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Constitutional Law - Equal Protection - Determinable Fee as Devise to Impose Racial Restrictions on Use of Land

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CONSTITUTIONAL LAW—EQUAL PROTECTION—DETERMINABLE FEE AS DEVISE TO IMPOSE RACIAL RESTRICTIONS ON USE OF LAND—Land was conveyed by deed to the Park and Recreation Commission, a municipal corporation. The grant was in the nature of a determinable fee, with the land to revert to the grantor if it was ever used by members of any race other than the white race. Members of the colored race petitioned the Park and Recreation Commission for permission to use the recreational facilities erected on the

land conveyed and the commission then sought a declaratory judgment as to the legal effect of the possibility of reverter contained in the deed, joining the petitioners and the grantors of the land as defendants. The lower court held that there was a valid possibility of reverter and that upon use of the land by non-whites the fee would terminate by its own limitation and the estate would automatically revert to the grantor. Upon appeal to the North Carolina Supreme Court, *held,* affirmed. The possibility of reverter is valid and operates independently of judicial enforcement by the state courts. Thus, its operation is not a violation of the equal protection of the laws given to the petitioners by the Fourteenth Amendment.[1] *Charlotte Park and Recreation Commission v. Barringer,* 242 N.C. 311, 88 S.E. (2d) 114 (1955), cert. den. sub nom. *Leeper v. Charlotte Park and Recreation Commission,* (U. S. 1956) 76 S.Ct. 469.

The constitutional prohibition against the denial of equal protection of the laws has exclusive reference to state action, which can be action by any agency or instrumentality of the state, legislative, executive, or judicial.[2] The clause covers discriminatory legislation favoring one group over another, discriminatory administration of an impartial law,[3] or exercise of authority beyond the scope of the power given.[4] In *Shelley v. Kraemer* the Supreme Court, although invalidating the enforcement of a restrictive racial covenant in the case before it, nevertheless said that "the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed. . . by the Fourteenth Amendment" and that they were constitutional so long as they were "effectuated by voluntary adherence to their terms."[5] This language invited attempts to enforce restrictive racial covenants without the use of state action and the principal case illustrates a possible means of doing this. The court felt that since the possibility of reverter would operate automatically the declaratory judgment procedure did not constitute state action.[6] While the court may be completely accurate in its

1 There were actually three deeds discussed in the principal case: the Barringer deed, with which the court chiefly concerned itself, a deed from the Abbott Realty Company which also contained a possibility of reverter (but on which the court did not dwell because the land conveyed by this deed was not the land the petitioners were seeking to use), and a deed from the city of Charlotte containing a possibility of reverter. The court held that this last deed, coming as it did from a municipality, violated the equal protection clause of the Fourteenth Amendment. Principal case at 323.

2 Ex parte Virginia, 100 U.S. 339 (1880); Virginia v. Rives, 100 U.S. 313 (1879).

3 Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886).

4 Ex parte Virginia, note 2 supra. See Barnett, "What is 'State' Action under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?" 24 ORE. L. REV. 227 (1945).

5 Shelley v. Kraemer, 334 U.S. 1 at 13, 68 S.Ct. 836 (1948).

6 In contrast with the view taken by the court in the principal case, a California court has held that since the restrictive covenant in question there was not enforceable, there was no purpose served in giving a declaratory judgment as to the legal effect of the covenant standing alone. Claremont Improvement Club, Inc. v. Buckingham, 89 Cal. App. (2d) 32, 200 P. (2d) 47 (1948).

analysis of the legal effect of the possibility of reverter,[7] its failure to find state action in the declaratory judgment procedure is not as unimpeachable for "the judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State."[8] This is so whether the law is the result of a legislative enactment or a judicial interpretation,[9] and surely the law of property is within these confines.[10] It is hard to distinguish a state court decision that there is a valid possibility of reverter contained in a deed and that upon use or purchase of the land by a member of an excluded race the legal title will automatically revert to the grantor from a decision divesting legal title from a member of an excluded race who purchased the land.[11] In both cases the state court is determining that the use or purchase of the land by a member of an excluded race can affect the title to the land and this determination, requiring as it does the construction of the property law of the state, should be considered state action. Yet even if a valid distinction could be made, the result would not be at all desirable. If a member of an excluded race purchased the land and obtained possession—an act terminating the fee—the court could not enforce the possibility of reverter. Clearly, neither an injunction against the party in possession[12] nor damages against the party who sold to a member of an excluded race[13] could be obtained. Thus, the court would be in the position of saying that there is a valid, but unenforceable, possibility of reverter[14] or, in other words, telling the grantor that he has good legal title to the land in question but that there is no way that the court can help him get possession of the land. This would either breed contempt for the law and the judicial process, or, worse, invite self-help in an area where feelings are already too inflamed. Drawing a distinction of this type would also place the city of Charlotte on the horns of a

7 See 1 SIMES AND SMITH, FUTURE INTERESTS, 2d ed., §281 (1956). However, the deed primarily discussed in the principal case had one unique feature: before the land would revert to the grantor because of use by non-whites, the grantor had to pay the grantee $3,500. About all that can be said concerning such a possibility of reverter (if, indeed, it is that at all) is that its operation is clearly far less automatic than the court believed.

8 Twining v. New Jersey, 211 U.S. 78 at 90-91, 29 S.Ct. 14 (1908).

9 Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362 at 369, 60 S.Ct. 968 (1940).

10 "The power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." Shelley v. Kraemer, note 5 supra, at 22. The law of contracts, torts, criminal law, etc., would also fall within these confines. It has been argued that the result of this position would destroy the delicate balance between the state and federal judicial systems and be tantamount to placing the federal courts over the state courts as a final court of appeals in all cases in which there was any allegation of a denial of due process or equal protection. For a warning against thus extending federal review over state courts, see JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 69-72 (1955).

11 This was the result reached by the Missouri Supreme Court in Kraemer v. Shelley, 355 Mo. 814, 198 S.W. (2d) 679 (1947).

12 See Shelley v. Kraemer, note 5 supra.

13 See Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031 (1953).

14 The concept of a valid but unenforceable right is present in the law of trusts. See Bryant v. Klatt, (D.C. N.Y. 1924) 2 F. (2d) 167, a case involving an oral trust in relation to a conveyance of land.

dilemma. If the city allows members of the excluded races to use the recreational facilities erected on the property, it loses the land. On the other hand, the equal protection clause of the Fourteenth Amendment prohibits the maintenance of recreational facilities solely for the use of the white race.[15] Perhaps this case points out the need for a reevaluation by the Supreme Court of the problem of restrictive racial convenants. For as long as these covenants are held valid if adhered to by the parties and invalid only if enforced by state action, there will be an infinite variety of attempts to achieve, by subterfuge, the goal of restricting the use of property to certain races.[16]

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[15] See Dawson v. Mayor and City Council of Baltimore, (4th Cir. 1955) 220 F. (2d) 386, affd. 350 U.S. 877, 76 S.Ct. 133 (1955), where the maintenance of separate but equal municipal recreational facilities was held to be a violation of the equal protection clause.

[16] 32 BOST. UNIV. L. REV. 320 (1952), lists some of the methods by which racial covenants might be enforced without the use of state action.