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The Constitutionality of Restrictive Covenants

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Comments

CONSTITUTIONALITY OF RESTRICTIVE COVENANTS

The United States Supreme Court cases of *Shelley v. Kraemer*[1] and *Hurd v. Hodge*[2] are companion cases that effected a reversal in what generally had been conceived to be the law as to restrictive covenants forbidding the sale or use of real property to certain racial groups. Both cases involved similar agree-

1. 68 S.Ct. 836 (U. S. 1948).
2. 68 S.Ct. 847 (U. S. 1948).

ments along the familiar line, the *Shelley* case arising in a state and the *Hurd* case in the District of Columbia. The property owners of the vicinity had signed an agreement designed to prevent ownership or occupancy of any of the property by "any person not of the Caucasian race" in the state case and by "any Negro or colored person" in the District of Columbia case. In each case a sale was made to a Negro, and the other property owners sued to enforce the agreement. In the *Shelley* case the Supreme Court held that judicial enforcement of such restrictive covenants amounted to state action violating the equal protection clause of the Fourteenth Amendment. In the *Hurd* case, the constitutional question of due process under the Fifth Amendment was not decided. Judicial enforcement of the restrictive covenants was denied on the ground that it was prohibited by the Civil Rights Act of 1866.[3] The District of Columbia is included within the meaning of the term "every State and Territory,"[4] in Section 1978 of the Revised Statutes:

> "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 and personal property."[5]

These decisions simply state that the courts may not enforce the so-called restrictive covenants based on racial grounds wherever they may arise, but such agreements, however, are not invalid per se. As long as their purpose is achieved privately through voluntary adherence to their terms, there can be no court interference for there is no governmental action to invoke the Fourteenth Amendment and legislation enacted to effect its purposes.

The Court had no difficulty in distinguishing *Corrigan v. Buckley*,[6] previously thought to be authority for the enforce-

3. 14 Stat. 27, 8 U.S.C.A. § 42 (1866). The Civil Rights Act of 1866 was re-enacted in Section 18 of the Act of May 31, 1870, 16 Stat. 144, 8 U.S.C.A. § 41 (1870).

4. Cf. Geofroy v. Riggs, 133 U. S. 258, 10 S.Ct. 295, 33 L.Ed. 642 (1890); Talbott v. Silver Bow County, 139 U. S. 438, 444, 11 S.Ct. 594, 596, 35 L.Ed. 210 (1891).

5. 14 Stat. 27, U.S.C.A. § 42 (1866).

6. 271 U. S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926). The court also distinguished Hansberry v. Lee, 311 U. S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Here again the issue did not arise as to whether judicial enforcement of the covenant amounted to state action. The case held that the petitioners, who were suing to enforce the restrictive covenant, would be deprived of property without due process of law if they were held bound by an erroneous stipulation in a previous suit, termed a class suit, to which they had not been a party.

ability as well as the legality of such covenants.[7] In that case, where there was a restrictive covenant not to sell to Negroes for a period of twenty-one years, the Supreme Court refused to take jurisdiction as there was no substantial constitutional question, the appeal being based solely on the contention that the covenant itself was void because it violated the Fifth, Thirteenth and Fourteenth Amendments and the Civil Rights Act. The case, arising in the District of Columbia, could not conceivably be authority for the proposition that the Fourteenth Amendment is not violated by such covenants being judicially enforced, as that amendment applies only to states. Whether or not judicial enforcement amounted to state action was left undecided, for that question had not been raised by the petition for the appeal or by any assignment of error. On a jurisdictional point, therefore, the appeal was dismissed.[8] Thus the *Corrigan* case decided only that these covenants in and of themselves do not violate the constitutional mandate and is not authority for the proposition that such a covenant is both valid and enforceable by injunction, although such covenants have been enforced on its authority.[9] The latter question had never been properly raised before the Supreme Court prior to the instant cases.

Ordinances and *statutes* designed to prevent Negroes from acquiring and using particular property have always been held invalid as they are too obviously prohibited by the Fourteenth Amendment, and attempts to justify them as a lawful exercise of the police power to prevent conflict and ill feeling between the races have failed.[10]

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7. See McGovney, Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds is Unconstitutional (1945) 33 Calif. L. Rev. 5. In Hurd v. Hodge, 162 F.(2d) 233, 235 (App. D.C. 1947), speaking of the Corrigan case, Justice Edgerton, dissenting, said: "Accordingly it decided nothing with regard to racial restrictive covenants except that *the Constitution and the Civil Rights Act* plainly do not make them *void*." See also Mays v. Burgess, 79 App. D.C. 343, 349, 147 F.(2d) 869, 162 A.L.R. 168 (1945), certiorari denied 325 U. S. 868, 65 S.Ct. 1406, 89 L.Ed. 1987 (1945), rehearing denied 325 U.S. 896, 65 S.Ct. 1567, 89 L.Ed. 2006 (1945).

8. Corrigan v. Buckley, 271 U.S. 323, 331, 46 S.Ct. 521, 70 L.Ed. 969 (1926).

9. Similar restrictive covenants have been upheld by the United States Court of Appeals for the District of Columbia in Torrey v. Wolfes, 56 App. D.C. 4, 6 F.(2d) 702 (1925); Cornish v. O'Donoghue, 58 App. D.C. 359, 30 F.(2d) 983 (1929), cert. denied 279 U.S. 871, 49 S.Ct. 512, 73 L.Ed. 1007 (1929); Russell v. Wallace, 58 App. D.C. 357, 30 F.(2d) 981 (1929), cert. denied 278 U.S. 871, 49 S.Ct. 512, 73 L.Ed. 1007 (1929); Grady v. Garland, 67 App. D.C. 73, 89 F.(2d) 817 (1937), cert. denied 302 U.S. 694, 58 S.Ct. 13, 82 L.Ed. 536 (1937); Hundley v. Gorewitz, 77 App. D.C. 48, 132 F.(2d) 23 (1942); Mays v. Burgess, 79 App. D.C. 343, 147 F.(2d) 869, 162 A.L.R. 168 (1945), cert. denied 325 U.S. 868, 65 S.Ct. 1406, 89 L.Ed. 1987 (1945), rehearing denied 325 U.S. 896, 65 S.Ct. 1567, 89 L.Ed. 2006 (1945).

10. Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149, L.R.A.

In Louisiana the general rule is that building and use restriction clauses constitute real rights, not personal to the vendor, running with the land for the benefit of all other grantees under a general plan of development. The remedy of other grantees is by injunction to prevent a violation.[11] This rule remains, of course, unaffected except as to the enforceability of racially restrictive covenants. The Louisiana decision of *Queensborough Land Company v. Cazeaux*,[12] was the first in the United States holding that a restraint against the sale to any Negro was legal and enforceable. It distinguished between local and perpetual inalienability as compared with partial and temporary inalienability holding the latter valid and enforceable, the covenant in the case being for twenty-five years. The question as to judicial enforcement of the covenant amounting to state action was not raised. However, Justice Provosty, speaking for the court, said:

> "The fourteenth amendment, in so far as prohibiting discrimination against the negro race, applies only to state legislation, not to the contracts of individuals. Civil Rights Cases, 109 U.S. 62, 3 Sup. Ct. 18, 27 L. Ed. 835."[13]

Had a broader view been taken as to what constituted state action, the decision might not have been reached so easily. In view of the instant cases, the Louisiana Supreme Court can no longer enforce a restrictive covenant based on race or color alone, despite the fact that such covenants have been held to constitute a dismemberment of ownership in the nature of a servitude and

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1918C 210, Ann. Cas. 1918A 1201 (1917). Harmon v. Tyler, 273 U.S. 668, 47 S.Ct. 471, 71 L.Ed. 831 (1927); City of Richmond v. Deans, 281 U.S. 704, 50 S.Ct. 407, 74 L.Ed. 1128 (1930).

Oyama v. California, 332 U.S. 633, 68 S.Ct. 269, 92 L.Ed. 257 (1948), declared a state law denying equal enjoyment of property rights to a certain racial group was not a legitimate exercise of the state's police power.

11. Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641, L.R.A. 1916B 1201, Ann. Cas. 1916D 1248 (1915); Hill v. Wm. P. Ross, Inc., 166 La. 581, 117 So. 725 (1928); Ouachita Home Site & Realty Co. v. Collie, 189 La. 521, 179 So. 841 (1938).

Louisiana courts have treated a restriction not to sell to a negro as a dismemberment of ownership operating as a servitude on the land. The right to alienate (abusus) has been held to be subdivided and only partially transferred to the new owner, there being withheld from him that part which would enable him to sell to a negro.

Art. 709, La. Civil Code of 1870, states: "Owners have a right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; provided, nevertheless, that the services be not imposed on the person or in favor of the person, but only on an estate or in favor of an estate; and provided, moreover, that such services imply nothing contrary to public order."

12. 136 La. 724, 67 So. 641, L.R.A. 1916B 1201, Ann. Cas. 1916D 1248 (1915).

13. 136 La. 724, 728, 67 So. 641, 643.

their breach to effect a resolutory condition or condition subsequent in the contract.[14]

Employment of state action to enforce any agreement or arrangement (whatever it may be called) denying essential civil rights secured by the Fourteenth Amendment is now forbidden. The extent to which any system that might involve racial discrimination as to property rights will be scrutinized is indicated by the case of *Harmon v. Tyler*,[15] where the United States Supreme Court held unconstitutional a New Orleans ordinance which barred whites or Negroes from any portion of the city except on the written approval of a majority of the persons of the opposite race inhabiting that particular portion of the city. This decision indicates that a discrimination is nonetheless invalid though counterbalanced by another of similar character.[16]

The decision in the *Shelley* and *Hurd* cases came as no surprise to many,[17] since it has long been settled that not only legislation and procedure, but judicially adopted rules of substantive law are invalid if they conflict with the Fourteenth Amendment.[18] Taking the premise that the courts cannot validly do that which is forbidden the legislature, and thus refusing to construe nar-

14. Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915).

15. 273 U.S. 668, 47 S.Ct. 471, 71 L.Ed. 831 (1927).

16. Cases from other states upholding similar covenants are Wyatt v. Adair, 215 Ala. 365, 110 So. 801 (1926); Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596, 9 A.L.R. 115 (1919); Wayt v. Patee, 205 Cal. 46, 269 Pac. 660 (1928); Littlejohns v. Henderson, 111 Cal. App. 115, 295 Pac. 95 (1931); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Stewart v. Cronan, 105 Colo. 393, 98 P.(2d) 999 (1940); Meade v. Denistone, 173 Md. 295, 196 Atl. 330 (1938); Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330, 38 A.L.R. 1181 (1922); Shulte v. Starks, 238 Mich. 102, 213 N.W. 102 (1927); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217, 9 A.L.R. 107 (1918); Porter v. Johnson, 232 Mo. App. 1150, 115 S.W.(2d) 529 (1938); Thornhill v. Herdt, 130 S.W.(2d) 175 (Mo. App. 1939); Porter v. Pryor, 164 S.W.(2d) 175 (Mo. App. 1942); Lyons v. Walden, 191 Okla. 567, 133 P.(2d) 555 (1942); Doherty v. Rice, 240 Wis. 389, 3 N.W.(2d) 734 (1942); Ridgeway v. Cockburn, 163 Misc. 511, 296 N.Y. Supp. 936 (1937).

17. Hurd v. Hodge, 162 F.(2d) 233, 235 (App. D.C. 1947) (dissent), noted in (1945) 33 Calif. L. Rev. 5.

18. Ex parte Commonwealth of Virginia, 100 U.S. 339, 347, 25 L.Ed. 676 (1880); Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883); Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97 (1908); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527 (1932); Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352 (1940); A. F. of L. v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941); Bridges v. State of California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192; Bakery and Pastry Drivers and Helpers Local 802 of International Brotherhood of Teamsters v. Wohl, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178 (1942); Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S.Ct. 126, 88 L.Ed. 58 (1943); Pennekamp v. Florida, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946). Cf. Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 144 A.L.R. 1487 (1938).

rowly the constitutionally guaranteed civil rights, a federal district court in California, in *Gandolfo v. Hartman*,[19] has refused to enforce a restrictive covenant against transfers to Chinese. The Civil Rights cases[20] had held that the Fourteenth Amendment applies to the action of state officers, executive or judicial, and to state laws and acts done under state authority, thus, the obvious proposition that the state may not, by any of its agencies, violate the Fourteenth Amendment.[21] The present decisions mark only one more step in the Supreme Court's efforts to validate the proposition stated in *Strauder v. West Virginia*,[22] that a state may not make the enjoyment of any civil right dependent upon race or color, and that all persons, whether colored or white, shall stand equal before the laws of the states. Especially included as a protected civil right is equality in the enjoyment of property, which was first seen as a prerequisite to other basic civil liberties in the *Slaughter-House* cases.[23] The decisions were no doubt influenced by the social interest in adequate Negro housing and the current national policy to eradicate all racial discrimination in order to accomplish a higher standard of living for the Negro. Their efficacy toward those ends remains to be seen.[24]

The difficulty of finding a constitutional basis for holding that such a restrictive covenant was void in and of itself was perhaps one reason the court did not disturb its holding in the *Corrigan* case,[25] but the result leaves such covenants in a twilight zone, not void but not legally enforceable. Yet in the *Hurd* case, it was indicated that even had there been no statute, enforcement of such covenants in a federal court would be held contrary to the public policy of the United States,[26] again indicative of federal policy on all points involving racial issues. Future manifestations of this trend will be interesting, especially in the light of the existing acceptance of the principle set up by *Plessy v. Ferguson*[27] that segregation is valid so long as facilities are substantially equal.

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19. 49 Fed. 181, 16 L.R.A. 277 (S. D. Calif. 1892).
20. 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883).
21. Many decisions but especially Commonwealth of Virginia v. Rives, 100 U.S. 313, 25 L.Ed. 667 (1880).
22. 100 U.S. 313, 25 L.Ed. 664 (1880).
23. 83 U.S. 36, 21 L.Ed. 394 (1873).
24. See Hurd v. Hodge, 161 F.(2d) 233, 235 (App. D.C. 1947)(dissent).
25. 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969 (1926).
26. 68 S.Ct. 847, 853 (U.S. 1948).
27. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896). But see Taft, C. J., in Gong Lum v. Rice, 275 U.S. 78, 48 S.Ct. 91, 72 L.Ed. 172 (1927).