Florida Law Review

Volume 1 | Issue 3 Article 14

March 2021

Constitutional Law: Racial Restrictive Covenants as Affected by the Fourteenth Amendment

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CONSTITUTIONAL LAW: RACIAL RESTRICTIVE COVENANTS AS AFFECTED BY THE FOURTEENTH AMENDMENT

Shelley v. Kraemer, 68 Sup. Ct. 836 (1948)

A written agreement among property owners in a district of St. Louis restricted the use or occupancy, as owners or tenants, of the included parcels of land for a period of fifty years to persons of the Caucasian race, the agreement providing that the restrictive covenant should run with the land. Petitioners, the Shelleys, who are Negroes, purchased a particular parcel burdened by the restrictive covenant, and accepted a warranty deed. Thereupon, respondents, as owners of other property described in the agreement and subject thereto, sought to enjoin petitioners from taking possession, and, further, prayed that they be divested of title. The trial court denied the relief. The decision was reversed by the Supreme Court of Missouri,[1] holding that such agreement was effective and its enforcement not in violation of any rights guaranteed to petitioners by the Constitution. On certiorari, by unanimous decision, HELD, enforcement by a state court of a racial restrictive covenant is discriminatory state action prohibited by the equal protection clause of the Fourteenth Amendment[2] to the Constitution. Judgment reversed.

A restrictive covenant in an agreement or deed which affects the use and enjoyment of property runs with the land[3] and, therefore, is enforceable by and against the parties, their privies and assigns.[4] Upon a breach or threatened breach there lies an action in law for damages; or, in lieu thereof, a court of equity will undo the consummated acts in violation of such covenant, or may prevent a breach by injunction.[5] The right of an individual so to burden his own property with racial restrictions has been recognized as not contrary to public policy[6] de-

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[1]Kraemer v. Shelley, 355 Mo. 814, 198 S. W.2d 679 (1946).

[2]U. S. CONST. AMEND. XIV, §1.

[3]RESTATEMENT, PROPERTY §§530, 542 (1944).

[4]*Id.* at §§534, 535, 537.

[5]*Id.* at §528.

[6]*E.g.*: Corrigan v. Buckly, 299 Fed. 899 (App. D. C. 1924), *appeal dismissed*, 271 U. S. 323, 46 Sup. Ct. 521, 70 L. Ed. 969 (1926); Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1920); Queensborough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915); Parmalee v. Morris, 218 Mich. 625, 188 N. W. 330 (1922); Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918). *Contra*: Gandolfo v. Hartman, 49 Fed. 181 (C. C. S. D. Cal. 1892).

termined by good morals, public order or express law, nor is it repugnant to a conveyance of a fee simple estate.[7]

In avoidance of the strict common-law rule[8] that any restriction which destroys the freedom of property ownership is an unlawful restriction upon the power of alienation, invoked against racial restrictive covenants, a distinction was made[9] so that restrictions upon sale or lease fell within the principle, whereas limitations upon use or occupancy were not so governed. Thus such covenants were deemed valid and enforceable, although the courts averred that fundamental economic and social changes in the character of a given area destroying the general purpose of the restriction would preclude their enforcement.[10]

The Fourteenth Amendment, promulgated to protect the interests of the newly freed slaves and to place them on parity with the white members of society, did not confer rights upon the Negro but was a mode of protecting their already existent rights.[11] The right of the individual to make discriminatory contracts was well substantiated by the Court in the early days, individual invasion of individual rights not being the subject-matter of the amendment.[12] Private racial restrictive covenants, therefore, were construed to be without its prohibition,[13] although city[14] and state [15] legislation accomplishing the same objective, namely,

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[7]Steward v. Cronan, 105 Colo. 393, 98 P.2d 999 (1940); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930).

[8]Mandelbaum v. McDonnell, 29 Mich. 78, 95, 18 Am. Rep. 61, 75 (1874).

[9]Cases compiled in McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,* 33 CALIF. L. REV. 5, 10-11 (1945).

[10]Gospel Spreading Ass'n v. Bennetts, 147 F.2d 878 (App. D. C. 1945); Hundley v. Gorewitz, 132 F.2d 23 (App. D. C. 1942); Fairchild v. Raines, 24 Cal.2d 818, 151 P.2d 260 (1944); Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (1932); Clark v. Vaughan, 131 Kan. 438, 292 Pac. 783 (1930); *see* Mays v. Burgess, 147 F.2d 869, 871 (App. D. C. 1945).

[11]Strauder v. West Virginia, 100 U. S. 303, 25 L. Ed. 664 (1880).

[12]Civil Rights Cases, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835 (1883); United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588 (1876); Slaughter-House Cases, 16 Wall. 36, 21 L. Ed. 394 (U. S. 1873).

[13]Cases cited note 6 *supra* and note 23 *infra.*

[14]Richmond v. Deans, 37 F.2d 712 (C. C. A. 4th 1930), *aff'd,* 281 U. S. 704, 50 Sup. Ct. 407, 74 L. Ed. 1128 (1930); Harmon v. Tyler, 273 U. S. 668, 47 Sup. Ct. 471, 71 L. Ed. 831 (1927); Buchanan v. Warley, 245 U. S. 60, 38 Sup. Ct. 16, 62 L. Ed. 149 (1917).

[15]Bowen v. Atlanta, 159 Ga. 145, 125 S. E. 199 (1924); Carey v. Atlanta, 143 Ga. 192, 84 S. E. 456 (1915); Jackson v. State, 132 Md. 311, 103 Atl. 910 (1918);

racial segregation, were quite logically declared unconstitutional notwithstanding the restriction applied equally upon the White and the Negro.

In *Gandolfo v. Hartman*,[16] the first case entering the federal courts on a similar question, an injunction to enforce a restrictive covenant against Chinese was denied. The decision, finding the covenant void as against public policy in violation of the Fourteenth Amendment, took the new tack that it is a narrow construction of the Constitution to forbid the state to discriminate while "a citizen of the state may lawfully do so by contract."[17] This case was overlooked in subsequent rulings, or, where noted, was regarded as overruled[18] by *Corrigan v. Buckley*,[19] wherein the Court merely held the covenant not in violation of the dictates of the Fifth Amendment,[20] the applicability of the Fourteenth Amendment and enforcement as state action thereunder not being drawn into question. Consequently, the present case is one of first impression,[21] although the *Corrigan* case has been previously cited as decisive of the issue.[22]

State v. Darnell, 166 N. C. 300, 81 S. E. 338 (1914). *Contra*: Harden v. Atlanta, 147 Ga. 248, 93 S. E. 401 (1917).

[16]49 Fed. 181 (C. C. S. D. Cal. 1892).

[17]Gandolfo v. Hartman, 49 Fed. 181, 182 (C. C. S. D. Cal. 1892).

[18]Doherty v. Rice, 240 Wis. 389, 396, 3 N. W.2d 734, 737 (1942); Parmalee v. Morris, 218 Mich. 625, 627, 188 N. W. 330, 331 (1922); Fairchild v. Raines, 24 Cal.2d 818, 833, 151 P.2d 260, 268 (1944).

[19]299 Fed. 899 (App. D. C. 1924), *appeal dismissed*, 271 U. S. 323, 46 Sup. Ct. 521, 70 L. Ed. 969 (1926). The Court dismissed an appeal from an injunction in Washington, D. C., enforcing a restrictive covenant on the ground of want of jurisdiction, the petitioner's brief only raising the issue as to the constitutional validity of the covenant.

[20]U. S. CONST. AMEND. V.

[21]*Cf.* Hansberry v. Lee, 311 U. S. 32, 61 Sup. Ct. 115, 85 L. Ed. 22 (1940).

[22]Mays v. Burgess, 147 F.2d 869 (App D. C. 1945), *cert. denied*, 325 U. S. 868, 65 Sup. Ct. 1406, 89 L. Ed. 1987 (1945); Grady v. Garland, 89 F.2d 817, 819 (App. D. C. 1937), *cert. denied*, 302 U. S. 694, 58 Sup. Ct. 13, 82 L. Ed. 536 (1937); Herb v. Gerstein, 41 F. Supp. 634, 635 (D. C. D. C. 1941); Wyatt v. Adair, 215 Ala. 363, 365, 110 So. 801, 803 (1926); Burkhardt v. Lofton, 63 Cal. App.2d 230, 238, 146 P.2d 720, 724 (1944); Chandler v. Ziegler, 88 Colo. 1, 5, 291 Pac. 822, 823 (1930); Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 364, 34 S. E.2d 522, 529 (1945); United Cooperative Realty Co. v. Hawkins, 269 Ky. 563, 565, 108 S. W.2d 507, 508 (1937); Meade v. Dennistone, 173 Md. 295, 302, 196 Atl. 330, 333 (1938); Mrsa v. Reynolds, 317 Mich. 632, 27 N. W.2d 40, 42 (1947); Northwestern Civic Ass'n v. Sheldon, 317 Mich. 416, 27 N. W.2d 36, 38 (1947); Swain v. Maxwell, 355