North Dakota Law Review

Volume 29 | Number 1 Article 7

1953

Constitutional Law - Equal Protection of the Laws - Is an Agreement to Convey to a Negro Property Subject to a Recially Restrictive Covenant Actionable as a Conspiracy

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RECENT CASES

CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — IS AN AGREEMENT TO CONVEY TO A NEGRO PROPERTY SUBJECT TO A RACIALLY RESTRICTIVE COVENANT ACTIONABLE AS A CONSPIRACY? — The famous United States Supreme Court decision of *Shelley v. Kraemer*[1] received a narrowly restricted application recently in an Oklahoma case involving an unusual attempt to sustain a racially restrictive covenant with respect to land. The plainiff, a party to an agreement that certain property should not be sold to persons other than Caucasians, brought an action against one of his co-covenantors which charged a conspiracy to evade the effect of the covenant and wilfully and maliciously decrease the value of his own property. The alleged conspiracy was entered into between the defendant and an insolvent white mesne grantee who, by the terms of the alleged conspiracy, was to convey land bordering the plaintiff's property to a member of the Negro race. The Oklahoma Supreme Court, reversing an order sustaining a demurrer to the complaint, *held* that the precedent of *Shelley v. Kraemer* was controlling in so far as the plaintiff sought to invoke action by the state court to have the deed cancelled. Nevertheless, a conspiracy of the type charged in the complaint gave rise to a cause of action for damages enforceable in the Oklahoma courts. *Correll v. Earley*, 237 P.2d 1017 (Okla. 1951).

Shelley v. Kraemer held that the injunctive enforcement of a racial restrictive covenant against members of the Negro race constituted state action which denied to Negroes the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. In contrast to the Oklahoma decision, *Barrows v. Jackson*,[2] a recent California case involving a similar attempt to limit the effect of this holding, resulted in a far broader and it is believed more accurate application of the rule thus enunciated. The plaintiff in *Barrows v. Jackson* sued for breach of contract, charging the defendant with vacating the premises in order to permit persons not of the Caucasian race to occupy them, in breach of a covenant restricting such occupation. The California decision was that the rule of *Shelley v Kraemer* prevented the application of any state sanction, direct or indirect, for breach of such a covenant.

Prior to *Shelley v. Kraemer* the Oklahoma courts granted injunctive relief in such cases, holding that racial restrictive covenants were not void as against public policy[3] or in violation of the Fourteenth Amendment.[4] In other instances, it was recognized that equity would set aside covenants if the original purpose and intention of the parties creating

1. 334 U.S. 1 (1948).
2. 247 P.2d 99 (Cal. 1952).
3. Schwartz v. Hubbard, 198 Okla. 194, 177 P.2d 117 (1947); Hemsley v. Sage, 194 Okla. 669, 154 P.2d 577 (1944); Lyons v. Wallen 191 Okla. 567, 133 P.2d 555 (1942).
4. Corrigan v. Buckley, 271 U.S. 323, 331 (1926) (court in referring to the 13th and 14th Amendments stated: ". . . while they provide . . . that all persons and citizens shall have equal rights with white persons to make contracts and acquire property, they . . . do not in any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property." This case constitutes principle authority for state decisions.); Hawkins v. Whayne, 198 Okla. 400, 179 P.2d 138 (1947); Lyons v. Wallen, 191 Okla. 567, 133 P.2d 555 (1942).

the restrictions had been so destroyed by changed conditions, without fault on the part of those who sought to have them enforced, that the restrictions were no longer of substantial benefit to the residents and the original purpose could not be reasonably effected by granting equitable relief.[5] However, the Oklahoma courts were reluctant even in such instances to set racial covenants aside.[6]

The California courts, before *Shelley v. Kraemer*, would have enforced covenants restricting the use or occupancy of property [7] but not covenants restricting the sale of the property.[8] California had also set aside covenants where the character of the restricted area [9] or the surrounding property [10] had materially changed so as to render it unjust and inequitable to continue enforcing the covenant.

Because *Shelley v. Kraemer*, on its facts, involved merely the injunctive enforcement of a restrictive covenant, and because the court indicated that such agreements were not unlawful so long as the parties voluntarily adhered to them, the Oklahoma court found it possible in the *Correll* case to interpret *Shelley v. Kraemer* as invalidating only actions seeking injunctive relief against the breach of such covenants.[11] In Oklahoma

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5. Southwest Petroleum Co. v. Logan, 180 Okla. 477, 71 P.2d 759 (1937) (restriction of lots to residential occupancy prevented oil drilling operations); Van Meter v. Manion, 170 Okla. 81, 38 P.2d 557 (1934) (residential restrictive covenant prevented erection of a business building).

6. Schwartz v. Hubbard, 198 Okla. 194, 177 P.2d 117 (1947) (the court, in validating a racial restrictive covenant, cites Porter v. Johnson, 232 Mo. App. 1150, 115 S.W.2d 529 (1938) "If no radical change in the condition and use of the restricted property occurs, the circumstances that there have been changes in the territory surrounding the covenanted area will not of itself be sufficient to destroy the restrictions."); Hawkins v. Whayne, 198 Okla. 400, 179 P.2d 138, 143 (1947) ". . . the residents . . . are entitled to protection by having the restrictive covenants enforced, even though another portion of the restricted area may be injured or its value reduced by the enforcement of the restrictions."; *cf.* Eakers v. Clopton, 199 Okla. 99, 184 P.2d 247 (1949).

7. Wayt v. Patee, 205 Cal. 46, 269 Pac. 660 (1928) (case initially determined that covenant against non-caucasian occupancy could be enforced by injunction); Stone v. Jones, 66 Cal. App.2d 264, 152 P.2d 19 (1944); Burkhardt v. Loften, 63 Cal.App.2d 230, 146 P.2d 720, 724 (1944) "Non-Caucasians are and always have been just as free to restrict the use and occupancy of their property to members of their own races as Caucasians have been."

8. Los Angeles Inv. Co. v. Gary, 181 Cal. 680, 186 Pac. 596, 597 (1919) (court stated, when invalidating a deed containing a forfeiture clause with reversion to grantee if property was sold, leased or rented to others than Caucasians, "The condition that the property be not sold, leased or rented to one not of Caucasian birth is clearly a restraint on alienation. . . . The condition, however, that the property should not be occupied by a person not of Caucasian birth is in a different category."

9. Letteau v. Ellis, 122 Cal. App. 584, 10 P.2d 496 (1932) (racial covenant not enforced where locality had become a "Negro district"); Robertson v. Nichols, 92 Cal. App.2d, 206 P.2d 898 (1949) (residential covenant).

10. Fairchild v. Raines, 24 Cal.2d 818, 151 P.2d 260, 264 (1944) (court refusing to enforce a racial covenant stated: "In an area as small as that involved in this case . . . and where the restricted lots do not form a single contiguous group, it would not seem essential that the occupancy of any such restricted lots themselves should have undergone a critical change . . ."); Downs v. Kroeger, 200 Cal. 743, 254 Pac. 1101 (1927) (residential covenant not enforced due to change in neighborhood).

11. Correll v. Earley, 237 P.2d 1017, 1022 (Okla. 1951) ". . . since the restrictive covenant was valid the white seller would act at his peril of being required to pay plaintiff's damages for breach of a valid contract between himself and other lot owners."; *accord* Weiss v. Leaon, 359 Mo. 1039, 225 S.W.2d 127, 131 (1949) "We are of the opinion that an action for damages for the breach of a valid agreement need not be affected by the Fourteenth Amendment. The United States Supreme Court has not expressly ruled on this question . . . ."

this appears to mean that the Court has held that while a plaintiff cannot seek equitable enforcement of these covenants he can bring an action for breach of contract or sue for the tort which causes the breach. California and other jurisdictions have held to the contrary.[12]

The United States Supreme Court was first called upon to determine the validity of racial restrictions when they were imposed by statute or municipal ordinance. The court declared such statutes and ordinances to be state action of a type prohibited by the Fourteenth Amendment.[13] Subsequently two cases involving contractual race restrictions were submitted to the court, but each case was disposed of on other grounds.[14] The constitutional question as to the authority of the various state courts to enforce these covenants was therefore not settled until *Shelley v. Kraemer.*

Acts of the judiciary, whether procedural discriminations,[15] or enforcement of substantive common law rules formulated by the courts,[16] constitute state action within the meaning of the Fourteenth Amendment. While the action in either the *Correll* or the *Barrows* case can be distinguished from the action in *Shelley v. Kraemer,* the distinction is purely technical. Although the Oklahoma court is not restraining the vendor from disposing of his property in violation of the covenant, it is subjecting him to a charge of conspiracy to violate the covenant. The result, it would seem, is the same. Both types of action, though one is more direct than the other, have a deterrent effect on the vendor's willingness to sell to any purchaser.[17] It is submitted that the California court's inter-

12. Barrows v. Jackson, 247 P.2d 99 (Cal. 1952); Roberts v. Curtis, 93 F.Supp. 604 (D.C. 1950) (action for breach of racial restrictive covenant, court held Shelley v. Kraemer was sufficiently broad to include an action for damages); Phillips v. Naff, 332 Mich. 427, 52 N.W.2d 158, 161 (1952) "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms."

13. Buchanan v. Warley, 245 U.S. 60, 78 (1917) "Colored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color."; City of Richmond v. Deans, 37 F.2d 712, (1930), *aff'd mem.,* 281 U.S. 704 (1930); Tyler v. Harmon, 160 La. 943, 107 So. 704 (1926), *rev'd mem.,* 273 U.S. 668 (1927).

14. Corrigan v. Buckley, 271 U.S. 323, 331 (1926) "We . . . conclude that neither the constitutional nor statutory questions relied on as grounds for the appeal to this Court have any substantial quality or color of merit, or afford any jurisdictional basis for the appeal."; Hansberry v. Lee, 311 U.S. 32 (1940) (petitioner was denied due process when Illinois Supreme Court held that petitioners were bound by an earlier judgment to which they were not parties).

15. Twining v. New Jersey, 211 U.S. 78, 90 (1908) "The judicial act of the highest court of the State, in authoritatively construing and enforcing its law is the act of the State."; Civil Rights Cases, 109 U.S. 3 (1883); Virginia v. Rives, 100 U.S. 313 (1880); Ex Parte Virginia, 100 U.S. 339, 347 (1880) "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State . . . shall deny to any person within its jurisdiction the equal protection of the laws."

16. American Federation of Labor v. Swing, 312 U.S. 321 (1941) (enforcement of common law policy which resulted in restraining peaceful picketing was considered state action); Bridges v. California, 314 U.S. 252 (1941) (enforcement of a common law rule relating to contempt by publication was held to be state action prohibited by the 14th Amendment); Cantwell v. Connecticut, 310 U.S. 296 (1940) (defendant was convicted of the common law crime of breach of the peace under circumstances involving freedom of religion, it was held that such action was state action as prohibited by the 14th Amendment).

17. Phillips v. Naff, 332 Mich. 427, 52 N.W.2d 158, 164 (1952) ". . . if a sale of property subject to a reciprocal racial covenant cannot be made without rendering the grantor liable to suits for damages, such . . . would operate to inhibit freedom to purchase . . . and also place a burden on the right of an owner to sell to a purchaser of his own selection."

pretation of *Shelley v. Kraemer* correctly appraises the true result of that case.

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CONSTITUTIONAL LAW — RIGHT TO FAIR AND IMPARTIAL HEARING— NEWSPAPER PUBLICITY AS AN OBSTACLE TO A FAIR TRIAL. — The defendant, a Collector of Internal Revenue, was indicted by a federal grand jury for accepting bribes and issuing false certificates. Thereafter, despite objections by the Department of Justice, a Congressional subcommittee conducted an open public investigation of the conduct of the defendant's office. As a result of the nation-wide publicity given these hearings, the defendant moved for a continuance of his trial until the prejudicial effect of the press coverage could wear off. The motion was denied. *Held,* conviction reversed. Forcing the defendant to trial under such circumstances denied him his right to an impartial hearing. Nor was the defendant obliged to move for a change of venue instead of a continuance, since he had a constitutional right to be tried in the district where the alleged offense was committed. *Delaney v. United States,* 199 F.2d 107 (1st Cir.. 1952).

The Court of Appeals did not make it clear whether it regarded its decision as an exercise of its supervisory authority over the district courts within its jurisdiction or as an adjudication that the defendant's rights under either the Fifth [1] or Sixth [2] Amendments to the United States Constitution had been violated. Under any view, the result seems highly desirable. It is to be hoped that the case will have some tendency in the future to prevent the "sensationalizing" of criminal prosecutions for political or other purposes.

The larger issue inherent in the case is a complex one. What practical measures can be taken, in view of the constitutional right of newspapers to freedom of expression, to safeguard the rights of an individual who is subjected to "trial by newspaper"? It seems clear that direct action against the publications involved, by means of constructive contempt procedures, would have been ineffective. Congress can pass no law abridging freedom of speech or of the press [3] and the same disability applies to the states by virtue of the due process clause of the Fourteenth Amendment [4] to the Federal Constitution. While the right of freedom of speech and press is not unlimited [5] and does not prevent the punishment of those who abuse this freedom [6] courts are extremely reluctant to proceed against newspapers for contempt of court in instances

1. "No person . . . shall be deprived of life, liberty, or property without due process of law. . . ." U.S Const., Amend. V.

2. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. Const., Amend. VI.

3. U.S. Const., Amend. I.

4. Terminiello v. City of Chicago, 337 U.S. 1 (1949); *see* Carpenters Union v. Ritter's Cafe, 315 U.S. 722, 726 (1942).

5. Gitlow v. New York, 268 U.S. 652, 666 (1925).

6. Dennis v. United States, 341 U.S. 494 (1951) (upheld Smith Act sanctions as not violating First Amendment); *see* Stromberg v. California, 282 U.S. 359. 368 (1931).