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Direct Restraints Upon Alienation of Fee Simple Estates - Covenant Against Occupancy by Negroes - Meade v. Dennistone Et Al.

DIRECT RESTRAINTS UPON ALIENATION OF FEE SIMPLE ESTATES — COVENANT AGAINST OCCUPANCY BY NEGROES

Meade v. Dennistone et al.[1]

Complainants, as owners of two lots in the 2200 block on Barclay Street in the City of Baltimore, joined with fifteen other lot owners in the same block in executing a written agreement, under which each covenanted for himself, personal representatives, and assigns "that neither the said respective properties—shall be at any time occupied or used by any Negro or Negroes or person or persons either in whole or in part of Negro or African descent" except as servants. By various conveyances one of these lots was conveyed to defendant Frank Berman who contracted to sell the lot to defendant Edward Meade, a Negro. Pursuant to this contract of sale defendant Meade entered into possession. Complainants brought suit in equity for an injunction to enforce this covenant. The trial court entered a decree enjoining the defendant Meade, a Negro, from using or occupying the house or from permitting any Negroes or persons of African descent to use

[1] 196 Atl. 330 (Md. 1938).

or occupy the same. From this decree defendant Meade appealed. *Held:* Affirmed.

The defendants contended that this covenant was not binding and enforceable against them for three reasons: (1) that its enforcement would be in violation of the Fourteenth Amendment to the Federal Constitution; (2) that it is personal and did not run with the land to the defendant Meade for lack of privity of estate; and (3) that it is a restraint upon alienation and therefore illegal and void.

As to the contention that enforcement of this covenant would be a violation of the Fourteenth Amendment, the opinion properly held that the constitutional inhibition is upon the power of the state, and not on the rights of individuals to contract with each other in respect to their property. In *Corrigan v. Buchley*[2] the Supreme Court held that covenants prohibiting the sale or occupation of private property by Negroes were not a violation of either the Fifth, Thirteenth, or Fourteenth Amendments. These amendments, it is true, apply to the judicial as well as the legislative department of the state government, but the state or federal judiciary does not violate these amendments of the Federal Constitution merely because it sanctions discriminations that are the outgrowth of contracts between individuals.

As to the contention that this covenanant was personal and did not run with the land to defendant Meade, the opinion correctly held that in a suit in equity to enforce a restrictive covenant, privity of estate existing between the original covenantor and covenantee is not material. The enforcement of covenants running with the land by an action at law against an assignee of the covenantor is entirely dependent upon the existence of privity of estate. At the time this covenant was entered into between these lot owners, there existed no privity of estate between each other. No estate or interests in the land of each was conveyed to the others at the time. Each was a stranger to the legal title of the others. Therefore, for lack of any privity of estate existing between covenantors and covenantees at the time of the execution of this covenant, neither the benefit nor burden of the covenant could attach to the respective lots of each and run to subsequent assignees in a court of law.[3] However, equity has dis-

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[2] 271 U. S. 323, 70 L. Ed. 969, 46 S. Ct. 521 (1926).

[3] For a full discussion of the requirement of privity of estate as a basis for the enforcement of covenants against subsequent assignees in an *action at law*, see (1937) 1 Md. L. R. 320.

pensed with the necessity for the existence of privity of estate between covenantor and covenantee. The benefit and burden of any contract or covenant entered into between owners of real property will attach and run with their respective properties in equity against subsequent assignees with notice, so long as the covenant touches and concerns their respective properties. Strangers to the legal title of each may contract with each other, so as to bind their respective properties with the benefits and burdens of covenants running with the land. Here these lot owners contracted with each other for the purpose of imposing a restrictive burden on the lot of each with a corresponding benefit on the lots of the others. The agreement expressly stated that it was intended to run with the land and be binding upon all subsequent owners of any of the lots. Since the covenant restricted the use and occupation of the lots, there can be no question as to the burden not touching and concerning the land, and so, in equity, subsequent assignees with notice of any of these lots would be bound by an equitable easement or servitude for the benefit of the other lots.[4]

The principal question confronting the Court in this case arose from the defendants' third contention that the covenant in question was a direct restraint upon alienation of a fee simple estate, and therefore void as against public policy. Restraints upon alienation fall into two classes: Indirect and direct. Indirect restraints upon alienation arise by the creation of interests which from their inherent nature are inalienable. The two principal forms of indirect restraints are the creation of indestructable private trusts and the creation of contingent future interests. The policy of the law as evidenced by the Rule against Perpetuities is to permit the creation of these types of indirect restraints, so long as they are not of too long a duration in the future. On the other hand direct restraints against alienation are limitations in the creation of possessory estates which restrict or prevent full alienation of such present possessory estates.

Direct restraints may take one of three different forms. One form consists of a provision in the creating instrument purporting to deny to the grantee or devisee the power of alienation over the estate created. If this device is successful, an estate has been created of an inalien-

[4] For a full discussion of the enforcement *in equity* of covenants or contracts as equitable easements and servitudes against subsequent assignees, see (1938) 2 Md. L. R. 265.

able character. Any attempt to alienate the estate is a nullity and is void. On the other hand the attempted alienation in no way destroys or forfeits the estate. Some authorities describe this type of restraint as a "disabling restraint"[5] while others describe it as a "direction against alienation"[6]. As the attempted alienation does not destroy or forfeit the estate, there remains no right of enforcement in the original grantor or testator's heirs. The only attack upon the validity of the alienation must come from either the alienor or the alienee. If this type of restraint is held valid, then clearly the property is inalienable for its duration and it has been entirely removed from commerce. This type of restraint existed in *Clark v. Clark*[7] and *Gischell v. Ballman*.[8]

The second type of restraint consists of a forfeiture provision upon an attempted alienation by the grantee or devisee. This forfeiture provision may be of one of three types. It may be a condition subsequent against alienation with a right of re-entry upon breach left in the grantor or testator's heirs. *Brown v. Hobbs*[9] involved this type of restraint. It may be made in the form of a determinable or special limitation causing an automatic termination of the estate upon an attempted alienation. Under this type of restraint there exists a possibility of reverter in the grantor or testator's heirs. *Stansbury v. Hubner*[10] contained this type of restraint. Thirdly, it may be made in the form of an executory interest over to a third person upon an attempted alienation. Anyone of these three forms of restraints operates to destroy or forfeit the estate of the grantee upon an attempted alienation. If restraints against alienation are to be treated as contrary to public policy, it is perfectly apparent that "disabling restraints", discussed in the previous paragraph, are much more objectionable than forfeiture restraints. In the case of the former the grantee holds an indestruct-

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[5] See Schnebly, *Restraints Upon the Alienation of Legal Interests* (1935) 44 Yale L. J. 961. This article contains a full and complete analysis of all the American and English cases dealing with direct restraints on alienation.

[6] Simes, Future Interests Secs. 445-454.

[7] 99 Md. 356, 58 Atl. 24 (1904).

[8] 131 Md. 260, 101 Atl. 698 (1917).

[9] 132 Md. 559, 104 Atl. 283 (1918).

[10] 73 Md. 228, 20 Atl. 904 (1890). The provision was worded as follows: "So long as they hold and till the same". The opinion describes it as a condition subsequent but the Restatement of Property Sec. 44, subsection L. states that such words indicate an automatic termination and not a forfeiture, and thus must be construed as a determinable or special limitation.

ible estate which is inalienable, while in the latter the grantee holds a destructible estate which is destroyed by an attempted alienation. Therefore, it is always possible for the owner of the right of re-entry, possibility of reverter, or executory interest to join with the grantee in alienating the full estate. A "disabling restraint" prevents alienation by any person or group of persons, while a forfeiture restraint merely prevents alienation by the grantee himself but permits alienation by the grantee acting jointly with the owner of the right of re-entry, possibility of reverter, or executory interest. Thus, a "disabling restraint" removes the property entirely from commerce while a forfeiture restraint merely places an impediment upon alienation.

The third type of restraint arises where the provision is worded as a covenant running with the land. It might be argued that a covenant against alienation creates merely a contract right, and therefore does not affect the power of the grantee to alienate, and at most merely acts as a deterant to alienation because of the resulting liability for damages for breach of contract. Certainly in an action at law a covenant against alienation does not operate as a restraint upon the legal power of alienation. But equity has developed the doctrine of enforcing covenants running with the land by injunction irrespective of the adequacy of the remedy at law.[11] As a result, in equity, a covenant against alienation becomes an equitable servitude or easement upon the legal estate of the grantee or devisee. If the alienation can thus be enjoined, then the covenant operates in equity as a "disabling restraint". Thus a naked covenant against alienation is just as objectionable in removing the property from commerce as the ordinary "disabling restraint". In *Real Estate Co. v. Serio*[12] the restraint was worded as a covenant, and the opinion treats it as having the same effect as a "disabling restraint". However, there is one fundamental difference between a "disabling restraint" and a covenant. In the former since the attempted alienation does not destroy the estate, there is no right of enforcement in the grantor or any other third person. The only attack upon the attempted alienation must come from the alienor or alienee. But in the case of covenants, the benefit of the covenant either rests in the grantor in gross or runs with some nearby land, so that

[11] Thruston v. Minke, 32 Md. 487 (1870).
[12] 156 Md. 229, 144 Atl. 245 (1929).

a right of enforcement rests in the person who holds the benefit of the covenant. This fact makes it less objectionable than the ordinary "disabling restraint", since it is possible for the holder of the benefit of the covenant to join with the grantee in alienating the estate. Thus, a covenant operates like a "disabling restraint" by leaving the grantee's estate indestructible by an attempted alienation, but operates like a forfeiture restraint in giving the grantee the ability to alienate if joined by the holder of the benefit.

In many cases where the restraint is worded as a covenant, it is accompanied by a condition subsequent with a right of re-entry left in the grantor or testator's heirs. In such cases the attempted alienation results in a forfeiture, thereby ending the duration of the covenant. The presence of the covenant as a restraint is therefore, no more objectionable than the condition subsequent, and must be treated as a forfeiture restraint. *Brown v. Hobbs*[18] contained a combination of a covenant and condition subsequent against alienation.

In the present case the provision in question is clearly worded as a covenant running with the land. If construed to be a restraint against alienation, it cannot be considered of the forfeiture type because of lack of a provision for forfeiture or termination upon breach. On the other hand it cannot be construed as a "disabling restraint" since a right of enforcement was clearly intended to attach to the other lot owners in the block. The only reasonable construction was as a covenant, the burden of which ran with the land to the defendant Meade with the benefit running with the land of the complainants.

If the covenant in question can be considered a restraint against alienation, the problem is presented as to whether it is void as against public policy when imposed on a fee simple estate. The recognized objection to restraints against alienation is the fact that they remove the property from commerce, and tend toward concentration of wealth. Another great objection is that they tend to deter the making of improvements, since the owner will be reluctant to make improvements if he is unable to realize their value by sale. In discussing these objections a distinction must be made between these three types of restraints. Certainly "disabling restraints" entirely remove the property from commerce during their duration, but forfeiture restraints and covenants merely require the

[18] *Supra* note 9.

alienation to be joined in by another person or persons. Thus, these two types are less objectionable than the "disabling restraint". Likewise the forfeiture restraint is considerably less objectionable than the covenant or "disabling" types when it comes to the objection that they tend toward the concentration of wealth. In the forfeiture type the owner of the land cannot live in ease without payment of his debts, since a creditor always has the power of causing a forfeiture by levying an execution upon the land. Of course, the execution sale cannot benefit the creditor, but he will have the satisfaction of destroying his debtor's estate. On the other hand in the case of the "disabling" and covenant types, the debtor may live in ease without payment of his debts with the knowledge that no one can destroy his estate.

Where the restraint against alienation is imposed upon a fee simple estate, our Court of Appeals has held the restraint void, whether created by a "disabling restraint", a covenant, or a forfeiture provision. *Clark v. Clark*[14] and *Gischell v. Ballman*[15] involved disabling restraints; *Brown v. Hobbs*[16] and *Stansbury v. Hubner*[17] involved forfeiture restraints; and *Real Estate Co. v. Serio*[18] involved a covenant. In all of these cases the restraints were imposed upon fee simple estates and were held to be illegal and void irrespective of the type of restraint. Where the restraints are unqualified as to time the courts have uniformly held void all three types if imposed on a fee simple estate. However, where the restraint is limited as to time, a few jurisdictions will uphold the restraint if it is of the forfeiture type,[19] while none of the courts seem willing to uphold a restraint limited as to time when it is of the disabling type.

Frequently restraints are qualified as to the alienee. The covenant in this case if construed as a restraint against alienation was qualified as to alienee, i. e. persons of African descent. Where the restraint restricts alienation to a relatively small group, it is certainly as objectionable as if it were unqualified. This was the situation in *Brown v. Hobbs*[20] where alienation was restricted to "some person or persons by the name of Brown within the line of

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[14] *Supra* note 7.
[15] *Supra* note 8.
[16] *Supra* note 9.
[17] *Supra* note 10.
[18] *Supra* note 12.
[19] Simes, Future Interests Sec. 458.
[20] *Supra* note 9.

consanguinity or blood relation to the said grantor''. The Court of Appeals properly held that to be an illegal restraint against alienation. But where a restraint permits alienation to everyone except a small class there is less objection to the restraint. This type principally arises where the restraint is against persons of a particular race as in this case. Such restraints usually have the practical effect of promoting alienability to persons of the non-restricted group by enhancing the value of the land. In two states, Louisiana[21] and Missouri,[22] such restraints when created by the forfeiture type of restraint have been upheld, while two states, California[23] and Michigan,[24] have held forfeiture restraints of this type void. Where the restraint is in the form of a covenant as in this case the District of Columbia,[25] Kansas,[26] and Colorado[27] have upheld their validity, while West Virginia[28] has denied their validity.

However, in the case under discussion the covenant was not worded as a covenant against selling, leasing, or conveying to persons of African descent, but as a covenant against ever being "occupied or used" by Negroes. The opinion carefully points out that this wording makes the covenant one dealing with the use and occupancy of the land and not with the *legal power* to alienate to Negroes. As such a covenant it does not restrain alienation. This theory recognizes the right of defendant Berman to alienate to defendant Meade, a Negro, but denies the latter the right to occupy his own land. Whether this be a reasonable distinction or not, certainly a covenant against occupancy by persons of African descent will actually restrict alienation as much as one against selling or leasing to such a class. In drawing this distinction our Court of Appeals was supported by decisions in both California[29] and Michigan,[30] both being jurisdictions denying validity to such restraints when they directly prohibit the sale to a specified race.[31]. Probably this distinction rests on the

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[21] Queensborough Land Co. v. Cazeau, 136 La. 724, 67 So. 641 (1915).
[22] Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918).
[23] Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919).
[24] Porter v. Barrett, 233 Mich. 373, 206 N. W. 532 (1925).
[25] Torrey v. Wolf, 6 Fed. (2nd) 702 (1925); Cornish v. O'Donoghue, 30 Fed. (2nd) 893 (1929).
[26] Clark v. Vaughn, 131 Kan. 438, 292 Pac. 783 (1930).
[27] Chander v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930).
[28] White v. White, 108 W. Va. 128, 150 S. E. 531 (1929).
[29] Los Angeles Investment Co. v. Gary, *supra* note 23.
[30] Parmalee v. Morris, 218 Mich. 625, 188 N. W. 330 (1922).
[31] *Supra* notes 23 and 24.

feeling that social interests require the toleration of these restrictions, and therefore the courts have eagerly seized upon the theoretical difference between a restraint upon alienation and a restraint upon occupancy to justify their conclusions.