb the existing occupancy of any property. If at the time of its passage, there were white and colored persons residing on the same street, they are permitted to continue such residence. By its first section it prohibits any white person from thereafter residing upon a street on which a majority of houses were then occupied by colored persons. Could anything be fairer, or more impartial, in its operation than this? It could make no difference whether an offender against the ordinance were white or colored. In either event the same penalty is prescribed for its violation. It can be truly said to operate alike on all persons and property under the same circumstances and conditions and to affect all persons similarly situated, within the sphere of its operation."

(3) The third case is that of *State* v. *Darnell*, 166 N. C. 300; S. C. 81 S. E. 338.

This case turned principally on the extent of the charter powers of the Town of Winston-Salem, N. C. The court held that there was nothing in the charter of that town to authorize the adoption of the ordinance, and for that reason held it invalid. But the court expressly refrained from passing upon the power of the State to authorize such an ordinance, saying: "Whether, if the General Assembly had passed a statute conferring on town or county commissioners the power to make such an ordinance as this, it would have been constitutional, is not now before us."

In the light of this deliverance, anything that the court said concerning the constitutionality of the law must be accepted as mere *dictum.* The court attempted to justify its conclusion that the public policy of the State of North Carolina was against the thing sought to be attained by the segregation ordinance of Winston-Salem, founding its opinion on an act of the Legislature of that State penalizing anyone who might seek to induce colored farm laborers to leave the State. In this it took a long leap. Viewed from a purely psychological standpoint, it seems to us that an enforcement of such a regulation would more likely drive the negroes from the towns than induce their going to the towns.

It is a well known fact, of which the court will take judicial notice, that the separation of the races on the railroads of the country has had a marked effect upon their conduct when traveling. The best element among them take a pride in maintaining a degree of respectability and good order in the coaches assigned to them, that they may compare favorably with the conditions in coaches assigned to the white people. It is high time, after fifty years of freedom, that the negro should stand alone in residential communities as well as in public schools and public conveyances.

The language of Mr. Justice Bradley in the Civil Rights Cases, 109 U. S. 6, is pertinent. He there said:

> "When a man has emerged from slavery, and by the aid of beneficient legislation has shaken off the inseparable concomitants of that state, there must be some

> stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected."

Coming now to a further examination of the analogous cases concerning the separation of the races, we beg to say that:

It may not be without interest to mention that the first segregation case in the United States was decided by the Supreme Court of Massachusetts. In *Roberts* v. *City of Boston*, 5 Cush. 198, decided in 1849, it was held that the school committee of Boston had the power under the Constitution and laws of the Commonwealth to make provision for the instruction of colored children in separate schools established exclusively for them and to prohibit their attendance upon other schools. Charles Sumner appeared for the negroes, and the opinion of the court was delivered by the great Chief Justice Shaw.

> "It is urged," the court said in its opinion, "that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion. This prejudice, if it exists, is not created by law and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling the colored and white children to associate together in the same schools, may well be doubted; at all events it is a fair and proper question for the committee to consider and decide upon, having in view the best interests of both classes of children placed under their superintendence. We cannot say that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and sound judgment."

It is a matter of history that the first "separate coach"

regulation was enacted in the City of Boston, and there the unrefined term "Jim Crow" originated. We simply mention these facts to show that so-called race prejudice is not by any means a fault peculiar to the South, if indeed it is a fault.

Curiously enough the case of *Hall* v. *Decuir*, 95 U. S. 485, 508, arose as to the legality of an act passed by the Legislature of the State of Louisiana during the "Reconstruction period," which statute as construed by the State court, sought to take away from the owner of a steam-boat operating beyond the limits of the State of Louisiana, the right while within the limits of the State of Louisiana, to separate white persons from colored ones on his steam-boat. In this case the court construed the Civil Rights Act passed by Congress for the purpose of the enforcement of the Fourteenth Amendment to the Constitution. Concerning the force and effect of that act and of that amendment, Mr. Justice Clifford uses the following language:

> "Colored persons, it is admitted, are citizens, and that citizens, without distinction of race or color or previous condition of servitude, have the same right to make and enforce contracts, to sue, be parties and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of personal property, as is enjoyed by white citizens. 14 Stat. 27. States are also forbidden to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Enforcement Act, 16 id. 140; Fourteenth Amendment to the Constitution.
>
> "Vague reference is made to the Civil Rights Act and to the preceding amendment to the Constitution, as if that act of the said amendment may supersede the operation and legal effect of the coasting license as applied to the case before the court; but it is clear that

neither of those provisions, nor both combined, were intended to accomplish any such purpose. Enough appears in the language employed in those provisions to show that their principal object was to confer citizenship, and the rights which belong to citizens as such, upon the colored people, and in that manner to abrogate the rule previously adopted by this court in the Dred Scott Case."

(4.) But possibly the most important and the best discussion of the general subject under consideration is the case of *Plessy* v. *Fergusson*, 163 U. S. 537, in which there is a full review of the rights of the negro under the Thirteenth and Fourteenth Amendments, with respect to laws which seek to segregate him from the whites, and which simply recognize those social barriers which nature itself has long ago erected between the white and colored races. The Supreme Court, speaking by Mr. Justice Brown, says:

> "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, or even requiring their separation in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State Legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which have been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced. * * *
>
> "So far, then, as a conflict with the 14th Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regula-

tion, and with respect to this there must necessarily be a large discretion on the part of the legislators. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances, is unreasonable or more obnoxious to the 14th Amendment than the Acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of the State legislatures.

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the State Legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet on terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People* v. *Gallaher*, 93 N. Y. 438, 448, 'this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are de-

signed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it is organized, and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other, civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

The court also in the opinion answers the fanciful argument which is probably advanced whenever a regulation of this sort is proposed, that if the negroes can be made to accept separate accommodations, tnen the State might require people whose hair is of a different color, or who are aliens or who belong to certain religions, to be separated in the same manner; or to require the whites and negroes to paint their houses or places of business a certain color, etc. But police regulations must stand or fall on the ground of their own innate reasonableness and necessity, and not on the ground of some possibly freak legislation of the future, which an illogical mind may deem justified by the precedent which they establish. And so we find the Supreme Court, answering such objections in the following language, citing the case of *Yick Wo* v. *Hopkins*, to which counsel ordinarily appeal for comfort:

"The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. Thus in *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held by this court that a municipal ordinance of the City of San Francisco to regulate the carrying on of public laundries within the

> limits of the municipality violated the provisions of the Constitution of the United States if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race."

Certainly in the case at bar it cannot be said, in the light of ordinary human experience, that this ordinance is not reasonable in the purpose which it aims to accomplish, or that it was not enacted in good faith for the promotion of the public good, or that it was enacted for the annoyance of a particular class; on the contrary it is clear that the ordinance has in view as much the good of the negro as the good of the white, for each alike is benefited by any law which seeks to perpetuate or preserve the good feeling between the races, and the prevention of friction or conflict.

It will be kept in mind that the ordinance under consideration provides essentially equal advantages for each class and treats each class, white and colored, in precisely the same way in every detail of its provisions; what is forbidden to one class is forbidden to the other. Granting this, it is logically impossible to say that the law is discriminatory on its face or in fact. Is it then enacted in good faith for the public good? The Legislature is to be allowed a large discretion in the matter.

In *Childs* v. *C. & O. Ry. Co.*, 218 U. S. 71, 77, Mr. Justice McKenna, delivering the opinion of the court, uses the following language in reference to the case of *Plessy* v. *Fergusson*, *supra*:

> "Mr. Justice Brown reviewed prior cases and not only sustained the law, but justified as reasonable the distinction between the races on account of which the statute was passed and enforced. It is true, the power

of a Legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, and it was declared to be, "the established usages, customs and traditions of the people," and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate *cannot be said to be said to be unreasonable.*" Citing the case of *C. & O. Ry. Co.* v. *Ky.*, 179 U. S. 388.

The court in this case, evidently tiring of the persistency on the part of the members of the negro race in bringing similar questions to that court, in conclusion uses this language:

> "The extent of the difference, based upon the distinction between the white and colored races *which may be observed in legislation* or in the regulations of carriers has been discussed so much that we are relieved from further enlargement upon it."

(5.) Statutes intended to prevent miscegenation constitute another class of legislation which has been vigorously assaulted as discriminatory against the negro race.

Concerning such laws, it is laid down in 27 Cyc., at p. 799, as follows:

> "State laws against miscegenation do not discriminate against non-Caucasian races, but are equally prohibitive against the white races, and therefore are not in conflict with the Federal Constitution, and the 14th and 15th Amendments thereto, or with the State Constitution and laws, abolishing slavery and conferring upon the negro race equal rights and privileges with other races. The making of race or color an element of an offense is nowhere prohibited." Citing many cases,

among them a Virginia case, *ex parte Kinney*, 3 Hughes 9.

In *Pace* v. *Alabama*, 106 U. S. 583, it was held that a statute of Alabama which prohibited a white person and negro from living with each other in adultery or fornication is not in conflict with the Constitution of the United States, although it prescribes penalties more severe than those to which the parties would be subject were they of the same race and color.

We come now to the discussion of the question how far, in the exercise of the police power, can a legislative act disturb vested rights, or injure private property without compensation.

It is a mistake to suppose that the fundamental principle involved in the exercise of the police power has been of late enlarged. There has been no enlargement. *Its application only has been made more comprehensive.*

Mr. Justice Holmes, then of the Supreme Judicial Court of Massachusetts, speaking on this subject, said:

> "It may be said that the difference is only one of degree; most differences are when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the Legislature to exercise police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain." (*Rideout* v. *Knox*, 148 Mass. 368).

What this learned judge said in *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, is an affirmation of what he said in the case of *Rideout* v. *Knox*, *supra.* The language is as follows:

> "All rights tend to declare themselves absolute to their logical extreme. Yet all, in fact, are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and

which become strong enough to hold their own when a certain point is reached. The limits set to property by other public interests present themselves as a branch of what is called the police power of the State. The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points along the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. * * * It constantly is necessary to reconcile and adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others."

In another recent opinion the same jurist observes:

"And yet again the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Traditions and the habits of a community count for more than logic." (*Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358).

In the year 1830 Chief Justice Marshall uses the following language:

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself. It is granted by all for the benefit of all. It resides in government as a part of itself, and need not be reserved when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments.

> The interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security where there is no express contract, against unjust and excessive taxation as well as against unwise legislation generally." (*Providence Bank* v. *Billings*, 4 Peters, 514, 563).

Another one of the earlier cases is *Commonwealth* v. *Alger*, 7 Cushing 53, 84-86 (decided in 1851). In this case it appeared that by an ordinance of the legislative body of the Colony of Massachusetts the proprietors of uplands bounded on the sea had an estate in fee in the adjoining flats above low water-mark, and within 100 rods of the upland, with full power to erect wharves and other buildings thereon, subject to reasonable use by other individual proprietors and the public for purposes of navigation. Subsequently the Legislature of the State of Massachusetts passed an act to establish lines in the harbor of Boston beyond which no wharf should be erected, extended or maintained, and to declare any wharf extended or maintained beyond such lines to be a public nuisance. It was insisted that the statute last mentioned, having provided no compensation for the proprietors of the land abutting on the water, was unconstitutional as taking property and appropriating it to public use without compensation, in violation of the declaration of rights under Article X, and that it impaired the obligation of the grant made by the Colony Ordinances and thus transgressed the Constitution of the United States against passing laws impairing the obligation of contracts. The Supreme Judicial Court of Massachusetts overruled these contentions and held the statute constitutional.

Shaw, Chief Justice, in an opinion among the ablest ever delivered from any bench, used the following language:

> "The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common and unobstructed use thereof for the citizens of the Commonwealth and all other persons for navigation with ships, boats and vessels of all kinds, as a common and public right. If this can be

done, without an unwarrantable encroachment on the rights of private property, it is an object of great importance, and one in which the holders of riparian rights, as well as all other holders of real estate, and the whole community, have a deep and abiding interest.

"We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated; that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this Commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those several regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.

"This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the Constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the Commonwealth, and of the subjects of the same."

* * * * * * *

"Nor does the prohibition of such noxious use of property, a prohibition imposed because such use would be injurious to the public, although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. If the owner of a vacant lot in the midst of a city could erect thereon a great wooden building, and cover it with shingles, he might obtain a larger profit of his land than if obliged to build of stone or brick, with a slated roof. If the owner of a warehouse in a cluster of other buildings could store quantities of gunpowder in it for himself and others, he might be saved the great expense of transportation. If a landlord could let his building for a small-pox hospital, or a slaughter-house, he might obtain an increased rent. But he is restrained; not because the public have occasion to make the like use, or to make any use of the property, or to take any benefit or profit to themselves from it; but because it would be a noxious use, contrary to the maxim *sic utere tuo, ut alienum non laedas.* It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain. The distinction, we think, is manifest in principle, although the facts and circumstances of different cases are so various, that it is often difficult to decide whether a particular exercise of legislation is properly attributable to the one or the other of these two acknowledged powers."

Another decision which ranks as a land-mark in determining the limits of the police power is the case of *Health Department* v. *Rector*, 145 N. Y. 32, 42-43; S. C. 27 L. R. A., 710.

The statute there called in question as unconstitutional was a requirement that improvements and alterations should be made in existing houses at the owners' expense so that houses in the City of New York should be furnished with water facilities on each floor occupied or intended to be occupied by one or more families. Peckham, Judge, said:

"We may own our property absolutely and yet it is subject to the proper exercise of the police power. We have surrendered to that extent our right to its unrestricted use. It must be so used as not improperly to cause harm to our neighbor, including in that description the public generally. There are sometimes necessary expenses which inevitably grow out of the use to which we may put our property and which we must incur, either voluntarily or else under the direction of the legislature, in order that the general health, safety or welfare may be conserved. The legislature in the exercise of this power may direct that certain improvements shall be made in existing houses at the owners' expense, so that the health and safety of the occupants and of the public through them may be guarded. These exactions must be regarded as legal so long as they bear equally upon all members of the same class and their cost does not exceed what may be termed one of the conditions upon which individual property is held. It must not be an unreasonable exaction, either with reference to its nature or its cost. Within this reasonable restriction the power of the State may, by police regulations, so direct the use and enjoyment of the property of the citizen that it shall not prove pernicious to his neighbors or to the public generally."

* * * * * * *

"Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria*, or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure. (1 Dillon on Mun. Corp. [4th ed.], sec. 141 and note 2; *Com.* v. *Alger*, 7 Cush. 83, 84, 86; *Baker* v. *City of Boston*, 12 Pick. 184, 193; *Clark* v.

Mayor of Syracuse, 13 Barb. 32, 36.) The State, or its agent in enforcing its mandate, takes no property of the citizen when it simply directs the making of these improvements. As a result thereof, the individual is put to some expense in complying with the law by paying mechanics or other laborers to do that which the law enjoins upon the owner, but so long as the amount exacted is limited as stated, the property of the citizen has not been taken in any constitutional sense without due process of law."

In *Welch* v. *Swasey*, 214 U. S. 91, the following language was used:

"It might well be supposed that taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion. This court is not familiar with the actual facts, but it may be that, in this limited commercial area, the high buildings are generally of fire proof construction; that the fire engines are more numerous and much closer together than in the residential portion, and that an unlimited supply of salt water can be more readily introduced from the harbor into the pipes, and that few women and children are found there in the day time, and very few people sleep there at night. And there may, in the residential part, be more wooden buildings, the fire apparatus may be more widely scattered, and so situated that it would be more difficult to obtain the necessary amount of water, as the residence quarters are more remote from the water front, and that many women and children spend the day in that section, and the opinion is not strained that an undiscovered fire at night might cause great loss of life in a very high apartment house in that district. These are matters which, it must be presumed, were known by the legislature, and whether or not such were the facts was a question, among others, for the legislature to determine. They are asserted as facts in the brief of the counsel for the City of Boston. If they are, it would seem that ample justification is

therein found for the passage of the statutes, and that the plaintiff in error is not entitled to compensation for the reasonable interference with his property rights by the statutes. That, in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them."

The case almost universally referred to when the question of the legality of the execution of the police power is under discussion, is the Slaughter-House cases, 16 Wall. 36. One reason for this, no doubt, is the great ability of the jurist who delivered the opinion of the court in the case, as well as the great ability of the counsel who participated in the argument. Mr. Justice Miller, in delivering the opinion of the court, cut deep into the contention of the able counsel who maintained the unconstitutionality of the Louisiana statute, when he said:

"The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the States, however it may *now* be questioned in some of its details."

and on the same page (62),

"This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another eminent judge (*Commonwealth* v. *Alger*, 7 Cush. 84), 'to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general com-

fort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned."

Denying that the result of the Civil War had deprived the States of the Union of their right to exercise the police power, at page 82 the great judge says:

"But, however pervading this sentiment, and however it may have contributed to the adoption of the amendments we have been considering, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights—the rights of person and of property—was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States and to confer additional power on that of the nation."

In *Soon Hing* v. *Crowley*, 113 U. S. 703, the court, speaking of discriminatory provisions in statutes, said:

"The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

And again at page 710 it is said:

"The principal objection, however, of the petitioner to the ordinance in question is founded upon the supposed hostile motives of the supervisors in passing it.

The petition alleges that it was adopted owing to a feeling of antipathy and hatred prevailing in the city and county of San Francisco against the subjects of the Emperor of China resident therein, and for the purpose of compelling those engaged in the laundry business to abandon their lawful vocation and residence there, and not for any sanitary, police, or other legitimate purpose. There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordi nance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate anly against the class mentioned; and of this there is no pretense."

The foregoing language is especially applicable for underlying the several contentions of the plaintiffs in error and between the lines there may be read that the ordinance in question is aimed at the negro race, although they are unable to point to a single sentence of its provisions which in the least justifies that supposition.

In the case of *Susie Brown* v. *J. H. Bell Co.*, 146 Iowa 89, S. C. 27 L. R. A. (N. S.) 407, a merchant leased spaces

in a pure food show for demonstration purposes, at which he permitted patrons of the show to sample their wares, and who is in no way interested in the management of the show, or the profits therein, does not, in refusing to serve negroes at a booth, violate the statute entitling all persons to full and equal enjoyment of the privileges of inns, etc. Deemer, J., speaking of race discrimination, uses the following language:

> "It is true that plaintiff was invited with white people to the food show, but there was no guaranty that she would be treated alike by the concessioners who had souvenirs to give away, or who were advertising their goods for future trade purposes. It rested solely with defendants as to whom they would serve, and the courts should not undertake to control such matters. The action is not for defamation, but is planted squarely on the civil rights act; and if there be no ground of recovery thereunder, plaintiff's action must fail. There can be no doubt that plaintiff was humiliated, but it was one of those social humiliations which the law does not undertake to protect. It is such as is likely to befall any race or any kind or condition of men. Our social distinctions are arbitrary and sometimes extremely exasperating, but the law has no remedy for them."

In the case of *Northern P. R. Co.* v. *Duluth*, 208 U. S. 583, 595-7, the court said:

> "There can be no question as to the attitude of this court upon this question, as it has been uniformly held that the right to exercise the police power is a continuing one; that it cannot be contracted away, and that a requirement that a company or individual comply with reasonable police regulations without compensation is the legitimate exercise of the power, and not in violation of the constitutional inhibition against the impairment of the obligations of contracts."

In *New York, etc., Co.* v. *Bristol*, 151 U. S. 556, 567, Chief Justice Fuller said:

> "It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts, of the deprivation of property without due process, or of the equal protection of the laws by the State are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury.
>
> *Boston Beer Co.* v. *Mass.*, 97 U. S. 25;
> *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659;
> *Barbier* v. *Connolly*, 113 U. S. 27;
> *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg Co.*, 115 U. S. 650;
> *Mugler* v. *Kansas*, 123 U. S. 623;
> *Budd* v. *New York*, 143 U. S. 517."

This language was approved in *Northern Pac. Ry. Co.* v. *Duluth*, 208 U. S. 583, 596, 597, where it was pertinently added by Mr. Justice Day:

> "The same principles were recognized and the previous cases cited in *Chicago, B. & W. R. Co.* v. *Illinois*, 200 U. S. 561; 50 L. Ed. 596; 26 Sup. Ct. Rev. 341; and again in *Union Bridge Co.* v. *United States*, 204 U. S. 364; 51 L. Ed. 523; 27 Sup. Ct. Rep. 367. The result of these cases is to establish the doctrine of this court to be that the exercise of the police power in the interest of public health and safety is to be maintained unhampered by contracts in private interests, and that uncompensated obedience to laws passed in its exercise is not violative

of property rights protected by the Federal Constitution."

In *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, 22, Mr. Justice Shiras said:

> "The right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the State, and its inhabitants, the police power of the State may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters." Citing *Atchison, T. & S. F. R. Co.* v. *Mathews*, 174 U. S. 96.

In *Bacon* v. *Walker*, 204 U. S. 311, 317, the court, speaking through Mr. Justice McKenna, and referring to the case of *Chicago, etc.*, v. *Illinois*, 200 U. S. 561-592, said:

> "In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said, embraces regulations designed to promote *the public convenience or general prosperity*, as well as regulations designed to promote the public health, the public morals or the public safety."

And in the case cited by the learned justice, at page 584, it was said:

> "We refer also, as having direct application here, to some of the cases familiar to the profession, that, recognize the possession by each State of the power, never surrendered to the Government of the Union, of guarding and promoting the public interests by reasonable police regulations that do not violate the Constitution of the State or the Constitution of the United States."

In the recent case of *Engel* v. *O'Malley*, 219 U. S. 128, 136, Mr. Justice Holmes says:

"The case cited establishes that the State may regulate that business, and may take strong measures to render it secure. It also establishes that the plaintiff has no such constitutional right to carry it on at will, as to raise him above State laws not manifestly unfit to accomplish the supposed end, greatly in excess of the need, or arbitrary and capricious in discrimination * * * Whether the court thinks them wise or not, such laws are within the scope of the discretion which belongs to legislatures, and which it is usual for them to exert. This appeal seems to have been taken upon the notion that the plaintiff had a business which, under the 14th Amendment, the State could not touch. But although cut off from that broad proposition, his counsel presents other more specific objections to the act with earnestness and force."

And in *Noble State Bank* v. *Haskell*, 219 U. S. 104, 111, Mr. Justice Holmes uses language which strikingly states the general principle involved here. He said:

"It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S. 518, 42 L. Ed. 269, 17 Sup. Ct. Rep. 864. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. One of those conditions at the present time is the possibility of payment by checks drawn against bank deposits. To such an extent do checks replace currency in daily business. If, then, the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it."

And in the case of *Mutual Loan Co.* v. *Martell*, 222 U. S., Mr. Justice McKenna says:

> "There must, indeed, be a certain freedom of contract, and, as there cannot be a precise verbal expression of the limitations of it, arguments against any particular limitation may have plausible strength, and yet many legal restrictions have been and must be put upon such freedom in adapting human laws to human conduct and necessities. A too precise reasoning should not be exercised, and before this court may interfere there must be a clear case of abuse of power. See *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 55 L. Ed. 328, 31 Sup. Ct. Rep. 259, where the right of contract and its limitation by the legislature are fully discussed."

In *Crowley* v. *Christensen*, 137 U. S. 86, Mr. Justice Field, in commencing his opinion says at page 89:

> "It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is, then, liberty regulated by law. The right to acquire, enjoy and dispose of property is declared in the Constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property. What contracts respecting its acquisition and disposition shall be valid and what void

or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non laedas*, is a maxim of universal application."

In *Lawton* v. *Steele*, 152 U. S. 133, 139, 141-3, Mr. Justice Brown, delivering the opinion of the court, said:

"The main and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the protection of fisheries, is to be treated as a public nuisance, 'and may be abated and summarily destroyed by any person, and it shall be the duty of each and every protector aforesaid and every game constable to seize, remove, and forthwith destroy the same.' The legislature, however, undoubtedly possessed the power not only to prohibit fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. If the nets were being used in a manner detrimental to the interests of the public, we think it was within the power of the legislature to declare them to be nuisances, and to authorize the officers of the State to abate them.

* * * * * * *

"Examples of this are vessels illegally registered or owned, or employed in smuggling or other illegal traffic; distilleries or breweries illegally carried on or operated, and buildings standing upon or near the boundary line between the United States and another country, and used as depots for smuggling goods. In all these cases, however, the forfeiture was decreed by judicial

proceeding. But where the property is of little value, and its use for the illegal purpose is clear, the legislature may declare it to be a nuisance, and subject to summary abatement. Instances of this are the power to kill diseased cattle; to pull down houses in the path of conflagrations; the destruction of decayed fruit or fish or unwholesome meats, or infected clothing, obscene books or pictures, or instruments which can only be used for illegal purposes. While the legislature has no right arbitrarily to declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interest, it may exercise a large liberty of choice in the means employed."

* * * * * * *

"If the property were of great value, as, for instance, if it were a vessel employed for smuggling or other illegal purposes, it would be putting a dangerous power in the hands of a customs officer to permit him to sell or destroy it as a public nuisance, and the owner would have good reason to complain of such act, as depriving him of his property without due process of law. But where the property is of trifling value, and its destruction is necessary to effect the object of a certain statute, we think it is within the power of the legislature to order its summary abatement."

* * * * * * *

"The value of the nets in question was but $15 apiece. The cost of condemning one, (and the use of one is as illegal as the use of a dozen) by judicial proceedings, would largely exceed the value of the net, and doubtless the State would, in many cases, be deterred from executing the law by the expense. They could only be removed from the water with difficulty, and were liable to injury in the process of removal. The object of the law is undoubtedly a beneficient one, and the

State ought not to be hampered in its enforcement by the application of constitutional provisions which are intended for the protection of substantial rights of property. It is evident that the efficacy of this statute would be very seriously impaired by requiring every net illegally used to be carefully taken from the water, carried before a court or magistrate, notice of the seizure to be given by publication, and regular judicial proceedings to be instituted for its condemnation.

* * * * * * *

"It is said however, that the nets are not in themselves a nuisance, but are perfectly lawful acts of manufacture, and are ordinarily used for a lawful purpose. This is, however, by no means a conclusive answer. Many articles, such, for instance, as cards, dice, and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases fall within the ban of the law and may be summarily destroyed. It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use since it may be as readily used for a lawful purpose (*Ely* v. *Supervisors*, 36 N. Y. 297), but where minor articles of personal property are devoted to such use the fact that they may be used for a lawful purpose would not deprive the legislature of the power to destroy them. The power of the legislature to declare that which is perfectly innocent in itself to be unlawful is beyond question (*People* v. *West*, 106 N. Y. 293), and in such case the legislature may annex to the prohibited act all the incidents of a criminal offense, including the destruction of property denounced by it as a public nuisance."

In *McLean* v. *Arkansas*, 211 U. S. 539, 545, Mr. Justice Day uses the following language:

"That the Constitution of the United States, in the

14th Amendment thereof, protects the right to make contracts for the sale of labor, and the right to carry on trade or business, against hostile State legislation, has been affirmed in decisions of this court, and we have no disposition to question those cases in which the right has been upheld and maintained against such legislation. (Citing cases.) But, in many cases in this court, the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the State, enacted for the protection of the public health, safety or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract. It would extend this opinion beyond reasonable limits to make reference to all the cases in this court in which qualifications of the right of freedom of contract have been applied and enforced.

* * * * * * *

"It is, then, the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health and welfare of the people."

* * * * * * *

"The legislature, being familiar with local conditions, is, primarily the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power."

The latest case on this subject in the Supreme Court of the United States, which we beg to cite, is the case of *Mo. P.*

Ry. Co. v. *City of Omaha*, 235 U. S. 121, where Mr. Justice Day, delivering the opinion of the court, said:

> "This is done in the exercise of the police power and the means to be employed to promote the public safety are primarily, in the judgment of the legislative branch of the government, to whose authority such matters are committed, and so long as the means have a substantial relation to the purpose to be accomplished, and there is no arbitrary interference with private rights, the courts cannot interfere with the exercise of the power by enjoining regulations made in the interest of public safety which the legislature has duly enacted." (Citing many cases.)

* * * * * * *

> "The Constitution of the United States requiring that no State shall deprive any person of life, liberty or property without due process of law, has not undertaken to equalize all the unequalities which may result from the exercise of recognized State authority. In the exercise of the police power, it may happen, as it often does, that inequality results which the law is powerless to redress. It is only in those clear and unmistakable cases of abuse of legislative authority that the court is authorized, under section of the Federal Constitution, to enjoin the exercise of legislative power."

Coming now to a consideration of the briefs filed in this case by the learned counsel for the plaintiff in error we beg to submit the following:

1. Concerning the able argument made in the brief signed by Honorable Moorfield Storey, it is to be said that it is addressed to the issue involved, rather than "to conjecture concerning other legislation of this character," which it is feared might follow should the legislation assailed be upheld. (*Berea College* v. *Kentucky*, 123 Ky. 209). In this brief it is practically admitted that there is no dis-

crimination between the races so far as the text of the ordinance shows. Reliance is placed solely upon the deduction that "it is obvious that the purposes intended were different from those set out" therein.

With all deference to the learned counsel, who we believe is a practitioner and presumably a resident in the City of Boston, Massachusetts, we hardly think that his contention that the general tendency of the ordinance is to stir up conflict and ill-feeling between the races, can be upheld in view of the declared purpose that it was enacted "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." Sincere, no doubt though his belief be, yet it cannot outweigh the judgment of the Council of the City of Louisville and the uncontradicted evidence of three witnesses who testified on this subject, found on pages 67-91 of the Record.

The case which the learned attorney cites as sustaining the propriety of such a course is *Bailey* v. *Alabama*, 219 U. S. 219. That case turned entirely upon the constitutionality of a statute of Alabama which the court held to be violative of the 13th Amendment of the Constitution of the United States and the statutes passed in pursuance thereof. That Amendment is in the following language:

> "Sec. 1. Neither slavery nor involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.
>
> "Sec. 2. Congress shall have power to enforce this Article by appropriate legislation."

In the exercise of the power conferred on Congress it enacted Sections 1990 and 5526 of the Revised Statutes of the United States 1901.

The legislature of Alabama undertook by statute to prescribe certain rules of evidence in cases where suits were brought for the enforcment of labor contracts, which might result in holding the laborer bound not in damages but to perform labor in pursuance of the terms of the contract. The

court held that a statute of that nature would result in "peonage" and was therefore invalid under said Amendment to the Federal Constitution and the statutes passed in pursuance thereof. The analogy between that case and this, if any, is so remote as to be negligible, indeed in the concluding opinion of Mr. Justice Hughes he expressly declined to consider the contentions made by counsel as to the unconstitutional--ity of the statute of Alabama under the Fourteenth Amendment of the Constitution.

This learned attorney frankly admits that there is nothing upon the face of the ordinance which violates the letter of the 14th Amendment, saying: "The ordinance was manifestly drawn with great ingenuity with a view to placing the negro citizens of Louisville in as inferior a position as possible with respect to their right of residence and directly violating the *spirit* of the Fourteenth Amendment without transgressing the letter," concluding his argument with this sentence: "This court, it is apprehended, cannot shut its eyes to these obvious facts, but must recognize in the ordinance a palpable attempt to destroy those fundamental rights which The Amendment guarntees." What facts, may we ask? Surely none which the record discloses. If none which the record discloses then resort must be had to those of which the court will take judicial notice, that is from the experience or observation of this Honorable Court it must be able to be said that the legislative department of the City of Louisville was actuated by prejudice and acted in blind disregard of the real social and economic conditions of their city, by declaring that no such conditions existed which could justify the declarations made in the ordinance, though sustained by uncontroverted evidence found in the record. Can the court so declare? If judicial notice is to control then we beg later on to bring to the attention of the court social and economic conditions in the City of Richmond where the negro population, according to the census of 1910, constitutes 36 per cent of the whole population, whereas in the City of Louisville they constitute only 18 per cent. (See Brief of Defendant in Error, p. 109).

2. In common with counsel assailing police regulations

as discriminatory and therefore void, the learned counsel quotes and relies upon *Yick Wo* v. *Hopkins*, 118 U. S. 356.

This case furnishes possibly the best illustration of the maxim that "hard cases make bad law." Concerning which phrase Mr. Bouvier says it describes a condition growing out of the necessity "to meet a case of hardship to a party not entirely consonant with the true principles of law." So the court, under the stress of the situation shown in the record may have made use of expressions, which taken apart from the circumstances surrounding the particular case, have been misconstrued and misapplied by many of the State courts, *although this Honorable Court, speaking through Mr. Justice Mathews, delivering the opinion of the court, took pains to guard against such a misapprehension*, and though subsequently this court has several times called attention to the real ground upon which the *Yick Wo* case rested, notably was this done in the case of *Gundling* v. *Chicago*, 177 U. S. 183, 186, where Mr. Justice Peckham uses the following language:

> "The case principally relied upon by the plaintiff in error is that of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. Ed. 220, relating to the regulation of laundries in the city of San Francisco. The ordinance in question in that case was held to be illegal and in violation of the Fourteenth Amendment, because, with reference to the subject upon which it touched, it conferred upon the municipal authorities arbitrary power, at their will and without regard to discretion in the legal sense of the term, to give or withhold consent as to persons or places carrying on a laundry without reference to the competency of the person applying or the propriety of the place selected. *It was also held that there was a clear and intentional discrimination made against the Chinese in the operation of the ordinance, which discrimination was founded upon the difference of race, and was wholly arbitrary and unjust.* It appeared that both petitioners, who were engaged in the laundry business, were Chinese, and had complied with every requisite deemed by the law, or by the public officers charged with its administration, necessary for the protection of the neighboring property from

fire, or as a protection against injury to the public health, and yet the supervisors, for no reason other than discrimination against the Chinese, refused to grant the licenses to the petitioners and to some 200 other Chinese subjects, while granting them to eighty people who were not such subjects and were working under precisely the same conditions. Such an ordinance, so executed, was held void by this court."

* * * * * * *

"The ordinance in question here does not grant to the mayor arbitrary power such as is described in the above mentioned laundry case, but the provision is similar to that mentioned in the foregoing extract from the opinion in that case. In the case at bar, the license is to be issued if the mayor is satisfied that the person applying is of good character and reputation and a suitable person to be intrusted with the sale of cigarettes, provided such applicant will file a bond as stated in the ordinance, as a security that he will faithfully observe and obey the laws of the State and the ordinances of the city with reference to cigarettes. The mayor is bound to grant a license to every person fulfilling these conditions, and thus the fact of fitness is submitted to the judgment of the officer, and it calls for the exercise of a discretion of a judical nature by him. There is no proof nor charge in the record that there has been any discrimination against individuals applying for a license or any abuse of discretion on the part of the mayor."

To show that Mr. Justice Peckham rightly construed the operation and effect of the *Yick Wo* case, we quote from Mr. Justice Mathews in delivering the opinion of the court in that case at page 373:

"In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal

and unjust discrimination. For the cases present the ordinance in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."

In the case under consideration in its practical application in the City of Louisville, there was not one scintilla of evidence to show or even tending to show any unjust discrimination against either white people or negroes. On the contrary in the case of *Hopkins* v. *City of Richmond*, 117 Va. 692, it will be seen that there were two cases brought before the court in the City of Richmond for violating its ordinance, one case against Mary Hopkins, who was a negro, and the other case against Amedo Toni; a white person. (See p. 697 of the opinion of the court.)

3. The quotation made by Hon. Clayton B. Blakey in his brief for the plaintiff in error from John Stuart Mill is unfortunate for his side of this controversy. He quotes him as saying:

> "As soon as any part of a person's conduct affects prejudicially the interest of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion." (p. 11)

Here the great philospher but recognizes the universally accepted maxim of the Common Law, *sic utere tuo ut alienum non laedas*, which has been frequently stated to be

the basal principle upon which the exercise of the police power rests.

4. The brief of this learned counsel bristles with such expressions as these:

> "The General Council which enacted this ordinance was actuated by a desire to serve the majority, viz: *the white voters who had elected it to office.*" (p. 12)
>
> "The negro has prospered equally with the white man and is equally desirous to remove to a better residence section, but he is totally deprived of this opportunity. *Every community open to him is of a character identical with that from which he wishes to remove.*" (p. 17)
>
> "The court knows and it is a matter of common knowledge, *that the negroes of all Southern cities are confined to the undesirable sections of the City.*" (p. 18.)
>
> "A negro who was fortunate enough to own a home in a good neighborhood may use his utmost endeavor to instill into his children right principles and shield them from contaminating influences, but before their maturity he dies and *the Law drives his widow and children back to the red light district where every vestige of early training is wiped out through the degrading influences there predominating.*" (p. 24)

He adopts as his own the deliverance of Dr. William Pickens, who said:

> "To ask the negro to accept this *ghetto* and do these things for himself would be a capital joke, if it were not so serious a matter." (p. 27)
>
> "The negro suddenly found himself projected into man's estate. The authority of his parent master was removed. He ran riot with sudden excess of freedom. He took no thought of the morrow. *All manner of bestial excesses were indulged in, bringing the race so low in the strata of society that it was only fit to be*

herded in those quarters of the city where the scum and offscouring of the land plied their nefarious callings. But by sure degrees came a change. The negro, growing more accustomed to man's estate, and naturally imitative, sprouted an ambition to pattern after the white man—the man full-grown, dignified and responsible. As a necessary part of this ambition *there sprang up in his soul a desire to escape from the slums and give his children the advantages of environment which had been denied to him.*" (42)

"At this stage of his development he is met with a law, passed by the white man who caused his degraduation, *which drives him to the slums to escape from which the good that is in him has struggled for generations.*" (p. 43)

"*If the negro is made a pariah he will assume the pariah's disqualifications.*" (p. 43)

"The law that represses ambition and self-respect in a large mass of people, insisting upon permanent inferiority, is a terrible law, with possibilities in it to do terrible harm." (p. 43)

"*All that a man has will he give for right relations with his mates*, all that he has will he give for an erect demeanor in every company and on every occasion." (p. 43)

As a fitting climax to this line of bold assertions the following concluding sentence is found:

"For the sake of the good that is in him, he should be made to feel the possibility of *final fellowship*, *not thrown contemptuously back upon himself*, segregated as a contamination, obliged to slink and creep, his legitimate longing to acquit himself in all men's sight as a man forever annihilated." (p. 44)

(The foregoing italics under this head are ours.)

This and other *ex cathedra* deliverances appear to us more likely to impress a jury than to weigh with this Honorable Court, and therefore we think, with all respect be it said, deserve to be dismissed as inept rather than to be an-

swered. Yet, inasmuch as the Richmond ordinance must stand or fall by the decision in this case we feel justified by the facts in saying that the enforcement of the Richmond ordinance which became effective in April, 1911, has not had the dire effect which the learned counsel claims will follow the enforcement of such legislation, but on the contrary, has had the effect of stimulating civic pride and developing economic activity among our already happy and prosperous negro citizens. Statistics will tell the tale more impressively than words. Of a negro school population of 11,842, there are enrolled in the public schools 9,911 pupils, out of a total enrollment in the city (white and colored) of 30,909. The difference in the percentage of negro enrollments is less than one per cent. in favor of the whites, thus showing a laudable interest on the part of negro parents in the education of their children. The court is asked to believe in one of the romantic deliverances of the counsel that all this deep interest in educatio on the part of parents is developed in "*Ghettos*" and in "*red light districts*, where every vestige of early training is wiped out through the degrading influences there predominating."

The total number of public schools maintained in the City is 43, of which 14 are devoted exclusively to negroes, and the aggregate value of school property set apart and used exclusively for negro children is $346, 170. 80, and the last annual appropriation for the maintenance of negro schools in the City of Richmond was $129,405.86.

There are in the City of Richmond 52 negro church buildings of the aggregate assessed value of $289,455, the cost of which was largely if not exclusively raised and contributed by negroes themselves, with approximately 31,250 communicants, who are held in the brief of counsel as *necessarily* "thriftless and debased" because segregated from the whites. Over these churches highly respectable, consecrated and educated ministers of the Gospel preside; one of whom more than two years ago (before prohibition became egective in this State) led a large majority of his race in a great movement which resulted in closing four-fifths (20) of the saloons located in the negro section and taught a lesson worthy to be followed by the other race.

While the negro population of the City in 1910 was 47,222, the estimated population in the year 1916, made by the United States Census Bureau, is placed at 54,840, an increase approximately of 16 per cent. Greater by far than the average increase in the population of the whole country. Thus we have proof conclusive that no such result has come to pass since the adoption and enforcement of the segregation ordinance as charged would result by the learned counsel, where he says that such enforcement will totally deprive him (the negro) of his opportunity to "improve his condition and that of his home and family," and compel him "to seek homes among their own people; that is, side by side with the vicious and depraved."

The tax books will show that negroes in 1916 owned real estate of the assessed value of $2,817,741, and personal property to the value of $501,695, aggregating $3,319,436, on which they pay State and City taxes to the amount of $58,008.85; whereas as above stated there was appropriated for the annual support of the schools devoted exclusively to colored people the sum of $129,405.86. These statistics are brought forward with no desire in the least to humiliate, but to show that on the part of the white population there is not only no intent to retard the development of the negro race nor lack of sympathy with their struggle to better their condition, but a genuine altruistic spirit to help in the uplift of the race.

Indicative of the prosperity of the negro population of this City we beg to say that there are two large and flourishing Banks located in the City, conducted entirely by negroes, the stock of which is owned largely if not exclusively by that race, and we submit below copies of the last financial report required by law to be made by every Bank and Banking Institution in the State annually.

STATEMENT

Of the financial condition of St. Lukes Penny Saving Bank located at Richmond, in the county of Henrico, State of Virginia, at the close of business, December 27, 1916, made to the State Corporation Commission.

RESOURCES.

Loans and discounts	$105,086 64
Overdrafts, secured, $————; unsecured, $————	23 27
Bonds, securities, etc., owned, including premium on same	20 00
Banking house and lot	42,514 64
Other real estate owned	10,487 94
Furniture and fixtures	6,294 54
Exchanges and checks for next day's clearings	3,522 06
Due from National Banks	41,357 56
Paper currency	6,510 00
Fractional paper currency, nickels and cents	1,150 30
Gold coin	752 50
Silver coin	2,510 25
Total	$220,229 70

LIABILITIES.

Capital stock paid in	$ 50,000 00
Surplus fund	5,000 00
Und'vided profits, less amount paid for interest, expenses and taxes	2,727 23
Dividends unpaid	204 60
Individual deposits, including savings deposits	160,488 87
Certified checks	534 24
Cashier's chocks outstanding	57 61
Reserved for accrued interest on deposits	984 28
Reserved for accrued taxes	232 87
Total	$220,229 70

STATEMENT

Of the financial condition of Merchants Savings Bank, located at Richmond, in the county of Henrico, State of Virginia, at the close of business December 27, 1916, made to the State Corporation Commission.

RESOURCES.

Loans and discounts	$120,815 12
Overdrafts, secured, $————; unsecured, $————	2,254 16
Bonds, securities, etc, owned, including premium on same	1,630 00
Banking house and lot	41,053 99
Other real estate owned	47,345 75
Furniture and fixtures	4,848 75
Exchanges and checks for next day's clearings	721 76
Other cash items	465 14
Due from National Banks	4,422 47
Due from State Banks, Private Bankers, and Trust Companies	1,000 00
Paper currency	22,123 00
Fractional paper currency, nickels and cents	270 60
Gold coin	5,773 50
Silver coin	760 75
Total	$253,484 99

LIABILITIES.

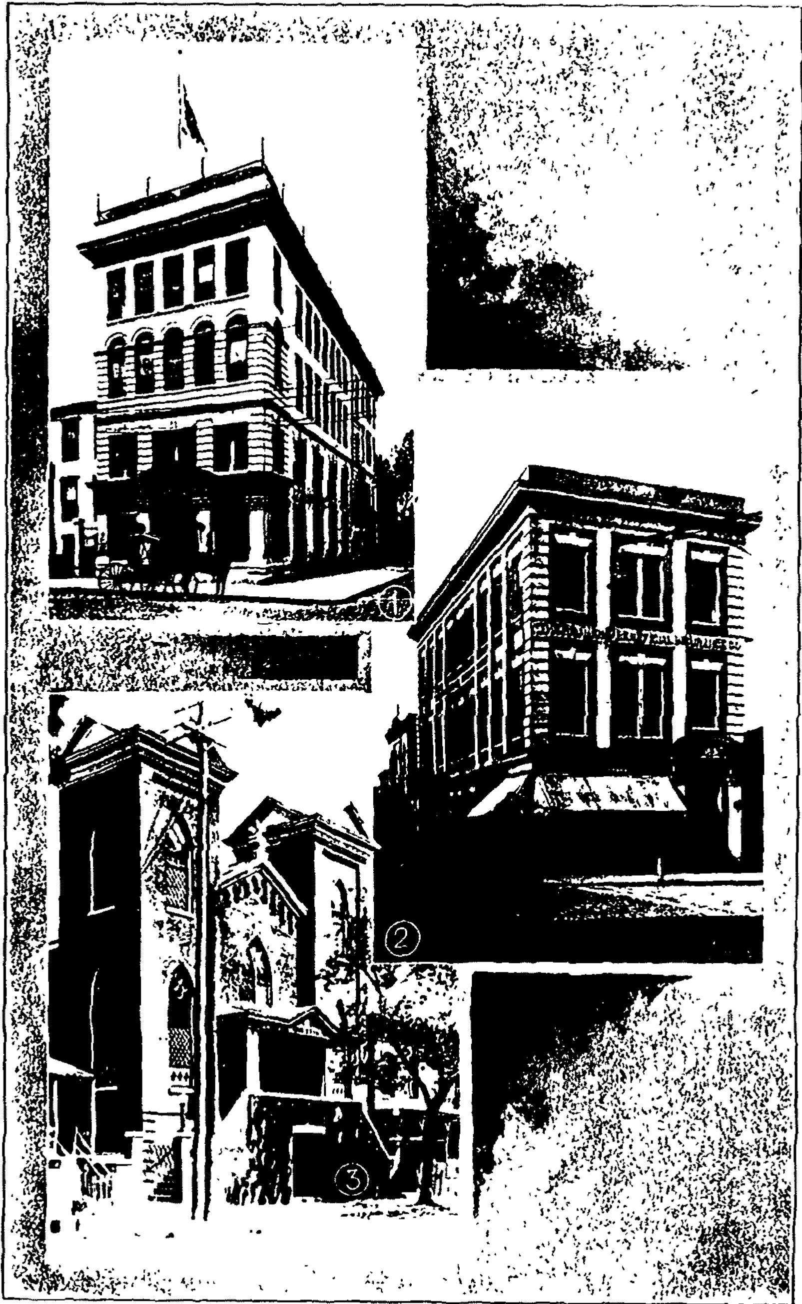
Capital stock paid in	$ 33,810 0)
Undivided profits, less amount paid for interest, expenses and taxes	55 24
Dividends unpaid	455 60
Individual deposits, including savings deposits	194,086 63
Time certificates of deposit	1,000 00
Certified checks	234 75
Cashier's checks outstanding	222 38
Bills payable, including certificates of deposit representing money borrowed	20,000 00
All other items of liability, viz.:	
Unearned discount	3,620 39
Total	$253,484 99

In further refutation of the charge of the wretched condition of the average negro section of the Southern cities, we beg to submit the following photographs of business and domiciliary conditions in the negro sections of the City of Richmond:

(1) First and Leigh Streets, Looking East

(2) Hartshorn Memorial College

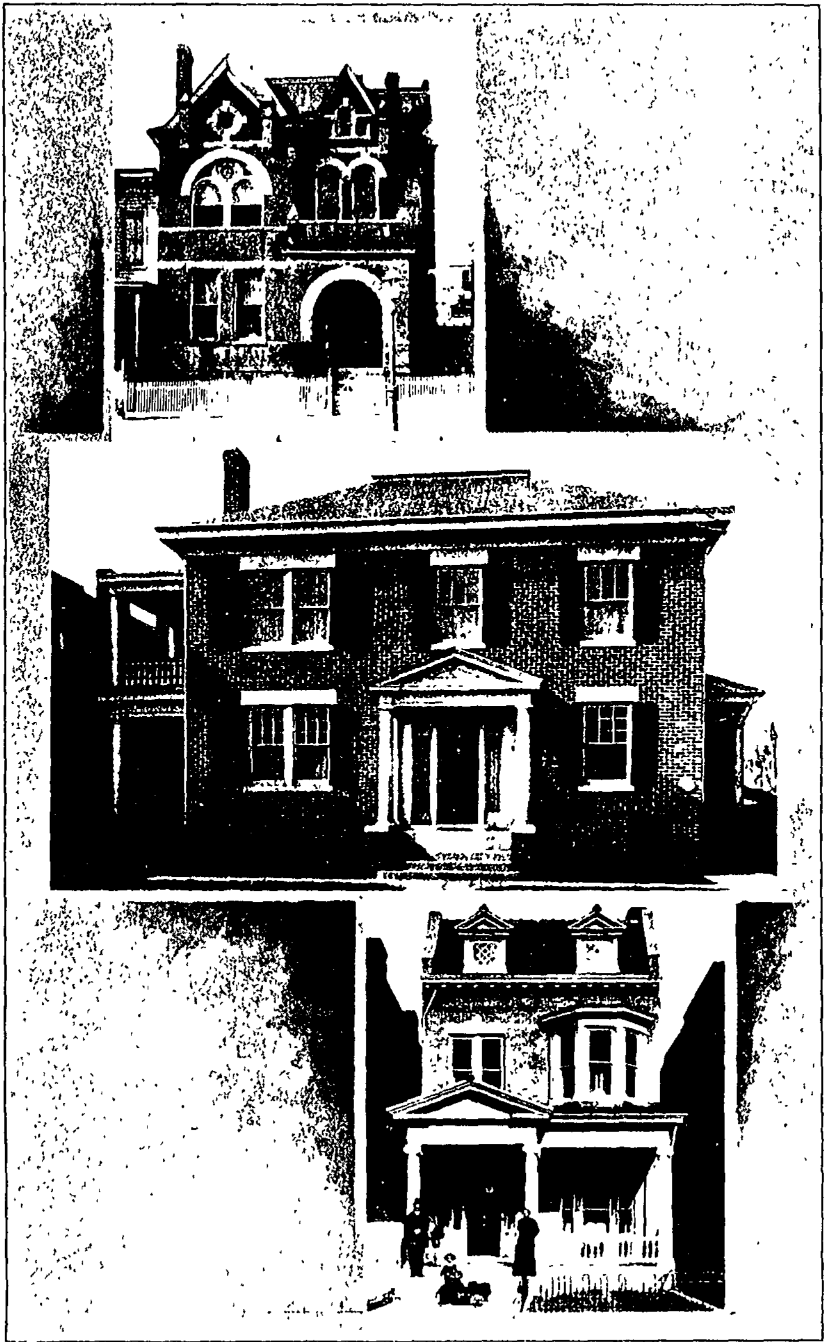
(3) West Leigh Street, between St. James and Adams



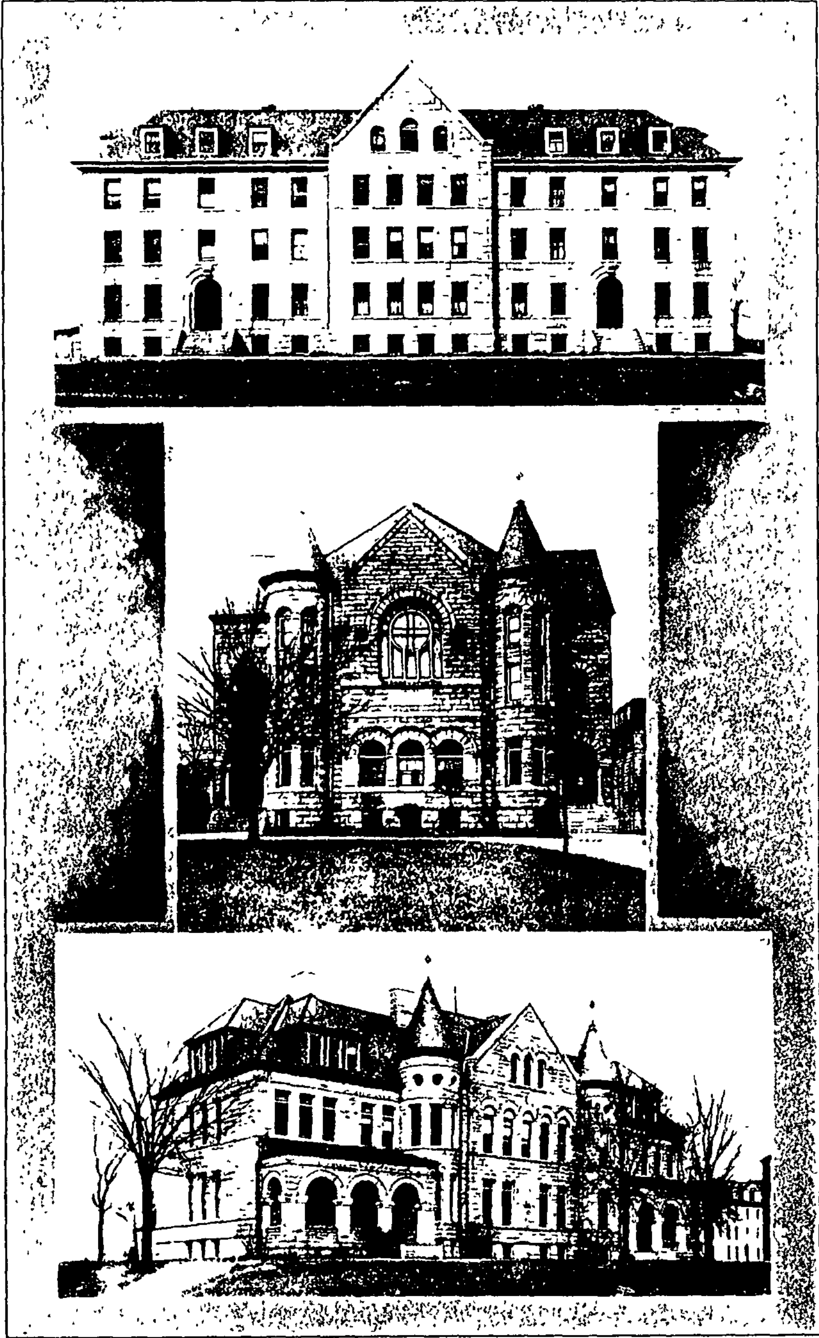
(1) Mechanics Savings Bank

(2) The Richmond Beneficial Insurance Co.

(3) Church



Residences in the Negro Section



Group of Buildings Virginia Union University

These views will show to the court that many negroes, though confined to the negro section, are living in handsome and well appointed homes and surrounded with all the comforts that adhere to people of more than moderate means.

We beg to submit that on reason and authority the following propositions have been established.

First: That the enactment of the ordinance in question was the exercising of the police power resident in the City of Louisville.

Second: That its object was to promote the peace, good order, morals and general welfare of the community.

Third: That the separation of the races in places where they are likely to come in contact has been held by the Supreme Court of the United States to be a reasonable exercise of the police power in cases where separation had been prescribed by law or by regulation in the case of common carriers.

Fourth: That no question can arise under the Fourteenth Amendment of the Constitution of the United States as to the abridgment of the privileges or immunities of the citizens of the United States, for the reason that the use of property by its owner is one of the fundamental rights and privileges which are held by the owner as a privilege or right under the State government as a citizen of the State in contra distinction to the rights and privileges held by that citizen as a citizen of the United States.

Fifth: That a valid exercise of the police power does not involve and cannot be held to be, a deprivation of property without due process of law.

Lastly: We submit that from the very language of the ordinance itself no possible question can arise under the Fourteenth Amendment with regard to the denial of the equal protection of the laws, for the ordinance expressly and in terms denies to the white race what it denies to the black race, and permits to the black race what it permits to the white race.

We beg to bring to the attention of the court in further refutation of the insinuation, if not the direct charge made by one Dr. Pickens, who assumes "to present the negro view

of the segregation question," found on page 27 of the brief of learned counsel, and presumably approved by the learned counsel, where he says:

> "And why does the negro oppose legal segregation? Because a generation of experience has taught him the meaning of successful segregation; a general absence of improvements in the negro sections—sometimes no pavements, no lights, no sewers, and no police protection against brothels and saloons. The negro section is equally taxed; they must pay taxes on all City improvements and bonded indebtedness. If he (the negro) could live on any street anywhere this discrimination would be impossible."

A communication addressed to us by the City Engineer of the City of Richmond, giving official information as to the various improvements constructed by the City within the limits of old Jackson Ward '(that is Old Jackson Ward means the negro section of this City as hereinbefore stated), is as follows:

February 2, 1917.

Honorable H. R. Pollard,
City Attorney,

Dear Sir:

In reply to your letter of the 29th ulto, requesting information as to the amount of improvements of various kinds constructed by the City within the limits of "Old Jackson Ward," I hereby submit a list of improvements as requested and as obtained from the maps of record in this office:

Granite Spall Paving, 28020 lin. ft. ....5.31 miles
Granite Curb, 97740 lin. ft. ....18.51 miles
Granite Spall Gutters 36150 lin. ft. ....6.85 miles
Brick Sidewalk, 85320 lin. ft. ....16.16 miles
Gravel Roadbed, 41160 lin. ft. ....7.85 miles
Sewers, 18650 lin. ft. ....15.46 miles

Yours very truly,
(Signed) CHAS. E. BOLLING,
City Engineer.

From the last January issue of The Crisis, a periodical published monthly by the National Association for the Advancement of the Colored People, at 70 Fifth Avenue, New York City, in support of our contention as to the financial and social conditions of the negro population in Richmond, we beg to quote the following language found on page 126:

"A most striking feature of Richmond is the large number of apparently prosperous beneficial societies. Among these may be found the St. Luke, the True Reformers, the Richmond Beneficial, the American Beneficial, the Southern Aid, Inc., and several others of like prominence which present interesting examples of Negro thrift and business ability. The Southern Aid Society alone owns $200.000 worth of real estate and government bonds, and about $50,000 worth of first mortgages on improved city real estate. The St. Luke Order operates in twenty-four States with a financial membership of 41,200 and assets of $114,000. In August, 1917, this organization will celebrate its fiftieth anniversary.

Richmond is noted for its large and prosperous Negro churches. Ten of these churches have memberships of over two thousand each. Of the fifty odd churches, all except seven are Baptists.

Richmond's voice of public sentiment is edited through four weeklies: The St. Luke Herald, the Richmond Planet, the Reformer, and the Progressive Citizen.

There is no city, probably, in the whole country that does as much Negro business as Richmond. There are two prosperous Be-Busy banks: The St. Luke's Penny Savings Bank, and the Mechanics' Savings Bank. Each does a business of over two hundred thousand dollars per year, and the last two named are members of the American Bankers' Association.

The leading educational institution in Richmond is Virginia Union University, which is also one of the leading colleges of the country. It is under the control of the Baptists. It employs twenty teachers and has enrolled sixty-one college students and 264 students in other departments. Its annual income is about $24,000."

In the same issue the following are given as the occupations of the negroes in the City of Richmond:

Agents, insurance, 54.
Artists, 4.
Automobile repairers, 4.
Bakers, 18.
Butlers, 178.
Bookkeepers, 18.
Bellmen, 53.
Butchers, 47.
Bricklayers, 28.
Bicycle dealer and repairer, 1.
Barbers, 85.
Blacksmiths and wheelwrights, 10.
Bootblacks, 5.
Caterers, 2.
Colleges, 3.
Cooks, 782.
Coopers, 28.
Contractors and builders, 16.
Carpenters, 101.
Clerks, 126.
Chauffeurs, 128.
Coachmen, 101.
Dressmakers, 48.
Drivers, 720.
Domestic service, 1,905.
Dentists, 4.
Dry goods and notion business, 3.
Druggists, 6.
Dyers and cleaners, 86.
Fish, game and oyster dealers, 16.
Funeral directors and embalmers, 16.
Engineers, 5.
Elevators operators, 43.
Foremen, 74.
Hairdressers, 23.
Horseshoers, 6.
Hucksters, 9.
Ice cream manufacturer, 1.
Insurance companies, 7.
Janitors, 168.
Janitresses, 12.
Junk dealers, 2.
Laborers, 4,339.
Linesmen, 8.
Livery, boarding and sales stables, 2.
Laundresses, 734.
Lathers, 10.
Manicurists, 3.
Mail carriers, 72.
Machinists, 6.
Maids, 310.
Midwives, 5.
Music teachers, vocal and instrumental, 12.
Nurses, 99.
Newspapers and periodicals, 5.
Notaries, 13.
Orderlies, 32.
Paperhangers, 8.
Painters, 25.
Pavers, 5.
Peddlers, 6.
Photographers, 2.
Physicians, 30.
Porters, 841.
Plasterers, 126.
Plumbers, gas and steam fitters, 3.
Postoffice clerks, 7.
Poultry dealers, 3.
Publisher, 1.
Printers, 3.
Real estate agents and dealers, 6.
Seamstresses, 25.

Shoemakers and repairers, 60. Upholsterers, 5.
Sextons, 14. Waiters, 282.
Stenographers, 8. Watchmen, 20.
Teamsters and expressmen, 23. Waitresses, 23.
Tailors, 6.

It is to be borne in mind that this periodicial is devoted largely to the exploitation of a propoganda, the object of which is the abolition of the present segregation laws of all sorts and the prevention of the extension of the same in any direction, and especially domiciliary segregation. Its attitude in this particular abundantly appears from the issue from which the foregoing quotations are taken.

The foregoing facts and figures afford, we submit, the best possiblé refutation of the exaggerated statements made in the brief of learned counsel concering the "inhumanity" of whites towards negroes and of their deplorable condition superinduced by such action.

In *State* v. *Darnell*, supra, the court undertook to criticize the policy of the segregation ordinance under discussion in direct violation, we submit, of the well recognized principle that the courts are not concerned with whether the policy or effect of a statute is wise. See *Commonwealth* v. *Henry*, 110 Va. 879; *Patrick* v. *Commonwealth*, 115 Va. 933, and *C. B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 569, where it was said:

> "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative consideration in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.
>
> "The principle was thus stated in *McLean* v. *Arkansas*, supra, pp. 547, 548: 'The legislature being familiar with the local conditions, is, primarily, the judge of the

necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. (Citing cases.)

* * * If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

We submit that the judgment of the Court of Appeals of the State of Kentucky should be reaffirmed.

H. R. POLLARD
City Attorney.
For the City of Richmond.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 33

CHARLES H. BUCHANAN, *Plaintiff,*

—vs.—

WILLIAM WARLEY, *Defendant.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

BRIEF AMICUS CURIAE ON BEHALF OF THE PLAINTIFF IN ERROR

ALFRED E. COHEN,
of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1916

NO. 231

CHARLES H. BUCHANAN, Plaintiff in Error,

vs.

WILLIAM WARLEY, Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

Motion to Allow Alfred E. Cohen, a citizen of the City of Richmond, Virginia, to file a brief *Amicus Curiae* on behalf of the Plaintiff in Error.

Comes now Alfred E. Cohen, a citizen of the City of Richmond Va., in his proper person and moves this Honorable Court to allow him to file a brief *amicus curiae* on behalf of the plaintiff in error.

Of Counsel for plaintiff, in case of *Hopkins v. City of Richmond*, (117 .Va. 692.)

In the Supreme Court of the United States

OCTOBER TERM, 1916

NO. 231

CHARLES H. BUCHANAN, Plaintiff in Error,

vs.

WILLIAM WARLEY, Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

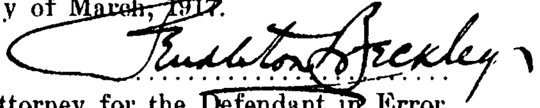
NOTICE.

To Pendleton Beckley, City Attorney for the City of Louisville, Ky., Attorney for the Defendant in Error, and Clayton B. Blakey and Moorfield Storey, Attorneys for the Plaintiff in Error.

You are hereby notified that Alfred E. Cohen, a citizen of the City of Richmond, Virginia, will on the twenty-third day of March, 1917, move the Supreme Court of the United States, on that day, or as soon thereafter as he can be heard, for leave to file a brief *amicus curiae* in behalf of the plaintiff in error, which brief is hereto attached.

Of Counsel for plaintiff, in case of *Hopkins v. City of Richmond*, (117 Va. 692.)

Service of the foregoing notice of motion, with the said motion and the brief therein referred to, is hereby acknowledged this 21st day of March, 1917.



Attorney for the Defendant in Error.

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Attorneys for the Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1916

NO. 231

CHARLES H. BUCHANAN, Plaintiff in Error,

vs.

WILLIAM WARLEY, Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

BRIEF AMICUS CURIAE ON BEHALF OF THE PLAINTIFF IN ERROR.

There is no substantial difference between the ordinance of the City of Louisville and that of the City of Richmond, segregating the races in their residences.

As we understand the contentions of the learned counsel for defendant in error they are that the ordinance segregating the races in their residence, was adopted as a result of racial antagonism which endangered the peace and good order of the community; that the values of property were depreciated, because of mixed races in residential blocks; that the ordinance is reasonable in its terms; that it is constitutional, and lastly, ameliorates the housing conditions of both races.

We beg to submit for the plaintiff in error the propositions following in reply, viz:

First: The ordinance is unreasonable in its operation and this is apparent upon its *face*.

Second: The ordinance is unconstitutional and void, and

Third: The housing conditions of the colored race were better before than since segregation.

THE CASE ARGUED.

First: The ordinance is unreasonable in its operation and this is apparent on its *face*.

The learned Attorney for the City of Richmond, Va., says quoting the language of the case of *Hopkins* v. *Richmond*, 117 Va. Rep. 692, in which he appeared as counsel for the City of Richmond and in which we appeared of counsel for the plaintiff in error, that

> "The central idea of the ordinance under consideration seems very manifest. It is to prevent the TOO CLOSE association of the races, which association results, or tends to result in breaches of the peace, immorality and danger of health."
> (Hon. H. R. Pollard's Brief p. 12.)

If in both the letter and spirit of the terms of the ordinance and its operation within such letter and spirit it was actually calculated to, and did prevent the *too close* association of the races in their residences, the legislative intent might speak for itself without the declaratory preamble of the Virginia Legislature that "the preservation of the public morals, public health and public order in the Cities and Towns of this State is endangered by the residence of white and colored people in CLOSE PROXIMITY to one another. (Virginia) Acts 1912 p. 330." (Hon. H. R. Pollard's Brief p. 13.)

Although the Virginia Constitution requires the enactment to have a title, the facts are, however, as it appears to us, that not only was the Legislature not justified in the fear above expressed, but the Legislature actually had no such real fear, for it has, *within the very terms of the ordinance*, made provision for the *close association* of an EQUAL num-

ber of white and colored householders at the same time on the same block.

(Hon. H. R. Pollard's Brief pp. 13-17-18.)

Upon the question of reasonableness of a law, courts do not run a race of opinion with the legislative discretion; but due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution is not secured if the citizen is subjected to an *arbitrary* exercise of the powers of government.

Giozza v. *Turman*, 148 U. S. 675.

TERMS OF THE ORDINANCE.

By the terms and letter of the ordinance, the *close association* of the races in their residences is not prohibited, nor are the white and negro citizens prevented thereby from living in close proximity, for the reason that the ordinance has not made it unlawful for an EQUAL NUMBER of each race to so dwell, but has only made it unlawful for them.

> "To occupy as a residence * *any house upon any street or alley between adjacent streets on which a *greater number of houses are occupied as residences*" by the other race (Ordinance clauses 1 and 2; Brief Hon. Moorfield Storey pp. 2, 3, 4.)

In other words, it appears to us that the legislature really had no fear of breaches of the peace, immorality, injury to health and other disastrous results to humanity, depicted by its defenders, from too close association of five white householders and five negro householders on the same block; or from the accretion of the eleventh householder, white or colored, on the same block, thus delimiting the same; or from a block occupied by mixed races; as the ordinance has not been, and cannot be construed to prevent the living in close proximity on the same block of an equal number of each race; but, the whole biting force of the law is directed arbitrarily as we claim, against the twelfth householder intending to occupy the same block for domiciliary purposes; it is not directed against the six other white and five colored, or five other white and six colored householders who preceded the

twelth one. We respectfully submit that the vice of the ordinance therefore lies in that *what is permitted to one individual of the same race is denied to another.*

SPIRIT OF ORDINANCE.

The spirit of the ordinance can be ascertained in no more accurate or satisfactory method than by discovering the way in which its advocates calculated it to act, and the way in which it *actually does act.* They desired to have set apart separate residential districts for the more opulent of the white race, and they employed the most ingenious method ever devised within the history of this government to baffle judicial detection of the fact that they were violating that clause of the Fourteenth Amendment which provides that "No State shall deny to any person within its jurisdiction the equal protection of the laws," by first classifying the races for the purpose of making it appear that it acted upon all equally who were brought within the sphere of its operation, so that they might argue "*What is denied one class is denied the other, what is allowed one class is allowed the other*" as the court said in *State* v. *Gurry* 121 Md. 534 (Hon. H. R. Pollard's Brief p. 18); and then proceeding to *delegate* to the more numerous of the two races—the white race—the power, in the natural movement and shifting of citizens in their homes, to *make law*, or carve residential districts, for both races.

The ratio of the white to the colored population before and since the enactment of these segregation ordinances has been about 2 to 1 in favor of the white race. For the year 1916 Hill's City Directory of Richmond, Virginia, gives the white population as 99,294 and that of the colored as 57,393.

The preponderance in number of the white population over that of the colored has been the important factor in producing, and has produced the unlawful result.

In other words the object of the ordinance is, and its necessary operation has been, to set apart certain exclusive residential districts for the more opulent members of the white race, and another different district for all members of the colored race, by employing the numerical preponderance

of the white race, while shifting the location of their residences at intervals, to carve residential districts for *both* races.

(See Brief Hon. Clayton B. Blakey, pp. 15 to 22.)

"A class of citizens cannot be limited in their residences to a certain district."

In *re Lee Sing* 43 *Fed.*, 353; *Yick Wo* v. *Hopkins*, 118 U. S. 356.

Separate districts could not have been lawfully set apart to each race in the first instance; for all agree that as a class citizens must not be denied the equal protection of the laws, or deprived of their life, liberty and property without due process of law, so the ingenious method of pitting the numerical preponderance of the white against the colored race was fixed upon and thus is brought about indirectly what could not have been done in the first instance.

(See Brief Hon. Clayton B. Blakey, pp. 18 to 22, inclusive)

> "The Courts are not bound by mere form, nor are they to be misled by mere pretenses; they are at liberty, indeed are under the solemn duty to look *at the substance of things* whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute *purporting* to have been enacted to protect the public health, the public morals or public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by fundamental law, it is the duty of the Courts to so adjudge and thereby give effect to the Constitution."

Mugler v. *Kansas*, 123 U. S., 623; *Toledo*, *W.* & *W. Ry. Co.* v. *Jacksonville*, 67 Ill. 37; In re Jacobs 98 N. Y. 98.

"The test of the validity of a statute is not what has been done but what may be done under its provisions."

City of Richmond v. *Model Steam Laundry*, 111 Va. 758.

By clauses 1 and 2 of the ordinance, from the moment it became operative, all squares were definitely segregated as white and colored residence districts as effectually as if they

had been surveyed, platted and colored on the City map. But the City Council, contemplating and realizing that the individual, in an urban population changes his domicile at intervals, these two clauses cause such shifting movement to operate as a resurveying, re-platting and re-coloring of the City blocks by both races, white and colored, *without any rule of law* while this is taking place to protect the race of lesser numerical weight; as a result of which, while the whole body politic unite in the movement, the carving is done according to the will and power of the white race which preponderates; and therefore the colored race is at their mercy.

And for the failure of the law to overcome this inequality while both races are in action, the colored race, as a race, is thereby denied the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States.

Of course, upon a block which either before or after this shifting there are an unequal number of either race inhabiting it, none but those of the predominating race on that square may enter; but when the square is depopulated and there is but one house-holder living in it, or the races are equally mixed on the block, then *the movement*, as indicated above, is the controlling and compelling force, and not *the law*.

> "A general limitation on the exercise of the police power is found in the idea of reasonableness; that is, to be valid, a statute must be reasonable and enacted in good faith; for every merely arbitrary and capricious fiat of the legislature is out of place in a government of *laws* and not of *men* and is irreconcilable with the conception of due process of law." (Italics ours.)
> *McGhee on Due process*, p. 306.

As the white race out-numbers the colored race about *two to one* in southern urban population, the method adopted for the segregation of the races in the ordinance is further obnoxious as a delegation to the white citizens of the power to set apart separate residential districts, and thereby make law for the negro citizens.

As to the power of the legislature to delegate to the

people administrative and judicial functions in the exercise of the police power, there is great conflict in the authorities.

Freund on Police Power, Secs. 641, 643, 644.

> "The whole difficulty seems to have arisen from confounding the distinction between the exercise of legislative power in framing and enacting laws or a statute which is to become a law; and the exercise of another altogether different and foreign, but subordinate power in producing the event or result upon which such enactment is to take effect as law.
>
> *Johnson* v. *Rich*, 9 Barb. (N. Y.) p. 683, 684.

Therefore, ministerial and judicial functions, which appoint a day, bring about an event, certain or uncertain, arrange a classification or division and provide for similiar objects, may be delegated.

Ex parte Bassett, 90 *Va.* 681;
McCrowell v. *Bristol*, 89 *Va.* 663;
Ould & Carrington v. *Richmond*, 64. *Va.* 464.

But in all of the above instances of a delegation of authority to the whole people, there is no such inequality as we find in the ordinance in question, by which a portion of the populace may deprive a citizen of a fundamental right by virtue of a preponderating numerical power existing in one race.

This Honorable Court, in the case of *Eubank* v. *City of Richmond*, 226 U. S., 139, declared an ordinance void where "part of the property owners, fronting on the block, determine the extent of the use that other owners may make of their lots." While this Honorable Court in that case pronounced the ordinance unconstitutional and void as unreasonable and oppressive under the Fourteenth Amendment, it was also void for the reason that it delegated to some of the property owners the right to make *law* for the residue of the owners on the block.

It is complained by the learned attorney for the City of Richmond that "The principal objection, however, of the petitioner is founded upon the supposed hostile motives of

the supervisors passing it" in the language of the Court in *Soon Hing* v. *Crowley*, 113 U. S. 703, and he further says quoting "and the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the *face* of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation."

(Hon. H. R. Pollard's Brief, p. 42.)

We most respectfully submit that both upon the *face* of the ordinance in question and as disclosed by necessary, natural inferences from its operation, it is clearly an oppressive and unduly harsh race discriminatory measure, violating the Fourteenth Amendment providing for due process of law and the equal protection of the law, and enacted as a result of negroes moving into better quarters called "white sections of the City" by the learned attorney for the City of Richmond, by which, as he says" the value of properties were depreciated, thus entailing serious losses on property owners."

(Hon. H. R. Pollard's Brief, p. 7-8.)

If proof were wanting, this unfortunate admission of his supplies the motive, but he excuses his own frankness by arguing *ad hominem* on page 27 of his brief, "that so called race prejudice is not by any means a fault peculiar to the South, if indeed it is a fault."

As has been said by the learned attorney for the City of Richmond in the case of *Hopkins* v. *Richmond*, 117 Va. 692, Mary Hopkins was a negress and Amedo Toni a white man; in that case Judge Keith, President of that Court dissented but failed to file his reasons therefor in writing; yet the real motive for the segregating of the races in their residences was overlooked by the residue of the Court, *i. e.* the preservation from depreciation in certain portions of the city of the value of land intended for occupancy by the more opulent of the white race.

This method of segregating the races in their residences is different from that adopted to segregate the races in public conveyances, and in the school-rooms, in that in the latter

case the separation of the races was made directly by the law, and not indirectly by the dominant race *making the law*, as in the former.

Laws which make direct provision for limited separation of the races while travelling, have received the approval of this Honorable Court where the accommodations furnished have been seemingly equal and there has been no discrimination. And such were the laws passed upon in the cases of *Plessy* v. *Fergusson*, 163 U. S. 537; *Berea College* v. *Kentucky*, 211 U. S. 45; *Hall* v. *Decuir*, 95 U. S. 485, and kindred cases; and, not only was the separation not made in those instances in as vast a degree as in the ordinance in question, but the regulations were fastened upon *corporations* which were creatures of the several States and subject to visitation and control by the legislature.

Munn v. *Ill.* 94 U. S. 113.

This Honorable Court has said bearing out our contention, and as quoted by the learned City Attorney, Hon. H. R. Pollard, in his brief page 17, from the case of *Berea College* v. *Ky.* 211 U. S. 45:

> "We need concern ourselves only with the inquiry whether the first section can be upheld as coming within the power of a State over its own corporate creatures. We are of opinion, for reasons stated that it does come within that power, and on this ground, the judgment of the Court of Appeals of Kentucky is affirmed."

But here in the ordinance before this Honorable Court it is attempted to fasten the regulation upon the property of an individual in such manner as to deprive him of a fundamental right belonging to the ownership thereof, and in such a vast degree as to make the foregoing cases inapplicable for the purposes of illustrating the reasonableness of the ordinance; for within the confines of his curtlage and the four walls of his castle, be it a palace or hovel, the citizen is already segregated from his neighbors in as great a degree, if not vaster than is the traveller in the separate public conveyance and the scholar in the separate school-room.

If the separation in the ordinance provided for were against the domiciliary occupancy of the same house, or roof, by the races, there would be some analogy between the principles governing intermarriage of the races and their separation while traveling, but the segregation sought to be effected by the ordinance is more radical, brought about in a different manner and in a partial and *unfair way.*

If this Honorable Court will take judicial notice of the history of Virginia it will be found such an ordinance as the one in question could not have been passed with as much facility before as after the Constitution of Virginia of 1902, since which time the colored man neglected politics and failed to qualify for the electorate. The interest of the colored man in politics gradually waned until in the year 1911 when the first ordinance of this character, so it is said, was framed in the City of Richmond, Va. and they then ceased to have any voice at all in the council. As a result of this the Richmond Council was enabled to pass legislation affecting the right of the negro citizen without his dissenting vote, and thus bring about, under the guise of law, what would otherwise have been a conspiracy punishable under the Civil Rights Acts of Congress, if encompassed by individuals.

> "A conspiracy between two or more persons to prevent negro citizens from exercising the right to lease and cultivate land, because they are negroes, is a conspiracy to deprive them of a right secured to them by the Constitution and laws of the United States within the meaning of Rev. St. U. S. Sec. 5508 (U. S. Comp. St. 1901 3712)."
>
> *United States* v. *Morris, et al.*, 125 Fed. 322.

Second: THE ORDINANCE IS UNCONSTITUTIONAL AND VOID.

We hardly think it can be successfuly controverted that the home is the basis of many civil and political rights exercised by the citizen, and, if his will be circumscribed in the selection thereof, we strike at the manhood of the races.

In the Roman law we find, in the days of Justinian, that

the right to live in one's own house, or rent it to another, was respected as a *particular right.*

> "A habitation, whether given by testament, or constituted by other means, seems neither a use nor usufruct, but rather a particular right. And for public utility and in conformity to the opinion of Marcellus we have decideu that he who has a habitation may not only live in it, but let it to another."
> Cooper's Justinian Liber II Title V *De habitatione.*

At common-law it was held that "a law for the total restraint of one's right will be void, as if a man be debarred the use of his land." R. Sav., p. 74.

With the legislative policy the Courts have no concern when not arbitrary and cannot run a race of opinion with the legislative discretion.

"But the policy of the government as expressed in its Constitution should control."
Hannah v. *People*, 198 Ill. 77.

> "We must not forget that a Constitution is the measure of the rights delegated by the people to their governmental agents and not the rights of the people. The implied restraints of the Constitution upon legislative power may be as effectual for its condemnation as is the written words, * *"
> *Rathbone* v. *Wirth*, 150 N. Y. 459.

The policy of the State of Virginia as contained in the Bill of Rights in its Constitution is to guarantee to every citizen the right "of life and liberty, with the means of acquiring and possessing property * *."
Art. I. Sec. 1, Virginia Constitution.

> "The police power is not above the Constitution, State or Federal, and must be exercised in subordination thereto as far as it imposes restraints."
> *Lacey* v. *Palmer*, 93 Va. 159.

> "The police power is the most essential of powers, at times the most insistent, and always one of the least limitable of powers of the government, but necessarily it has its limits and must stop when it encounters the prohibitions of the Constitution. A clash will not, however, be lightly inferred."
> *Eubank v. City of Richmond*, 226 U. S. 137.

As the right of "POSSESSING PROPERTY" is guaranteed to the citizen in the Bill of Rights of the Virginia Constitution. there we find an express limitation upon the exercise of the police power by the legislature to accomplish its destruction, unless the property itself, or the use to which it is put, and not the OWNER or USER has become hurtful. '(See Brief Hon. Moorfield Storey, pp. 25, 26, 27, 28.)

> "Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer."
> *Wynehamer v. People*, 13 N. Y. 392.

Therefore, when the conduct of the individual citizen is inimical to the peace, health and well-being of society, the individual may be disciplined, but his right of property in his home cannot be destroyed.

> "The individual characteristics of the owner do not furnish a basis on which to make a classification * * "
> *Quong Wing v. Kirkendall*, 223 U. S. p. 64.

When the Hon. Clayton B. Blakey, in his brief p. 11, quotes Mills on Liberty, Ch. 4, saying: "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it * * *" is, to our way of reasoning, not so unfortunate to the side of the plaintiff in error, as the Hon. H. R. Pollard, in his Brief page 57, believes but an apposite quotation to mark the line of distinction between the personal attributes of the individual, and his property, or the use to which the property is subjected by him, and which distinction has led this Honorable Court to remark:

> "A discrimination founded on the personal attributes of those engagaed in some occupation and not on the value or amount of the business, is arbitrary.
> *Quong Wing V. Kirkendall*, 223 U. S. p. 64.

And the maxim, *sic utere tuo ut alienum non laedas* which the Hon. H. R. Pollard quotes to refute the above position of the Hon. Clayton B. Blakey, but strengthens the same; for the reason that the word "*tuo*" in the Roman law from which the maxim is derived, was used in the limited sense of "*property*" therein, and had no reference to the personal attributes of the individual.

The Thirteenth Amendment to the Constitution of the United States made persons both citizens of the United States and of the individual States.

Although after this great union was formed, political parties arose holding divergent views as to whether the federal body politic should be construed as a union of INDIVIDUALS, or of the STATES, when the Constitution of Virginia was adopted in the year 1902, the present State government was composed of INDIVIDUALS who formed the electorate, and not of CLASSES, white or colored, who formed the State.

That while we agree with the Hon. H. R. Pollard that in the case of *State* v. *Darnell*, 166 N. C. 300, the Court said:

> "An ordinance cannot legally be made which contravenes a common right, unless the power to do so be plainly conferred by a valid and *competent* legislative act *"

and then held the Winston-Salem ordinance void because the legislature of North Caroline had failed to invest the Council with power to legislate on that subject up to that time, it will be noted that the Court was careful to say that such legislative act must be "competent." For that Court then goes on to say: "Besides an ordinance of this kind forbids the owner of property to sell or lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this 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 having power to take away."

While it is proper to classify property, as well as to classify the uses to which it is put by the owner, by making the property, or the use either lawful, or a nuisance, the differences in the owners who use the property cannot be legitimately classified, whether it be of color, race, religion or nationality. (See Brief Hon. Clayton B. Blakey, pp. 10 and 11.)

We maintain that it is unfair to condemn a whole race for the faults of a few individuals of that race. The colored man does not desire social equality, or does he look upon separateness as a mark of inferiority, but what he asks is, equal protection of his rights of property before the law; that when the white race is carving residential districts in their movement for both races, there may be some rule to guide them by which some desirable residential districts may be left for the colored man so that equally with his other colored brethren he may dwell upon a mixed block, if so disposed, or upon an unmixed one. But he cannot do this under the terms of the ordinance if a greater number of white men dwell thereon. It is for the privilege, as an individual citizen, of maintaining his home where he pleases, which urges the colored man to resist segregation of the races in their residences.

Mr Freund on Police Power, Sec. 491 says:

"If it be a privilege of a citizen of the United States to move freely within the whole country, the power of the State to control the migration and settlement of its own people within its own territory must logically be denied, for the whole country includes the State. But apart from the Federal Constitution the right of each individual to travel about and to choose his residence must be regarded as an essential part of the liberty which evey State Constitution guarantees. Experience has shown that government interference with the natural movement of population is unwise, oppressive and futile. There is nothing in modern legislation to parallel the va-

rious royal proclamations issued in England toward the end of the sixteenth and beginning of the seventeenth centuries, prohibiting the building of houses in the London suburbs, because with such multitudes many must live by begging or worse means, or directing noblemen, knights and gentlemen having houses in the country to abide there until the end of the summer, and attend to their duties * * * * *. If legitimate purposes do not justify the impairment of the general liberty of migration and settlement, measures for the separation of the classes must still be more obnoxious to the Constitution. While the United States Supreme Court has sanctioned compulsory separation of the white and colored persons in public conveyances, it has intimated that the assignment of separate residence districts, on the basis of color, creed or nationality would not be tolerated, and it has been held that Chinese persons cannot be compelled to live in one portion of a City."

"The Constitutional guarantee would be of little worth, if the Legislature could without compensation destroy property or its value, deprive the owner of its use, deny him the *right to live in his own house*, or to work at any trade therein * * *."
In re Jacobs, 98 N. Y. p. 105.

"The word 'Liberty' as used in the Constitution of the United States, and the several States * * means not merely the right to go where one chooses, but * * is deemed to embrace the right of the citizen *to live* and work where he will."
Algeyer v. *Louisiana*, 165 U. S. 578; *Powell* v. *Penn.*, 127 U. S. 678.

While it may be necessary, in certain exigencies in the exercise of the police power, for the citizen to forfeit his property without compensation for the commonweal, there must be a real and pressing necessity therefor, and, when viewed in this light, the rights guaranteed by the constitutional provisions to the citizen are relative and not absolute, yet, there is,

we submit, no power in the legislature to declare that a NUISANCE which is not such. Although there is some sentiment among the white race of the South that as a neighbor, because of his color alone, a negro is a *nuisance*, that does not make him so in Law or Reason, which is the life of the law.

(See Brief Hon. Moorfield Storey, pp. 12-13-24-25.)

> "Nor can a State by designating as 'coercion' conduct which is not such in truth, render criminal any normal and essentially innocent exercise of personal liberty or of property rights * *."
>
> *Coppage* v. *Kansas*, 236 U. S. 15.

> "All persons may maintain homes wherever they wish and any arbitrary intereference with this rights violates the Constitution."
>
> 8 Cyc. p. 1106.

Third: The housing conditions of the colored race were better before than since segregation.

In the brief of the Hon. H. R. Pollard between pages 63 and 65 are photographs of public institutions, churches and residences of the colored race of Richmond, Virginia. That this Honorable Court may not be erroneously impressed thereby, we beg to submit they were erected in every instance, many years before 1911, the year the segregation ordinance of Richmond, Virginia became effective.

We beg to bring to the attention of this Honorable Court the photographs following, showing the residential sections of the colored people of Richmond, Virginia, before ano since segregation, by law.

And following these photographs will be found the official map of the City of Richmond, Virginia, the dark spaces indicating the residential districts of the colored race and the white spaces the residential districts of the colored race, the filling in having been done by W. A. Jordan, Superintendent of the Southern Aid Society of Virginia, Incorporated, a colored man, with knowledge of the districts in the absense of any official knowledge of the segregated districts by the City Officials of Richmond, Virginia.

Within this urban area is included 24,383 square miles of territory thickly inhabited.

We respectfully submit that the judgment of the Court of Appeals of the State of Kentucky should be reversed.

ALFRED E. COHEN,
Of Counsel for plaintiff, in case of *Hopkins v. City of Richmond*, (117 Va. 692.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 231

CHARLES H. BUCHANAN, *Plaintiff-in-Error,*

—VS.—

WILLIAM WARLEY, *Defendant-in-Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

BRIEF AMICUS CURIAE

S. S. FIELD,
City Solicitor,
For the Mayor and City
Council of Baltimore.

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BRIEF AMICUS CURIAE

FILED BY LEAVE OF COURT ON BEHALF OF THE MAYOR AND CITY COUNCIL OF BALTIMORE.

THE BALTIMORE ORDINANCE AND ITS RESULTS.

The first ordinance of the City of Baltimore on the subject involved in this case was passed May 15, 1911. A case involving the validity of that ordinance reached the Court of Appeals of Maryland and was decided by a *per curiam* order in the summer of 1913, the opinion being filed October 7th, 1913.

State vs. Gurry, 121 Md. 534; Same Case, 47 L. R. A. (N. S.), 1087.

The Maryland Court of Appeals held that ordinance invalid because it contained no saving clause preserving the rights of property owners which had become vested prior to the passage of the ordinance, but the Court treated the whole matter very fully and upheld the power of the City Council, by a proper ordinance, to accomplish the objects intended to be accomplished.

To obviate the objection as to vested rights the Mayor and City Council of Baltimore passed Ordinance No. 339 on September 25, 1913, and Ordinance No. 355 on November 8, 1913, the former applying to residences and the latter applying to places of assembly. These ordinances are printed as an *addendum* to this brief.

The Louisville ordinance involved in the present case of Buchanan vs. Warley was adopted May 11, 1914, and appears to have been drawn largely along the same lines as the Baltimore Ordinances.

For nearly four years these ordinances have been in force in Baltimore City, and have been almost universally obeyed, only one case having reached the Courts of any person violating the provisions of the ordinances.

It is the general opinion and belief of the people of Baltimore that the ordinance has, in practical effect, accomplished the purpose set out in its title, of preventing conflict and ill-feeling between the white and colored races and preserving the public peace and promoting the general welfare.

The Baltimore Ordinance has not resulted in any way to the disadvantage of the colored people; it has not driven them into the slums or alleys; it leaves open for their occupation, all of the blocks in Baltimore, in which colored people resided at the time of the passage of the ordinance, and all blocks hereafter to be built upon, which may be first inhabited by colored persons. The built up blocks which were inhabited, in whole or in part, by colored people, at the time of the passage of the ordinance, and which are left open

for residences for the colored people, include a great many fine houses which had formerly been the residences of people of means and refinement; and include many blocks of houses on streets, as well paved, and lighted, and cleaned, as any streets in the city. There is ample vacant land in and around Baltimore, which is being built up, and will be built up, to meet any demand for residences by colored people, just as it is being built up, and will be built up, to meet the demands of the increasing white population. The vast majority of the colored as well as the white people in Baltimore (and we assume it to be so also in Louisville and other cities) prefer to live as next door neighbors to people of their own race. The invasion of white residences by colored residents, and the consequent destruction of the values of residence property, has usually been brought about by the spite, or cupidity of some white owner, who has induced some negro to move into the block. The Ordinance will have no effect on the great *majority* of both races, who have heretofore done, and will continue to do, from natural selection, the very thing which the ordinance requires *all* to do. *The ordinance merely undertakes to compel the very small minority of both races to act in accordance with the prevailing sentiment, and feeling, and actions, of the overwhelming majority of both races.*

The passage of the Baltimore Ordinance was followed by a period of freedom from agitation on the subject. Both races were accommodating themselves to the situation, just as readily as they have accommodated themselves to separate schools, separate churches, separate coaches in railway cars and other similar provisions. The colored people began to develop nice colored neighborhoods, in which they took pride. Certain portions of Druid Hill Avenue and other streets have become a sort of an aristocratic section amongst the colored people. The City paved the street with smooth pavement and the colored residents formed a neighborhood association and

showed a great deal of pride in keeping their street nice, clean, attractive and up to date. There probably would not have been any test case brought if our colored people in Baltimore had been left to themselves, but on October 14th, 1914, after the ordinance had been in effect for a year and everything was working smoothly under it, Senator Moses E. Clapp of Minnesota attended a meeting of colored people in one of the colored churches in Baltimore, and made a speech stirring them up, TO FIGHT FOR "EQUALITY."

Senator Clapp's speech urging the colored people to
"FIGHT FOR EQUALITY"
was made October 14, 1914.

The one case which has arisen under the Baltimore Ordinance originated Nov. 17, 1914. This case is now being held *sub curiae* by the Court of Appeals of Maryland, awaiting the decision of this Honorable Court in this case.

It may safely be predicted that if the validity of this ordinance is upheld and the people of Baltimore know that it is the policy of the City and of the State, they will continue obedience to it without friction, and that the result will be for the benefit of the colored people as well as of the white people of Baltimore.

In fact the ordinance has been enforced and obeyed since its passage, notwithstanding the fact that its validity has not yet been passed upon by the Court of Appeals. In the *nearly four years of the existence of the ordinance, not a single case of a breach of the peace or disorder has attended its enforcement.*

LOUISVILLE ORDINANCE IS A REASONABLE EXERCISE OF THE POLICE POWER.

That the ordinance assailed in this case, like the Baltimore Ordinance, is a reasonable exercise of the police power, and, therefore, valid, has been adjudged by the decisions of

the highest courts of three states, passing directly on that point.

State vs. Gurry, 121 Md. 534;
Hopkins vs. Richmond, 117 Va. 692;
Buchanan vs. Warley, 165 Ky. 559.

And by many decisions of this Court and other Courts, in analogous cases, of which reference may here be made to the following:

R. R. vs. Mississippi, 133 U. S. 587;
Plessy vs. Ferguson, 163 U. S. 537;
Berea College vs. Kentucky, 211 U. S. 45;
Chiles vs. C. & O., 218 U. S. 71;
Hart vs. State, 100 Md. 595;
Roberts vs. Boston, 5 Cush. 198;
West Chester Co. vs. Miles, 55 Pa. 209.

THE MARYLAND DECISION.

In State vs. Gurry, the Court of Appeals of Maryland after a discriminating discussion of authorities upon the subject of the Police Power says, 121 Md. 546:

> "As we have seen the avowed object of the ordinance is to preserve peace, prevent conflict and ill-fieeling between the two races and thereby promote the welfare of Baltimore. The means employed are that blocks which were occupied by colored people exclusively, should continue to be occupied by them exclusively and that blocks occupied exclusively by white people should so continue to be occupied by them.
>
> "The ordinance does not legislate on what were 'mixed blocks'—those occupied by members of the two races—at the time it was passed, and whatever other objections may be urged against it, it cannot be truly said that there is any discrimination in the ordinance against the colored race. * * * What is denied one class is denied the other, what is allowed one class is allowed the other. There is therefore no such discrimi-

nation as is prohibited by the Constitution or statutes securing civil rights, and it is not necessary to discuss that question further.

* * * * * * * * *

"*If the welfare of the City, in the minds of the Council, demanded that the two races should be thus, to this extent, separated and thereby a cause of conflict removed, the Court cannot declare their action unreasonable.* It was acknowledged by the counsel for the appellee, both in the brief and in verbal argument, that for years there had been more or less friction resulting from the occupancy by colored people of houses in blocks theretofore occupied wholly by white people. With this acknowledgment *how can it be contended that the City Council, charged with looking to the welfare of the city, is seeking to make an unreasonable use of the police power, when it enacts a law which, in their opinion, will tend to prevent the conflict?*

* * * * * * * * *

"A large number of the States have laws regulating, like in the foregoing case, the separation of the races in railroad cars, including our own State. Hart vs. State, 100 Md. 959. The Courts have uniformly held that this was a reasonable exercise of the police power, and was not a discrimination when the same accommodations were provided for each race.

* * * * * * * * *

"In this State, as well as in a number of others, there has been a statute in force for many years prohibiting marriages between white and colored persons, and imposing a heavy penalty for its violation, and in Plessy vs. Ferguson, *supra,* the Supreme Court said: 'Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State.' That case as well as many others has also recognized the right of States to establish separate schools for white and colored children, and, as we have seen, to require the separation of the white and colored races in public conveyances. WITHOUT GIVING OTHER ILLUSTRATIONS OF THE EXER-

CISE OF THE POLICE POWER, WE ARE OF THE OPINION THAT THE OBJECT SOUGHT TO BE ACCOMPLISHED BY THIS ORDINANCE IS ONE WHICH PROPERLY ADMITS OF THE EXERCISE OF THE POLICE POWER."

The principles thus announced by the Maryland Court of Appeals have been followed by the decisions of the highest courts of Virginia and Kentucky.

The Supreme Court of Appeals of Virginia adopts, with a slight modification, the very learned and exhaustive opinion of the Circuit Court of Hanover County, which reached the same conclusion as the Maryland Court of Appeals, and also cites with approval the decisions of the Maryland and Kentucky Courts of Appeal. The Virginia decision is treated at length in the brief of the City Attorney of Richmond; the Kentucky decision is found in full in the record in this case.

The title of the Louisville ordinance, the validity of which was sustained by the highest Court of Kentucky, is:

> "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."

This ordinance was passed professedly in the exercise of the police power. *So far as it was in the power of the City Council to decide that the ordinance is a valid exercise of the police power, it has so decided. The highest Court of the State has also decided that the ordinance is a valid and reasonable exercise of the police power.* The weight which this Court will give to this *legislative and judicial determination of the sovereign State of Kentucky* is well stated in the recent case of Thomas Cusack Co. vs. City of Chicago, decided January 8, 1917, and reported in the advance sheets of the Supreme Court Reporter, page 190.

This Court, through Mr. Justice Clarke, say (37 Supreme Court Reporter, Advance Sheets, page 192):

> "The principles governing the exercise of the police power have received such frequent application and have been so elaborated upon in recent decisions of this Court, concluding with Armour & Co. vs. North Dakota, 240 U. S. 510, 514, 60 L. ed. 771, 775, 36 Sup. Ct. Rep. 440, Ann. Cas. 1916 D, 548, that further discussion of them would not be profitable, especially in a case falling as clearly as this one does within their scope. We, therefore, content ourselves with saying that while this Court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welware, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals or to the general welfare."

The Ordinance Has a Real and Substantial Relation to the Public Safety and Morals and to the General Welfare.

That the ordinances of Baltimore and Louisville relate *"to matters completely within the territory of the state enacting them"* is, of course, apparent.

Has the ordinance a real and substantial relation to the public safety or morals or to the general welfare? The highest Courts of Maryland, Virginia and Kentucky say that it has. The position of these Courts is sustained by many analogous cases which are collected in the brief for defendants in error, and in the brief of the attorney of the City

of Richmond. It will, therefore, suffice to refer here to only a few of them.

The earliest and leading case on the subject was written by Chief Justice Shaw of Massachusetts in the case of *Roberts vs. City of Boston,* 5 Cushing, 198, decided in 1849. This case is notable not only as the decision of a great Northern judge in the State where, and rendered at a time when, the movement for the emancipation of the colored people was active, but also because the alleged right of the negroes to sit side by side with the whites in the schools of Boston was championed in that case by no less a person than the celebrated Charles Sumner. Answering the contention of Mr. Sumner, the Court, through Chief Justice Shaw, said (5 Cushing, 148):

> "It is urged that this maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep rooted prejudice in public opinion. This prejudice, if it exists, is not created by law and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling the colored and white children to associate together in the same schools, may well be doubted; at all events it is a fair and proper question for the committee to consider and decide upon. having in view the best interests of both classes of children placed under their superintendence We cannot say that their decision upon it is not founded on just grounds of reason and experience, and in the results of a discriminating and sound judgment."

This Massachusetts case is quoted, with approval, in the case of Plessy vs. Ferguson, 163 U. S. 544.

In Westchester R. R. Co. vs. Miles, 55 Pa. St., 213-214, the Supreme Court of Pennsylvania say:

> "The right to separate being clear in proper cases, and it being the subject of sound regulation, the question remaining to be considered is whether there is such

a difference between the white and black races within this State, resulting from nature, law and custom, as makes it a reasonable ground of separation.

"The question is one of difference, not of superiority or inferiority. Why the Creator made one black and the other white we know not; but the fact is apparent, and the races distinct, each producing its own kind and following the peculiar law of its constitution.

"Conceding equality, with natures as perfect and rights as sacred, yet God has made them dissimilar, with those natural instincts and feelings which he always imparts to his creatures when he intends that they shall not overstep the natural boundaries he has assigned to them. The natural law, which forbids their intermarriage and that social amalgamation which leads to a corruption of races, is as clearly divine as that which imparted to them different natures. The tendency of intimate social intermixture is to amalgamation, contrary to the law of races. The separation of the white and black races upon the surface of the globe is a fact equally apparent. Why this is so, it is not necessary to speculate; but the fact of a distribution of men by race and color is as visible in the providential arrangement of the earth as that of heat and cold. The natural separation of the races is therefore an undeniable fact, and all social organizations which lead to their amalgamation are repugnant to the law of nature. From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage. But to assert separateness is not to declare inferiority in either. It is not to declare one a slave and the other a freeman; that would be to draw the illogical sequence of inferiority from difference only. It is simply to say that, following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix. The right of each to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition but not less entitled to protection as a right. When, therefore, we declare a right to maintain separate relations, as far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights,

> it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts."

It is worthy of note that this philosophical discussion of the status of the two races, and the fundamental principles upon which separation of the black and white races may be justified, came from a Pennsylvania Court at the very time when people were voting upon the Fourteenth Amendment and when the subject was one of bitter feeling between the North and South and of heated political discussions throughout the country.

The case of West Chester Railroad Company vs. Miles, involved the question of the power of the Railroad Company voluntarily to assign different places, in its cars, to white and colored pasengers, respectively. The same principle upholds the power of the Legislature to *compel the railroad company* to assign separate compartments to the members of the two races.

Plessy vs. Ferguson, 163 U. S. 537;
Chiles vs. C. & O. Ry., 218 U. S. 71;
Hart vs. State, 100 Md. 601.

The right of the Legislature to compel colleges to teach the two races separately was upheld in Berea College vs. Kentucky, 211 U. S. 45.

The Court will observe that, in stating the question, the Supreme Court of Pennsylvania, in the case above cited, said that:

> "The question remaining to be considered is whether there is such a difference between the white and black races within this State * * *."

This suggests the principle, frequently approved in other decisions that the *reasonableness* and *therefore* the validity of an attempted exercise of the police power *may depend to some extent upon the locality to which the measure applies.*

Prevailing Sentiment of the Community May Be Considered in Determining the Extent of the Police Power.

W. Chester R. R. Co. vs. Miles, 55 Pa. St. 213;
Plessy vs. Ferguson, 163 U. S. 537;
Chiles vs. C. & O. Railway, 218 U. S. 71;
Noble Bank vs. Haskell, 219 U. S. 104;
State vs. Gurry Case, 121 Md. 544;
Laurel Hill Cem. vs. San Francisco, 216 U. S. 358.

In the case of *Laurel Hill Cemetery vs. San Francisco,* 216 U. S. 358, the Supreme Court affirmed the decision of the Supreme Court of California which upheld an ordinance forbidding the burial of any dead within the limits of the City.

It was claimed that the ordinance would render valueless unsold lots in Laurel Hill Cemetery worth $75,000. The ordinance recited, as the ground for its passage, that

> "The burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to the public health."

Referring to this, the Supreme Court, through Mr. Justice Holmes, say (216 U. S. 365):

> "If every member of this Bench clearly agreed that burying grounds were centers of safety and thought the Board of Supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief."

And again, on page 366, the Supreme Court say:

> "Again there may have been other grounds fortifying the ordinance besides those recited in the preamble. And yet again the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic."

In Plessy vs. Ferguson, the Supreme Court say (163 U. S. 550-551):

> "So far then as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the Legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of State legislatures."

In the case of *Chiles vs. C. & O. Railway,* 218 U. S. 71, the Supreme Court upheld a regulation of the Railway Company requiring a separation of the whites and blacks in the railway coaches.

Referring to the opinion in the case of Plessy vs. Ferguson, the Supreme Court say (218 U. S. 77):

> "It is true the power of a Legislature to recognize a racial distinction was the subject considered, but if the test of reasonableness in legislation be, as it was declared

> to be, 'the established usages, customs and traditions of the people' and the 'promotion of their comfort and the preservation of the public peace and good order,' this must also be the test of the reasonableness of the regulations of a carrier, made for like purpose and to secure like results. Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable."

In *Noble Bank vs. Haskell,* 219 U. S. 104, the Supreme Court upheld a law of Oklahoma requiring all the banks to contribute to a guaranty fund for the protection of the depositors. The Court again declared that the prevailing sentiment of the community might be considered in determining the reasonableness of a provision under the police power. The Court say (219 U. S. 111):

> "It may be said in a general way that the police power extends to all the great public needs. Camfield vs. United States, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." (Quoted in State vs. Gurry, 121 Md. 544.)

Applying this principle to the present case, it cannot be denied that the separation of the residences of whites and blacks in the city of Baltimore is held by *"strong and preponderating opinion to be greatly and immediately necessary to the public welfare."* Baltimore is a Southern City. It has many most excellent citizens who have come from Northern States or from foreign countries, but the vast preponderance of its population are Southern people. It is true that the feeling against close contact between the races is not confined to the South.

But while the objection to so close contact between whites and blacks is universal, it is also true, and naturally true,

that that sentiment is more marked in Southern States and cities. The existence of that prevailing opinion is recognized by the Court of Appeals of Maryland in the case of State vs. Gurry, in which the Court say (121 Md. 546-547):

> "No intelligent observer in communities where there are many colored people can fail to notice that there are sometimes exhibitions of feelings between members of the two races which are likely to, and occasionally do, result in outbreaks of violence and disorder. It is not for us to say what this is attributable to; but the fact remains, however much it is to be regretted, and if a segregation of the races to such extent as may be permissible under the Constitution and laws of the land will have a tendency, not only to avoid disorder and violence, but to make a better feeling between the races, everyone having the interests of the colored people as well as the white people at heart ought to encourage rather than oppose it."

Upon the question of whether or not the ordinance now before the Court is a reasonable exercise of the police power, the Court will therefore take into consideration the *prevailing sentiment among the people of Baltimore, and will also consider the physical fact that the great bulk of the dwelling houses of Baltimore are built in solid rows, so that every man's front steps are immediately adjoining or not more than* 12, 15 *or* 20 *feet from the steps of his neighbor.* The residences are built upon small lots. Perhaps 90% of the dwellings of Baltimore have no grounds, and the children of the house have no place for out-door air, exercise and play near their homes, except in the street in front of their respective homes. If black and white are to occupy houses side by side, there is a daily close contact of the members of the households going in and out their front doors, and of the children of the household meeting at their front doors, either to play together or to fight, more probably the latter.

In an article in the Virginia Law Register, which is referred to with approval by the Supreme Court of Appeals

of Virginia in the case of Hopkins vs. Richmond, Mr. T. B. Benson, Associate Editor, of the Law Register, says (1 Va. Law Register, New Series [Sept. 1915], page 353):

> "The Court will not close its eyes to the fact that, under the congested conditions of modern municipal life, there is practically as much, if not a greater degree of, association among the children of white and colored inhabitants when living side by side than there would be in mixed schools under the direct observation of teachers. Harris vs. Louisville (Ky.), 177 S. W. 472."

The members of the Court are respectfully asked to consider the reasons which sustain laws providing for separate schools and separate coaches or compartments on railway trains. Do not these reasons apply, with added force, to a *bona fide* effort to separate the residences of white and black? People travel on railway trains only occasionally—they live in their homes all the time. If the feeling against close contact justifies a law which will separate the races on railroad trains, where they meet only occasionally and for a short time, does not the same reason apply to a law which attempts to separate the races as to their residences, and so avoid their meeting all the time and every day, as they necessarily go in and out their front doors?

If considerations of peace and good order justify the separation of the races in coaches; if there is sufficient danger of clashes between the races from meeting occasionally and for a short time in railway coaches, is there not far greater danger of clashes between the races from families, white and black, living side by side, with their front doors within a few feet of each other every day? If the natural feeling between the races, or the danger of conflict between children is sufficient justification for separate schools, where the children would be brought into contact only a part of the time and under the supervision of teachers who could maintain order, do not the same reasons apply with greater force to a

measure which is intended to prevent the children from meeting in daily contact in front of their homes, and much of the time without any older person present to maintain order? Of course, children might fight without any detriment perhaps to the public, but here again human nature must be reckoned with, for the Court knows that if the white and black children get into fights the respective parents are very apt to be drawn into the quarrels of the children.

The reason which sustains laws against intermarriage and the laws making sexual intercourse between black and white, crime, is to prevent cross-breeding between the races. This same reason sustains provisions for preventing black and white children growing up side by side with front door steps either adjoining or within a few feet of each other.

The Court will take judicial notice of the facts that a much larger, percentage of colored people live in southern cities than in northern cities, and that in southern cities, due to the difference in the climate, the people spend a much larger proportion of their time on their front steps or on the pavements in front of their houses. It is an almost universal custom in Baltimore for people to sit out on their front steps or front pavements in the evening in warm weather.

The Doctrine that a Man May Do What He Will With His Own and Its Limitations.

The doctrine that a man may do what he will with his own, like every other statement of rights of person or property, is limited when it comes into conflict with some other equally well-established doctrine. The maxim of the common law *"sic utere tuo ut alienum non laedas"* is quite as well established as the doctrine that a man may do as he pleases with his own. All rights, certainly all rights of property, are relative. When a man voluntarily chooses to live in a city, in close proximity to other men, he submits his rights to a

great number of limitations to which they are not subjected when he lives alone in the center of a large estate. A vast number of ordinances and regulations limit and qualify the right of a man in the city in the manner of the use of his own dwelling house.

This Court, through Mr. Justice Field, say, *Crowley vs. Christensen,* 137 U. S. 89-90:

> "But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy and dispose of property is declared in the constitutions of several States to be one of the inalienable rights of man. But this declaration is not held to preclude the Legislature of any State from passing laws respecting the acquisition, enjoyment and disposition of property. What contracts respecting its acquisition and disposition shall be valid and what void or voidable; when they shall be in writing and when they may be made orally; and by what instruments it may be conveyed or mortgaged are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property. *Sic utere tuo ut alienum non laedas* is a maxim of universal application."

Ordinance Deprives No One of Property Without Due Process of Law.

Before it can be successfully maintained that the Louisville ordinance deprives any one of property, without due process of law, it must *first* be shown that it *deprives some one of property.*

That cannot be shown. The ordinance takes no man's house or land, it deprives no man of one foot of his land or one stick or brick of his house. The most that can be charged against the ordinance is that it places a limitation upon the uses to which property in the city of Louisville may be put. This limitation may result in some loss to a few people, but the ordinance prevents greater losses to a larger number of people. It may be that a man might sell his house in a white block for more money, if it could be used as a residence by a negro, but it is equally true that a man might frequently get more money for a particular house if it could be used as a saloon, or garage.

In Harris vs. City of Louisville, 165 Ky. 569, the Court say:

> "If it be conceded that the right of alienation is a vested right which cannot be taken away altogether by legislation, still such is not the effect of the ordinance. An indirect restriction upon the right of alienation, resulting from the denial of the probability of alienation to certain classes of purchasers, cannot be held to be a complete destruction of the power to alienate or deprivation of a vested right, violative of the constitutional guaranties."

The legislature may prohibit the sale or manufacture of liquor, and largely destroy the value of property acquired or improved for that purpose, while the manufacture and sale of liquor was lawful. The legislature may require railroad companies to go to enormous expense in building viaducts or tunnels to obviate grade crossings, or to build a new tunnel under a river, when the increase in the draught of boats requires a deeper channel for navigation, even though the railroad's *property, the first tunnel built at large expense,* is destroyed thereby.

Ry. vs. Drainage Commrs., 200 U. S. 592;
R. R. vs. Chicago, 201 U. S. 506;
Ry. vs. Duluth, 208 U. S. 596.

If a law or ordinance is a reasonable exercise of the police power the fact that it places restrictions on the use of property which spell loss or expense to the owners does not render the law or ordinance void.

In the Gurry Case, the Court of Appeals of Maryland said, 121 Md. 550:

> "Such an ordinance may work some hardships even as to after-acquired property, but if property is acquired when valid laws or ordinances affecting it are in force, it is taken subject to them."

And see the clear statement of this principle by Chief Justice Shaw in Commonwealth vs. Alger, 7 Cush. 58, 84, quoted in brief for defendant in error, p. 101.

If it be said that the segregation ordinance may diminish the value of the house of a man in a white block by depriving him of the right to sell or use that house for a residence for colored people, what is to be said of the loss in value to the houses of all of the other people in that block which would result from permitting one house to be used as a residence for colored people? If the ordinance causes a loss to some it saves a far greater number from a much greater loss. Moreover, the whole public is interested in saving the greater number from the larger loss, because that affects the taxable basis from which the revenues for the support of the government are derived.

The police power is not limited to questions affecting the public peace, safety or morals, but embraces every subject of legislation affecting the public welfare.

R. R. vs. Nebraska, 170 U. S. 50;
Ry. vs. Ohio, 173 U. S. 285;
Ry. vs. Drainage Commrs., 200 U. S. 592.

The contention that, if the objection which the white man almost universally has to having negroes as next-door neighbors leads to a breach of the peace, the proper remedy is to

punish those who commit the breach of the peace, is very succinctly answered by Judge Agnew in the case of Miles vs. Chester R. R. Co., quoted and approved by the Court of Appeals of Maryland in the case of Hart vs. State, 100 Md. 602, as follows:

> "It is much wiser to avert the consequences of this repulsion of race by separation than to punish afterward the breach of the peace which it may have caused."

Contention That the Ordinance, While, in Terms, Applying to Both Races, is Aimed at the Negro.

The ordinance forbidding a white man to move into a colored block and forbidding a colored man to move into a white block applies, without discrimination, to both races. The contention that, while this is true as to the terms of the ordinance, the ordinance is really aimed at the colored man, because the white man will not want to move into a colored block; amounts to this: That a law may be said to be invalid because it only operates on those who want to violate it. Moreover, the same contention could be made, and with certainly equal force, against the laws which require separation of the races in railroad trains and in schools. It might be said that, while these laws apply without discrimination to both races, they are aimed at the negro; that their purpose is to keep the negro out of white schools and out of the white compartments on trains. The same contention might be made against the law which forbids intermarriage between the races; it might be said that the real purpose of it is to protect the integrity of the white race. Why is a law or ordinance forbidding the erection and maintenance of a garage in a residence block, without the consent of a majority of the property owners therein, a valid

exercise of the police power? It cannot be said that a garage in a residence block would materially affect the health or safety of the residents in that block, and some people do not object to garages—they rather like the smell of the gasoline and the noise and bustle of a garage. But the majority of people do object to garages near their residences. *The maintenance of a garage in a residence block offends the prevailing sentiment of the community, and, therefore, affects the comfort of the residents of the block and diminishes the value of their property;* and for these reasons a law forbidding a garage in a residence block is a valid exercise of the police power. *For precisely the same reason,* because *the residence of a negro in a white block offends the general sense of the community and thereby tends to the discomfort of the white residents in the block and diminishes the value of their property,* a reasonable segregation ordinance is a valid exercise of the police power. Moreover, the segregation ordinance may be truly said to have a real relation to the public peace and the public morals—which could not be said of a garage.

If it be said that the ordinance does not apply without discrimination to both races, because it does not apply to both races *in regard to the same place;* but forbids a white man to live at one place (in a colored block), and forbids a colored man to live at a different place (in a white block); the same thing can be said of the laws providing for separate schools and separate railway coaches. They do not apply to *both* races as to the *same school or car;* but a white child is forbidden to attend *one* school (a colored school) and a colored child is forbidden to attend *another* school (a white school); and similarly as to the railway cars.

CONTENTION THAT IF THE LAW CAN SEGREGATE BLACK FROM WHITE, IT CAN SEGREGATE DEMOCRATS FROM REPUBLICANS, GERMANS FROM IRISH, ETC.

A practical answer to this contention is that laws have existed for many years separating black from white in schools, in railway cars and in the matter of marrying, but no one has ever suggested a law to separate Germans from Irish, or Catholic from Protestant, or Republican from Democrat, in schools or railway cars or in the matter of marrying.

In Plessy vs. Ferguson this Court answered this contention as follows (163 U. S. 549-550):

> "In this connection it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the State Legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street and white people upon the other, or requiring white men's houses to be painted white and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable and extend only to such laws as are enacted in good faith for the promotion of the public good and not for the annoyance or oppression of a particular class."

THE TWO DECISIONS HOLDING SEGREGATION ORDINANCES INVALID.

State vs. Darnell, 51 L. R. A. (N. S.), 332;
Carey vs. Atlanta, 81 S. E. Rep. 456.

In State vs. Darnell, 51 L. R. A. (New Series), 332, *the real point passed on was whether or not the Legislature had given the City Council the power to pass such an ordinance.*

In the Charter of the Town of Winston there was no grant of the police power, such as we have in the Baltimore City Charter, but the ordinance was attempted to be passed under the power to pass ordinances for the general welfare.

The Court say, State vs. Darnell, 51 L. R. A. (New Series), 335:

> "Whether, if the general assembly had passed a statute conferring on town or county commissioners the authority to make such an ordinance as this, it would have been constitutional, is not now before us. We simply hold that an act of this broad scope so entirely without precedent in the public policy of the State, and so revolutionary in its nature, cannot be deemed to have been within the purview of the Legislature from the use of the words conferring authority to make ordinances for the general welfare."

There is a very clear distinction between the power of the City Council to pass an ordinance under the general welfare clause and its power to pass an ordinance under a specific grant of power, or a full grant of the police power.

See this distinction clearly pointed out in *Rossberg vs. State,* 111 Md. 394.

It is true that in the North Carolina case there are statements in the opinion to the effect that the ordinance is question would not be valid under the police power, but *all this was obiter, as the Court itself said that the power of the Legislature to pass such an ordinance, or to authorize the City to pass it, "is not now before us."*

Criticizing the North Carolina case, the Kentucky Court say (177 S. W. Rep. 474-475):

> "The opinion is notable in that the Court seems to have been impressed by the time worn sophistry (always advanced when legislation of this character is being attacked) that, if the power exist to segregate whites and blacks, then the power must likewise exist to segregate Republicans and Democrats, persons of Irish descent and those of German descent, Protestant and Catholic, and so on. This argument was advanced and answered by this Court in the Berea College case, 123 Ky. 209, 94 S. W. Rep. 623, 124 Am. St. Rep. 344, 13 Ann. Cas. 337, conclusively disposed of by the Supreme Court of the United States in Plessy vs. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256. To give ear to this kind of reasoning is to close one's mind to the gravity of the race problem as it exists in our country today, and especially to those phases of it most intimately concerned with congested municipal conditions. The opinion is also notable in that the Court for the time being, apparent forgetful that congested municipal conditions and rural conditions are not identical, seems impressed with the argument that, if segregation may be enforced in a city, it may be enforced in rural communities as well."

Carey vs. Atlanta, 84 S. E. Rep. 456, was decided by the Supreme Court of Georgia February 12, 1915. That Court consisted of six judges. The case was decided by five judges, the Chief Judge having been absent. One of the five, the celebrated Judge Lumpkin, *dissented from the views* expressed by Judge Atkinson, who wrote the opinion of the Court.

The ordinance contained the following provision (also a similar provision as to a white person moving into a house formerly occupied by a colored person), as quoted in 84 S. E. Rep. 458:

> "SECTION 1. That from and after the approval of this ordinance it shall be unlawful for any colored per-

son to move into or use as a residence or place of abode any house, building or structure, or any part of a house, building or structure situated or located except as provided in said original ordinance, which said house, building or structure has previously been occupied by white people and where white people are still living in houses or buildings adjoining the same without the consent of the white people living in said adjoining houses or buildings."

Commenting on this provision, the Court, Atkinson, J., say, 84 S. E. 458-9:

"Under the operation of Sections 1 and 2 of the original ordinance and the corresponding sections of the amendment the following result could be brought about; assuming that in any mixed block, that is, one occupied by both white and colored persons, there are three adjacent lots owned by separate persons, each of whom resides on his lot and that the proprietor of the middle lot be a white person and that the proprietor on one side be a white person and the proprietor on the other be a colored person; if the middle proprietor should desire to move out and substitute a colored tenant, he could not do so if the adjacent white proprietor objected; or if he should sell to a colored person the purchaser could not move into the house to reside or substitute another colored person to do so, if the adjoining white proprietor objected. So also if the middle proprietor were a colored person and should desire to move out and substitute a white person to reside in his dwelling, he could not do so if the colored adjoining proprietor objected; or if he should sell to a white person the purchaser could not move into the dwelling to reside, nor substitute a white tenant to do so if the colored adjoining proprietor objected. In each of such instances an owner of property could, by mere force of the ordinance and caprice of an adjoining proprietor, without any compensation or process of law be deprived for all time of the right to reside on his property or to substitute a tenant or grantee to do so. The right of the owner of property to reside on it is inherent, and permanent

deprivation of that right is in substance a taking of the property itself. Deprivation thereof in the manner above indicated, without any symbol of legal procedure, is opposed to the guaranty as embodied in the due process clauses of the State and Federal Constitutions."

Judge Lumpkin concurred in the result, but not in the opinion. He says:

"I concur in the result reached but not in all that is said in the opinion of Mr. Justice Atkinson. It seems to me that the discussion in regard to the right to use property as an incident to ownership may lead to extreme results. The right of the owner to use his property is important, but it is not so absolute that he may at all times and under all circumstances, use it as he pleases, regardless of the public welfare, morals or safety. The statute books contain many laws restricting the use of property by the owner of it and prohibiting him from using it for certain purposes. Laws prohibiting the erection of wooden buildings within the fire limits of a city restrict the owner's use of his property, although he may contend that a wooden building which he desires to erect would be safe and that he has not the means to build one of brick or stone. Laws which prevent an owner from using his property for the storage of dynamite, powder, oil or other dangerous substances in populous communities, likewise place limitations upon the owner's right to use his property as he sees fit. The right of contract has been treated as a part of the liberty of a citizen and yet it is subject to certain limitations for the public good. Thus usurious contracts have long been prohibited. Many other illustrations might be given in addition to those arising under laws relating to the segregation of the white and negro races in cars and schools. I cannot subscribe to the apparent idea that classification has anything to do with such laws."

Then after quoting from Plessy vs. Ferguson, Judge Lumpkin concludes as follows:

> "Of course, regulations based on a distinction between the two races must be reasonable and not arbitrary, and a municipal council or other body making them must have authority to do so. In the present case, the petition does not distinctly make the point that the general welfare clause in a city charter does not confer authority to adopt a segregation ordinance or aver in terms that the ordinance under consideration was unreasonable. *It does, however, charge that the ordinance delegated to individuals the right to say how the plaintiffs should use their property. I think that this ground is well taken. If the residence of the two races in close proximity was a matter requiring regulation by ordinance, the legislative body should determine the fact, and not leave it to depend upon the will of individuals, perhaps the whim of a single resident, and subject to shift from time to time according to the wishes of some of those who for the time being might reside in the block, so that sometimes the block might be classified as 'white' sometimes as 'black' and sometimes mixed.* It provides for no method for determination of the fact by legitimate authority, save as a proper owner's neighbors may wish."

The Louisville ordinance does not make the use to which a man may put his house, in an occupied block, dependent in any respect upon the consent or whim of a single individual. By Sections 5 and 6, the right to build on a vacant block, a house intended to be used as a residence, for either white or colored, is made to depend upon the consent, either actual or assumed, of the owners of a majority of the front feet in the block, but this is a very different thing from putting the matter in the hands of a single individual. Ordinances making a man's right to use his property for a garage, or bill

board signs, or for a saloon, dependent upon the consent of the majority of the neighborhood or block, have been upheld.

> Cusack Co. vs. Chicago, 37 Sup. Ct. Rep. 190;
> Swift vs. People, 162 Ills. 534;
> Busching vs. Erickson, 263 Ill. 368.

Laws, dependent for operation, upon the will of an individual, are well nigh universally condemned; valid legislation, representing the sentiment of the majority of the community, is common. How many it takes to make a community, is largely a legislative question. It is generally agreed that it takes more than one.

On the question upon which the North Carolina case turned, viz: whether or not the Legislature had granted power to the City Council to pass such an ordinance, the decision of the highest Court of Kentucky with reference to the Louisville ordinance is conclusive. And on the question whether or not the Louisville ordinance is a reasonable exercise of the police power granted by the Legislature to the City Council, the decision of the City Council, itself, upheld by the highest Court of the State is of great weight. If the City Council of Louisville "in determining the question of reasonableness" was "at liberty to act with reference to the established usages, customs and traditions of the people" (163 U. S. 550); if the police power "may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare" (219 U. S. 111); if "tradition and the habits of the community count for more than logic" (216 U. S. 366); if "regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate cannot be said to be unreasonable" (218 U. S. 77); then it is submitted that the Louisville ordinance cannot be said to be unreasonable.

Moreover, the question whether or not that ordinance is an unreasonable exercise of the police power is not the precise question before this Court. The question before this Court in reference to the Louisville ordinance is: Is it "plain and palpable that it has no real or substantial relation to the public health, safety, morals or to the general welfare"? (Cusack vs. Chicago, Supreme Ct. Repr. 192.)

It is submitted that this question must be answered in the negative.

Respectfully,

S. S. FIELD, *City Solicitor,*
For the Mayor and City Council of Baltimore.

ADDENDUM.

No. 339.

AN ORDINANCE TO PREVENT CONFLICT AND ILL-FEELING BETWEEN THE WHITE AND COLORED RACES IN BALTIMORE CITY, AND TO PRESERVE THE PUBLIC PEACE AND PROMOTE THE GENERAL WELFARE BY MAKING REASONABLE PROVISIONS REQUIRING THE USE OF SEPARATE BLOCKS FOR RESIDENCES BY WHITE AND COLORED PEOPLE, RESPECTIVELY.

Separate blocks for residences by white and colored people, respectively.

SECTION 1—*Be it ordained by the Mayor and City Council of Baltimore* that, from and after the passage of this ordinance, it shall be unlawful for any white person to use as a residence or place of abode any house, building or structure, or any part thereof, located in any colored block, as the same is hereinafter defined; and it shall also be unlawful for any colored person to use as a residence or place of abode any house, building or structure, or any part thereof, located in any white block as the same is hereinafter defined. Provided, however, that nothing herein contained shall preclude persons of either race employed as servants by persons of the other race from residing upon the premises of which such employer is the owner or occupier, and that nothing herein contained shall be construed or operate to prevent any person who, at the date of the passage of this ordinance, shall have acquired a legal right to occupy, as a residence any building or portion thereof, whether by devise, purchase, lease or other contract, from exercising such legal

right, and that nothing in this ordinance contained shall be construed to apply to the use of any building or structure except such as are located within either a white or a colored block, as hereinbelow defined.

Definition of white and colored blocks.

SECTION 2—*And be it further ordained by the Mayor and City Council of Baltimore,* that the following constitute Definitions. The word "block" as the same is used in this ordinance, shall be construed to mean that portion of any street or alley, upon both sides of the same between the two adjacent intersecting or crossing streets. In any case where either of the said adjacent streets intersects but does not cross the street upon which the block in question may be located, the houses upon the side of the last-mentioned street facing the intersecting street shall be deemed a part of the said block. Corner houses shall be deemed to be located in the block in which they are numbered.

A "white block" shall be construed to mean a block, as hereinabove defined, in which, at the time of the passage of this ordinance, white persons shall be residing, and in which, at said date, no colored person shall be residing, except such, if any, as may be employed as servants by white residents therein, as provided in Section 1 hereof; a "colored block" shall be construed to mean a block, as hereinabove defined, in which, at the time of the passage of this ordinance, colored persons shall be residing, and in which, at said date, no white person shall be residing, except such, if any, as may be employed as servants by colored residents therein, as provided in Section 1 hereof.

Definition of white and colored blocks.

A resident of any block shall be construed to include any person occupying any room therein as a sleeping place, whether as owner, tenant, dependent, boarder, lodger, or otherwise, unless it appear that such occupation is merely transitory and that such person has another fixed place of abode; but nothing in this definition shall be construed to affect the provision in regard to servants in Section 1 hereof.

Penalty for violating provisions of ordinance.

SECTION 3—*Be it further ordained by the Mayor and City Council of Baltimore,* that any and every person violating the provisions of Section 1 of this ordinance shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not less than five nor more than fifty dollars (and each day that said violation shall continue shall be considered a separate offense), or, in the discretion of the Court, shall be imprisoned in the Baltimore City Jail for not less than thirty days nor more than twelve months; and the owner or agent of any building, or any part of any building, who shall cause, or permit, the same to be used in violation of this ordinance shall be deemed to be equally guilty of a misdemeanor with the person occupying said building, or any part of said building, and, upon conviction, shall be subject to the penalty prescribed in this section of this ordinance.

Penalty for violating provisions of ordinance.

SECTION 4—*And be it further ordained by the Mayor and City Council of Baltimore,* that this ordinance shall take effect from the date of its passage.

Aproved September 25th, 1913, 7:30 P. M.

JAMES H. PRESTON, *Mayor.*

No. 355.

An ordinance supplemental to ordinance No. 339, approved September 25th, 1913, entitled "An ordinance to prevent conflict and ill-feeling between the white and colored races in Baltimore City, and to preserve the public peace and promote the general welfare by making reasonable provisions requiring the use of separate blocks for residences by white and colored people, respectively."

Separate blocks for residences by white and colored people, respectively.

Section 1—*Be it ordained by the Mayor and City Council of Baltimore,* that, from and after the passage of this ordinance, it shall be unlawful for any white person to use as a residence or place of abode any house, building or structure, or any part thereof, located in any colored block, as the same is hereinafter defined; and it shall also be unlawful for any colored person to use as a residence or place of abode any house, building or structure, or any part thereof, located in any white block, as the same is hereinafter defined. Provided, however, that nothing herein contained shall preclude persons of either race employed as servants by persons of the other race from residing upon the premises on which such employer resides, and that nothing herein contained shall be construed or operate to prevent any person who, at the date of the passage of this ordinance, shall have acquired a legal right to occupy, as a residence, any building or portion thereof, whether by devise, purchase, lease or other contract, from exercising such legal right, and that nothing in

this ordinance contained shall be construed to apply to the use of any building or structure, except such as are, or hereafter may be, located within either a white or a colored block, as hereinbelow defined.

Definition of the word "block."

SECTION 2—*Definitions*—*And be it further ordained by the Mayor and City Council of Baltimore,* that the word "block" as the same is used in this ordinance, shall be construed to mean that portion of any street or alley, upon both sides of the same, between the two adjacent intersecting or crossing streets. In any case where either of the said adjacent streets intersects, but does not cross, the street upon which the block in question may be located, the houses upon the side of the last mentioned street facing the intersecting street shall be deemed a part of the said block. Corner houses shall be deemed to be located in the block in which they are numbered.

"White" block.

A white block shall be construed to mean a block, as hereinabove defined, which shall have become since September 25th, 1913, or which, at any time hereafter, shall become a block in which white persons are residing, and in which no colored persons are residing except such, if any, as may be employed as servants by white residents therein, as provided in Section 1 hereof; also any block, as the same is hereinabove defined, heretofore formed, and also any block which may hereafter be formed, in which on September 25th, 1913, there were no residents, but which, since September 25th, 1913, shall have become, or which, at any time hereafter, may become, a block in which white persons

are residing, and in which no colored persons are residing except such, if any, as may be employed as servants by white residents therein, as provided by Section 1 hereof.

"Colored" block.

A colored block shall be construed to mean a block as hereinabove defined which, since September 25th, 1913, shall have become, or which hereafter shall become a block in which colored persons are residing, and in which no white persons are residing except such, if any, as may be employed as servants by colored residents therein, as provided in Section 1 hereof; also, any block as the same is hereinabove defined, heretofore formed, and any block which may be hereafter formed, in which, on September 25th, 1913, there were no residents, but which, since September 25th, 1913, shall have become, or which, at any time hereafter, may become a block in which colored persons are residing, and in which no white persons are residing except such, if any, as may be employed as servants by colored residents therein, as provided by Section 1 hereof.

Meaning of resident.

A resident of any block shall be construed to include any person occupying any room therein as a sleeping place, whether as owner, tenant, dependent, boarder, lodger or otherwise, unless it appear that such occupation is merely transitory and that such person has another fixed place of abode; but nothing in this definition shall be construed to affect the provision in regard to servants in Section 1 hereof.

Buildings used as churches, schools, etc.

SECTION 3—*Be it further ordained by the Mayor and City Council of Baltimore*, that after the passage of this Ordinance, no building

Buildings used as churches, schools, etc.

or portion of a building in the City of Baltimore shall be used as a church or for the purpose of conducting religious services, or for a school, a dance hall or an assemblage hall, by white persons in a colored block, as the same is defined in this Ordinance, or in a colored block, as the same is defined in Ordinance No. 339, approved September 25th, 1913, and, after the passage of this Ordinance, no building or portion of a building in the City of Baltimore shall be used as a church or for the purpose of conducting religious services, or for a school, a dance hall or an assemblage hall, by colored persons, in a white block, as the same is defined in this Ordinance, or in a white block, as the same is defined in Ordinance No. 339, approved September 25th, 1913; provided, however, that nothing herein contained shall apply to any building or portion of a building which, at the time of the passage of this Ordinance, is being used as a church or for the purpose of conducting religious services, or for a school, a dance hall, or an assemblage hall, or which, at the time of the passage of this Ordinance, any person or persons, or corporation shall have acquired the legal right to use as a church or place for conducting religious services, a school, a dance hall or an assemblage hall, by devise, purchase, lease or other contract.

SECTION 4—*And be it further ordained by the Mayor and City Council of Baltimore,* that nothing in this Ordinance contained shall be construed to repeal, in whole or in part, or alter or amend in any way, Ordinance No. 339, approved September 25th, 1913, it being the in-

tention of this Ordinance only to provide for cases and conditions not covered by said Ordinance No. 339, approved September 25th, 1913.

Penalty for violation of ordinance.

SECTION 5—*And be it further ordained by the Mayor and City Council of Baltimore,* that any and every person violating any of the provisions of this Ordinance shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not less than five nor more than fifty dollars, (and each day that said violation shall continue shall be considered a separate offense), or, in the discretion of the Court, shall be imprisoned in the Baltimore City Jail for not less than thirty days nor more than twelve months; and the owner or agent of any building, or any part of any building, who shall cause or permit the same to be used in violation of this Ordinance, shall be deemed to be equally guilty of a misdemeanor with the person occupying or using said building, or any part of said building, and, upon conviction, shall be subject to the penalty prescribed in this section of this Ordinance.

SECTION 6—*And be it further ordained by the Mayor and City Council of Baltimore,* that this ordinance shall take effect from the date of its passage.

Approved November 8, 1913, 2:10 P. M.

JAMES H. PRESTON, *Mayor.*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 33

CHARLES H. BUCHANAN, *Plaintiff,*

—vs.—

WILLIAM WARLEY, *Defendant.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

BRIEF AMICUS CURIAE ON BEHALF OF THE DEFENDANT IN ERROR

CHILTON ATKINSON,
Attorney.

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In the

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 231

CHARLES H. BUCHANAN, - - - - Plaintiff in Error,

versus

WILLIAM WARLEY, - - - - - Defendant in Error.

In Error to the Court of Appeals of the State of Kentucky.

BRIEF AMICUS CURIAE ON BEHALF OF THE DEFENDANT IN ERROR.

As attorney for the United Welfare Association of St. Louis and as one of the counsel in injunction proceedings against the City of St. Louis, Missouri, referred to in the brief permitted to be filed herein by Messrs. Wells H. Blodgett and Frederick W. Lehmann, the undersigned begs leave to submit a brief as *amicus curiæ* in answer to theirs.

The United Welfare Association is an organization composed of thirty neighborhood improvement and protective associations of St. Louis, having a membership of over fifteen thousand male citizens. Its counsel have been associated with the legal department of the City

of St. Louis, Mo., for the defense in the proceedings filed in the United States District Court of St. Louis, referred to by Messrs. Blodgett and Lehmann, to enjoin said city from enforcing certain segregation ordinances; these ordinances being similar in character to the ordinances of the City of Louisville, which are involved in the case at bar, to-wit: The case of Charles H. Buchanan v. William Warley.

While the segregation ordinances of St. Louis are not involved in this case, a brief reference to them, and to the constitution, laws and social conditions of Missouri, is made hereafter for the purpose of showing the peculiar problems presented to states where a large negro population has mingled with the whites in the more congested cities of the United States.

Segregation and the Constitution.

The whole proposition is bound up in the question of police power, its limitations, and its relation to the prevailing habits, needs and sentiment of the people in communities where segregation laws are sought to be enforced.

If the legislation in question serves no public purpose, and places an arbitrary restriction upon persons, entirely out of proportion to the good sought to be attained, then it may be questioned whether such laws are reasonable. But if they may be supposed to operate for some public benefit, they should not be considered an arbitrary interference with the right of contract or the right of property and an improper exercise of the police power.

3

Decision and Precept.

The Supreme Court of the United States has given as a guide to the several states for the exercise of their police powers, certain broad rules and expressions of opinion. Among these are the following:

Justice Field:

Neither the Fourteenth Amendment to the Constitution, nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources and add to its wealth and prosperity.

Special burdens are often necessary for general benefits. Though certain laws must be in many respects special in their character, they will not furnish just ground of complaint if they *operate alike upon all persons and property under the same circumstances and conditions.* Barbier v. Connolly, 113 U. S. 27, l. c. 31, 32.

Chief Justice Waite:

The police power extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the states. Munn v. Illinois, 94 U. S. 113, l. c. 125.

Justice Brown:

Conditions likely to give rise to disputes and bickerings prejudicial to the public order, may be prevented by an act which, to a certain extent, involves the taking of property without compensation. Camfield v. United States, 167 U. S. 518, l. c. 524.

Justice Hughes:

Whether a law is wise or unwise, whether based upon sound economic theory, whether it is the best means to achieve the desired result, are matters for the judgment of the state legislative body. And the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance of the United States courts. C. B. & Q. R. R. Co. v. McGuire, 219 U. S. 549, l. c. 569.

Justice Holmes:

Protecting what is sanctioned by usage, or held by prevailing morality or strong *preponderant opinion* to be greatly and immediately necessary to the promotion of their comfort and preservation of the public peace and good, is a proper exercise of the police power. Noble v. Haskell, 219 U. S. 104, l. c. 111.

Justice Miller:

Upon the police power of the state depends the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. Slaughter House Cases, 16 Wall. 36.

Justice Harlan:

With the legislatures of the several states rests the determination of the peculiar facts, upon which its police regulations are based, and if such facts *can* exist it will be assumed that they *do* exist. Powell v. Penn., 127 U. S. 678, l. c. 685.

Justice Field:

The motives of the members of the state lawmaking body in passing a law in question cannot be in-

quired into, except as disclosed on the face of the act in question or inferable from its operation. Soon Hing v. Crowley, 113 U. S. 703, l. c. 710.

Justice Brewer:

Some must suffer by the establishment of any territorial boundaries. Because the legislative body is unable to protect all, must it be denied the power to protect any? L'Hote v. New Orleans, 177 U. S. 587, l. c. 597.

Justice McKenna:

Regulations which are induced by the general sentiment of the community for whom they are made and upon whom they operate, cannot be said to be unreasonable. Chiles v. Chesapeake & Ohio Ry., 218 U. S. 71, l. c. 77.

Justice Brown:

A statute which implies merely a legal distinction between the white and colored races; a distinction which is founded in the color of the two races and which must always exist, so long as white men are distinguished from other races by color, has no tendency to destroy the legal equality of the two races.

We cannot accept the argument that equal rights cannot be secured to the Negro, except by an enforced commingling of the two races. Neither the 13th, 14th or 15th amendments to the United States Constitution operated to make the Negro race wards of the nation.

In determining the question of reasonableness, the state is at liberty to act with reference to the *established usages, customs and traditions of the people* and with a view to the promotion of their comfort and the preservation of the public peace and good order. Plessy v. Ferguson, 163 U. S. 537.

Strong Preponderant Opinion.

A general understanding of the social problems existing in certain states and peculiar to their climates and population, is necessary in order to form just and fair inferences concerning the motives and objects of their restrictive laws. The experience of one state under similar conditions is naturally in some degree the basis of the laws enacted in another state. Therefore, some consideration of the laws bearing upon the same subject, and passed from time to time in a number of the states, and long antedating the neighborhood segregation laws therein, is necessary in order to understand and properly classify them.

It is worthy of note that the problems involved in the free commingling of the two races, of utterly different species and very different physical and mental tendencies, were first presented in the more northerly or free states. Thus prior to the war between the states, and before sectional habits and passion had lowered the race problem from a plane of reason and scientific consideration to one of angry debate, the State of Massachusetts wrestled with the problem of segregation.

It is unnecessary to make specific reference to the cases upholding the Massachusetts law for separate schools and the Pennsylvania law for separate coaches, the former enacted as early as 1849, because ample references and extracts have been given of these in the learned brief of counsel for the City of Louisville. Reference is simply made, in passing, to show that the development

of the system of laws for separating the black and white races had its start and has continued apart from the question of slavery or the question of civil rights of the negro.

The constitutions of some and the statutes of many of the states, from a very early date, have contained restrictions upon the social intermingling of the two races. The constitution of the State of Missouri, known to fame as the Drake Constitution, adopted April 8, 1865, in Article 9, Section 2, provides:

"Separate schools may be established for children of African descent. All funds for the support of public schools shall be appropriated in proportion to the number of children without regard to color."

The present Constitution of Missouri, adopted October 30, 1875, in Article 11, Section 3, provides as follows:

"Separate free public schools shall be established for the education of children of African descent."

Missouri passed a law at an early date, now in the Revised Statutes of 1909, at Section 4727, as follows:

> "No person having one-eighth part or more of negro blood shall be permitted to marry any white person, nor shall any white person be permitted to marry any negro or person having one-eighth part or more of negro blood; and every person who shall knowingly marry in violation of the provision of this section shall, upon conviction, be punished by imprisonment in the penitentiary for two years, or by fine not less than one hundred dollars, or by imprisonment in the county jail not less than three months, or by both such fine and imprisonment; and the jury trying any such case may determine the proportion

of negro blood in any party to such marriage from the appearance of such person."

State v. Jackson, 80 Mo. 175.

The State of Missouri also enacted at an early date, and now designated Section 8280, Revised Statutes of Missouri, 1909, a statute making marriages between white persons and negroes and white persons and Mongolians absolutely void, as follows:

> "All marriages between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the half as well as of the whole blood, and between uncles and nieces, aunts and nephews, first cousins, white persons and negroes, white persons and Mongolians, are prohibited and declared absolutely void, and this prohibition shall apply to illegitimate as well as legitimate children and relatives."

The State of Indiana on May 13, 1869, enacted a statute providing separate schools for colored and white children.

Corey v. Carter, 48 Ind. 327.

On May 1, 1863, a law was passed by the State of Indiana declaring void, among others, marriages where one of the parties is white and the other possessed of one-eighth or more negro blood.

Sec. 8380, Burn's Ann. Stat. of Indiana of 1914.

Since 1864 the State of New York has had a law permitting county boards to establish separate schools for colored children.

Birdseye's Cumming & Gilbert Cols. Laws of New York, Sec. 981, p. 1289.

The Constitution of Kentucky adopted September 28, 1891, provides as follows:

"In distributing the school fund no distinction shall be made on account of race or color, and separate schools for white and colored shall be maintained."

Kentucky legislation enacted May 16, 1893, in Section 2097 of the Kentucky Statutes of 1915, provides that marriage between a white person and a negro or mulatto is prohibited and declared void.

Maryland provided for separate colored schools at a very early date, as may be seen in Chapter 377 of the Maryland Statutes of 1872.

Virginia and West Virginia have also provisions for separate schools for negroes, as have many other states and there are also many other provisions in reference to the intermarriage between the two races, black and white. Further enumeration will add nothing to the point involved.

New Phases.

As time advanced the underlying principles involved in these early laws demanded new legislation to meet other phases of the problem. The large number of the two races brought together in congested cities gradually drew forth the question into new prominence; and thus the new expedient, neighborhood restriction, became more and more in demand. These neighborhood segregation laws have been enacted in the cities of Richmond, Atlanta, Baltimore, Louisville and St. Louis, and when brought before the courts, have presented different

ferent questions of law, varying with the type of ordinance enacted. The decisions of the courts and the various phases of these enactments are referred to quite fully in the principal briefs in this case.

The feature of such legislation which we are attempting to bring out is the increasing demand for it, as shown by the advance of the movement from city to city. It may be insisted by our opponents that laws of this type are promoted by political considerations rather than by the demands of public welfare; as the legislative bodies in the more southerly states may be considered to be uniformly of one political type. A striking contrast, however, is afforded in the case of the City of St. Louis, where, and the fact is notorious, the political bodies refused to pass any such legislation.

Passed by Direct Popular Vote.

Here in St. Louis the people by means of the initiative forced the enactment of segregation ordinances by popular vote on February 19, 1916. It is a matter of general knowledge that out of a total vote of approximately 69,000, over 52,000 votes were cast in favor of the segregation ordinances. The number of negroes entitled to vote at that election was over 9,000, and while their vote was not uniformly opposed to the ordinances, it may be assumed that they were in large number induced to vote against the proposition. The general political tendency of the City of St. Louis is too well known and understood to be ignored in connection with this result. It was also notorious that no party organ

advocated the segregation ordinances and none of the political parties was in favor of them or gave any aid or countenance to the movement.

Alleged Imputation of Inferiority.

Messrs. Blodgett and Lehmann say that the Louisville ordinances place a badge of inferiority on the negro race. This same argument was urged in the case of Plessy v. Ferguson. It brought out the comment of Justice Brown that if the enforced separation of the two races stamps the colored race with a badge of inferiority, it is not by reason of anything found in the act itself but solely in the construction put upon it by the colored people themselves.

Another objection which they urge is that the law will not entirely eliminate the evil which it is designed to remove. They also suggest that there is likely to be more trouble between blacks and whites across the alley than over the side fence. Such argument is entirely apart from the main question involved, and it is not necessary to test these laws by the standard of the patent medicine advertisement; the panacea for all evils is not yet discovered either in medicine or legislation.

Neutral Zone.

Counsel suggest that a neutral zone will result from segregation which will surround the colored blocks. That no whites will want to live there, and these districts will either be deserted or given over to factories or railroad yards. Perhaps this is a greater reflection upon the

colored race than they seriously intend. They may find that some people do not object to having colored neighbors on the next block. Whatever may be the result in that respect, it clearly comes within the rule of the case of L'Hote v. New Orleans, where the Court says that because the legislative body cannot protect all is no reason why they shall not protect any.

But this fear is hardly borne out by experience. On the contrary, it shows that in the past where there was less artificial stimulus to scattering around, the white population frequently remained intact next adjoining a negro street, although it would disappear rapidly after the negro moved into the same or opposite block on the same street with the whites. Back to back is different from side by side, and no amount of argument can blot out this well-established fact.

It is not to be supposed that these laws will be perfect, or will not, in some measure, inconvenience some persons. Whatever may have been the exact theory of the legislative bodies as to the practical operation of these laws, one certainly must find in them enough to demonstrate that they are passed for police regulation and may reasonably be supposed to have some effect in preventing the violation of valid constitutional and statutory regulations and promoting a settled and peaceful condition of the community.

Settled Order of Things.

Experience has demonstrated too well that the establishment of a settled order of things is the best preventa-

tive of controversy. The negro and the white get along very well in the same community where the status of things is established and well understood. In small communities there is no disposition to restrict the negro and he may have his abode within a "stone's throw" of a wealthy white person, without offense. In such community he is continually under the eye, and depends upon the support, of his neighbors and fellow townsmen. This condition of things develops his better tendencies and gives him a disposition to respect the feelings and general sentiment of his neighbors and the community at large. In certain cities, however, where he is to be found in large numbers, the negro is often turned directly across the current of civilization and public sentiment. Designing persons, often whites, who pretend to be working in his interest, are continually agitating and filling him with tales of his rights, his power and his prospects for the purpose of using him as a means of gaining profit through agitation and disorder. Out of a race of naturally happy people is thus developed a large number of covetous, designing and unfriendly residents, who are bent upon capitalizing their difference from the whites.

In the main, this is the type of negro who is continually fighting every form of regulation enacted for the purpose of removing the power and temptation from the negro to do injury to the whites and consequently to himself. He carries the false alarm to the negro gatherings and scatters the germs of discontent.

Natural Tendencies.

The natural tendency of the negro is social and normally he prefers to live among his own people. A familiar example is shown in the case of the negro house servant, who almost invariably prefers to go to his or her own home after working hours. Quite different is the particular type referred to. He chooses to live in the midst of a white community, apart from his own friends. Neither entreaty nor fair offers will induce such negro to sell his property and unless some neighbor gives a very large profit to him, he holds on in isolation while the neighborhood wilts and dies, as if with " a worm in the bud." If the high price is given to induce him to move, some white neighbor is likely to recognize and seize the opportunity for selling *his* house at a big price by way of planting a negro therein. It can be seen that such a system once started goes on until the negro is fast converted into an instrument of extortion; and why should not the cause, which develops ill will of the bitterest sort, be removed by the state in the interest of peace and good will? It is not every negro who has it in his heart to do these things, and we concede also that it is not every community, where negroes have come in and the whites retired, where the change has been brought about by blackmail. But the fact remains, manifest by the succession of laws being proposed and enacted, that this new phase of race conflict has reached such proportions as to startle and bring despair into many communities.

Logical Sequence.

If this were only a property consideration, it would still be worthy of respect. But it involves more. The segregation movement is based upon natural laws which make of the negro and white man two different and distinct species of humanity. This was regarded as a fact by Abraham Lincoln, who stated in his debate with Douglas at Charleston, Ill., on September 18, 1858, the following:

> "While I was at the hotel today, a gentleman called upon me to know whether I was really in favor of producing a perfect equality between the negroes and white people (great laughter). While I had not not proposed to myself on this occasion to say much on that subject, yet as the question was asked me I thought I would occupy perhaps five minutes in saying something in regard to it. I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races (applause); that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say in addition to this that there is a physical difference between the white and black races, which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together, there must be the position of superior and inferior, and I, as much as any other man, am in favor of having the superior position assigned to the white race. I say upon this occasion, I do not perceive that because the white man is to have the superior position the negro should be denied everything. I do not understand that, because I do not want a negro

> woman for a slave I must necessarily want her for a wife (cheers and laughter). My understanding is that I can just let her alone. I am now in my fiftieth year, and I certainly never have had a black woman for either a slave or a wife. So it seems to me quite possible for us to get along without making either slaves or wives of negroes. I will add to this that I have never seen to my knowledge a man, woman or child who was in favor of producing a perfect equality, social and political, between negroes and white men."

The laws prohibiting intermarriage were based upon the well-considered idea that mixture of the two bloods is cruelty to the offspring; that such offspring will be inferior to both the black and white progenitors. The laws preventing the co-education of the races have the same underlying principle—the idea being that such forced association will lead to disorder, humiliation of one race or the other and possibly illicit cohabitation; marriage being both prohibited by law and offensive to the sentiment of the community.

Same Right to Hold Property.

Counsel refers to laws of Congress enacted in 1866 and 1870, respectively, giving all citizens of the United States the same right in every state, as is enjoyed by white citizens thereof, to inherit, purchase, sell, hold and convey real and personal property, and giving to all the full and equal benefit of the laws.

A casual reading of the Louisville ordinance will allay all fear on the point of its violating these statutes. Counsel ignored the fact that the ordinance classifies and re-

stricts the *property in certain districts* and not the *individual as to race.* It becomes white or colored property, as the case may be, irrespective of who is or becomes the owner of it.

This same style of argument was used in the case of Pace v. Alabama, 106 U. S. 583, where a statute providing greater punishment for sexual offenses, when committed between two persons of the different races than for the same offenses committed between those of the same race. Justice Field, in writing the opinion in that case, observed that whatever discrimination is made in the punishment prescribed is directed against the *offense* designated, and not against the *person* of any particular color or race; that the punishment of each offending person, whether black or white, is the same.

Fair Inferences.

A fair inference as to the motives of the lawmaking body, in the enactment of this ordinance, in view of the history of early legislation in Kentucky and other states, and in view of the well-known traditions, usages, prevailing morality and strong preponderant opinion in the state, is that it was intended, first, to settle and establish the order of things and thus prevent further conflict and ill feeling by alarming residential developments, and second, to encourage the ownership of homes and prevent the rapid abnormal and wasteful shift of population and property values; third, to conserve the prevailing respect for and consequent observance of the state law against miscegenation. Therefore, we must

either condemn the provisions in the laws of the states prohibiting marriage between the white and colored, and the white and Mongolian races, or else justify every regulation which tends to prevent a breach of these laws, in spirit or in letter.

What distinction can be seriously drawn between the incident which brings social intercourse between children of the opposite races living side by side and the incident which establishes that social intercourse in the school yard. It might be supposed from the arguments of our opponents that they are entirely in accord with race separation in the schools and railroad coaches, but find a great objection in the neighborhood segregation, distinguishing it from the other cases. These arguments, however, are identical with those to be found in the suits by which those other laws were sought to be nullified by this Court.

Where Draw the Line?

The argument is made that the principle of segregation once acknowledged will lead into distinctions very narrow and absurd; and that the population of this country, as in a chemical laboratory, will be separated into many racial elements, labeled and set apart each from the other. A religious distinction is even suggested, as between Jew and Gentile. Of course, those making such argument fear no such thing. The query of how far it is to be allowed to go, can well be answered in the words of Justice Holmes in the case of Noble v. Haskell. He stated, in answer to the question as to

whether a state can do this, and whether it can do that, and where are you going to draw the line, as follows: "The last is a futile question and we will answer the others when they arise."

Preservation of Species.

People naturally crave the preservation of their own species. It belongs to the noble attributes of mankind. The amendments to the Constitution of the United States did not have as their purpose the downright leveling of the people of this land in respect of property, blood, or social condition, nor was their purpose to construct the posterity of the United States after the pattern of the West Indies. While they prevented unfair discrimination, they did not establish a tenancy in common.

The state may certainly, without clashing with the constitution, encourage its citizens to build homes and may protect them in the preservation of these homes and surroundings from all influences which will make them indifferent to the laws of the state or else at war with neighbors.

A Statute of Frauds.

This law might logically contain in its title that it is to prevent fraud. When a man seeks to be your neighbor, not because he likes you, but because he knows you don't want him, and because you fear the consequences, it *may* even arouse your anger. So it would arouse his under similar conditions. You will not, nor would he under like conditions, see any application of the query, "Dost thou well to be angry?"

Respectfully submitted,

CHILTON ATKINSON.

ST. LOUIS ORDINANCES.

APPENDIX 1.

An Ordinance to Prevent Ill Feeling, Conflict and Collisions Between the White and Colored Races in the City of St. Louis, in the City Blocks Occupied by Both Races, and to Preserve the Public Peace, and Promote the General Welfare, by Making Reasonable Provisions Whereby Gradually Such Blocks May Become in Time Occupied Wholly by Either White or Colored People, Thereby Promoting the General Welfare of White and Colored People Respectively.

Be it ordained by the City of St. Louis as follows:

Section 1. That hereafter, it shall be unlawful for any white person to use as a residence, or place of abode, or to establish and maintain as a place of public assembly any house, building or structure or any part thereof in any block, as same is hereinafter defined, on which seventy-five per cent or more of such houses, buildings or structures are occupied or used as residences, places of abode or public assembly by colored people, and twenty-five per cent or less of such houses, buildings or structures are occupied or used as residences, places of abode or public assembly by white people.

Section 2. That hereafter it shall be unlawful for any colored person to use as a residence or place of abode, or to establish and maintain as a place of public assembly, any house, building or structure or any part thereof in any block, as same is hereinafter defined, on which seventy-five per cent or more of such houses, buildings or structures are occupied or used as residences, places of abode, or public assembly by white people, and twenty-five per cent or less of such houses, buildings or structures

are occupied or used as residences, places of abode or public assembly by colored people.

Definition of the Word "Block."

Section 3. That the word block, as the same is used in this ordinance, shall be construed to mean both sides of a street to the rear of the lots thereon, between the two adjacent, intersecting or crossing streets. A house, any part of which is opposite the end of and facing in the direction of an intersecting street, shall be construed as being in the same block with the adjacent property with street or house numbers receding and which front in the same direction. Corner houses shall be deemed to be located in the block in which they are numbered.

Section 4. That any person intending to build or erect for himself or as agent for another, any building to be used as a residence, place of abode, or place of public assembly, upon property situated on a block, as same is hereinabove defined, on which there are no buildings used as residences, places of abode, or places of public assembly, shall in the application for a permit, to the Building Commissioner of the City of St. Louis, declare for what purpose said proposed building, residence, or place of abode, for which said permit is asked, is to be used, whether as a residence, or place of abode or place of public assembly for white persons or for colored persons. Upon the filing of said application, the Building Commissioner shall, as soon as practicable thereafter, cause to be published twice a week for four consecutive weeks, in one English and one German daily newspaper in the City of St. Louis, and at the cost of said applicant, the fact that a building of the character described is proposed to be built at the place indicated in the permit, and to be used or occupied as a residence, place of abode, or place of public assembly, as the case may be, for white or col-

ored people, and he shall cause to be posted in a conspicuous manner at some convenient place on or near the lot where such building is to be erected, a similar statement, within one week after the presentation of such application; and unless within five days after the date of the last publication thereof, protest be made in writing to the Building Commissioner by those owning more than fifty per cent of the foot frontage on said block, against the use mentioned in said application, the permit desired shall, if in other respects said application be in conformity with the ordinances of the city, be granted. Thereafter, all buildings erected on said block and all buildings erected on said block for other purposes, but which it may be desired thereafter to use as residences, places of abode or places of public assembly, shall be so used, either for white persons or for colored persons respectively, as may be determined by the permit granted in the manner hereinabove provided. If, however, the owners of more than fifty per cent of the foot frontage on said block in which the proposed building is to be erected, and for which a permit is asked, shall protest against the said building in the manner above provided, then in such case, no permit shall be issued on said application for the erection of said building for the use set out therein. Whenever a protest is filed under the provisions of this ordinance, those signing the protest shall state the exact number of feet of their respective property that front on the block in question, and each signature to such protest shall be acknowledged before a notary public, and any signature not so acknowledged shall be disregarded by the Building Commissioner.

The provisions of this section are intended to provide a method by which a block which is vacant may be improved and by which its use for either white persons or colored persons may be determined, but shall not be con-

strued to affect unlawfully any constitutional right which any owner of property may possess to use or occupy his property, subject to reasonable police regulations.

Section 5. That nothing in this ordinance shall affect the location of residences, places of abode, or of public assembly established previous to the approval of this ordinance, and nothing herein shall be so construed as to prevent occupation of residences, by white or colored servants or employes on the premises on which they are so employed.

Section 6. That any and every person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than Ten ($10.00) Dollars, nor more than One Hundred ($100.00) Dollars, for each offense. Each day upon which a violation of this ordinance shall exist, shall be and constitute a separate offense.

Penalty for Violation of Ordinance.

The owner or agent of any building or any part of any building who shall cause or permit the same to be used in violation of this ordinance shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be subject to the penalty prescribed by this ordinance.

Section 7. That the invalidity of any portion of this ordinance shall not affect the validity of any other portion thereof, which can be given effect without such invalid part.

Section 8. That this ordinance shall take effect ten days after the date of its passage.

Appendix 2.

An Ordinance to Prevent Ill Feeling, Conflict and Collisions Between the White and Colored Races in the City of St. Louis, and to Preserve the Public Peace and Promote the General Welfare by Making Reasonable Provisions Requiring the Use of Separate Blocks for Residence by White and Colored People Respectively.

Be it ordained by the City of St. Louis as follows:

Separate Blocks for Residence by White and Colored People Respectively.

Section 1. That, from and after the passage of this ordinance, it shall be unlawful for any white person to use as a residence, or place of abode, any house, building or structure, or any part thereof, located in any colored block, as the same is hereinafter defined; and it shall also be unlawful for any colored person to use as a residence or place of abode, any house, building or structure, or any part thereof, located in any white block, as the same is hereinafter defined. Provided, however, that nothing herein contained shall preclude persons of either race employed as servants by persons of the other race from residing upon the premises on which they are so employed, and that nothing herein contained shall be construed or operate to prevent any person *who, at the date of the passage of this ordinance, shall have acquired a legal right to occupy as a residence, any building or portion thereof,* from exercising such legal right, and that nothing in this ordinance contained shall be construed to apply to the use of any building or structure, except such as are, or hereafter may be, located within either a white or a colored block, as hereinbelow defined.

Section 2. That the word block, as the same is used in this ordinance, shall be construed to mean both sides

of a street to the rear of the lots thereon, between the two adjacent intersecting, or crossing streets. A house, any part of which is opposite the end of and facing in the direction of an intersecting street shall be construed as being in the same block with the adjacent property with street or house numbers receding and which front in the same direction. Corner houses shall be deemed to be located in the block in which they are numbered.

Definition of the Word "Block."

"White Block." A white block shall be construed to mean a block, as hereinabove defined, which was such at the date of the passage of this ordinance, or which at any time hereafter shall become a block, in which white persons are residing and in which no colored persons are residing, except such, if any, as may be employed as servants by white residents therein, as provided in Section 1 hereof; also any block which may hereafter be formed, in which at the date of the passage of this ordinance, there were no residents, but which since the passage of this ordinance shall have become or which at any time hereafter may become a block in which white persons are residing and in which no colored persons are residing, except such, if any, as may be employed as servants by white residents therein, as provided by Section 1 hereof.

"Colored Block." A colored block shall be construed to mean a block as hereinabove defined, which at the time of the passage of this ordinance, or since, shall have become a block in which colored persons are residing, and in which no white persons are residing, except such, if any, as may be employed as servants by colored residents therein, as provided in Section 1 hereof; also any block, as the same is hereinabove defined, heretofore formed, or any block which may be hereafter formed, in

which at the date of the passage of this ordinance, there were no residents, but which since the passage of this ordinance shall have become or which at any time hereafter may become a block in which colored persons are residing, and in which no white persons are residing, except such, if any, as may be employed as servants by colored residents therein, as provided by Section 1 hereof.

Meaning of Resident. A resident of any block shall be construed to include any person occupying any room therein as a sleeping place, whether as owner, tenant, dependant, boarder, lodger or otherwise, unless it appears that such occupation is merely transitory, and that such person has another fixed place of abode; but nothing in this definition shall be construed to affect the provisions in regard to servants in Section 1 hereof.

Section 3. That after the passage of this ordinance, no buildings, or portion of any building, in the City of St. Louis, shall be used as a church or for the purpose of conducting religious services, or for a school, a theater, a dance hall or assemblage hall, by white people in a colored block, as the same is hereinabove defined, and after the passage of this ordinance, no building or portion of a building in the City of St. Louis, shall be used as a church or for the purpose of conducting therein religious services, or for a school, a theater, a dance hall or an assemblage hall, by colored people in a white block, as the same is defined in this ordinance; provided, however, that nothing herein contained shall apply to any building or portion of a building which at the time of the passage of this ordinance is being used as a church or for the purpose of conducting religious services, or for a school, a theater, a dance hall or an assemblage hall, or which at the time of the passage of this ordinance any person or persons

Buildings Used as Churches, Schools, Etc.

or corporation *shall have acquired the legal right to use as a* church or place for conducting religious services, as a school, a theater, a dance hall or an assemblage hall.

Section 4. That it shall be the duty of the Building Commissioner, as soon as practicable after the passage of this ordinance, to prepare and preserve for inspection in his office, a map or maps, showing which blocks in the City of St. Louis are white blocks as the same is hereinabove defined, and which blocks are colored blocks as the same is hereinabove defined, and also showing such blocks in the City of St. Louis in which there are buildings now occupied as residences, places of abode, and places of public assembly for both white and colored people, respectively, and shall continue to make and revise such maps from time to time as will enable his office and the public to determine the character of use or occupancy of any given block in the city. Such map or maps so prepared and properly certified shall be *prima facie* evidence of the facts shown thereby. Any owner of property in the City of St. Louis, or any agent therefor, or any occupant thereof, who shall refuse upon request to furnish to the Building Commissioner, or anyone whom he may appoint to gather such information, with such information as such owner, agent or occupant may possess, necessary to make up such map or maps and to revise same from time to time, or who shall knowingly furnish any false information as to the character of use or occupancy of any residence, place of abode, or place of assembly in the City of St. Louis, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined as hereinafter provided. But the failure of the Building Commissioner to comply with the provisions of this section shall not operate to exempt or excuse any person from complying with the terms of this ordinance.

Section 5. That any and every person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than Ten ($10.00) Dollars, nor more than One Hundred ($100.00) Dollars, for each and every offense, and each day upon which a violation of this ordinance shall exist shall be and constitute a separate offense.

Penalty for Violation of Ordinance.

The owner or agent of any building or any part of any building, who shall cause or permit the same to be used in violation of this ordinance, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be subject to the penalty prescribed by this ordinance.

Section 6. That the invalidity of any portion of this ordinance shall not affect the validity of any other portion thereof, which can be given effect without such invalid part.

Section 7. That this ordinance shall take effect Ten (10) days from the date of its passage.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 33

CHARLES H. BUCHANAN,

—vs.—

WILLIAM WARLEY.

BRIEF FOR THE PLAINTIFF IN ERROR ON REHEARING

CLAYTON B. BLAKEY,
MOORFIELD STOREY,
Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1916.

[No. 231]

CHARLES H. BUCHANAN

v.

WILLIAM WARLEY.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is a writ of error to reverse a decision made by the Court of Appeals of Kentucky (165 Ky. 559), affirming a judgment for the defendant entered by the Jefferson Circuit Court in a suit for the specific performance of a contract to buy a tract of land in Louisville.

The petition (Record, p. 1) alleges that the plaintiff in error (hereinafter referred to as "the plaintiff") is the owner in fee simple of the premises in question and that the defendant in error (hereinafter referred to as "the defendant") on November 2, 1914, entered into a contract to buy the premises, which contract contained the following proviso:—

> "It is understood that I am purchasing the above property for the purpose of having erected thereon a house which I propose to make my residence, and it is a distinct part of this agreement that I shall not be required to accept a deed to the above property or to pay for said property unless

I have the right under the laws of the State of Kentucky and the City of Louisville to occupy said property as a residence." (Record, p. 4.)

The petition further alleges that the plaintiff duly tendered a deed but the defendant refused to accept it or to pay the price.

The defendant's answer (Record, p. 4) alleges that he is a colored person and that the premises are in a block in which a greater number of houses are occupied as residences by white people than are occupied as residences by colored people, so that, if a house should be erected upon the premises, the defendant would be forbidden to occupy it by an ordinance of the City of Louisville adopted May 11, 1914.

This ordinance (Record, pp. 32–35) is as follows:—

"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 respectively.

"Be it ordained by the General Council of the City of Louisville:

"SECTION 1. It shall be unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly, any house upon any block upon which a greater number of houses are occupied as residences, places of abode or places of public assembly by white people than are occupied as residences, places of abode or places of public assembly by colored people.

"SECTION 2. It shall be unlawful for any white person to move into and occupy as a residence, place of abode or to establish and maintain as a place of public assembly, any

house upon any block upon which a greater number of houses are occupied as residences, places of abode or places of public assembly by colored people than are occupied as residences, places of abode or places of public assembly by white people.

"SECTION 3. The word 'block' as the same is used in this ordinance shall be construed to mean that portion of any street or public alley upon both sides of the same between two adjacent intersecting or crossing streets or public alleys, or between such streets or alleys, if extended. In determining the boundary of any given block for the purpose of complying with the provisions of this ordinance, there shall be taken as a basis of measuring the length of such block, the space between the intersecting streets or public alleys on that side of the street or alley in which the house numbers are even, if that side of the street be divided into blocks; otherwise, the block on the opposite side shall be taken as the basis. A 'residence' or 'place of abode' or 'place of public assembly' shall be counted in that block on which it faces and has its main entrance.

"SECTION 4. Nothing in this ordinance shall affect the location of residences, places of abode or places of public assembly made previous to the approval of this ordinance, and nothing herein shall be so construed as to prevent the occupation of residences, places of abode or places of public assembly, by white or colored servants or employees of occupants of such residences, places of abode or places of public assembly on the block on which they are so employed; nor shall anything herein contained be construed to prevent any person who, at the date of the passage of this ordinance, shall have acquired or possessed the right to occupy any building as a residence, place of abode or place of assembly, from exercising such a right. Nor shall anything herein contained prevent the owner of any building now leased, rented or occupied as a residence, place of abode or place of public assembly for colored persons, from continuing to rent, lease or occupy such residence,

place of abode or place of public assembly for such persons, if the owner shall so desire; but, if such house shall after the passage of this act be at any time leased, rented or occupied as a residence, place of abode or place of assembly for white persons, it shall not thereafter be used for colored persons, if such occupation would then be a violation of Section One hereof. Nor shall anything herein contained prevent the owner of any building now leased, rented or occupied as a residence, place of abode or place of assembly for white persons, from continuing to rent, lease or occupy such residence, place of abode, or place of assembly for such purpose, if the owner shall so desire; but if such house should, after the passage of this act, be at any time leased, rented or occupied as a residence, place of abode or place of assembly for colored persons, it shall not thereafter be so used for white persons, if such occupation would then be a violation of Section Two hereof.

"SECTION 5. Any person intending to build or erect for himself, or as agent for another, any building to be used as a residence, place of abode or place of public assembly, upon property situated on a block on which there are no buildings used as a residence, place of abode or place of public assembly, shall in the application for the permit to the Building Inspector declare for what purpose said proposed building for which the permit is asked, is to be used, whether as a residence or place of abode or place of public assembly for white persons or for colored persons. Upon the filing of said application, the Building Inspector shall, as soon as practicable thereafter, cause to be published twice a week for two successive weeks in one German and in one English daily paper of the city of Louisville, and at the cost of said applicant, the fact that a building of the character described is proposed to be built at the place indicated in the permit and to be used or occupied as a residence, place of abode or place of public assembly, as the case may be, for white or colored people; and he shall cause to be posted at some convenient place on or near the lot

where such building is proposed to be erected a similar statement; and unless within five days after the date of the last publication thereof, protest be made in writing to the Building Inspector by those owning more than fifty per cent of the foot frontage of said block against the use mentioned in said application, the permit desired shall, if in other respects said application be in conformity with the ordinances of the city, be granted. Thereafter, all buildings erected for residences, places of abode or places of public assembly on said block, and all buildings erected on said block for other purposes, but which it may be desired thereafter to use as residences, places of abode or places of public assembly, shall be so used either for white persons or for colored persons respectively, as may be determined by the permit granted in the manner hereinabove provided. If, however, the owners of more than fifty per cent of the foot frontage on said block in which the proposed building is to be erected and for which a permit is asked, shall protest against such building in the manner above provided, then in such case no permit shall be issued on said application for the erection of a building for the use set out therein. Whenever a protest is filed under the provisions of this ordinance, those signing the protest shall state the exact number of feet of their respective property that front on the block in question, and each signature to such protest shall be acknowledged before a notary public; and any signature not so acknowledged shall be disregarded by the Building Inspector.

"The provisions of this ordinance are intended to provide a method by which a block which is vacant may be improved and by which its use for either white persons or colored persons may be determined, but shall not be construed to abridge unlawfully any constitutional right which any owner of property may possess to use or occupy his property, subject to reasonable police regulations.

"Section 6. No person shall be granted a permit by the Building Inspector for the construction of any house

or other building intended to be used as a residence, as a place of abode, or as a place of public assembly, unless he state in his application for a permit whether the house or building to be constructed is designed to be occupied or used by white or colored people; and if upon the completion of said building or any time thereafter, the owner shall permit said building to be occupied in any manner other than as stated in said application, he shall at once file with the Building Inspector an affidavit stating the change in the manner of use or occupancy. Whenever the use or occupancy of any building as a residence, place of abode or place of assembly for white or colored people, whether erected before or after the passage of this ordinance, is changed from white to colored, or from colored to white, after the passage of this ordinance, the owner of said building shall at once file with the Building Inspector a sworn statement of such change. If the owner of any building used or occupied as a residence, place of abode or place of assembly, shall permit its use or occupation before there is a compliance with the provisions of this section, he shall be fined for each day of such use or occupation, not less than five dollars nor more than fifty dollars. But no permit issued by the Building Inspector shall authorize any person to use or occupy any property in violation of any section of this ordinance.

"SECTION 7. It shall be the duty of the Building Inspector as soon as practicable after the passage of this ordinance, to prepare and preserve for inspection in his office, maps of such blocks in the city of Louisville as are now occupied as residences, places of abode, and places of assembly for both white and colored people, and shall continue to make such maps from time to time as will enable his office and the public to determine the character of use or occupancy of any given block in the city. Such map so prepared and properly certified shall be prima facie evidence of the facts shown thereby. Any owner of property in the city of Louisville or any agent therefor,

or any occupant thereof, who shall refuse upon request, to furnish to the Building Inspector, or anyone whom he may appoint to gather such information, with such information as such owner, agent or occupant may possess, necessary to make up such map and to revise it from time to time, or who shall furnish any knowingly false information as to the character of use or occupancy of any residence, place of abode or place of assembly in the city of Louisville, shall be subject to a fine of not less than five dollars nor more than fifty dollars for each offense. But the failure of the Building Inspector to comply with the provisions of this section shall not operate to exempt or excuse any person from complying with the terms of this ordinance.

"SECTION 8. Any person who shall violate this ordinance either by himself or through his agent, or any agent for another violating any provision of this ordinance for which a penalty is not otherwise provided, shall be liable to a fine of not less than five dollars nor more than fifty dollars for each offense. Each day that property is occupied in violation of this ordinance shall constitute a separate offense for the purposes of this section.

"SECTION 9. The invalidity of any portion of this ordinance shall not affect the validity of any other portion thereof which can be given effect without such invalid part.

"SECTION 10. This ordinance shall take effect from and after its passage. (Approved May 11, 1914.)"

The plaintiff in his reply (Record, pp. 7-11) alleged that the ordinance was void, for the reason, among others, that it was legislation forbidden by the Constitution of the United States and especially by the Fourteenth Amendment thereof, and showed in detail how the enforcement of the ordinance deprived the people of Louisville generally and the plaintiff in particular of rights secured by that amendment. Additional allegations to the same effect were embodied in an amendment to the reply (Record, p. 14).

On motion of the defendant, most of these allegations were struck from the plaintiff's reply, subject to the plaintiff's exception (Record, pp. 11, 15).

The allegations so struck out are printed in the record (pp. 15–17) and need not be reprinted here.

The defendant thereafter demurred to the reply. The demurrer was sustained (Record, pp. 19, 31), and, the plaintiff having declined to plead further, it was ordered that the petition be dismissed (Record, p. 27). Upon appeal, this judgment was affirmed by the Court of Appeals (Record, p. 31), whereupon the plaintiff sued out this writ of error (Record, p. 43).

SPECIFICATION OF ERRORS.

The errors insisted upon in this brief may be summarized as follows:—

1. The refusal to reverse the action of the trial court in sustaining the defendant's demurrer to the plaintiff's reply, and to hold that the ordinance relied upon by the defendant is void because it deprives the plaintiff and others of property without due process of law, abridges the privileges and immunities of citizens of the United States including the plaintiff, and denies to the plaintiff and other persons within the jurisdiction of Kentucky the equal protection of its laws, and therefore is forbidden by the Constitution of the United States and especially by the Fourteenth Amendment thereof. (Assignments 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 14; Record, pp. 46–49.)

2. The refusal to reverse the action of the trial court in striking from the plaintiff's reply as immaterial allegations of fact which, if proved, would have shown that the ordinance relied on by the defendant in the circumstances existing in the City of Louisville deprived the plaintiff of

property without due process of law, abridged the privileges and immunities of the plaintiff and other persons in like situation and denied to him and them the equal protection of the laws of Kentucky, and that it was therefore void as forbidden by the Constitution of the United States and especially by the Fourteenth Amendment thereof. (Assignment 13; Record, p. 49.)

ARGUMENT.

I.

The Allegations as to the Results of the Ordinance in Question should not have been Struck from the Plaintiff's Reply.

We treat this subsidiary question briefly before proceeding to the argument of the main question presented by the record, that the Court may understand the whole case which the plaintiff can prove.

These allegations are in substance that the result of the ordinance is to prevent the plaintiff from selling his land, which by reason of its location is only salable to colored persons for purposes of residence; that the ordinance compels the colored inhabitants of Louisville to live in quarters where they and their offspring will be thrown constantly into close touch with and subject to contamination by disagreeable and worthless neighbors and that it prevents them from moving into desirable and healthy neighborhoods and confines them to unhealthy and crowded localities. These allegations open the door for evidence, which would have been introduced, that the classification of territory made by the ordinance confines the colored people of Louisville, though one-fifth of its whole population, to about one-eighth of its area; that the police have set apart certain sections

to which houses of ill-repute are confined and that of these sections 63 per cent. are within the territory allotted to negroes; that the liquor saloons are far more numerous in this region than in the white territory, and that the negroes are thus compelled to live in a region where criminals and vicious people congregate and conditions prevail in which no reputable person would wish to live and bring up his children; that, moreover, the negro population, as it increases, must become more and more crowded, so that all the evils which result from the congestion of population are certain to follow.

The question is whether such facts as these are wholly immaterial in this case and, in dealing with that question, we have a right to assume that such facts could have been proved and to ask the Court to consider whether the opportunity to prove them was properly denied to the plaintiff. Some of the allegations which the Court struck out state consequences of the ordinance to the public of Louisville, others state the situation and surroundings of the plaintiff's property and the effect of the ordinance, if valid, upon him as the owner of that property. They are brought forward not as things of which the plaintiff complains, but as proof that the ordinance produces results which show that it is clearly unconstitutional.

If the Court is at all inclined to take judicial notice of any facts in this case such as bitter antagonism and even conflicts between the races arising from their proximity, as the Court is urged to do by the defendant (Deft.'s brief, p. 3), it is clear that the allegations of the reply should stand and that the plaintiff should have the opportunity to prove them, since it is expressly alleged that the occupancy of more desirable localities by colored people "instead of creating conflict and ill-feeling between the white and colored races has been welcomed and encouraged by the white inhabitants of the city of Louisville." The

Court can hardly take judicial notice of facts like these which a party offers to disprove.

Unless the Court in dealing with the case assumes that the consequences inevitably imposed upon the public by the ordinance are such as to make it invalid, or rules as matter of law that it is immaterial whether the ordinance produces these results or not, we contend that it was error to strike these allegations out and so deny the plaintiff the opportunity to prove that they are true.

While the question is, in a sense, one of pleading, it is open in this Court.

Rogers v. *Alabama*, 192 U. S. 226.

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, the language of the ordinance under consideration was apparently innocent on its face, but the Court looked through the language to the facts, considered the real purpose and effect of the ordinance and dealt with it accordingly. Under the rule of that case the evidence which the Court excluded should have been admitted.

This question becomes immaterial, however, if the Court sustains our contention on the main question, which is that the inevitable consequences of the ordinance are such that it must be held to violate the Fourteenth Amendment.

II.

The Case Necessarily and Properly Presents the Question whether the Ordinance is Valid.

The defendant's counsel in their brief (pp. 3, 80) suggest that the plaintiff is a white man and cannot therefore "complain of discrimination against members of the colored race."

This suggestion makes it necessary to state the plaintiff's exact position, which is this. He is not complaining of

discrimination against the colored race. He is not trying to enforce their rights but to enforce his own. He is seeking to make the defendant pay for land which the latter has agreed to buy provided he can legally occupy it as a residence. The plaintiff tenders the deed and asks the defendant to accept and pay for it. The defendant replies that he is not bound to do so, because the ordinance prevents his occupying the lot as a residence. The plaintiff replies that the ordinance is void. If he is right, he recovers; if not, the defendant prevails.

The question, therefore, is whether the ordinance is or is not valid.

Upon the answer to this question depends the plaintiff's right to enforce his contract with the defendant.

The validity of the ordinance depends on whether it is or is not in violation of the Fourteenth Amendment, and therefore that is the question which the case presents. As in *Truax* v. *Raich*, 239 U. S. 33, 39, it is "idle to call the injury [suffered by the plaintiff] indirect or remote."

III.

The Ordinance Violates the Fourteenth Amendment to the Constitution of the United States.

A. *The effect of the ordinance.*

In order to sustain our main proposition it is necessary to show what the ordinance does,—what are its practical results.

The following diagram is presented in order to make the exact situation clear, and in it lots occupied by negroes are black and those occupied by whites are not, the number of lots in each block being assumed for purposes of illustration.

13

STREET

ALLEY

	1
	2
	3
	4
	5
	6
	7
	8
	9

STREET

1	
2	
3	
4	
5	
6	
7	
8	
9	

ALLEY

STREET

This shows that parallel to and between the streets of Louisville run alleys, and that behind each row of houses facing on the street is another row back to back with it facing on the alley, so that on each street two opposite rows of houses face each other and that in like manner two rows face or may face on each alley. The two rows facing on the street are one block and the two rows facing on the alley are another block (Ordinance, Section 3, *ante*, p. 3).

Under the ordinance there may be and, as a matter of fact often is the situation shown on the diagram by which a small majority of white occupants makes the block facing on the street a white block, while the block facing on the rear is a colored block.

In such a case, or indeed in any case where colored people live in the block facing the alley and white people in the block facing the street, the dwellers on the street are much nearer their neighbors on the alley than they are to their opposite neighbors on the street, and whatever evils arise from propinquity are present. The front of the house may be closed but the rear stands invitingly open.

The ordinance produces these practical results:—

1. It does not prevent white and colored people from living in close propinquity with only a fence between their respective premises, and whatever dangers arise from propinquity are present (Section 3, *ante*, p. 3).

2. Colored servants or employees of white persons may live under the same roof with them, so that the proximity of the two races is not forbidden if they stand in the relation of master and servant (Section 4, *ante*, p. 3).

3. If the residents of a block are half white and half colored, the ordinance does not apply so long as the equal division continues.

In these cases the ordinance operates to continue that occupation of a square by both white and colored people, which its framers profess to consider dangerous, and so to perpetuate the conditions at which ostensibly it is aimed.

If in the last case a single transfer of property makes the division unequal, a use of premises which to-day is legal becomes a crime to-morrow.

4. Taking the situation shown by the diagram as an example, no white resident of the white block can sell or let to a negro, until at least six white occupants, including perhaps himself, move out and leave their houses vacant. If negroes, as counsel for the defendant assert (Deft.'s brief, pp. 7-9), are the only persons willing to buy or hire in such a situation, the first white people who wish to move will have to face the loss of a return on their property for an indefinite time while it stands idle. Such a restriction on the power of sale must take value from the property (Sections 1 and 2, *ante*, p. 2).

5. Where a block is vacant, the owners of more than fifty per cent. of the foot frontage may by protest prevent any owner of land from building "a residence or place of abode or place of public assembly" for the use of white persons or colored persons, as the case may be (Section 5, *ante*, p. 4; Record, pp. 33, 34).

6. The ordinance in many cases clearly takes from the colored owner of land the right to live upon it or to sell or lease it to any person who wishes to buy or hire, which are the fundamental rights attached by the law to the ownership of land.

The defendant's brief contains important admissions as to the effect of this ordinance.

> "This ordinance *will not affect in the slightest the great mass of the white people in the city or the great mass of the negroes,* who will continue to live in the neighborhoods in which they are living at the present time unaffected by its provisions. The ordinance will only affect that relatively small percentage of white people who may seek to move into normally negro neighborhoods, and that relatively small percentage of negroes who, to gratify their new-born

social aspirations, seek to move into white neighborhoods. *The ordinance does not move a single negro or a single white person from the home in which either may be living* at the time of the enactment of this ordinance. They may continue to live in those places until the end of time, so far as this ordinance is concerned." (Deft.'s brief, p. 5.)

"It is notorious that in a community such as Louisville, only the more degraded and vicious element among the whites (barring those who own the homes they live in and can not sell) seem willing to live in a predominantly negro section of the city." (*Ibid.* p. 17.)

"In other words, those whites who seek to move into negro sections are almost invariably the worst element of the race; those whites who seek to move therefrom are of the better class." (*Ibid.* p. 17.)

Is it not natural that the better class of negroes should also wish to escape from such surroundings?

The defendant's brief contains this statement:—

> "Nor can it be stated, as is stated by opposing counsel, that this ordinance forbids an owner *from occupying his own property previously acquired.*" (p. 6.)

If the owner has built a house on his land he may occupy it as a residence, but if he owns a lot intending to build his house there and has not carried out his purpose, the ordinance forbids him to do so unless the majority of occupants in the block are of his color. Its language is,

> "Nor shall anything herein contained be construed to prevent any person who, at the date of the passage of this ordinance, shall have acquired or possessed *the right to occupy any building* as a residence, place of abode or place of assembly, from exercising such a right." (Section 4.)

This permits him to occupy an existing building but not to build a new one, and the ordinance thus deprives him of the right to live on his own land.

B. *The purpose of the ordinance.*

The ordinance is 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," but the title is not controlling.

It is manifest that, far from promoting these laudable ends, the ordinance tends to stir up conflict and ill-feeling. The effect of the ordinance cannot be other than to cause continual controversy as to whether particular houses may be occupied by white persons or by colored persons, as the case may be. Moreover, even after the mixed blocks have been eliminated by the gradual process indicated in the defendant's brief, the "colored" and "white" areas will meet at many points and the supposed harmful results arising from the juxtaposition of the races will continue.

It is said that the Court cannot presume that the ordinance was not enacted in good faith for the purposes declared, but it is equally true that this presumption fails when it is obvious that the real purposes were very different from those which are declared.

Bailey v. *Alabama*, 219 U. S. 219.

No one outside a court room would imagine for an instant that the predominant purpose of this ordinance was not to prevent the negro citizens of Louisville, however industrious, thrifty and well-educated they might be, from approaching that condition vaguely described as "social equality."

Here again, all doubt is removed by the frank admissions in the defendant's brief, which says:—

> "The ordinance will only affect *that relatively small percentage of . . . negroes, who to gratify their new-born social*

aspirations, seek to move into white neighborhoods." (Deft.'s brief, p. 5.)

"Can it be that a negro has the constitutional right, which can not be restricted in the slightest degree, whatever the consequence, to move into a block occupied by white families . . . *simply to gratify his inordinate social aspirations* to live with his family on a basis of social equality with white people?" (Deft.'s brief, p. 11.)

"*This law only seeks to regulate that natural and normal segregation which has always existed and to prevent a few of each race from overstepping the racial barriers which Providence and not human law has erected, and which, whenever they are overstepped, result inevitably in most serious clashes, and often bloodshed, and in this particular instance also in the most destructive consequences to the white man's property, thereby only accentuating the existing race antagonism.*" (Deft.'s brief, p. 10.)

We may fairly disregard the few of the white race who are forbidden to move into negro blocks and who are described by the defendant as "almost invariably the worst element of the race" (Deft.'s brief, p. 17). These men are obliged by the ordinance to live in white blocks, (unless, perchance, they already live in negro blocks,) but nothing can show more clearly the prejudice which is the sole foundation of this enactment than the fact that the most degraded white man is considered a better neighbor than a Booker Washington.

The defendant in his brief has quoted at length from the testimony given in the case of *Louisville* v. *Harris*. It is stipulated that the transcript of the proceedings in that case may be read "as evidence of what was done in said case and of the proceedings therein and for no other purpose" (Record, p. 27). This withdraws the broader stipulation previously made (Record, p. 50).

The evidence so quoted is not evidence in this case under the stipulation and cannot properly be considered.

Since, however, the defendant's counsel quotes it, we may point out that it confirms our position as to the purpose of this ordinance.

The testimony quoted is that of real estate experts to the effect that the occupancy of dwellings by negroes depreciates neighboring property. The reason for this is frankly stated by the leading witness when, after saying that, if the "best negro in town" were to buy a lot in a certain neighborhood, it would depreciate property in the square, he testified as follows (Record, p. 77):—

> "*Q*. What would you attribute that to?
>
> "*A*. I would attribute it to its being occupied by a negro.
>
> "*Q*. Would you attribute that to the man himself or to a prejudice in the mind of the other people?
>
> "*A*. I would attribute it to the fact that the white people do not want to put themselves on an equality with the negro."

The only breach of the peace disclosed by the evidence arose from white people stoning a house in which an unoffending negro had hired two rooms, and thereby driving him out (Record, p. 82).

The testimony shows that it is nothing that the negro does, but simply the fact that he is what God made him to which objection is made and that, being what he is, he may live as a servant under the same roof with the white man or may live in the closest proximity to the rear of the white man's dwelling, but may not live on the opposite side of the same street.

It is nothing in the conduct of the negro, but simply the prejudice that the white man feels against the race which he formerly enslaved and regards as inferior, which is the reason for the ordinance in question. It is not his moving into a street but the prejudice which leads white people to move out that depreciates property; the loss comes not from hostile attack but from suicidal action.

This Court has decided again and again that it will look through the words to the facts,—through the form to the substance.

As was said in the case of *Lochner* v. *New York,* 198 U. S. 45 (at p. 64):—

> "The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. *Minnesota* v. *Barber,* 136 U. S. 313; *Brimmer* v. *Rebman,* 138 U. S. 78. The Court looks beyond the mere letter of the law in such cases. *Yick Wo* v. *Hopkins,* 118 U. S. 356."

So in *Guinn* v. *United States,* 238 U. S. 347 (at p. 364), the Court found in language which contained "no word of discrimination on account of race or color or any other reason" the clear purpose to discriminate on those grounds and judged the law by its results.

The case of *Austin* v. *Murray,* 16 Pick. 121, illustrates the same principle. A by-law ostensibly passed to regulate burials in the interest of the public health, but operating in such a manner as largely to prevent the use of a Catholic burying-ground without affecting other burying-grounds, was held void, the Court saying (at p. 126):—

> "The illegality of a by-law is the same, whether it may deprive an individual of the use of a part or of the whole of his property; no one can be so deprived, unless the public good requires it. And the law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation. Now we think this is manifest from the case stated, in respect to the by-law in question. It is a clear and direct infringement of the right of property, without any compensating

> advantages, and not a police regulation, made in good faith, for the preservation of health. It interdicts, or in its operation necessarily intercepts, the sacred use to which the Catholic burying-ground was appropriated and consecrated according to the forms of the Catholic religion, and such an interference, we are constrained to say, is wholly unauthorized and most unreasonable."

The same rule was applied in *Bailey* v. *Alabama*, 219 U. S. 219 (at p. 238), where a statute in terms passed to punish fraud was judged by "its natural and inevitable effect."

Legislatures as well as individuals must be presumed to intend the necessary consequences of their acts.

The ordinance in this case seeks to preserve the semblance of equality among the races by forbidding white men to reside in blocks where the colored residents preponderate, though the whole segregation movement rests on the assumption that white men will not live in such neighborhoods. This provision cannot disguise the purpose of the enactment, which is to establish a Ghetto for the colored people of Louisville. It is an attempt to prescribe the district or districts within which they must reside and beyond which they cannot take up their abodes. After white and colored people have lived side by side all over the country for nearly fifty years since the Civil War, there has come an outbreak of race prejudice, and legislation like the ordinance under consideration has been attempted in various cities. It is a disease which is spreading as new political devices constantly spread from State to State.

This ordinance is passed ostensibly "to prevent conflict and ill-feeling between the white and colored races in the city of Louisville, and to preserve the public peace." If the purpose alleged is the real purpose, the justification for the ordinance must be found in existing conditions. Yet it is

expressly admitted that existing conditions are not disturbed. Both white and black "may continue to live" where they were living when the ordinance was enacted "to the end of time, so far as this ordinance is concerned" (Deft.'s brief, p. 5).

It is suggested that it is necessary to preserve "race purity and integrity" (Deft.'s brief, p. 8). If this danger arises from proximity, it is not removed. The two races may live under the same roof as master and servant, a relation which has never assured race purity. They may live as the closest neighbors back to back, but such a fence as divides them has never proved an impassable barrier. Surely the danger is far less when two families are separated by a wide street, and it is no greater if they live side by side.

It is suggested that dwelling as neighbors on the same street means social intimacy. Even if this were a reason for taking away men's rights, nothing is more contrary to daily experience. The closest neighbors in a city are in most cases strangers. Men cannot force their friendship on others or establish social relations with persons who do not desire them.

There is no foundation for either of these excuses. It is the prejudice of race and color,—a prejudice that would keep Booker Washington, received by the Queen of England and honored at the Commencement of Harvard College, from living on the same street with any white man in Louisville,—which is the sole reason for this ordinance, intended, as its defenders expressly admit, only "*to prevent a few of each race from overstepping the racial barriers which Providence and not human law has erected*" (Deft.'s brief, p. 10). Had Providence in fact erected such a barrier, it would have been impassable and no human law would have been needed, but the authors of the ordinance are not willing to trust the Providence whom they invoke. It is because

no divine barrier exists that they seek to establish one by human legislation.

Counsel for the defendant are right in saying that the Fourteenth Amendment does not compel social equality, and that, as this Court said in the *Civil Rights Cases,* 109 U. S. 3, the negro under the Fourteenth Amendment "takes the rank of a mere citizen, and ceases to be the special favorite of the laws." But no one is complaining of the ordinance because the negro is not treated more favorably than are other citizens. The ordinance was manifestly drawn with great ingenuity in order to place the negro citizens of Louisville in as inferior a position as possible with respect to their right of residence and to violate the spirit of the Fourteenth Amendment without transgressing the letter. If one of those who enacted the ordinance were defending his course before his constituents, he would ask their approval just because he had succeeded so well in establishing a permanent superiority for the white race. This Court, it is apprehended, cannot shut its eyes to these obvious facts, but must recognize in the ordinance a palpable attempt to destroy those fundamental rights which the Amendment guarantees.

C. *The ordinance destroys property rights without due process of law.*

As bearing on this the following propositions are fundamental.

1. The Constitution secures to all citizens of the United States equal rights under the law and forbids any State or municipal agency to pass any law which denies this equality. The rights, privileges and immunities of all must be equal, and all must receive equal protection from the law. No distinction of color, race, religion or politics can be made the basis of discrimination between citizens.

2. Among the rights and privileges of the citizen which

are fundamental are "protection by the government . . . , with the right to acquire and possess property of every kind" (Washington, J., in *Corfield* v. *Coryell*, 4 Wash. C. C. 371, p. 381; quoted with approval in *Slaughter House Cases*, 16 Wall. 36, p. 76) and to dispose of it, the right to live on his land, the right to rise and to take any place in society which his ability, his industry and his thrift will enable him to reach. No other citizen or majority of citizens can say to him, "Thus far shalt thou go and no further." In the words of Mr. Justice Miller, the fundamental rights of the citizen embrace "nearly every civil right for the establishment and protection of which organized government is instituted" (*Slaughter House Cases*, 16 Wall. 36, at p. 76).

It is clear that the right to sell land, buildings or other property to any one who is willing to buy for any lawful purpose and the right to live upon one's own land are property and that any law which destroys these rights takes the very essence of property. This ordinance clearly takes from the plaintiff this right to sell his property, since it forbids him to sell it for the only use to which it can be put. The allegation in the second paragraph of Section II of the plaintiff's reply (Record, p. 8) shows that, if the plaintiff cannot sell his lot to a colored person, he cannot sell it at all, since it is useful only for a residence and is so situated with reference to other colored men's residences that no white man would buy it for that purpose. This the defendant calls "a fundamental and admitted fact" (Deft.'s brief, p. 7). The ordinance thus takes the value from the plaintiff's land without due process of law.

The framers of the ordinance evidently had in mind the necessity of avoiding interference with the vested rights of those who owned real estate in Louisville when it took effect. It is asserted by the defendant that, in this respect, the ordinance is as fair as it is possible for such an ordinance

to be (Deft.'s brief, p. 5). If this be true, however, it simply proves that it is impossible to draw a segregation ordinance that will not directly and unreasonably impair property rights.

3. This ordinance deprives men who at the time of its passage owned unoccupied land from building on it residences for their own occupation or for sale or lease to a large class of buyers or tenants.

(*a*) It forbids, for example, a colored man to move into and occupy as a residence any house which he may build in a block where a majority of the residences are occupied by white people.

(*b*) It forbids him to build a residence or building for the use of colored people in any vacant block if the owners of more than fifty per cent. of the foot frontage in the block object (Section 5), thus giving a majority of owners the right to prevent a man from using his own land.

This arbitrary power is not conferred upon municipal authorities as in the case of *Yick Wo* v. *Hopkins*, but on a casual number of irresponsible citizens.

What distinction is possible here?

In such a case a man might buy his land when a majority of the block was owned by negroes and a sale by one before he was ready to use his land might destroy its value to him; or a single white man not objecting to colored neighbors might refuse to protest and, if the defendant's counsel is right, the other white owners would suffer all the evils which this ordinance is said to prevent; or a colored man might buy more land and so inflict the dreaded injury.

Such an ordinance puts every right of property in such land at the mercy of a few individuals, by whose arbitrary action the future of the block is fixed for all time.

(*c*) In the old blocks, now occupied, a change in ownership of a single dwelling may change the rights of all the inhabitants. In the new blocks no such change is possible. Is this the equal protection of the laws?

If a lot in a particular block is vacant when the ordinance takes effect and there are in that block the same number of white and colored families, it may practically be impossible for the owner of the vacant lot to improve his land, since he has no means of knowing that, before he can finish his house, some white family will not be replaced by a colored family, or *vice versa*, in which case the character of the block will become fixed and the intended use of the new house for white or colored occupants, as the case may be, rendered impossible.

There is in the facts of which the Court must take notice more than enough to show the impossibility of working out an equitable scheme of segregation and to show that the ordinance now in question is invalid, not only on the broad grounds discussed below, but on the narrower ground that it destroys without compensation rights which had become vested long before it took effect.

In this respect it differs only in degree from the Baltimore ordinance held void in *State* v. *Gurry*, 121 Md. 534, and from the Winston and Atlanta ordinances overthrown in *State* v. *Darnell*, 166 N. C. 300, and *Carey* v. *Atlanta*, 143 Ga. 192, respectively. In the case last cited the Court said:—

> "In the course of the opinion [in *State* v. *Darnell*, supra] it was said: 'Besides, an ordinance of this kind forbids the owner of property to sell or to lease it to whomsoever he sees fit, as well as forbids those who may be desirous of buying or renting property from doing so where they can make the best bargain. Yet this 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 having power to take away. In *Bruce* v. *Strickland*, 81 N. C. 267, it is said: "The *jus disponendi* is an important element of property, and a vested right protected by the clause in the Federal constitution which declares the obligation of contracts inviolable." . . . This ordinance forbids a white man or a colored man to live

> in his own house if it should descend to him by inheritance and should happen to be located on a street where the majority of the residents happen to be of such different race. . . . Property of a person, whether as a member of a class, or as an individual, cannot be taken without due process of law.' . . . The effect of the ordinance in question was not merely to regulate a business or the like, but was to destroy the right of the individual to acquire, enjoy, and dispose of his property. Being of this character, it was void as being opposed to the due-process clause of the constitution."

D. *The ordinance abridges the privileges and immunities guaranteed by the Fourteenth Amendment and deprives those affected of the equal protection of the laws.*

We have shown that this ordinance is an attempt to deprive the negro of the rights which belong to every citizen simply because white men consider him inferior by reason of his race and color.

It was to protect him against precisely such consequences of race prejudice that the Fourteenth Amendment was passed. This proposition has often been sustained by this Court.

In the *Slaughter House Cases*, 16 Wall. 36, in which the Court for the first time dealt with the Fourteenth Amendment, Mr. Justice Miller stated its history and purpose in these words (at pp. 70–72):—

> "The process of restoring to their proper relations with the Federal government and with the other States those which had sided with the rebellion . . . developed the fact that, notwithstanding the formal recognition by those States of the abolition of slavery, the condition of the slave race would, without further protection of the Federal government, be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal rela-

tions with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity. . . .

"These circumstances, . . . forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that by the thirteenth article of amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment. . . .

"We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth."

So, in *Ex parte Virginia,* 100 U. S. 339, the Court said (at p. 344):—

"One great purpose of these amendments [*i.e.*, the thirteenth and fourteenth] was to raise the colored race from

> that condition of inferiority and servitude in which most of them had previously stood, into perfect equality of civil rights with all other persons within the jurisdiction of the States. They were intended to take away all possibility of oppression by law because of race or color."

Can it be doubted that an ordinance is invalid which seeks to accomplish one of the very things which the Fourteenth Amendment was passed to prevent?

The familiar language of Mr. Justice Bradley may well be repeated in this connection:—

> "This is one of a series of constitutional provisions having a common purpose; namely, securing to a race recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy. . . . At the time when they were incorporated into the Constitution, it required little knowledge of human nature to anticipate that those who had long been regarded as an inferior and subject race, would, when suddenly raised to the rank of citizenship, be looked upon with jealousy and positive dislike, and that State laws might be enacted or enforced to perpetuate the distinctions that had before existed. Discriminations against them had been habitual. It was well known that in some States laws making such discriminations then existed, and others might well be expected. . . . It was in view of these considerations the Fourteenth Amendment was framed and adopted. It was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States. It not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any State the power to withhold from them the equal protection of the laws, and authorized Congress to enforce its provisions by appropriate legislation. . . .
>
> "If this is the spirit and meaning of the amendment,

whether it means more or not, it is to be construed liberally, to carry out the purposes of its framers. It ordains that no State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States (evidently referring to the newly made citizens, who, being citizens of the United States, are declared to be also citizens of the State in which they reside). It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

Strauder v. *West Virginia*, 100 U. S. 303, at p. 306.

Light upon the true construction of the Amendment is thrown by the decision in *Washington, Alexandria & Georgetown Railroad* v. *Brown*, 17 Wall. 445. An Act of Congress, passed in 1863, authorized a railroad company to extend its line into the District of Columbia, provided that no person should be "excluded from the cars on account of color." It was held that, under this provision, a rule requiring white and colored passengers to ride in

separate cars was void, even though the accommodation afforded to those of one race was equal to that furnished those of the other. Mr. Justice Davis said (at p. 452):—

> "The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but, on the contrary, has always provided accommodations for them.
>
> "This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently Congress did not use them in any such limited sense. There was no occasion in legislating for a railroad corporation to annex a condition to a grant of power, that the company should allow colored persons to ride in its cars. This right had never been refused, nor could there have been in the mind of any one an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carrier—south as well as north—to transport, if paid for it, all persons, whether white or black, who should desire transportation. It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its road within the District as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality. This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it."

The startling possibilities which follow if the power be assumed to enact an ordinance such as is now in question were pointed out by the Supreme Court of North Carolina in holding a similar ordinance void.

"If the board of aldermen is . . . authorized to make this restriction, a bare majority of the board could, if they may 'deem it wise and proper,' require Republicans to live on certain streets and Democrats on others; or that Protestants shall reside only in certain parts of the town and Catholics in another: or that Germans or people of German descent should reside only where they are in the majority, and that Irish and those of Irish descent should dwell only in certain localities, designated for them by the arbitrary judgment and permission of a majority of the aldermen. They could apply the restriction as well to business occupations as to residences, and could also prescribe the localities allotted to each class of people without reference to whether the majority already therein is of the prescribed race, nationality, or political or religious faith.

. . . .

"There is no reason why the power of the county commissioners to provide for the public welfare should not be as broad as those of the town commissioners, and if under such general authority similar regulations are prescribed for the country districts, one who should buy or inherit property in a section where the opposite race is in the majority could not reside on his own property, and he could not sell it or rent it out except to persons of such different race, since none other could reside there. Neither a white manager nor any white tenants could reside on a farm where a majority of the tenants or hands are colored."

State v. *Darnell*, 166 N. C. 300, at pp. 302 and 303.

Indeed it has actually been proposed in North Carolina and elsewhere to limit the area within which negroes may own and carry on farms, and surely the right to pursue any vocation is not more sacred than the right to live on one's own land.

The crucial question is whether the ordinance deprives

colored citizens of "the enjoyment of all the civil rights that are enjoyed by white persons" (*Strauder* v. *West Virginia*, 100 U. S. 303, 306) or prevents them from occupying a position of "perfect equality of civil rights with all other persons" (*Ex parte Virginia*, 100 U. S. 339, 344).

Applying this test, it is manifest that, if the ordinance now in question simply provided that colored citizens should not occupy houses hereafter acquired in blocks where a majority of the residents were white, it would be void. The effect of the ordinance would be that, if the purchaser or devisee of a house in a "white block" happened to be colored, he would be liable to criminal proceedings if he occupied his own house, whereas he would be subject to no such penalty if he were white. A plainer case of racial discrimination could not well be imagined.

In re Lee Sing, 43 Fed. Rep. 359.

In the present case it is contended that the difficulty is met by the provision that white persons shall not occupy buildings in "colored blocks." As well argue that an ordinance which prevented a denizen of the Five Points from moving into Fifth Avenue could be sustained because it forbade the dweller on Fifth Avenue to move into the Five Points. Anatole France has commented upon the absolute justice of the laws which prevent rich and poor alike from sleeping under the arches of the bridges which cross the Seine and from begging in the public streets. A law which forbids a negro to rise is not made just because it forbids a white man to fall.

The defendant's counsel on page 16 of their brief suggest that it is the duty of the educated and successful negro to reside with his poor brethren and by his example uplift them. This cannot be serious, for we cannot believe that counsel would set up for the race which they believe inferior

a higher standard of duty than they recognize for their own. If all the rich and educated white men recognized this obligation, there would be no fashionable quarters and no slums. When the peers of England make their homes in Whitechapel, when Vanderbilts, Astors and Carnegies move into the Tenderloin district, when any white men who can live in a healthy pleasant place forsake it for a squalid and dirty one, this argument may be used, but not until then. When the higher race sets the example, the lower may be asked to follow.

But the plain answer to the defendant's whole argument on this aspect of the case is that two wrongs do not make one right. The common law right of every landowner is to occupy his own house or to sell or let it to whomsoever he pleases. The ordinance, as it stands, forbids the owner of land in many parts of the city to live on his land if he happens to be a negro, although he would be free to live on the same land if he were white. This inequality is not removed by forbidding white owners to live on their own land in other parts of the city. In the "colored blocks" there is a discrimination against an entirely different set of white owners from those in whose favor the discrimination is made in the "white blocks." In the same way, the owners against whom discrimination is made in the "white blocks" are entirely different from those who are left in the enjoyment of their rights in the "colored blocks."

The same inequality exists with regard to tenants. In one part of the city a large class of the citizens cannot exercise their right of contracting for the occupancy of any premises which the owners may be willing to let, although no such restriction is imposed upon the balance of the citizens. In other localities, a similar restriction is imposed upon a different class.

When an owner of land on one corner of a street can sell

only to one class of buyers and an owner on the opposite corner only to another, the two do not enjoy the equal protection of the laws any more than two shop-keepers would if one was allowed to sell only to natives and the other only to foreigners.

The result is that the ordinance cannot be upheld except on the theory that the equality required by the Fourteenth Amendment is attained by imposing a penalty upon negroes for doing something which white citizens are left free to do, provided negroes are left free to do some entirely different thing which is forbidden to white persons,—if, for example, negroes, but not whites, are forbidden to maintain laundries in wooden buildings, whereas whites, but not negroes, are not allowed to maintain bakeries in similar buildings. It is submitted that the Constitution cannot be satisfied by any such offsetting of inequalities and that a discrimination against one race is not one whit less a discrimination because in some other matter a discrimination is made against the other race.

In the present case the nature of the right which is abridged gives special force to the foregoing considerations. In the cases of separate railroad accommodations and separate schools, more fully discussed below, it is possible to say that no harm is suffered through the separation of the races, if the facilities enjoyed by each race are the same as those enjoyed by the other. In the case at bar no such argument can be made, because every parcel of land has qualities peculiar to itself. According to the elementary rule, the mere fact that a contract calls for the conveyance of land is enough to show that the subject-matter of the contract is unique, so that a court of equity will decree specific performance instead of leaving the vendee to recover damages and therewith buy some other piece of land, as would be done if the subject-matter of the

contract could be substantially duplicated. Hence, the fact that persons restrained by the ordinance from occupying particular lots are left free to occupy other lots has no tendency to show that the ordinance imposes equal burdens upon all citizens.

The vital character of the right affected is yet more important. One of the first essentials of a free government is the right of every citizen to establish his residence where he sees fit and to move from place to place at pleasure. Such an ordinance as that now in question does not affect simply the convenience and comfort of those citizens to whom it applies, but strikes at their right to live at all. The result of such enactments on any large scale might well be to compel the entire negro population to reside in the most unwholesome and otherwise undesirable parts of the several States and to reduce them to a condition not far removed from slavery, through being thus in effect bound to the soil in the designated localities.

If the inquiry be confined to Louisville alone, the Court cannot but take notice of the fact that, in every city where the negroes form a large element of the population, those sections which are inhabited chiefly by negroes and which therefore become "colored blocks" under an ordinance like that in question are generally in the least healthful and least attractive parts of the city. The necessary effect of such an ordinance is, therefore, to confine a large part of the citizens to these undesirable quarters, in spite of every effort they may make to better their condition. In other words, such an ordinance cannot fail to keep the negro in that condition of inferiority as respects his opportunities for advancement and self-improvement which it was the prime object of the Fourteenth Amendment to end.

It may be said that, if the quarters inhabited by negroes are undesirable, it is because their inhabitants have made them so. In so far as this undesirability results from

the natural features of the localities to which the negro population has been largely confined by extra-legal influences, the allegation is obviously untrue. In so far as it results from the habits of the less thrifty among the negro citizens, the fact is irrelevant, unless it be assumed that the Fourteenth Amendment warrants us in visiting the shortcomings of the fathers upon the children, not unto the third and fourth generation alone, but for all time.

Again, what is permissible in Southern cities must be equally permissible in Northern cities. It may be that in Louisville, where the colored population is comparatively large, the "colored blocks" would occupy a considerable part of the city, so that a certain freedom of movement on the part of the colored population would remain. But in New York or Boston, where only a small fraction of the population is colored, the restriction of the colored residents to those blocks where they are now in the majority would result in compelling them to reside in a very small area and would differ only in degree from imprisonment. Could it be seriously argued that a segregation ordinance producing these effects would be valid? And yet it must be valid if the Louisville ordinance can be upheld.

E. *The cases relied upon by the defendant are irrelevant.*

The defendant relies upon the cases upholding laws providing for separate railroad accommodations and for separate schools. None of these cases, however, is pertinent. The Fourteenth Amendment applies to such cases, if at all, only because some right which would otherwise exist is inequitably abridged. In the railroad cases the reason for upholding the law is not that it is competent for the legislature to impair the right which the colored man would otherwise have as against the carrier. Every man has, at common law, a right to require that a carrier provide him with reasonable facilities at reasonable

rates and that the facilities furnished and the rates charged be as favorable as those offered the public generally. But if such accommodation is furnished at such rates, the carrier may determine what vehicle the passenger shall occupy.

Chiles v. *Chesapeake & Ohio Railway*, 218 U. S. 71.
West Chester & Philadelphia Railroad v. *Miles*, 55 Penn. St. 209.
The Sue, 22 Fed. Rep. 843.

Hence a statute requiring separate accommodations is outside the prohibitions of the Fourteenth Amendment since such a statute does not impair any right that would otherwise exist.

If, however, a statute purports to relieve the carrier from the obligation to furnish for colored passengers accommodation equal to that furnished for others, then it does inequitably impair a right which the colored passenger would otherwise enjoy and is void.

McCabe v. *Atchison, Topeka & Santa Fe Railway*, 235 U. S. 151.

The cases of public schools are even more remote from that now under consideration. So far as the Fourteenth Amendment is concerned, the States are not bound to provide schools for anybody. The statutes regulating attendance at school do not cut down rights previously recognized, but grant privileges which would not exist otherwise. If, therefore, the privileges granted to white and to colored children are in general similar, there may be no ground for complaint.

As regards private schools, the situation is altogether different. It is true that a statute requiring segregation in private schools was upheld in *Berea College* v. *Common-*

wealth, 123 Ky. 209, and that the judgment of the Court of Appeals was affirmed by this Court. (*Berea College* v. *Kentucky*, 211 U. S. 45.) But this result was reached only because a majority of this Court held that the statute might be construed as an amendment to the defendant's charter,—a point apparently not taken by counsel for the State. If the defendant had been an individual, it is plain that the statute must have been declared void and the judgment of the Court of Appeals reversed for the reasons cogently stated in the dissenting opinion of Mr. Justice Harlan (211 U. S. at p. 68).

The only other cases that give any appearance of support to the defendant's position are those upholding statutes which forbid the intermarriage of whites and negroes. The validity of these statutes has never been determined by this Court, so that the decisions of inferior courts on this subject are not of great weight for the present purpose. These decisions, moreover, are irrelevant. Marriage is primarily a matter of status and only incidentally a matter of contract. The interests of the State are vitally concerned, as well as those of the parties. The conditions upon which citizens may enter into this status have from the earliest times been held subject to be determined by the State, so that no argument can be drawn from marriage regulations in support of an ordinance which radically interferes with fundamental rights of liberty and property.

Again, such marriage regulations are equal in their operation in the sense that no penalty is imposed upon the members of one race for doing that which is lawful for members of the other race, whereas in the ordinance now in question the avowed object is to prevent negroes from occupying land which it is lawful for whites to occupy.

Pace v. *Alabama*, 106 U. S. 583.

G. *The ordinance cannot be justified as an exercise of the police power.*

The limits of the police power are indefinite, but it cannot be used to justify such legislation as this. The police power is the power whereby the State protects the citizen in the enjoyment of his rights and punishes the invasion of those rights by others or protects the community against the injurious consequences of individual action.

The State may properly regulate the construction and height of buildings in cities and the storage of explosives; it may forbid unduly noisy occupations which disturb the slumbers of a community; it may enforce quarantines and sanitary precautions; but in every such case a man is forbidden to do some careless or inconsiderate thing by which his neighbors are affected injuriously. In the last analysis the police power is used to enforce the maxim "*Sic utere tuo ut alienum non laedas.*"

The exercise of this power can be justified only when it operates equally and when the act supposed to be injurious is forbidden to all alike and is not arbitrarily forbidden to some and permitted to others. There is no magic in the police power which enables the States to override the prohibitions of the Fourteenth Amendment. As this Court said in a recent case:—

> "We cannot at all agree that a police regulation is not, like any other law, subject to the 'equal protection' clause of the Fourteenth Amendment. . . . The constitutional guaranty entitles all persons and corporations within the jurisdiction of the State to the protection of equal laws, in this as in other departments of legislation."
>
> *Atchison, Topeka & Santa Fe Railway* v. *Vosburg*, 238 U. S. 56 (at p. 59).

Geiger-Jones Co. v. *Turner*, 230 Fed. Rep. 233 (at pp. 244, 245), is a still later case illustrating the same principle.

A regulation cannot be justified which forbids citizens of one color to do an act which those of another color are permitted to do. In consequence of the decisions of this Court to that effect, it was held by the Supreme Judicial Court of Massachusetts that a proposed statute imposing upon Chinese restaurant-keepers certain restrictions not imposed upon restaurant-keepers of other races could not be sustained. The Court closed its opinion with these words:—

> "The fact that a man is white, or black, or yellow is not a just and constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of a different color."

Opinion of the Justices, 207 Mass. 601, 605.

Ah Kow v. *Nunan*, 5 Sawy. 552, is to the same effect.

We rest our case upon the fundamental principle that, while a State may make police regulations which forbid many acts which would otherwise be lawful and may add restrictions respecting the use of property to those existing at common law, such restrictions must affect all citizens without discrimination. It will hardly be pretended that a State, for example, could require negroes to obtain licenses in order to practise medicine unless white persons were required to do the same, or could forbid the use of wooden buildings by negroes in a given area when the use of such buildings by white persons in the same area was permitted. Only a few authorities need be cited in support of this proposition.

In *Truax* v. *Raich*, 239 U. S. 33, this Court held void a statute forbidding with certain exceptions the employment of aliens and said in that connection (at p. 41):—

> "It is sought to justify this act as an exercise of the power of the State to make reasonable classifications in legislating to promote the health, safety, morals and wel-

fare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the State to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union Co.* v. *Crescent City Co.*, 111 U. S. 746, 762; *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 590; *Coppage* v. *Kansas*, 236 U. S. 1, 14. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that 'the employment of aliens unless restrained was a peril to the public welfare.' The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor is necessarily involved."

In *Yick Wo* v. *Hopkins*, 118 U. S. 356, it was held that the Fourteenth Amendment forbade an ordinance the effect of which was to prevent members of the Chinese race from carrying on laundries in wooden buildings while leaving other persons free from such a restriction. The Court said, with reference to the Fourteenth Amendment (p. 369):—

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of equal laws. It is accordingly enacted by § 1977 of the Revised Statutes,

that 'all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.'"

In *Barbier* v. *Connolly,* 113 U. S. 27, the Court said (at p. 31):—

> "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

The plaintiff submits that an ordinance which so plainly violates the rule of equality established by the Fourteenth Amendment cannot possibly be sustained as an exercise of the police power. It certainly cannot be justified as

a measure to protect property rights; the police power cannot be exercised to protect the property rights of a particular class of citizens when this is done by destroying the property rights of another class. Neither can the ordinance be justified as a measure to prevent conflict between the races. It has already been shown that the necessary tendency of the ordinance is to cause strife and ill-feeling between the races, instead of preventing conflict. Moreover, the means adopted for attaining this alleged end, even if they were calculated to reach it, are such as the State has no constitutional right to employ.

The elementary principle both of the common law and of natural justice is that if disorders arise to the disturbance of the community, the difficulty shall be remedied by punishing or restraining the aggressors, not their peaceable and law-abiding victims. In a leading case Field, J., said:—

> "What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition."
>
> *Beatty* v. *Gillbanks*, 9 Q. B. D. 308 (at p. 314).

Wherever the police power is invoked to prevent disturbance, the Court must consider what is the cause of the disturbance and who is at fault. For example, violent breaches of the public peace occur when strikers attempt by force to prevent their former employers from continuing business and other workmen from doing the work which they themselves refuse to do. The right of the employer to do business and the right of the new men to sell their labor to him are fundamental. A law which punishes the strikers for their violence is clearly within the scope of the police

power, but a law which forbade the employer to continue his work or to employ new workmen could not be sustained, for it would be aimed not at the breach of the law but at the exercise of an unquestioned right,—not at the malefactor but at his victim.

The negro is colored by no act of his. He is a citizen of the United States and entitled to every right that any other citizen has. The white men, because they do not like him as a neighbor, pass an ordinance depriving him of his right to live where he pleases, and they justify it on the ground that it is necessary to protect them from being tempted to assault him if he exercises that right. If he does any wrong act he may be punished, but to say that he can be deprived of the right to live on his own land, because his white neighbors do not like his color, is to punish him not for his fault but for their prejudice, to deprive him of his rights in order to prevent their lawless and criminal attacks upon him. Such legislation is a mockery of the police power, and if it can be sustained the consequences are disastrous.

At Palm Beach in Florida negroes act as chauffeurs; if they appear in Miami they are mobbed and the result is a breach of the public peace. In some places they are attacked if they engage in certain employments which the whites wish to monopolize, and violence may be used in the effort to prevent them. Would the police power justify a law forbidding them to act as chauffeurs in Miami, or to engage in any lawful employment anywhere, because they might be attacked if they did so? If so, they have no rights. If not, this ordinance cannot be sustained, for it is defended on the ground that one body of citizens may take from another their clear rights in order to prevent lawless attacks upon the latter by the former. The only policeman who ever fancied that such a police power existed was the wolf in his dealings with the lamb.

Beatty v. *Gillbanks*, *supra*.

The defendant's counsel even allude to *L'Hote* v. *New Orleans*, 177 U. S. 587, as if a statute which prescribed the limits within which certain offenders against social law might live in any way justified this legislation. The persons so segregated were quasi-criminals; a statute requiring that they be confined in jail would plainly have been constitutional. The persons segregated, moreover, had the remedy in their own hands; if they chose to reform, they could go where they pleased. The statute imposed no insurmountable disqualification, but inflicted a penalty for immoral life and protected the community against the spread of immorality. To say that perfectly respectable moral men and women may be treated in the same way simply because their fellow-citizens "mislike" them "for their complexion" is a proposition so monstrous that it needs only to be stated.

The question is whether a majority of the people dwelling in any locality may say to the minority, "You shall not have the rights of other men to live where you please, but shall be limited to certain localities, not because you have violated any laws human or divine, or have done anything to make you bad neighbors, but because you are what God made you and because we consider ourselves your natural superiors, no matter what our habits or our qualities, because our complexion is different."

The consequences of sustaining such legislation as this must be disastrous. It is not many years since there was in Massachusetts and other States a prejudice against the Irish, and when they moved into a locality their richer neighbors moved away and property depreciated. A similar prejudice against the Jews has affected values in many places. Everywhere as cities grow the poorer citizens drive out their richer fellows, but the law cannot prevent any consequent depreciation in the values of land. An attempt now to segregate Irish from Jews,

foreign from native citizens, Catholics from Protestants, would be fully as justifiable in communities where there is feeling between them as this attempt to segregate white from colored. If the danger that one body may lawlessly attack the other justifies segregation, that danger may exist in either of these cases. The great war which to-day devastates so large a part of the civilized world is sowing the seed of the bitterest racial enmities. If such legislation as this can be sustained under our Constitution, there is no limit to possible discrimination between citizens.

No more important question can be presented to this Court. The interests of ten million citizens are at stake. In their effort to rise from slavery to equality with their fellow-men they are everywhere met by the effort to keep them down and to deny them that equal opportunity which the Constitution secures to us all. If they can be forbidden to live on their own land they can be forbidden to work at their own trade. If this is possible, the prejudice against which the Fourteenth Amendment was framed to defend the negroes triumphs over it, and the amendment itself becomes a dead letter. If it does not protect the rights of all citizens, it does not protect the rights of any, since it knows no distinction of race or color.

CLAYTON B. BLAKEY.
MOORFIELD STOREY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

No. 33

CHARLES H. BUCHANAN, *Plaintiff,*

—vs.—

WILLIAM WARLEY, *Defendant.*

SUPPLEMENTAL AND REPLY BRIEF FOR DEFENDANT IN ERROR ON REHEARING

STUART CHEVALIER,
PENDLETON BECKLEY,
Counsel for Defendant.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1916.

(No. 231.)

CHARLES H. BUCHANAN, - - - *Plaintiff in Error,*

vs.

SUPPLEMENTAL AND REPLY BRIEF FOR DEFENDANT IN ERROR ON REHEARING.

WILLIAM WARLEY, - - - - *Defendant in Error.*

Our chief purpose in filing this additional brief is to respond to an argument advanced for the first time by opposing counsel on the former hearing before this Court in April, 1916, and which we anticipate will be again advanced on the present submission. We refer to the startling proposition of Mr. Storey that in so far as this law is aimed to prevent the amalgamation of the races, it is unconstitutional because such amalgamation is highly desirable, and therefore not a proper subject of police regulation.

But, before taking up that question, it may not be out of place to summarize the respective contentions of the parties hereto, reference being made to our original brief for their fuller treatment by the defendant. We have given a short statement therein, pages 3-10, of the provisions and purpose of the ordinance, which we need not here repeat.

GENERAL SUMMARY.

We believe we can say with entire accuracy that substantially every objection which has been urged by counsel against this law, whether legal, practical or sentimental, will be found quite as admirably stated and with quite as great a wealth of illustration and conjecture in the solitary dissenting opinions of Mr. Justice Harlan in *Plessy* v. *Ferguson,* 163 U. S. 537, the leading separate coach law case, and in the *Civil Rights Cases,* 109 U. S. 6. But those views, although so ably championed, failed to win the concurrence of a single other member of this Court. In fact, as we have endeavored to show heretofore, every objection urged against this law separating the races in the matter of residence can be urged with equal force against the separate coach laws, or the separate public or private school laws, or against the miscegenation laws; and most of such objections would apply equally to all of this legislation, which has nevertheless been quite uniformly upheld by state courts, North and South, and by this Court.

(1) The psychological objection, for instance, that such laws humiliate the negro or destroy his self-respect, has never met with judicial favor; nor has it any basis in common sense. As this Court has remarked, separateness does not imply the inferiority of either race.

(2) If it be said that this law puts all the negroes into one class, irrespective of whether they be good or bad, but simply because of their color, this is equally true of the other laws mentioned.

*For convenience of reference, the paging continues that of our former brief.

(3) If it be said that the law "is just as vicious as if it had specifically mentioned certain blocks and forbidden the negroes to live therein," the same is true, in effect, of the separate school laws, public and private, and of the miscegenation laws. For example, in the *Berea College Case,* 211 U. S. 45, it was not considered a valid objection that the law as upheld by this Court in effect prohibited negroes from attending all, or practically all, of the then incorporated schools in the State as though mentioned by name.

(4) Or, if it be urged that the ordinance is void because it prohibits one class from living in a certain place, while it prohibits an entirely different class from living somewhere else, obviously this objection would apply equally to the separate school and coach laws; the law in the Berea case in effect prohibits whites from attending Lincoln Institute and negroes from attending Berea College.

(5) Or, if it be said that this law is void because it "cuts down rights previously existing," this is equally true of the school and miscegenation laws (as well as of practically every other police regulation that might be mentioned), which have nevertheless been quite universally upheld. But for such laws the negroes, theoretically at least, could have attended any private school or chosen any particular spouse they saw fit. But the law steps in and for the good of the State prohibits the exercise of such pre-existing rights, although the parties immediately concerned might be entirely willing to enter upon the relation.

(6) Again, it is said that this law is not in fact equal, but a mere subterfuge, because the whites do not want to move into negro blocks as a rule, while negroes do want to move into white blocks. So of the other laws; the whites do not want to ride with the negroes or attend their schools, although the negroes ordinarily have no serious objection to such intermingling. In other words, the fact that racial repugnance may be largely one-sided does not for that reason render such legislation unequal in the constitutional sense.

The limitations on the whites and on the negroes under the terms of the ordinance *are precisely the same;* negroes have the *same rights* of property and of contract thereunder as the whites. Members of each race are prohibited from moving into a block where a majority of the residences are occupied by those of the opposite color (with certain exceptions applying alike to both races). As was well said by the Maryland Court of Appeals in passing upon the similar Baltimore ordinance (*State* v. *Gurry,* 88 Atl. 546), "whatever other objections may be urged against it, it can not be truly said that there is any discrimination in the ordinance against the colored race. Indeed, in its practical operation it would be more burdensome upon the white people than upon the colored people, for it is well known that white people own the great bulk of property in Baltimore City, and hence, where the property of one colored person would be affected by such an ordinance, those of many more white people would be. What is denied one class is denied the other; what is allowed one class is allowed the other. *There is, there-*

fore, no such discrimination as is prohibited by the Constitution or statutes securing civil rights, and it is not necessary to discuss that question further."

(7) Again, it is insisted by opposing counsel that such a law does not prevent conflict, but rather increases the evils sought to be cured. The answer to this is that while the universal experience with similar laws is to the contrary, that they do accomplish their purpose, yet if in fact they did not do so, this would be an excellent reason for repealing such laws, but not for holding them unconstitutional. The appeal on this ground, in other words, should be to the legislature, and not to the courts, which are not concerned with the expediency, the wisdom of or the necessity for particular police regulations.

(8) Nor can the hardship to the particular litigant be urged, as in this case, against the constitutionality of an otherwise valid law. Hardship results in every case of police regulations; but the constitutionality of such laws is not to be tried upon the hardship of the particular case, but upon their general purpose and effect as determined from their language read in conjunction with facts within the knowledge of the Court. Furthermore "the extent to which legislation may modify and restrict the uses of property consistently with the Constitution is not a question for pure abstract theory alone. Tradition and the habits of the community count for more than logic." (*Laurel Hill Cemetery* v. *San Francisco,* 216 U. S. 366.) We have discussed this whole question (*ante*, pp. 24-32) in connection with the ruling of the lower court striking out certain allegations from plaintiff's pleadings, and

with our contention that plaintiff is not in a position to raise the issue of race discrimination, not being himself a negro. *Mallinckrodt Chem. Works* v. *Missouri,* 238 U. S. 41, 54.

Plaintiff claims that the law works a hardship against him since it prohibits him from occupying his property with negroes and it being practically difficult to secure a white tenant as long as there is a negro living next door. But, as we have previously explained at length, the very hardship of which plaintiff complains, growing out of the difficulty of getting white people to live next to negroes, with the consequent injury to property and danger of conflict and other evils, is the very hardship which this law seeks, as far as possible, to relieve by prescribing the bounds for the habitation of the respective races. This temporary hardship to the plaintiff would be multiplied many times to the other white property owners on that block were he allowed to put negroes in his property. Furthermore, it was frankly conceded by opposing counsel, Mr. Blakey, in his first brief, page 30, that if the law were otherwise valid, the fact that it might greatly restrict or interfere with existing property rights would constitute no constitutional objection thereto, citing *Mugler* v. *Kansas,* 123 U. S. 623. Mr. Blakey's co-counsel, however, continues to urge this objection, and we have therefore attempted to meet the objection from every angle (*ante,* pp. 80-105).

(9) Again, it is urged that the law is discriminatory and does not in good faith attempt to separate because it makes certain exceptions as to servants, is only pros-

pective in operation, and does not attempt to disturb the negroes or whites where they are now living. It was not considered a valid objection to the law in the Plessy case, *supra,* that it excepted employes and servants, and did not apply to street cars and other vehicles as well as to trains. Nor are these laws void because they do not attempt a sweeping and universal separation of the races in every place.

In this connection counsel urge at much length in their new brief that the law should be condemned because it is possible for negroes to live in alleys running parallel with blocks on which the houses are occupied by white people. The law applies to public alleys precisely as it does to streets, nor do we see how there can be a practical distinction between the two, since a public alley is simply a narrow street. It is true that negroes living in alleys are nearer their white neighbors than if they were living on some other block, but it is obvious that the legislature in drafting laws of this sort must draw the line somewhere; and plaintiff fails to suggest a more equitable or practical method of separation, other than an absolutely sweeping and universal removal. "Because the legislative body is unable to protect all, must it be denied the power to protect any?" (*L'Hote* v. *New Orleans,* 177 U. S. 587, discussed *ante,* p. 107.) "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." (*Miller* v. *Wilson,* 236 U. S. 384; *St. Louis, etc., R. Co.* v. *Arkansas,* 240 U. S. 521). "We have frequently said that the legislature may recognize de-

grees of evil and adapt its legislation accordingly." (*Truax* v. *Raich,* 239 U. S. 43.)

(10) Again it is urged against this law that it limits negroes to what are vaguely referred to as less desirable sections of the city. This objection is without merit in law; and it is based upon three entirely false assumptions of fact: (a) that the negro sections are not "desirable," (b) that the white sections are more "desirable" for the negroes than the negro sections, and (c) that the present negro sections can not be expanded or improved or new sections established. As a matter of law, even if it were demonstrable that the negro sections are in fact less desirable than the white, this objection would not go to the validity of the ordinance, for similar objections might have been urged with even greater force in the Berea College case and against the separate marriage laws. The school law was upheld in spite of the fact that the best private incorporated schools for higher learning, if not all of them in Kentucky, were thereby theoretically closed against the negro, and he was left to provide other schools for his race (as he has done). And would any court think of holding the miscegenation laws invalid as a discrimination against negro men because it might appear that in a given community all of the "desirable" women living therein were white, and that all the negro women living therein were vicious or otherwise "undesirable" as wives, and that, therefore, the negro men in such community were grossly discriminated against in being prohibited the privilege of marrying white women?

But the assumptions of fact are equally unwarranted.

In this connection it is stated that the law restricts the negroes to the places where they are now living, and to undesirable sections of the city. As we have heretofore shown, it does nothing of the sort; the negro sections will continue to expand as heretofore, but in a more orderly and less haphazard fashion, thereby "stabilizing" property in both white and negro sections, and giving added security to the enjoyment of the homes therein. The law of nature or of races which influences the white man to retire from a negro neighborhood will also compel the constant widening of the borders of the negro sections. And there is nothing in the law to prevent the indefinite expansion of the negro suburbs and subdivisions as heretofore. White property owners, as well as the more thrifty negroes, will from economic, if not humanitarian motives, see that the negroes get as many and as desirable homes as they can afford or need.* In fact, it would be fortunate for the negro if he could get out of the more congested interior sections into the suburbs where he can build and rent homes just as desirable as his means will permit, although the law allows him to remain indefinitely where he may now be living. The analogy to the old ghetto laws is utterly ridiculous, therefore, especially when we reflect that there is nothing in this law that prevents the negro from working or carrying on business in any part of the city he may choose.

We have in our former brief, pages 12-17, and pages 73-80, discussed at some length this objection, since it

*The following advertisement from the issue of September 23, 1916, of *The Louisville News*, a local negro weekly, is one of many illustrations

bulks so largely in plaintiff's argument. He returns again and again to the question, and in his latest brief tries to construe our language into an admission that all

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that might be given of the truth of the above statement:

Office 820 W. Walnut Street — Phones City 2866

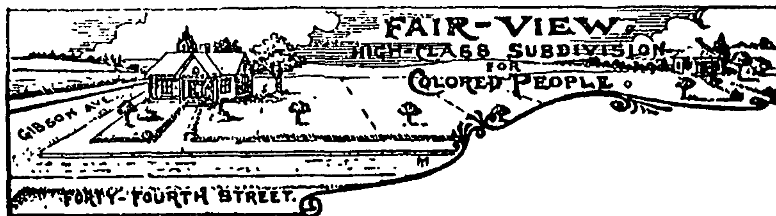
JOHN B. COLEMAN
[Colored]

Real Estate, Mortgages, Insurance

EXCLUSIVE AGENT FOR FAIRVIEW ADDITION

Rentals and Collections

LOUISVILLE, KY.



FAIR VIEW ADDITION.

Choice lot on Fall City avenue or Forty-fourth (44th) street, at $10, $8 and $5 per foot. Fifty (50) cents cash. Fifty (50) cents per week No interest at any time. No taxes until deed is made. Ten per cent discount for all cash. Every lot lies high and level. Graded streets, concrete sidewalks and shade trees in front of every lot, making them most desirable building sites where you are not crowded up nor choked by the smoke and fumes that are so objectionable in crowded central district, and yet you are in easy access to the schools, churches and interests of the city. Go out and join the army of independence—secure a HOME OF YOUR OWN.

READ OUR LIST OF REAL ESTATE BARGAINS

(1)—A six-room cottage on West Walnut street, near Fifteenth. Gas, water and sink in kitchen. Lot, 30x162. Also three-room cottage in the rear. A bargain. Price, $2,500. Terms good.

(2)—A nine-room residence on West Chestnut street, between Fifteenth and Sixteenth. Modern throughout. Both gases and bath. A fine summer kitchen, cement basement, large barn in rear. Lot, 34x200 feet. Price, $3,800. Terms.

(3)—A beautiful seven-room cottage on East St. Catherine street. Modern, electric lights, water and gas. Fine condition. Price, $3,000. Good terms.

(4)—A seven-room brick cottage on West Magazine street, near Twenty-third. Large front and back yard. Sink in kitchen. Price, $1,650. Good terms.

(5)—A six-room brick cottage on West Chestnut street, near Twenty-first. Bath, gas, stone foundation and good roof. Price, $1,800. Terms.

(6)—A four-room brick cottage on South Twenty-first street. Hydrant in yard. In good repair. Price, $1,800. One-third cash

(7)—Six-room cottage on West Magazine street, near Twentieth Modern, electric lights, gas, sink in kitchen and good barn. Lot, 30x140 Price, $1,750. Terms.

(8)—A four-room cottage on West Magazine street, near Nineteenth. Gas for cooking, and a good cistern. Lot, 30x200. Good condition. Price, $1,600

(9)—A four-room cottage on South Clay street, near East Chestnut. Sink in kitchen. Good out-houses. Price, $1,150. Good terms.

IF THIS LIST DOES NOT HAVE WHAT YOU ARE LOOKING FOR, CALL AT THE OFFICE.

the negro sections of the city are vicious. But to say, as we have done, that only the vicious whites are willing to live in a normally negro section is very far from saying that all negro sections are vicious. The Court would scarcely believe that the more than 40,000 negroes of Louisville, or any considerable portion of them, live in only vicious sections. The great mass of the negroes live in wholly negro neighborhoods and in sections which are quite as orderly and "desirable" as corresponding white sections of the city, measuring desirability by the social tastes and economic condition of the respective inhabitants. We repeat, however, that only the most degraded and vicious of the whites would seek to move into or voluntarily remain in a normally negro section, however orderly it might be. Counsel thereupon ask, referring to the relatively small number of mixed blocks where such whites are to be found (p. 16): "Is it not natural that the better class of negroes should also wish to escape from such surroundings?" Certainly, and they can do so by moving into any of the many respectable negro sections, which will be effectively protected by this ordinance from invasion by that same vicious class of whites who would and could otherwise seek a residence therein, *for this law also prohibits whites from moving into negro sections.* And even those few neighborhoods, therefore, which are now occupied by such whites will ultimately be freed from them through the enforcement of this law (as we have heretofore pointed out on page 17 in language which counsel was very careful to omit from their quotation). The negroes can make their own parts of

town just as desirable as they see fit, being aided and encouraged by this law in so doing. (*Ante*, pp. 12-17.) Counsel complain that saloons and disorderly houses are to be found in negro sections. But this is also true of many white sections of Louisville as of other cities. Aside from the processes of the courts which are always open to the citizen, white or black, to suppress nuisances; aside from the power of each race to purify and improve its respective portion of the city, one of the most encouraging features of the times is the success with which state after state and city after city have been working rapidly towards the abolition of these ancient and related evils; and the white and negro sections alike will reap the benefits of such abolition. We fail to see, therefore, how such an objection can have any possible bearing on the constitutionality of the present law.

On page 33, counsel declare dramatically that "a law which forbids a negro to rise is not made just because it forbids a white man to fall." This is but a repetition of the bald assumption running through counsel's entire brief that the only way in which a negro can improve his condition is by moving into a white block. The fallacy of this argument is quite effectively exposed by the lower court herein (quoted, *ante*, pp. 77-79): "To admit the soundness of this assumption would be to ascribe to the negro race a lack of capacity for self-development, a want of self-respect and of thrift, and a degree of dependence upon the white race which, it seems to the court, the history, past and current, of that people does not sustain." And a similar contention was thus met by this

Court in *Plessy* v. *Ferguson,* 163 U. S. 551: "The argument also assumes that social prejudices may be overcome by legislation, and that equal rights can not be secured to the negro except by an enforced commingling of the two races. We can not accept this proposition." We have given in the Appendix three illustrations out of many showing quite conclusively that the negroes thrive best from every standpoint when living in a community to themselves, where the whites may still help them in their efforts to rise. (Pp. 246-252.)

(11) Again, counsel in an effort to distinguish the separate coach and separate school laws, declare that they are valid because they regulate involuntary association, that is to say, where the whites but for the law would be helpless to get away from the negroes. They argue that such is not true here because the white man if a negro moves next door can move away if he so desires. The answer to this is (a) that the private school and miscegenation laws do prohibit even a voluntary association of the races—where those immediately concerned, in other words, are entirely willing to enter upon the association; and (b) in the present case we say emphatically that the association is with rare exceptions not voluntary, but is in fact compulsory. It is but poor consolation to the white man to tell him that he can move when a negro moves next door to him. With some difficulty and sacrifice he might be able to move from the home of his choice. What is more likely to happen, considering the frailties of human nature, is that he will endeavor to compel the negro, who has thus largely destroyed the enjoyment and

value of his home, himself to move. We thus have precisely the same danger which is sought to be averted by these other separation laws, to-wit, conflict where the relations are unfriendly, or the danger of amalgamation where they might become too intimate. In attempting to combat this interpretation of the law counsel argue (p. 22) that neighbors do not have to associate if they do not want to do so. But we all know that people move into a particular neighborhood because they already have or expect to find therein, congenial associations. This is especially true of the cottage and less pretentious residence neighborhoods which are chiefly threatened by negro invasion and which are protected by this law. The apartment dweller and the occupant of the palatial suburban home naturally have no fears of such invasion. The one is an unhampered transient, the other is protected by the very effective barrier of wealth from the approach of the negro neighbor.

There is an important distinction, however, between those laws applying to public agencies, like common carriers, and the present law. These public agencies and not the individual using them are required to supply the accommodations in question; and, therefore, where the law provides for a separation, it must also affirmatively require equal accommodations. But here the individual provides the accommodations, the home in which he lives, and the law need not and could not provide as a condition of separation that the homes of the two races shall be equal or equally desirable, any more than it could so provide as a condition of separation in private schools.

There is nothing in this law to prevent the negro from achieving equal or even superior accommodations to those of the whites, for the restrictions are identical upon both whites and negroes.

All we ask through this law is that the whites be left in peaceful and undisturbed enjoyment of those sections which they have already in a sense pre-empted for their homes, leaving the negroes to the similar enjoyment of those sections which they have also chosen for their residence, and leaving both races free to build up unimproved neighborhoods as economic opportunity offers. "It is simply to say that following the order of Divine Providence, human authority ought not to compel these widely separate races to intermix. The *right* of such to be free from social contact is as clear as to be free from intermarriage. The former may be less repulsive as a condition, but not less entitled to protection *as a right.* When, therefore, we declare a *right* to maintain separate relations, so far as is reasonably practicable, but in a spirit of kindness and charity, and with due regard to equality of rights, it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself, and not to compel them to intermix contrary to their instincts." (*West Chester, etc., R. Co.* v. *Miles,* 55 Pa. St. 209.)

(12) Again, counsel trot out the wornout sophistries which have probably been invoked whenever separation legislation of this sort is involved, that if such a law is upheld, there is no limit to the fantastic extremes to which such legislation might ultimately extend. We

might separate Catholics and Protestants, or compel negroes and whites to walk on different sides of the street, or paint their houses differently, etc. An excellent example of this character of reasoning will be found in the dissenting opinion of Mr. Justice Harlan in *Plessy* v. *Ferguson,* and a sufficient answer thereto in the opinion of the Court, 163 U. S., p. 550.

(13) Again, it is urged by counsel (p. 35), that if a man wants a particular house or lot he can not be legally satisfied with any other, and any law that makes it impossible for him to occupy that particular property in the manner he desires is, therefore, unconstitutional as an undue interference with the sacred rights of property. The same objection could be urged with equal force against a law prohibiting a man from improving his property within the fire limits in a certain way (*Welch* v. *Swasey,* 214 U. S. 91), or establishing a saloon in a certain part of the town, or against the law in the Berea College case on the theory that a negro may prefer to attend that school and no other, or against the separate marriage law on the theory that the desirability of the particular spouse which the party might seek to marry gave the right a character that could not be abridged, since no other spouse would be as satisfactory.

(14) Again, counsel on page 25 say the law is unconstitutional because Section 5 thereof is unconstitutional, in that it gives the owners of more than fifty per cent of the foot frontage of a wholly unimproved block the right to determine whether the block shall be occupied by white or colored people. As was pointed out by the Kentucky

Court of Appeals in the present case, the constitutionality of that section is not involved on the present appeal; and even if it were, the delegation to property owners of the right to determine the method of improvement of property raises no Federal question. *Fischer* v. *St. Louis*, 194 U. S. 361.

(15) Counsel for plaintiff endeavor to defend their position by declaring that the white man is the aggressor and the negro the victim of race prejudice, and that we are, therefore, by this legislation punishing the negro because of the white man's prejudice against him. Even if it were always true that the white man is the aggressor where the two races conflict, and this is not so by any means,* it is quite obvious that that fact would not invalidate a law intended to prevent such aggression and therefore to protect the negro and the community from such acts. Otherwise, other separation laws, and particularly the separate coach laws, would have to fall. The fact is that the legislature and the courts recognize that in order to avoid strife and ill-feeling, it is far better for all concerned that the respective bounds of the two races be definitely and clearly defined by law than to leave the matter of the selection of a seat in a car, or the location of a home on a city block, to the uncertain outcome of the conflict between the aggressiveness of the individual on the one hand opposing itself to the fundamental racial antipathy of the community on the other; a conflict that must only breed much evil while accomplishing no permanent good, either to the individual or to the community

* See Stone "American Race Problem," pp. 66, 69.

involved.† "It is much wiser to avert the consequences of this repulsion of race by separation than to punish afterwards the breach of the peace it may have caused." (*West Chester, etc., R. Co.* v. *Miles,* 55 Pa. St. 209.)

In pressing this argument counsel seem utterly unable to understand how racial antipathy may be entirely consistent with a sincere desire to uplift and improve the negro. Yet to those who know the Southerner's attitude toward the negro race, there was nothing surprising in the fact that in the city of Louisville, which had enacted this segregation ordinance, there should have been raised in five days by popular subscription last November more than $50,000 for the religious and industrial education of the negroes of the city under the auspices of the Presbyterian Colored Mission. To paraphrase the happy illustration of Lincoln, a community may advocate the

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† Such an incident, for instance, as the following reported in a recent issue of the Louisville *Courier-Journal* (Feb. 16, 1917), would not contribute to the good feeling between the races or to their well-being in the particular community.

> "Harrodsburg, Ky., Feb. 15.—Race feeling has been aroused here by the sale of the old Assembly Presbyterian church building, in the heart of the business district, a few doors from Main, fashionable residence street, to the congregation of a negro Methodist church. When the Assembly Presbyterians united with the southern branch of the church and moved into a larger edifice the old Assembly building was purchased at public auction by D. R. Rue, a member of the congregation, for $3,100. He sold it to the negroes for $4,000.
>
> "A mass meeting of the white citizens was held at the court house and resolutions were drafted. A Citizens' Committee, composed of Circuit Judge C. A. Hardin, F. P. James, cashier of the First National Bank, and A. M. Wash, a prominent insurance man, was appointed to confer with the trustees of the negro church. An offer was made them to take the Assembly building off their hands at what it cost them, but it developed that the negroes want $12,000. Should the citizens get possession of the old church, it will be converted into a recreation hall and gymnasium for boys."

moral and educational and industrial improvement of the negro, and yet be unalterably opposed to making him a social equal, of having him as a next door neighbor, or as an intimate member of its family life.

We have thus, at the risk of dignifying many quite trivial contentions of the plaintiff, attempted to touch briefly upon every point which opposing counsel have made. They seem to concede that the law is not a violation of the letter of the Fourteenth Amendment, but take refuge in that conveniently vague expression "the spirit of the Constitution" (p. 23); and in order to establish that there is a violation of this "spirit," argue against the wisdom and expediency of the law, matters which this Court has repeatedly declared are not its concern. But we have been more than glad to meet the plaintiff on that ground, and to show the practical considerations which fully justify its enactment.

To sum up, it is entirely clear that precisely the same reasons, constitutional and practical, which justify all these other forms of white and negro segregation, exist for separating the races as immediate neighbors. If anything, they apply here with redoubled force. If there is danger of conflict and a peril to the preservation of the purity of the races where there is the merely brief and temporary and almost casual association in the schools and in conveyances of public travel, how much greater must be this same danger where the relation is the fixed and permanent and uninterrupted one of immediate

neighbors on the same block; the negro with his family and children living side by side with the white man's family day after day and year after year? And there must be added to the natural antipathy of the races existing under ordinary circumstances, the further fact that in this instance the negro by moving next to the white man's home largely destroys its value and enjoyment, and in a peculiar sense invades its peace and security.

AMALGAMATION OR SEPARATION.

The members of the Court who were then present will doubtless recall that on the former argument of this case last spring one of the opposing counsel, Mr. Storey, in attacking this law, attacked the constitutionality of the analogous miscegenation laws on the one hand, and on the other advocated the intermarriage of whites and negroes, citing various scientific authorities to support his contention that amalgamation of these two races is a thing to be desired, and that all of these laws should, therefore, be condemned as both unconstitutional and unwise.

Mr. Storey is entirely sound in thereby apparently conceding the proposition, supported by the ablest students of this question from DeTocqueville to Thomas Nelson Page, that there must be either social separation or else amalgamation of these two races, there being no other alternative solution of the problem. But this is the first time we have heard a white American advocate amalgamation as in any aspect whatsoever the more desirable alternative, although such a doctrine is quite com-

monly, we believe, accepted and taught by members of the negro race. Coming as it does from the President of the National Association for the Advancement of Colored People, this statement deserves the very serious consideration of the Court as constituting itself an important fact in this case. It further serves to support our contention that this law was passed to meet a very real danger which threatens the racial integrity of the white race. Mr. Storey's association has branches in more than sixty cities, including the city of Louisville,* and we have a right to assume that his views represent the views of at least a part of that organization, if indeed they do not represent a distinct propaganda. We do not for a moment believe that Mr. Storey, or any member of his family, practices what he preaches to others on this subject, but the point we wish to emphasize is that there is always danger that others may in good faith follow the advice rather than the example of such teachers.†

It is also significant as reflecting the public opinion of the country on this subject that more than half the

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*Negro Year Book for 1916-17, page 392.

†The following quotation from an editorial in *The Survey* (New York) of March 28, 1914, has a special significance in this connection, particularly when it is remembered that Dr. du Bois is the Director of Publicity and Research for the association mentioned:

"On December 27th, *The Survey* published a symposium of New Year's resolutions. * * *

"We asked W. E. Burghardt du Bois to contribute to this symposium. We did not ask him as an official representative of anything, but we naturally turned to him as the editor of *The Crisis*, published by the National Association for the Advancement of Colored People.

"Dr. du Bois replied with a program of Work for Black Folk in 1914—a stirring presentment of political, economic and social reforms put forward in the name of justice and fair dealing to his people.

"Paragraph 6 of his contribution reads as follows:

> " 'Sixth.—Finally, in 1914 the Negro must demand his social rights: his right to be treated as a gentleman when he acts like one, *to marry any sane grown person*

states in the Union, including many outside of the South and with even comparatively small percentages of negroes, have enacted miscegenation legislation; these states being Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia.*

> *who wants to marry him,* and to meet and eat with his friends without being accused of undue assumption or unworthy ambition.'

"Dr. du Bois closed with this paragraph:

> " 'This is the black man's program for 1914, and the more difficult it looks the more need for following it courageously and unswervingly. It is not a radical program—it is conservative and reasonable. And the National Association for the Advancement of Colored People with offices at 26 Vesey Street is the active agent of this propaganda. Persons interested in its work should read *The Crisis.*'

"It was news in *The Survey* office that the National Association for the Advancement of Colored People was committed to the part of paragraph 6 which we have italicized, to the extent that it could be set down as propaganda for which the association undertook to be the active agent in 1914. * * *

"As a friendly act, we endeavored to make sure that the program was what it appeared to be—the semi-official announcement of a deliberate policy. * * * The secretary of the association informed us that, without prejudice to the views of individual members, this was not a position which had been taken by the national association, and asked us not to publish the statement in a way that would commit the organization. Dr. du Bois, who came in later, stated in effect (by telephone) that he had reached the conclusion that colored people were making a mistake in emasculating their demands, and that he for one would draft no more platforms which failed to include this plank. He was willing to drop the last paragraph which involved the association and let the program stand as his own. * * * In fairness to *The Survey,*—no less than as a problem in the ethics of organized agitation,—these facts are set forth; they are not to be found in the editorial columns of *The Crisis* where Dr. du Bois has since published the program as his own. * * *"

Is it not also significant that the passage of residence segregation laws by various cities, and by the legislatures of the states of Virginia and South Carolina, has been coincident with the formation and growth of the National Association for the Advancement of Colored People, incorporated in 1909?

*See Negro Year Book for 1916-17, pp. 160-163.

Counsel's assertion that amalgamation is beneficial and desirable and that any legal restraints thereon are, therefore, invalid, remains for consideration. At the risk of "bringing coals to New Castle," we will endeavor to meet this challenge of Mr. Storey and assemble in the Appendix to this brief a few typical quotations from the writings of those who can speak with some authority on this subject, showing, first, that **there is a negro problem** which is rapidly becoming national in its scope and which is the most solemn and insistent problem that now confronts the South; further, that **amalgamation offers neither a practical nor a desirable solution**; and, finally, that **the only other possible solution is through the various forms of segregation of the white and negro races**; the present law through fair and constitutional means, as we contend, proposing such a solution for one of its most acute and vital phases.

Briefly stated, the policy to which this country has consistently adhered throughout its history in dealing with the many diverse and alien races within our borders has been this: **For races of the same color, amalgamation or fusion; for races of different color, whether Indian, Mongolian or Negro, social separateness or segregation.**

If, as has been stated by this Court, the police power "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality, or strong and preponderant opinion to be greatly and immediately necessary to the public welfare," (219 U. S. 111), such sources of inquiry as those upon which we have drawn to determine the state of that opinion would seem to be entirely

proper, unless, indeed, the Court should take the more usual course and accept the legislative declaration as conclusive thereof. We believe, however, that these statements, which were selected as merely representative of a great mass of material to the same effect, will be of aid to the Court in reaching a just conclusion concerning a question which vitally affects so large a section of our country at the present time, and which at no distant day will affect every state in the Union. If nothing more, these lay authorities are confirmatory of the legislative wisdom in the particular enactment (as was similar material referred to in *Muller* v. *Oregon*, 208 U. S. 419-21).

In conclusion we will refer to three of the most recent utterances of this Court defining the latitude to be given to judicial inquiry in relation to the exercise of the police power. In *Rast* v. *Van Deman & Lewis Co.*, 240 U. S. 342, 357, 366, it was said:

> "It is the duty and function of the legislature to discern and correct evils, and by evils we do not mean some definite injury, but obstacles to a greater public welfare. * * * And it is not required that we should be sure as to the precise reasons for such judgment, or that we should certainly know them or be convinced of the wisdom of the legislation. * * *
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> "But it may be said that judicial opinion can not be controlled by legislative opinion of what are fundamental rights. This is freely conceded; it is the very essence of constitutional law, but its recognition does not determine supremacy in any given instance. 'While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based

upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.' Otis* v. *Parker,* 187 U. S. 606, 608, 609."

The field, therefore, within which the police power may be exercised is not to be ascertained by mere abstract, philosophic speculation or prophecy, nor is mere surmise as to possible evils which might result from the legislation proposed to be allowed to outweigh the actual and admitted evils sought to be cured thereby.

As was said again by this Court in *Tanner* v. *Little,* 240 U. S. 369, 385, in speaking of the influence upon the public welfare of the legislation therein sought to be overthrown:

"And of this the judgment of the legislature must prevail, though it be controverted and opposed by arguments of strength. Nor is there support of the system or obstruction to the statute in declamation against sumptuary laws, nor in the assertion that there is evil lesson in the statute, nor in the prophecies which are ventured of more serious intermeddling with the conduct of business. Neither the declamation, the assertion, nor the prophecies can influence a present judgment. As to what extent legislation should interfere in affairs political philosophers have disputed and always will dispute. It is not in our province to engage on either side, nor to

> pronounce anticipatory judgments. We must wait for the instance. Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we can not measure their extent against the estimate of the legislature. *McLean* v. *Arkansas,* 211 U. S. 539. Such belief has many examples in state legislation, and, we have seen, it has persisted against adverse judicial opinion. If it may be said to be a judgment from experience as against a judgment from speculation; certainly, from its generality, it can not be declared to be made in mere wantonness."

Experience, then, must be allowed to challenge the assumption of theory and disprove its prophecy, and, as has been frequently pointed out in discussing other legislation directed to the public welfare, experience constantly has undermined such assumptions and dispelled the dire prophecies.

In fact, the present legislation has long since passed the experimental stage, a similar law having been in force in the cities of Richmond and Baltimore now for *six* and *four years* respectively, and in the city of Louisville for nearly *three years,* with admirable practical effect, and without any of the dire results which were predicted by counsel. We would respectfully refer the Court to the briefs to be filed as *amici curiae* by the City Attorneys of Richmond and of Baltimore in further confirmation of this statement.

And finally in *Thomas Cusack Co.* v. *Chicago* (January 15, 1917), U. S. Adv. Ops., p. 190, it was said that "while this Court has refrained from any attempt to define with precision the limits of the police power, yet

its disposition is to favor the validity of laws relating to matters completely within the territory of the State enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, *especially when its action is approved by the highest court of the State whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare.*"

Let us add that if this character of legislation were unconstitutional, the door would be forever closed against this method of solving the race problem, the only method which will be possible in view of the sentiment of the white race toward the negro which makes the other solution, the one through amalgamation, utterly impracticable and unthinkable. This particular law might or might not be the wisest form that such legislation might take. That is a matter of detail to be worked out by the legislature as the law is put into operation; and many of the objections urged by plaintiff go not to the fundamental soundness of such legislation, but to matters which, if they are defects, can be cured by amendment of the law. If the law is not as effective or as sweeping as it should or could be made, this is certainly no objection to its constitutionality; and in the last analysis, these are the principal, if not the only, tangible criticisms to be found in plaintiff's several briefs.

We feel every confidence, therefore, in asking for an affirmance of the judgment of the lower Court in this case.

Respectfully submitted,

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March 5, 1917.