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Constitutional Law--Property--Clause Providing for Reverter Upon Use by Non-Whites Held Valid (Charlotte Park and Recreation Comm'n v. Barringer, 242 N.C. 311 (1955))

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RECENT DECISIONS

CONSTITUTIONAL LAW — PROPERTY — CLAUSE PROVIDING FOR REVERTER UPON USE BY NON-WHITES HELD VALID. — Defendants gave real property to plaintiff for use as a public park, the deed providing for an automatic reversion of title to the grantor if the property was used by non-whites. A number of Negroes petitioned the plaintiff for permission to use the park golf course. Thereupon plaintiff brought a declaratory judgment action to determine the validity of this reverter clause. Reasoning that the fourteenth amendment would not be violated because the title would revert without judicial action, the Court *held* that the grant created a determinable fee which would terminate upon use by non-whites. *Charlotte Park and Recreation Comm'n v. Barringer,* 242 N.C. 311, 88 S.E.2d 114 (1955).

Up to the year 1917, municipal ordinances were the primary legal devices for effectuating segregation in housing.[1] In that year, however, the Supreme Court declared municipal ordinances which provide for segregation in housing to be unconstitutional.[2] Thereafter, the restriction of ownership and use of property by Negroes became an individual matter, and the use of the restrictive racial covenant became widespread.[3] Prior to 1948, such covenants were almost unanimously held to be valid and enforceable when restricting use and occupancy,[4] but received conflicting treatment when they attempted to restrict ownership.[5]

The landmark case of *Shelley v. Kraemer* [6] held that court enforcement of such covenants is unconstitutional, yet declared that these covenants were valid as between the parties. Thereafter, New York [7]

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[1] Lowe, *Racial Restrictive Covenants,* 1 ALA. L. REV. 15-16 (1948).

[2] Buchanan v. Warley, 245 U.S. 60 (1917).

[3] Lowe, *supra* note 1, at 16, 17 n.11. See also Comment, 45 MICH. L. REV. 733-36 (1947).

[4] See, *e.g.,* Stone v. Jones, 66 Cal. App. 2d 264, 152 P.2d 19 (1944) (per curiam); Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); Malicke v. Milan, 320 Mich. 65, 30 N.W.2d 440 (1948); Thornhill v. Herdt, 130 S.W.2d 175 (Mo. 1939). *But see* Foster v. Stewart, 134 Cal. App. 482, 25 P.2d 497 (1933) (in which a covenant was held void which restricted against occupancy by persons of any other race than Caucasian for an unlimited time).

[5] *Compare* Hundley v. Gorewitz, 132 F.2d 23 (D.C. Cir. 1942); Steward v. Cronan, 105 Colo. 393, 98 P.2d 999 (1940); Lyons v. Wallen, 191 Okla. 567, 133 P.2d 555 (1942) (per curiam) (holding such covenants to be valid), *with* Porter v. Barrett, 233 Mich. 373, 206 N.W. 532 (1925); White v. White, 108 W. Va. 128, 150 S.E. 531 (1929) (denying validity).

[6] 334 U.S. 1 (1948).

[7] See, *e.g.,* Kemp v. Rubin, 298 N.Y. 590, 81 N.E.2d 325 (1948) (mem. opinion). This decision reversed the holdings of the Supreme Court and the Appellate Division on this issue, both of which had been handed down prior to

and other jurisdictions [8] refused to directly enforce these covenants. However, up until 1953, some courts permitted recovery of damages for breach of such a covenant.[9] In that year the Supreme Court ruled that the awarding of damages also is unconstitutional.[10]

The fourteenth amendment does not afford protection against individual action, however discriminatory; its applicability is limited to state action.[11] Following the *Civil Rights Cases*,[12] courts have construed state action to include judicial, as well as legislative, acts.[13] Since the courts have so interpreted the phrase—*state action*—it follows that *all* court action, which gives effect to a right which arises out of a discriminatory provision in a deed, should come under this constitutional prohibition.[14] In the instant case, the Court, basing its decision on the fact that the reverter clause in the deed would operate independently of court action, held that there was no violation of the fourteenth amendment; since title would revest automatically upon the happening of the condition,[15] the grantor would not need to enlist the aid of the courts to regain that title.

The grantor would, however, still be faced with the problem of regaining possession. Only two avenues are open to him, self-help or an action in ejectment.[16] Since the latter is court action, it should be precluded under the doctrine of *Shelley v. Kraemer*, and the fact that such action does not operate directly to enforce the right, *i.e.*, revesting of title, should be immaterial. Further, it would appear that the right to self-help is dependent upon a coexisting right to resort

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Shelley v. Kraemer. See Kemp v. Rubin, 188 Misc. 310, 69 N.Y.S.2d 680 (Sup. Ct.), *aff'd*, 273 App. Div. 789, 75 N.Y.S.2d 768 (2d Dep't 1947).

[8] See, *e.g.*, Cumings v. Hokr, 31 Cal. 2d 844, 193 P.2d 742 (1948) (per curiam); Tovey v. Levy, 401 Ill. 393, 82 N.E.2d 441 (1948); Correll v. Earley, 205 Okla. 366, 237 P.2d 1017 (1951).

[9] See, *e.g.*, Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949) (per curiam); Correll v. Earley, *supra* note 8. *Contra*, Roberts v. Curtis, 93 F. Supp. 604 (D.D.C. 1950).

[10] Barrows v. Jackson, 346 U.S. 249 (1953).

[11] See United States v. Harris, 106 U.S. 629 (1882); Powe v. United States, 109 F.2d 147 (5th Cir.), *cert. denied*, 309 U.S. 679 (1940); Claybrook v. Owensboro, 16 Fed. 297 (D. Ky. 1883).

[12] 109 U.S. 3 (1883).

[13] "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State." Twining v. New Jersey, 211 U.S. 78, 90-91 (1908). See Civil Rights Cases, *supra* note 12 at 6; Voigt v. Webb, 47 F. Supp. 743 (E.D. Wash. 1942); International Union of Mine Workers v. Tennessee Copper Co., 31 F. Supp. 1015 (E.D. Tenn. 1940).

[14] "When the court takes jurisdiction of the case and enforces, whether by declaratory judgment or some other form of judicial proceeding, the discriminatory provisions, whether they be in the form of reverter clauses or restrictive covenants, it is then that state action is in contravention to the Fourteenth Amendment." 60 DICK. L. REV. 191, 194 (1956). See also Kenney v. Fox, 132 F. Supp. 305, 309 (W.D. Mich. 1955).

[15] 1 AMERICAN LAW OF PROPERTY § 4.12 (Casner ed. 1952); RESTATEMENT, PROPERTY § 44 (1936); WALSH, PROPERTY § 227 (2d ed. 1937).

[16] 32 N. DAK. L. REV. 61-62 (1956).

to legal proceedings for the same relief.[17] Under this expanded view of what constitutes state action, the ultimate effect on the grantor would be the same whether the device chosen is a restrictive covenant, as in the *Shelley* case, or an automatic reverter clause, as in the present case. In both instances, whether the person is a grantor with a possibility of reverter or a covenantee, he will be left with an empty right, impossible of enforcement.

If the courts intend to strictly enforce the fourteenth amendment insofar as discriminatory racial provisions are concerned, *Shelley v. Kraemer* should not be confined, as in the instant case, to restrictive racial covenants, but should be recognized as establishing a constitutional principle. Complete clarification, however, can be achieved only when the present distinction between "valid" and "enforceable" is eliminated, and such discriminatory conditions are definitely declared to be illegal. Such action would preclude the possibility of a recurrence of the peculiar results reached in the instant case.

CONTRACTS — PLEDGES — ADEQUATE PUBLIC NOTICE OF SALE REQUIRED, DESPITE WAIVER, WHERE ESSENTIAL TO GOOD FAITH. — Plaintiff-executor instituted a discovery proceeding to ascertain whether defendant converted certain stock which had been pledged to secure a promissory note made by the testator. The contract of pledge contained a provision authorizing public or private sale on default, waiving any advertisement. Defendant-pledgee bought in the stock at public auction held pursuant to an advertisement which set forth only the names and number of shares of stocks offered. In answer to plaintiff's allegation that such notice of sale was inadequate, defendant pleaded the waiver. The Court *held* that notwithstanding testator's waiver, the pledgee was still obliged to give detailed notice of sale since such was essential to good faith. *Matter of Kiamie,* 309 N.Y. 325, 130 N.E.2d 745 (1955).

The relation between pledgor and pledgee has traditionally been regarded as one of trust [1] and at early common law the pledgor was accorded a considerable amount of protection. For example, the

[17] "In order that the actor may be entitled as against the other to the immediate possession of the land, it is necessary that he have a right to possession which he can enforce against the other by legal proceedings appropriate for the recovery of the possession of land." RESTATEMENT, TORTS § 90, comment *a* (1934).

[1] See Lord v. Hartford, 175 Mass. 320, 56 N.E. 609 (1900); Persons v. Russell, 212 Ala. 506, 103 So. 543, 545 (1925) (dictum); Hudgens v. Chamberlain, 161 Cal. 710, 120 Pac. 422, 424 (1911) (dictum).