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Domestic Relations: The Constitutionality of Oklahoma's Miscegenation Statutes

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determine that substantial employee interests require a limited revival of the "equal time" doctrine.[18]

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DOMESTIC RELATIONS: THE CONSTITUTIONALITY OF OKLAHOMA'S MISCEGENATION STATUTES

Oklahoma's Supreme Court recently upheld the constitutionality of Oklahoma's miscegenation statutes[1] in *Jones v. Lorenzen.*[2] The petitioners sought a writ of mandamus to require the clerk of Canadian County, Oklahoma, to issue a marriage license. One applicant was Mexican, the other a Negro, placing them within the purview of the statute forbidding such marriages. Assuming original jurisdiction,[3] the supreme court declared the issue to be whether they should overrule *Blake v. Sessions*[4] and hold the miscegenation statutes unconstitutional as being in violation of the first and fourteenth amendments of the Constitution.

Historically, miscegenation statutes have been attacked under the "equal protection of the laws" clause of the fourteenth amendment. Such attacks date from the 1882 case of *Pace v. Alabama*[5] where the United States Supreme Court held that an Alabama Statute, which prohibited a white person and a Negro from living together in adultery or fornication, was not in conflict with the Constitution, although it prescribed more severe penalties than those to which the parties would be subject, were they of the same color and race. This decision advanced the theory that since there was equal punishment there was no discrimination. Oklahoma cases on the subject not only have upheld the constitutionality of the statute[6] but also have described the intended purpose of the statute as applying ". . . to all persons, citizens, residents, and transients in the state, and are intended to prohibit marriage of the decendants of the African race

[18] Bonwit Teller, Inc., 96 N.L.R.B. 608 (1951).

[1] OKLA. STAT. tit. 43, § 12 (1961): "The marriage of any person of African descent, as defined by the Constitution of this State, to any person not of African descent, or the marriage of any person not of African descent to any person of African Descent, shall be unlawful and is hereby prohibited within this State." OKLA. STAT. tit. 43, § 13: "Any person who shall marry in violation of the preceding section, shall be deemed guilty of felony, and upon conviction thereof shall be fined in any sum not exceding five hundred dollars, and imprisonment in the penitentiary not less than one nor more than five years."

[2] 36 OKLA. B. A. J. 2237 (1965).

[3] OKLA. CONST. art. VII § 72.

[4] 94 Okla. 59, 220 Pac. 876 (1923).

[5] 106 U.S. 583 (1882).

[6] Blake v. Sessions, *supra* note 4.

with any other race in this state." [7] Only California has declared this type statute in violation of the "equal protection" clause of the fourteenth amendment. Speaking for the court, in *Perez v. Lippold*,[8] Mr. Justice Traynor pointed out that marriage is one of the rights protected by the fourteenth amendment, as declared by the United States Supreme Court in *Meyer v. Nebraska*[9] and that, "In the absence of an emergency the state clearly cannot base a law impairing fundamental rights of indivduals on general assumptions as to traits of racial groups." [10]

The *Jones* decision relied heavily on past decisions, particularly the leading federal case of *Stevens v. United States*.[11] In the *Stevens* case the Oklahoma miscegenation statute was held not to be in violation of the fourteenth amendment. *Pace*[12] and its equal punishment theory were the primary basis for the decision. Since the United States Supreme Court had not decided the question confronting the Oklahoma court, the principle that decisions of lower federal courts on federal questions, though not controlling, are highly persuasive[13] was applied, and the court echoed the results of the *Stevens* case. Thus, in the *Jones* case, the miscegenation statutes were once again declared to be constitutional.

Little, if any, consideration was given to *McLaughlin v. Florida*,[14] which held that a Florida Statute,[15] which prohibited the cohabitation of a Negro and a white person of different sexes, to be unconstitutional. Speaking through Mr. Justice White, the court said:

> Because the section applies only to a white person and a Negro who commit the specified acts and because no couple other than one made up of a white and a Negro is subject to conviction upon proof of the elements comprising the offense it proscribes, we hold § 798.54 invalid as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.[16]

While this decision dealt with interracial cohabitation as opposed to interracial marriage, it did set out a test which the court might apply to statutes differentiating between racial groups and dealing with fundamental rights guaranteed by the fourteenth amendment. The Court said,

> Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise. Without such

[7] Eggers v. Olson, 104 Okla. 297, 231 Pac. 483, 484 (1925).
[8] 32 Cal. 2d 711, 198 P.2d 17 (1947).
[9] 262 U.S. 390 (1923).
[10] Perez v. Lippold, *supra* note 8, at ___, 198 P.2d at 20.
[11] 146 F.2d 120 (10th Cir. 1944).
[12] Pace v. Alabama, *supra* note 5.
[13] Bruce v. Evertson, 180 Okla. 111, 68 P.2d 95 (1937).
[14] 379 U.S. 184 (1964).
[15] FLA. STAT. § 798.05.
[16] McLaughlin v. Florida, *supra* note 14, at 184.

> justification the racial classification . . . is reduced to an invidious discrimination forbidden by the Equal Protection Clause.[17]

It was also pointed out in *McLaughlin* that the interpretation of the equal protection clause handed down in *Pace* had been swept away by subsequent decisions of the Court. With the overruling of the effect of *Pace,* the basis of the *Stevens* case and ultimately the basis for upholding the miscegenation statutes like that in Oklahoma was greatly diminished.

Where are state courts to turn? The Oklahoma court was faced with abundant precedent upholding the constitutionality of these statutes and at the same time faced with a liberal trend on a national level, which can only be resolved by the United States Supreme Court which has been reluctant to decide this issue. The Court had an opportunity to decide the question in *Naim v. Naim,*[18] but refused certiorari on a procedural point. Likewise, as indicated above, they had an opportunity to go more directly to the issue at hand in *McLaughlin,* but chose not to.

The next move is up to the Supreme Court, because of the reluctance of the state courts to lead in changing and the vast amount of case law supporting constitutionality. Until the highest Court either upholds or voids these laws, they will continue in force on this uncertain footing. In forecasting the outcome of this situation, Mr. Justice Stewart's concurring opinion in *McLaughlin* should be noted, for he indicated that ". . . it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se.*" [19]

Problems of racial discrimination are of growing concern in our country. The civil rights of all citizens of the United States must be protected in an equal manner. As long as laws exist which make it a crime to marry another because one is a member of the African race and the other is of another race, or which prohibit marriage for the same reason, it cannot be said that equal protection exists.

John Turner

PATENTS: ACTION BY UNITED STATES GOVERNMENT FOR INFRINGEMENT OF GOVERNMENT PATENT

The United States Court of Claims held in the recent case of *Tektronix Inc. v. United States* [1] that the general policy of free-use of government patents over the past 100 years gives an unlicensed user an implied license

[17] *Id.* at 192-93.
[18] 350 U.S. 985 (1956).
[19] McLaughlin v. Florida, *supra* note 14, at 198.

[1] 351 F.2d 630 (Ct. Cl. 1965).