State Court Enforcement of Restrictions Achieving Racial Segregation

There is disharmony in the Democratic Party as a result of the stand taken by the President on omnibus Civil Rights legislation. Such dissension is a manifestation of the struggle between racial and religious minorities who feel that fundamental rights long denied them should receive active governmental recognition and those evanescent groups who believe that American traditions are being attacked unjustifiably by persons indifferent to the general welfare of the nation. The hue and cry raised by the more vociferous of the citizenry is likely to bewilder the average man and certainly tends to obscure the issues. But in any event, the turbulence provided an excellent backdrop for decisions from the Supreme Court of the United States concerning validity of judicially enforced restrictions achieving racial segregation.

Among those cases recently considered by the Supreme Court is *Sipes v. McGhee*,[1] wherein the plaintiffs, owners and occupants of properties encumbered by a properly recorded agreement forbidding use or occupancy of such properties by any person not of the Caucasian race, successfully sought a state court decree enforcing the restriction against colored occupants of neighboring properties similarly encumbered. The covenant was found not void for uncertainty, not void as against public policy,[2] and not violative of the due process clause of the Constitution of Michigan. Nor was judicial enforcement of the restriction found to be state action within the purview of the due process[3] and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The court stated that to accept such reasoning with regard to the latter clause would be to deny to *plaintiffs* the equal protection of the laws by preventing the enforcement of their private contracts. The submission of amicus curiae briefs[4] was commented upon, but the decision was confined to matters within the record and questions raised in the briefs of the parties to the action.

In the companion case[5] in which the Supreme Court granted

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[1] 316 Mich. 614, 25 N.W. 2d 638 (1947), *cert. granted*, 331 U.S. 804 (1947), Notes, 15 U. of Chi. L. Rev. 193 (1947), 31 Minn. L. Rev. 385 (1947).

[2] Citing Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922), one of the older leading cases.

[3] The court here relied on the oft-cited Corrigan v. Buckley, 271 U.S. 323 (1926), but recognized the fact that it is not squarely in point.

[4] Such briefs were submitted by American Jewish Congress (Detroit Section); Wolverine Bar Association; National Lawyers Guild (Detroit Chapter); United Automobile, Aircraft and Agricultural Workers (C.I.O.); Ardmore Association, Inc.; and the National Bar Association.

[5] Kraemer v. Shelley, 355 Mo. 814, 198 S.W. 2d 679 (1946), *cert. granted*, 331 U.S. 803 (1947), Note, 15 U. OF CHI. L. REV. 193 (1947).

certiorari, a similar restriction against the use or occupancy of residential property by people of the Negro or Mongolian race was upheld by the highest court of Missouri as one which the parties to the agreement had the right to make and which was not contrary to public policy. *Corrigan v. Buckley*[6] was again invoked to dispose of the constitutional arguments, with the further comment that to deny court enforcement of the agreement would be to deny to the covenanting parties one of the fundamental privileges of citizenship, access to the courts. The court expressed concern for the overcrowded conditions existing in the Negro sections of St. Louis but indicated that alleviation of the situation was not the function of the courts, particularly where a case involved determination of contractual rights between parties to a law suit.

A recent Ohio Court of Appeals decision upheld a restriction in a deed against the use or occupancy of the land by a non-Caucasian.[7] The determination by the trial court of the validity of that portion of the covenant prohibiting *sale* to non-Caucasians was held improper since no sale by defendant church was threatened. Furthermore, the defendant church, as a *corporation*, was an entity separate and distinct from its membership which was preponderantly Negro and therefore lacked racial identity. The restriction against user was compared to provisions forbidding sale of liquor on the premises by a grantee or requiring adherence to building requirements.[8] The concept of individual contract received the favorable attention accorded it in most cases of this type, and the public policy argument was evidently disposed of in that portion of the opinion. No violation of constitutional provisions, state or federal, was found.[9]

In 1917, in *Buchanan v. Warley*,[10] the U. S. Supreme Court held unconstitutional a city ordinance forbidding any white person or any Negro to move into and occupy any house in a city block where a majority of the houses were already occupied by persons of the other race as a deprivation by the *state* of the property owner's right to dispose of the property to whomsoever he wishes. Such

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[6] 271 U.S. 323 (1926).

[7] Perkins v. Trustees of Monroe Avenue Church of Christ, 79 Ohio App. 457, 70 N.E. 2d 487 (1946), *appeal dismissed*, 72 N.E. 2d 97 (1947); *cert. granted, judgment rev'd*, 16 U. S. L. WEEK 3337 (U.S. May 11, 1948). Notes, 15 U. OF CHI. L. REV. 193 (1947), 17 U. OF CIN. L. REV. 77 (1948). Amicus curiae briefs were presented by American Civil Liberties Union; the Asst. Pros. Atty.; Columbus Council for Democracy; the Eastwood Civic Ass'n. and three other like organizations .

[8] The court argued that no one would question the validity of a restrictive covenant against permitting a property "to be occupied and used as a house of prostitution." The court failed to correlate this statement to the racial problem.

[9] Relying on Corrigan v. Buckley, 271 U.S. 323 (1926).

[10] 245 U.S. 60 (1917).

legislative action is forbidden by the due process clause of the Fourteenth Amendment. Thereupon, white landowners resorted to agreements, conditions, and covenants in deeds to exclude non-Caucasians from purchasing or occupying residential property, for the Fourteenth Amendment does not apply to private contracts.[11] Restrictions against use or occupancy by non-Caucasians have frequently been upheld.[12] When such restrictions are broken, the usual form of relief sought is the equity injunction which, backed by the contempt power, evicts the non-Caucasian occupant. However, judicial aid has been withheld if the character of the restricted area or of the neighborhood has so changed that to grant enforcement would be inequitable.[13] Some jurisdictions recognized restrictions against sale to non-Caucasians.[14] But such a restriction has been held invalid as violative of the property rule against restraints on alienation.[15]

That state *judicial* action is state action within the purview of the Fourteenth Amendment was established as early as 1883 in the *Civil Rights Cases*,[16] and the proposition has been reaffirmed in re-

[11] Virginia v. Rives, 100 U.S. 313 (1879); U.S. v. Harris, 106 U.S. 629 (1882); Civil Rights Cases, 109 U.S. 3 (1883); Corrigan v. Buckley, 271 U.S. 323 (1926).

[12] Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922); Schulte v. Starks, 238 Mich. 102, 213 N.W. 102 (1927); Wayt v. Patee, 205 Cal. 46, 269 Pac. 660 (1928); Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); Burkhardt v. Lofton, 63 Cal. App. 2d 230, 146 P. 2d 720 (1944); Stone v. Jones, 66 Cal. App. 2d 264, 152 P. 2d 19 (1944); *see* White v. White, 108 W.Va. 128, 130, 150 S.E. 531, 532 (1929); Martin, *Segregation of Residences of Negroes*, 32 MICH. L. REV. 721 (1934); Notes, 42 MICH. L. REV. 923 (1944), 40 ILL. L. REV. 432 (1946); 5 TIFFANY, REAL PROPERTY, §1345 (3d ed. 1939). *Contra.* Gandolfo v. Hartman, 49 Fed. 181 (C.C.S.D. Cal. 1892).

[13] Hundley v. Gorewitz, 132 F. 2d 23 (App. D.C. 1942); Clark v. Vaughn, 131 Kan. 438, 292 Pac. 783 (1930); Pickel v. McCawley, 329 Mo. 166, 44 S.W. 2d 857 (1931); Letteau v. Ellis, 122 Cal. App. 584, 10 P. 2d 496 (1932); Fairchild v. Raines, 24 Cal. 2d 818, 151 P. 2d 260 (1944); Notes, 7 U. OF CHI. L. REV. 710 (1940), 40 ILL. L. REV. 432 (1946).

[14] Queensborough Land Co. v. Caseaux, 136 La. 724, 67 So. 641 (1915); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918); Wyatt v. Adair, 215 Ala. 363, 110 So. 801 (1926); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Lee v. Hansberry, 372 Ill. 369, 24 N.E. 2d 37 (1939); Lyons v. Wallen, 191 Okla. 567, 133 P. 2d 555 (1942); Note, 12 Mo. L. Rev. 221 (1947).

[15] Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Porter v. Barrett, 233 Mich. 373, 206 N.W. 532 (1925); White v. White, 108 W. Va. 128, 150 S.E. 531 (1929); 2 SIMES, FUTURE INTERESTS, §459 (1936); Siegel, *Real Property Law and Mass Housing Needs*, 12 Law & CONTEMP. PROB. 30, 45 (1947). Since the practical effect of either type of restriction is to exclude unwanted groups, the distinction is unwarranted.

[16] 109 U.S. 3 (1883). The principle was reaffirmed in Chicago, Burlington and Quincy R.R. v. Chicago, 166 U.S. 226 (1897); and in Twining v. New Jersey, 211 U.S. 78 (1908).

cent decisions by the United States Supreme Court.[17] That racial restrictions ultimately attain their objectives through court enforcement is self-evident. Therefore, several writers have maintained that state judicial enforcement of such individually created restrictive agreements is state action prohibited by the equal protection clause of the Fourteenth Amendment.[18]

That the judiciary should be reluctant to pioneer in disturbing the status quo is understandable, for the situation is a delicate one. But the enforcement of racial restrictions was of the courts' own choosing, for post-Civil War decisions by the United States Supreme Court[19] contained language broad enough to justify refusal by state tribunals of judicial sanction of these devices violative of the spirit of the Amendment, and these precedents were not followed. Nor are statements[20] such as those quoted in the opinion in the *Perkins* case[21] helpful when analysis of the problem is attempted. The issue is not whether courts should abolish the distinctions which some citizens do draw on account of racial differences but whether, once distinctions *have been drawn* by individuals, the state judiciary should give its manifest approval of racial barriers by granting the equity injunction where the pressure of population has forced initial encroachment upon areas subject to racial restrictions.

A forthright recognition of the issue distinguishes the recent

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[17] Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, (1930); Powell v. Alabama 287 U.S. 45 (1932); Cantwell v. Connecticut, 310 U.S. 296 (1940); Bridges v. California, 314 U.S. 252 (1941); Bakery Drivers Local v. Wohl, 315 U.S. 769 (1942).

[18] Kahen, *Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem,* 12 U. OF. CHI. L. REV. 198 (1945); McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds Is Unconstitutional,* 33 Calif. L. REV. 5 (1945); Notes, 21 IND. L. J. 223 (1946); 40 ILL. L. REV. 432 (1946). For another view, see Huston, *State Court Enforcement of Race Restrictive Covenants as State Action Within Scope of Fourteenth Amendment,* 45 MICH. L. REV. 733 (1947), wherein the opinion is expressed that invalidation of restrictive covenants as contrary to public policy would be a sounder approach to the law. A Note, 13 U. OF CHI. L. REV. 477 (1946), questions the advisability of using the courts as a forum in which to thrash out this essentially sociological problem.

[19] See Note 16 *supra.*

[20] "The law is powerless to eradicate racial instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matter of purely private concern. For the law to attempt to abolish these distinctions in the private dealings between individuals would only serve to accentuate the difficulties which the situation presents." 79 Ohio. App. 457, 466, 70 N.E. 2d 487, 492 (1946) quoting from Parmalee v. Morris, 218 Mich. 625, 628, 188 N.W. 330, 331 (1922).

[21] 79 Ohio App. 457, 70 N.E. 2d 487 (1946), *appeal dismissed,* 72 N.E. 2d 97 (1947); *cert. granted, judgment rev'd,* 16 U.S.L. WEEK 3337 (U.S. May 11, 1948).

opinion of Chief Justice Vinson holding that state judicial enforcement of restrictive agreements directed at Negroes is an unconstitutional denial by the state of the equal protection of the laws.[22] As succinctly stated by appellate Justice Edgerton, who dissented in *Mays v. Burgess*[23] and in *Hurd v. Hodge*,[24] "Restrictive covenants are not self-executing."[25] That what the state legislature is prohibited from achieving openly should be accomplished through individually created but judicially enforced constrictions was a reflection upon the judicial system of the nation. In companion cases[26] the Supreme Court, speaking again through the Chief Justice, held that judicial enforcements of racial restrictions is improper when undertaken by *federal* courts, for such enforcement is a denial of rights intended by Congress to be protected by the Civil Rights Act of 1866 and is contrary to the public policy of the United States. Therefore, as a result of these decisions, judicial sanction of a discriminatory device, the use of which has subjected the nation to criticism both at home and abroad, has finally been withdrawn.

Robert J Lynn

Enforcement of Submission Agreements

The significance of the enforceability of voluntary industrial arbitration agreements becomes apparent when one realizes the widespread usage of arbitration clauses in industry-union collective bargaining agreements. Conservative appraisals have shown that three out of every four of the collectively bargained contracts operative today between labor and management contain some proviso for the prospective arbitration of grievances and complaints. "In recent years the prevailing pattern has made practically automatic the acceptance of arbitration upon entering into contractual relations with a union."[1] "In the battle-scarred field of labor-management relations, where practically every issue is bitterly controversial, the principle of voluntary arbitration stands almost alone

[22] Shelley v. Kraemer, McGhee v. Sipes, 16 U.S.L. WEEK 4426 (U.S. May 4, 1948)

[23] 147 F 2d 869, 873 (App. D.C. 1945)

[24] 162 F 2d 233, 235 (App. D.C. 1947) This opinion is especially notable for its discussion of the public policy argument.

[25] *Supra* note 24, at 239.

[26] Hurd v Hodge, Urciolo v. Hodge, 16 U.S.L. Week 4432 (U.S. May 4, 1948)

[1] NATIONAL FOREMEN'S INSTITUTE INC., PITFALLS TO AVOID IN LABOR ARBITRATION 1 (1947)