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Constitutional Law -- Restrictive Covenants -- Judicial Enforcement

Charles S. Salem Jr.

in its opinion,[26] and rejected its holding on somewhat dubious grounds.[27] Faced by the need of overcoming the "equal but separate" rule,[28] the court declares, "Appellants by reason of their proportionate racial needs and neighborhood pattern policies are not furnishing and have prevented themselves from furnishing housing accommodations to persons of low income 'upon the basis of equality of right.' "[29] The court further reasons that if judicial enforcement of racial segregation schemes is repugnant to the Fourteenth Amendment,[30] it would be anomalous to permit enforcement of such a scheme by the executive branch of a state government. In effect, the court simply holds that it is unconstitutional for the housing authority to consider the color or race of an applicant in any manner.

In conclusion it appears that the issue of racial segregation in, or discrimination in granting admission to, public housing projects presents basically the same constitutional problems as other forms of racial discrimination. Generally speaking, the Supreme Court seems to show the greatest willingness to find a violation of the Constitution where segregation or discrimination is in issue. The lower federal courts, while theoretically bound by the Supreme Court holdings, appear to be more readily influenced by local feeling than by stare decisis.[31] The state courts, as may be expected, range from one extreme to the other in their interpretation[32] of the Fourteenth Amendment, and seem to have no difficulty in finding authority to support practically any point of view.

Greater uniformity of decision in this field of law will probably await greater uniformity of public opinion toward racial problems.

John C. Whitehouse

CONSTITUTIONAL LAW—RESTRICTIVE COVENANTS—JUDICIAL ENFORCEMENT

Plaintiff sued for damages resulting from defendant cemetery's refusal to bury her non-Caucasian husband. She had purchased a plot from defendant which, by the terms of the contract, restricted burials to members of the Caucasian race. *Held*, the restriction was not void as being

26. *Ibid.*

27. *Ibid.*

. . . the opinion . . . does not clearly indicate that the court's attention was pointedly directed to the fact that the rights of 'persons,' not groups, were involved under the 14th Amendment . . . .

28. *Id.* at 673.

29. *Id.* at 678. The court is quoting from the *Missouri* case, 305 U.S. 337 (1938).

30. See note 18 *supra.*

31. *Cf.* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Mendez v. Westminster School District, 161 F.2d 774 (9th Cir. 1947).

32. *Compare* Patterson v. Board of Education, 11 N.J. Misc. 179, 164 Atl. 892 (Sup. Ct. 1933), *with* the opinion of the Texas court in Sweatt v. Painter, 210 S.W.2d 442 (Texas 1948), *rev'd*, 339 U.S. 629 (1949), Noted in 30 B.U.L. Rev. 565 (1950).

repugnant to the equal protection and privileges clause of the Federal Constitution[1] as well as the state constitution.[2] *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 60 N.W.2d 110 (Iowa 1953).

For many years, constitutional attacks on racially restrictive covenants were generally unsuccessful.[3] Prior to *Shelley v. Kraemer*,[4] which was decided in 1948, the validity of private anti-racial covenants restricting the sale of real property to, or occupancy of, persons of a certain race was almost uniformly sustained over Constitutional objections.[5] While one early case considered a racially restrictive covenant to be violative of the equal protection clause of the Fourteenth Amendment and refused to enforce it,[6] it was most generally considered that since the Fourteenth Amendment applied only to state action, it had no application to *privately* created restrictive covenants[7]—even though they discriminated against persons solely because of race or color.[8] As authority for this view, the United States Supreme Court's opinion in *Corrigan v. Buckley*[9] was frequently cited. In that case, suit was brought in the District of Columbia to enjoin threatened violation of certain restrictive covenants relating to lands in the City of Washington. Relief was granted in the district court, and in hearing the case on appeal, the Supreme Court affirmed the decision on the grounds that since the covenants were on lands situated in the District of Columbia, the case could present no triable issues under the Fourteenth Amendment since that amendment, by its terms, applied only to the states. That is was error for future cases to use the holding in the *Corrigan* case[10] as precedent for enforcing privately created restrictive covenants was brought out clearly in the court's opinion in the *Shelley* case.[11] In this decision, the court ruled that state judicial enforcement of privately created restrictive covenants

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1. U.S. CONST. AMEND. XIV:
. . . No state shall make or enforce any law which shall abridge the privileges . . . of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.
2. IOWA CONST. Art. I, §§ 1-25.
3. Corrigan v. Buckley, 271 U.S. 323 (1926); Los Angeles Invest. Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Dooley v. Savannah Bank & Trust Co., 199 Ga. 33, 34 S.E.2d 522 (1945); Parmalee v. Morris, 281 Mich. 625, 188 N.W. 330 (1922); Ridgeway v. Cockburn, 163 Misc. 511, 296 N.Y. Supp. 936 (Sup. Ct. 1937).
4. 334 U.S. 1 (1948).
5. Objections were generally based on the Fourteenth Amendment to the United States Constitution, including the equal protection and due process clauses.
6. Gandolo v. Hartman, 49 Fed. 181 (C.C.S.D.Cal. 1892).
7. Dury v. Neely, 69 N.Y.S.2d 677 (Sup. Ct. 1942).
8. The history of judicial enforcement of restrictive covenants has been thoroughly reviewed. See, Ming, *Legal Disabilities Affecting Negroes*, 8 JOURNAL OF NEGRO EDUCATION 406 (1938); McGovney, *Racial Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds is Unconstitutional*, 33 CALIF. L. REV. 5 (1945); Miller, *Race Restrictions on Ownership or Occupancy of Land*, 7 LAW. GUILD REV. 99 (1947).
9. 271 U.S. 323 (1926).
10. *Ibid.*
11. Shelley v. Kraemer, 334 U.S. 1, 8 (1948).

upon the ownership or occupancy of property was state action and therefore repugnant to the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Even before the *Shelley* case,[12] judicial remedies appeared available for the victims of racial segregation, notwithstanding the absence of state statutes. But this was not the practical result. For example, if a Negro presented himself for admission to a privately owned public establishment, such as a theatre or hotel, and was denied admission solely because of color, it was generally held by state courts that, in the absence of a statute to the contrary, he was without remedy.[13] Even today, in those states where there are "civil rights" statutes (Iowa has such a statute),[14] recovery of damages for exclusion or segregation of a member of a particular racial group is denied if the place involved is deemed not within the coverage of the statute.[15]

The Iowa Supreme Court reasoned, however, that in the instant case, it would require an extension of the rule in *Shelley v. Kraemer*[16] to grant plaintiff desired relief—an extension in the sense that the *Shelley* case only bars direct action by the state, and has no application when a state is silent or merely refuses to act. The court refused to "extend" the rule, citing as authority the *Civil Rights Cases*.[17] It held that "state action" is only that action which is directly exerted by the legislative, executive and judicial branches of government, and that the Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful it may be.

Possibly the court erred in refusing to apply the *Shelley v. Kraemer* rule to the facts in the instant case. Treating state silence or neutrality as being indirect and therefore not "state action" gives rise to an illogical conclusion. Is not the effect of inaction equally binding upon the litigants as is this so called "state action"? Suppose one or more of the other plot owners in the cemetery had brought a bill of injunctive relief against threatened violation of the covenant? Clearly, *Shelley v. Kraemer* would apply, and the right of the plaintiff would be preserved. Yet in an action brought by herself, that right no longer exists.[18]

Charles S. Salem, Jr.

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12. See note 4 *supra*.

13. Camp v. Recreation Board, 104 F. Supp. 10 (D. D.C. 1952); de la Ysla v. Publix Theatres Corp., 82 Utah 598, 26 P.2d 818 (1933) (where a theatre manager insisted that Filipinos must sit in the balcony and upon refusal of Filipinos to be so seated, recover was limited to price of tickets not used).

14. IOWA CODE c. 735 (1950), which names as places covered lodging houses, restaurants, and amusement places. It is silent as to cemeteries.

15. Moore v. Atlantic Coast Line R.R., 98 F. Supp. 375 (E.D. Pa. 1951); Jinks v. Hodge, 11 F.R.D. 346 (E.D. Tenn. 1951); Rice v. Rinaldo, 59 Ohio Abs. 568, 95 N.E.2d 30 (1950).

16. See note 4 *supra*.

17. 109 U.S. 3 (1883).

18. Subsequent to this writing, *cert. granted*, 22 U.S.L. WEEK 3254 (U.S. April 12, 1954).