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Unenforceability of Racial Restrictive Covenants - Goetz v. Smith; Saunders v. Phillips

UNENFORCEABILITY OF RACIAL RESTRICTIVE COVENANTS

Goetz v. Smith; Saunders v. Phillips[1]

The owner of a 100-acre tract platted and subdivided it into 100 lots in 1922 and began conveying lots, the deeds containing restrictive covenants prohibiting "sale, lease, transfer or permitted occupation of the properties to or by 'any Negro, Chinaman, Japanese, or person of Negro, Chinese or Japanese descent' ", with the additional statement that such covenants would be inserted in all deeds for any land described in the plat. One of the first deeds, however, conveying 64.8 acres and containing 93 lots, being two-thirds of the entire tract, did not contain such a covenant; the deeds conveying the remaining lots, with the exception of one, included the covenant.

In *Goetz v. Smith,* the appellees who were Negroes, had purchased the 64.8 acre tract intact from the trustees under the will of the original grantee; the appellants, lot-owners in the remaining part of the tract, sought to enforce the restrictive covenants against appellees' tract. The Court of Appeals affirmed a decree refusing enforcement on the ground that the restriction did not apply to the appellees' tract.

In *Saunders v. Phillips,* the lots involved were in the remaining part of the tract, and the deed to the original grantees contained the restrictive covenant set out above. The Circuit Court had held the restrictions applicable against the appellant Negro purchasers, on the authority of *Meade v. Dennistone,*[2] and had enjoined appellants from using and occupying the lots purchased by them. The Court of Appeals reversed, and held squarely that under the Racial Restrictive Covenant cases,[3] decided by the Supreme Court subsequently to the Circuit Court decision, judicial enforcement of restrictive covenants based on race or color was unconstitutional. The Supreme Court subsequently denied *certiorari.*[4]

Admitting that the facts in the Maryland case could be differentiated from those in the Supreme Court, the Court of Appeals nevertheless held that the Supreme Court did

[1] 62 A. 2d 602 (Md. 1948).

[2] 173 Md. 295, 196 A. 330 (1938); see also Scholtes v. McColgan, 184 Md. 480, 41 A. 2d 479 (1945).

[3] Shelley v. Kraemer, and McGhee v. Sipes, 334 U. S. 1 (1948); Hurd v. Hodge, and Uricolo v. Hodge, 334 U. S. 24 (1948).

[4] Phillips v. Saunders, 69 S. Ct. 938 (1949).

not base its decision as to the invalidity of such restrictive covenants upon the particular facts of the cases before it but upon the broad principle that the equal protection clause of the Fourteenth Amendment "inhibits judicial enforcement by state courts of restrictive covenants based on race or color".

The Court therefore brushed aside the argument that the Negro purchasers bought with knowledge of the restrictions and should be regarded as estopped from contesting them, saying: "The defendants here, by their action in doing what the Supreme Court has said they have a right to do, cannot be estopped from making the defense the Court has said is valid."

To the further argument that the Supreme Court had held the restrictive covenants standing alone not to be a violation of any rights secured by the Fourteenth Amendment and that therefore no court should hold them judicially unenforceable when there has been a breach, the Court said curtly: "This argument comes too late. That is precisely what the Supreme Court decided. . . . We are not at liberty to decide to the contrary, or to attempt to whittle away the affect of such decisions by holding that some of the statements made are dicta. If the Supreme Court did not mean what it said, or said more than it should, or what it should not have said, the responsibility is its and not ours."[5]

The decisions in the Supreme Court were in cases from Missouri, Michigan and the District of Columbia, in all of which the racial restrictive covenants had been sustained and held enforceable in the lower courts on the authority of *Corrigan v. Buckley*.[6] The facts in the four cases differ slightly in detail. In the Missouri case,[7] the covenant was contained in an agreement executed in 1911 between thirty out of thirty-nine adjoining property owners and restricted for 50 years use or occupancy, as owners or tenants, "by people of the Negro or Mongolian Race"; the Negro purchasers bought without actual knowledge of the restriction. In the Michigan case[8] the restriction was against use or occupancy "by any person or persons except those of the Caucasian race", was contained in a contract, subsequently recorded, executed by the then owner of the property, was limited in duration, and was not to become effective unless 80% of the property in the block was subjected to

[5] *Supra*, n. 1, 603.
[6] 271 U. S. 323 (1926).
[7] Shelley v. Kraemer, *supra*, n. 3.
[8] McGhee v. Sipes, *supra*, n. 3.

similar restrictions. In the District of Columbia cases,[9] twenty of thirty-one lots in a city block had been sold in 1906, each subject to a covenant that it should "never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, under a penalty of Two Thousand Dollars ($2,000), which shall be a lien against said property"; there was no time limitation on the restriction; the remaining eleven lots in the block, all the lots being on the same side of the street, had been occupied by Negroes for some twenty years.

In the two cases from State courts, the Supreme Court held unanimously (a) that the rights of ownership, use and occupancy of property are protected by the Fourteenth Amendment; (b) that judicial enforcement of restrictive covenants is state action within the meaning of the Fourteenth Amendment and violates the guarantee of equal protection of the laws; (c) that as long as there is voluntary adherence to such covenants, no state action is involved and the Fourteenth Amendment is not operative, but the purpose of the covenants may not be attained by judicial action enforcing their terms just as it may not be attained by legislative action. In *Corrigan v. Buckley*[10] the only constitutional issue raised in the lower courts, and therefore the only question before the Supreme Court on appeal, related to the validity of the private agreements as such; that case neither considered nor adjudicated the validity of court enforcement of the restrictions contained in such agreements. To the contention that there was no denial of equal protection since the State courts stood equally ready to enforce restrictive covenants excluding white persons from ownership or occupancy of property covered by the agreement, the Court pointed out that no case had been cited, in which a court, State or Federal, had been asked to enforce such a covenant and went on to say: "But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights. It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities."[11]

[9] Hurd v. Hodge, and Uricolo v. Hodge, *supra*, n. 3.

[10] *Supra*, n. 6.

[11] A somewhat similar contention was made unsuccessfully in Buchanan v. Warley, 245 U. S. 60 (1917), which was, however, decided on due

In the cases from the District of Columbia, the Supreme Court, passing over the constitutional questions argued as unnecessary to consider, held that judicial enforcement by the Federal courts of racial restrictive covenants embodied in private agreements would be governmental action prohibited by the Civil Rights Act,[12] and said further that even in the absence of the statute such enforcement would be contrary to the public policy of the United States "as manifested in the Constitution, treaties, federal statutes and applicable legal precedents." Justice Frankfurter, in a concurring opinion, felt it was sufficient to say that, equitable relief being discretionary, it should not be granted by a Federal court where similar relief from State courts would violate the Constitution.

The rulings of the Supreme Court in these cases profoundly changed what had become an accepted part of real property law during the last three decades. They ended the chapter of a line of decisions which developed in the state courts mainly, and which had attempted to reconcile racial restrictions against sale and occupancy of land with the basic common law rule of property requiring freedom of alienation. The Supreme Court here held that the state and federal courts had misinterpreted the effect and scope of its prior holding on racial restrictive covenants in *Corrigan v. Buckley*, which for twenty-two years had been relied upon by the courts as authority for their position that judicial enforcement of such covenants did not violate the equal protection of the laws under the Fourteenth Amendment.

Racial restrictive covenants are of comparatively recent origin and represent an innovation in the property law governing restrictions on the use of land. Developed at the beginning of this century, they spread widely after 1917. In that year, the Supreme Court in *Buchanan v. Warley*[13] declared a municipal ordinance, prohibiting white

process grounds. *Cf.* Plessy v. Ferguson. 163 U. S. 537 (1896) and Missouri, ex rel. Gaines v. Canada, 305 U. S. 337 (1938). It has been pointed out that although the Court in the Shelley case did not consider the contentions raised as to denial of due process, the reasons assigned for holding the judicial action involved to be a denial of equal protection would be equally applicable to the due process clause. Tussman and ten Broek, *The Equal Protection of the Laws* (1949), 37 Calif. L. Rev. 341, 362.

[12] R. S., sec. 1978; 8 U. S. C. A., sec. 42. Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, c. 31, re-enacted in sec. 18 of the Act of May 31, 1870, 16 Stat. 144, c. 114, provides: "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."

[13] *Supra*, n. 11, 82. "We think this attempt to prevent an alienation of property in question to a person of color was not a legitimate exercise

persons from living in Negro districts and Negroes from living in white districts, unconstitutional as in direct violation of the Fourteenth Amendment. Thereafter, property owners turned to restrictive covenants to achieve by private action the residential segregation which the Supreme Court had held could not be effected by legislative act. The Maryland Court of Appeals declared in 1938: "Since the decisions under the Fourteenth Amendment no public action can be taken to solve what has become a problem, and property owners have undertaken to regulate it by contract."[14] With one exception,[15] all the racial covenant cases in the State courts were decided after *Buchanan v. Warley*.[16]

These racial covenants, conditions, or agreements were sometimes inserted in the deeds conveying property, so as to be controlled by the rules relating to covenants running with the land. More often, written agreements between a group of neighboring property owners were used, these being then officially recorded[17] so as to give due notice to all subsequent purchasers. The courts, as in Maryland, then recognized such agreements as creating an easement in each property affected which inured to the benefit, not only of the parties but as well of their heirs, personal representatives or assigns, enforceable in equity against one who subsequently dealt with one of the properties covered thereby, with notice, actual or constructive.[18] Some courts, in recognition of the rule against perpetuities and the distinction between partial and total restraints on alienation, limited them in duration, while others allowed them to be perpetual.

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of the power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law." The Supreme Court twice thereafter held segregation ordinances invalid in Harmon v. Tyler, 273 U. S. 668 (1927), and City of Richmond v. Deans, 281 U. S. 704 (1930).

[14] *Supra*, n. 2, 301.

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

[16] 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 the relatively early Federal case of Gandolfo v. Hartman, 49 Fed. 181 (C. C. Cal. 1892), racial restrictive covenants in a deed were held void and unenforceable both as violative of the equal protection clause and as in contravention of treaty provisions with China.

[17] It was held in Meade v. Dennistone, *supra*, n. 2, 308 that the Maryland statutes, requiring deeds conveying an estate of inheritance or freehold or any declaration or limitation of use, or any estate for seven years, to be executed, acknowledged and recorded as therein provided, were applicable to grants or covenants for easements in land and that racial restrictive agreements required recording to put purchasers on notice.

[18] Meade v. Dennistone, *supra*, n. 2.

The instant cases and those in the Supreme Court show the variations of the pattern. In the Supreme Court, in both the Michigan and Missouri cases, the covenants ran for a limited time, were not inserted in the deeds of the immediate grantees, and restricted occupancy alone; in the District of Columbia cases the covenants were not limited in time and restricted sale, lease, rental, or transfer. In the instant Maryland cases, only one of the deeds to the Negro immediate grantees contained the covenant, which was unlimited in duration and restricted both sale and occupancy. In the Supreme Court cases, although the issues were confined to restriction against sale and occupancy by persons of Negro descent, the Supreme Court in a footnote[19] to the decision remarked that such covenants are not infrequently against others than Negroes, such as Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, and Filipinos; the covenant in the Michigan case restricted from occupancy everyone but members of the Caucasian race, and in the instant Maryland cases the restrictive agreement extended to persons of Negro, Chinese and Japanese descent.[20]

When the covenants were broken by willing sellers and lessors, the courts acted to enforce the restrictive terms of the agreement. Meeting the defense that such covenants contravened the common law rule against restraints on alienation, the courts divided on the issue. The majority of the state courts and the District of Columbia upheld racial restrictions on sale and/or occupancy as valid;[21] in the Supreme Court cases, the Missouri and the District of Columbia courts had so held. The remaining jurisdictions held that restrictions against sale or lease were totally void as restraints on alienation, as tending to take property out of commerce, but that restrictions on use and occupancy were valid.[22] The latter view was that taken by the

[19] Shelley v. Kraemer, *supra*, n. 3, f. n. 26.

[20] One of the immediate grantees claimed to be an American Indian, but was found by the trial Court to be a Negro.

[21] See Wyatt v. Adair, 215 Ala. 363, 110 So. 801 (1926); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Hurd v. Hodge, 162 F. 2d 233 (1947); Dooley v. Savannah Bank & Trust Co., 199 Ga. 353, 34 S. E. 2d (1945); Lee v. Hansberry, 372 Ill. 369, 24 N. E. 2d 37 (1939); Clark v. Vaughan, 131 Kan. 438, 292 Pac. 783 (1930); Queensborough Land Co. v. Cazeaux, *supra*, n. 15; Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217 (1918); Ridgway v. Cockburn, 296 N. Y. Supp. 936 (1937); Vernon v. R. J. Reynolds Realty Co., 226 N. C. 58, 36 S. E. 2d 710 (1946); Lyons v. Wallen, 191 Okl. 567, 133 P. 2d 555 (1942).

[22] See Los Angeles Invest. Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Meade v. Dennistone, *supra*, n. 2; Porter v. Barrett, 233 Mich. 373, 206 N. W. 532 (1925); Perkins v. Trustees of Monroe Avenue Church, 79 Ohio App. 457, 70 N. E. 2d 487 (1946), appeal dismissed 147 Ohio St. 537, 72 N. E.

Maryland Court of Appeals, which said in *Meade v. Dennistone:* "The rules against restraints on alienation were only intended to make conveyancing free and unrestrained, and had nothing to do with use and occupancy."[23]

In those jurisdictions upholding racial restrictions on sale, the relief obtainable from the courts included a decree in equity declaring the deeds of the immediate grantees null and void, revesting title in their immediate grantor, and restraining future sale to members of the restricted group. Such, for example, was the decree below in the District of Columbia cases in the Supreme Court; and in the Missouri case, although the restriction at issue was solely on use and occupancy, the State Supreme Court, pursuant to the common law policy of that state as formulated in earlier decisions, interpreted breach of the covenant as requiring entry of a judgment divesting title out of the petitioners and revesting title in the immediate grantor or such other person as the trial court might direct. The customary form of relief granted in those states limiting validity to restrictions on use and occupancy was an injunction restraining use and occupancy. If the grantees had gone into possession, the courts customarily issued orders for removal within 60 to 90 days, and enjoined future rentals to and occupancy by members of the prohibited group. Such injunctions, supported by the contempt powers of the courts, usually resulted in the eviction of the non-Caucasian occupants. Some covenants provided liquidated damages for breach of the contract, as in the District of Columbia cases where two thousand dollars ($2,000) was the stipulated sum; however, damages were neither sought nor given.

Occasionally, courts have withheld judicial enforcement of covenants if the character of the restricted area had so changed that to grant enforcement would have been inequitable.[24] The Maryland Court of Appeals recognized the soundness of this policy, in *Meade v. Dennistone,* but held there that the occupancy by Negroes of one house in a city block had effected no such change in the neighborhood as to justify a court of equity in relieving the parties of the burden of their agreement.[25]

2d 97 (1947); White v. White, 108 W. Va. 128, 150 S. E. 531 (1929); Doherty v. Rice, 240 Wis. 389, 3 N. W. 2d 734 (1942). See also Re Wren (Ont.) 4 D. L. R. 674 (1945).

[23] *Supra,* n. 2, 335.

[24] 4 RESTATEMENT, PROPERTY, sec. 406, comment n. (1944). See, *e.g.* Hundley v. Gorewitz, 13 F. 2d (App. D. C. 1942); Fairchild v. Raines, 24 Cal. 2d 818, 151 P. 2d 260 (1944); Clark v. Vaughan, 131 Kan. 438, 292 Pac. 783 (1930).

[25] *Supra,* n. 2, 307-09.

The rationale of the decisions in the State courts which upheld racial covenants in their various forms has been, in brief, that such restraints were in the social interest and therefore reasonable, "outweighing" the requirements of the common law doctrines of alienability. Thus, it is stated in the American Law Institute Restatement of Property:

> "In states where the social conditions render desirable the exclusion of the racial or social group involved from the area in question, the restraint is reasonable and hence valid. . . . The avoidance of unpleasant racial and social relations and the stabilization of the value of the land which results from the enforcement of the exclusion policy are regarded as outweighing the evils which normally result from a curtailment of the power of alienation. . . . The most important factor in solving this problem is *the public opinion of the state* where the land is located. . . ."[26]

The Restatement thus regarded the public policy of a given state as the controlling factor in determining whether racial restrictive covenants were or were not reasonable restraints on alienation and enforceable. The Maryland Court of Appeals had, of course, ruled, prior to the instant cases that racial restrictive covenants were not against the public policy of the state of Maryland.[27] The decision in the instant cases makes no statement to the contrary. As a practical matter, however, it would seem that this may well be the actual result of the Court's holding that such covenants are not judicially enforceable.[28]

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[26] 4 RESTATEMENT, PROPERTY, sec. 406, comment 1 (1944); italics supplied.

[27] Meade v. Dennistone, *supra*, n. 2, 309.

[28] In support of the contention that such covenants should be regarded as against public policy, it has been argued that they had developed through "an uncritical distortion of the doctrines concerning restrictions on the use of property"; that the concept of use restrictions before their development had been, and with their sole exception still is, in terms of type of structure or activity on the land and not in terms of ownership or occupancy; that they bore no reasonable relationship to the public welfare, for which reason legislative action seeking to effect segregation had been declared unconstitutional; that on the contrary they were harmful to society, in that their effect is to hem proscribed races in ghettoes, create great overcrowding and congestion, extend and aggravate slum conditions with resultant increase in disease, crime, vice and racial tension with concomitant high cost to the community of police, health and fire protection and a heavier relief burden. See briefs for petitioners in *McGhee v. Sipes*, and *Hurd v. Hodges*, *supra*, n. 3, and CLARK and PERLMAN, PREJUDICE AND PROPERTY (brief submitted for the United States as *amicus curiae* in the Supreme Court cases), 76-80 (1948). It is interesting to note that in Canada, such a covenant was held to be against public policy in Re Wren, *supra*, n. 22, the court pointing to the declaration against racial discrimination contained in the Charter of the United Nations to which Canada was a signatory and to the Ontario Racial Discrimination Act.

There has been much speculation since the Supreme Court decisions as to their exact scope, and as to how far if at all they may be circumvented.[29] Would, for example, a suit for damages be maintainable against one selling or leasing in violation of a racial restrictive covenant, especially where as in *Hurd v. Hodges* a liquidated damage clause is contained in the agreement?[30] If title to the land involved is put in a corporation or club, with the residents simply owning shares of stock or club membership for the transfer of which approval by other stockholders or members, or by a specified board or committee, is required, could racial restrictions be effectively imposed?[31]

To the extent that such plans, or variations of them, would require resort to the courts to make them effective, most commentators have regarded them as being equally as impotent to achieve their aims as was the racial restrictive covenant, and for the same reasons. More questionable would seem to be the situation where a Negro plaintiff, buying or renting property covered by a racial restrictive covenant, seeks performance of his contract. Even here, however, it could be readily argued that refusal of a decree in such a case would be merely indirectly enforcing judicially the covenant which the court could not constitutionally enforce directly.

In general, the conclusion seems inescapable that racial restrictive covenants have, as a practical matter, been eliminated as effective means of controlling either the transfer or the use and occupation of land, by virtue of having been stripped of their enforceability. The Supreme Court's affirmance of the validity of such covenants as private agreements does not serve to alter the result. A property right incapable of enforcement would seem of little value, if indeed it can be regarded as a right at all.[32]

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[29] See, *e.g.*, Ming, *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. of Chi. L. Rev. 203 (1949); *Restrictive Covenants and Equitable Protection—the New Rule in Shelley's Case*, 21 So. Calif. L. Rev. 358 (1948); *State Action Reconsidered in the Light of Shelley v. Kraemer*, 48 Col. L. R. 1241 (1948); Note, 61 Harv. L. Rev. 1450 (1948); Note, 3 A. L. R. 2d 466, 473 (1949).

[30] In cases prior to Shelley v. Kraemer, it had been held that a suit for damages would lie; see Chandler v. Ziegler, *supra*, n. 21; Eason v. Buffaloe, 198 N. C. 520, 152 S. E. 496 (1930).

[31] *Cf.* Tudor Arms Apartments v. Shaffer, 62 A. 2d 346 (Md. 1948), as to the status of purchasers of stock under a co-operative apartment plan, title to the property being technically in the apartment corporation.

[32] Cases from California, Ohio, Michigan, Missouri, New Jersey, and New York decided subsequently to *Shelley v. Kraemer* are collected in Note, 3 A. L. R. 2d 466, 471 (1949), in which, as in the instant cases, racial restrictive covenants were ruled unenforceable; these, however, all involved direct enforcement by injunction.