North Dakota Law Review

Volume 32 | Number 1 Article 10

1956

Constitutional Law - Fourteenth Amendment - Effect of Racially Restrictive Determinable Fee

Paul Pfeilsticker

taken for public use does not restrict the owner of the property to a recovery of the market value.[15]

In the instant case it will be observed that the court by applying the "value to owner" or "value for use to which the property is being devoted" rule, has departed from the standard employed by most jurisdictions.[16] Even so, irrespective of the measure of damages employed, the judiciary's primary concern is that the owner of condemned property be awarded its actual value. Consequently, while "market value" must be retained as the verbal rule of compensation in order to preclude the possibility of awards based solely upon sentiment and whim,[17] it is emminently just that courts in order to insure *full* compensation encourage the admission of evidence tending to show "special" value in appropriate cases.

ORALL B. JOHNSON

CONSTITUTIONAL LAW — FOURTEENTH AMENDMENT — EFFECT OF RACIALLY RESTRICTIVE DETERMINABLE FEE — A parcel of land was conveyed to plaintiff, a city park commission, upon the limitation, *inter alia*, that it be used as a park only by persons of the white race. In a declaratory judgment action brought by the commission for determination of the validity of the limitation. the court *held* that the limitation was valid. If Negros used the park, the determiable fee conveyed to the park commission would cease and terminate by its own limitation, and the estate would automatically revert to the grantor. The reversion would not operate by judicial enforcement and rights of Negros under the Fourteenth Amendment and federal civil rights laws would not be violated. *Charlotte Park and Recreation Commission v. Barringer*, 88 S.E.2d 114 (N. C. 1955).

The court reasoned that because of the automatic reversion there was no state action within the rule of *Shelley v. Kraemer*.[1] It therefore concluded that the discriminatory nature of the limitation would fall outside the ban of the Fourteenth Amendment and the federal civil rights laws on the theory that an individual is free to discriminate as long as his acts are unsupported by state action.[2]

The North Carolina Court's employment of the concept of automatic reversion to avoid the rule of *Shelley v. Kraemer* raises a greater problem than it solves. If the happening of the limitation occurs, the title is in the grantor and the possession in the grantee.[3] If the grantor wishes to retake possession, an action of ejectment is appropriate.[4] But if the grantor brings ejectment, a

15. Boom Company v. Patterson, 98 U.S. 403 (1917).

16. The instant case was tried only on whether the constitutional provision justified the charge to the jury as to the value to be placed on property condemned through eminent domain and not as to whether the fact situation justified the charge. The case would have been of much greater value had it also passed upon this point.

17. Housing Authority of City of Augusta v. Holloway, 63 Ga.App. 485, 11 S.E.2d 418 (1940) (dissenting opinion) (Court stated that if instructions were not based on market value the door would be opened to the wildest kind of speculation based upon the fancy and whim of juries).

1. 334 U.S. 1 (1948) Racial descriminations, such as the determinable fee in the instant case, are merely wrongful acts of individuals and can remain outside the ban of the Constitution only so long as they are unsupported by state authority.

2. Civil Rights Cases, 109 U.S. 3 (1883); See Hale, *Force and State*, 35 Col.L.Rev. 149, 181 (1935).

3. Tiffany, *Real Property*, §217 (3d ed.) (1939).

4. Toth v. Bigelow, 1 N.J. 379, 64 A.2d 108 (1949).

favorable decree would constitute discriminatory state action[5] and of necessity would fall under the ban of *Shelley v. Kraemer.* Hence, conceeding his right to possession, he would still be unable to obtain possession through judicial process.

Self-help is the grantor's only other means of obtaining possession. However, if he goes upon the property to evict the possessor, his action must be privileged.[6] It will not be privileged unless he is entitled to immediate possession,[7] and in order to be so entitled, it is necessary that the right to possession be one which can be enforced by legal proceedings.[8] As the grantor cannot enforce any legal proceeding that would be contrary to the Fourteenth Amendment,[9] self-help is unavailable to him.

Although it was not argued in the instant case, it would seem that the North Carolina Court's declaratory judgment deciding that the transpiring of a discriminatory conditional limitation worked an automatic reversion which would not fall under the constitutional prohibitions was in itself state action. While it is true that no executory process follows a declaratory judgment,[10] the court is nevertheless required to determine the question in controversy,[11] and to issue a decree stating its position. The mere issuing a decree in a declaratory judgment action is clearly a function of a court,[12] and as such, is equally clearly state action.[13]

In the final analysis the rights of the citizens of a state find their existence in the laws of the state. As individual rights to equal protection are established by the law, so too must property rights find their sanction in the law. A determinable fee does not operate automatically, aside and apart from the law. It must necessarily gain its validity through the operation of the law,[14] and should not be permitted to operate contrary to paramount law.[15] The holding in the instant case defeats the spirit of *Shelley v. Kraemer* and opens a new avenue through which Negros can be denied the protection from discrimination which the framers of the Fourteenth Amendment intended them to have.[16]

PAUL PFEILSTICKER

---

5. See Shelley v. Kraemer, 334 U.S. 1 (1948); *accord,* Civil Rights Cases, 109 U.S. 3, (1883); Catlette v. United States, 132 F.2d 902 (1943). See also Ming, *Racial Restrictions and the Fourteenth Amendment,* 16 U.Chi.L.Rev. 203 (1949); McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,* 33 Calif.L.Rev. 5 (1945); Note 47, Col.L.Rev. 76 (1947).

6. Restatement, Torts §88 (1934).

7. *Id* § 90.

8. *Id* § 90a.

9. Twining v. New Jersey, 211 U.S. 78 (1908); *accord,* Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1880).

10. 28 USCA § 2201; Petition of Kariher, 284 Pa. 455, 131 Atl. 265 (1925).

11. American Machine & Metals, Inc. v. DeBothezat Impeller Co., 166 F.2d 535 (2d Cir. 1948).

12. Douglas Oil Co. v. State, 81 S.W.2d 1064 (Tex. 1935); See Village of Bay v. Gelvick, 58 Ohio App. 51, 15 N.E.2d 786 (1937).

13. Civil Rights Cases, 109 U.S. 3 (1883); *accord.,* Twining v. New Jersey, 211 U.S. 78 (1908); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1880).

14. Onondaga Hotel Corp. v. Hunney, 62 N.Y.S.2d 550 (1946). "In a qualified fee, the happening of the event is, in itself, the limit beyond which the estate no longer exists, but it is terminated by operation of law . . ." See Lyon v. Husey, 103 N.Y. 264, 8 N.E. 520 (1886); Big Lake Oil Co. v. Reagan, 217 S.W.2d 171 (Tex. 1949).

15. See Oyama v. California, 332 U.S. 633 (1948) (Where the California Alien Land Law was declared Unconstitutional as contrary to paramount law.)

16. Buchanon v. Warley, 245 U.S. 60, 77 (1917) (dictum); see also, Nixon v. Herdon, 273 U.S. 536, 541 (1927) (dictum).