

December 2019

Enforcement of Racial Restrictive Covenants

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Recommended Citation

Joe R. Wilmetti, *Enforcement of Racial Restrictive Covenants*, 3 Wyo. L.J. 89 (1948)
Available at: <https://scholarship.law.uwyo.edu/wlj/vol3/iss2/8>

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RECENT CASES

ENFORCEMENT OF RACIAL RESTRICTIVE COVENANTS

One Fitzgerald owned a parcel of land in a district of St. Louis, Missouri, in which all the landowners had entered into an agreement of record whereby none of the land was to be used or occupied by negroes for a period of fifty years. Fitzgerald, pursuant to a contract of sale for valuable consideration, executed a warranty deed to Shelley, who was a negro. Several owners of other property subject to the terms of the restrictive covenant brought suit to enjoin Shelley from taking possession of the property and to divest him of title. The Supreme Court of Missouri upheld the covenant and granted the relief asked.¹ A similar case arose in Michigan and there, too, the Supreme Court of Michigan held the restrictive covenant valid and enforceable and granted the relief sought.² The Supreme Court of the United States granted certiorari in both these cases and heard them together. *Held*, that while the restrictive covenants were not of themselves violative of the fourteenth amendment to the Federal Constitution, because the fourteenth amendment prohibits only state action which is discriminatory, nevertheless when the state courts acted to enforce the covenants it constituted discriminatory state action which was violative of the fourteenth amendment. *Shelley v. Kraemer, McGhee v. Sipes*, 334 U. S. 1, 68 Sup. Ct. 836, 92 L. Ed. 845 (1948).

The problem of racial restrictive covenants was first treated in *Gandolfo v. Hartman*.³ In that case, the grantor and the grantee of land entered into mutually restrictive covenants, each covenanting for himself, his heirs, and his assigns not to lease to a Chinese. Later, however, the grantor breached the covenant and the grantee brought an action to enforce the contract. The Circuit Court of the United States for the Southern District of California struck down the restrictive covenant as being violative of the fourteenth amendment to the Federal Constitution.⁴ The Court there said that the fourteenth amendment prohibited a state from discriminating against a person because of his race, creed, or color, and that it would be a very narrow construction to hold that a private citizen could do by contract what the state could not do by legislation or judicial action.⁵ The contract itself was held to be violative of the fourteenth amendment.

The reasoning of this case has very often been repudiated, and it is now well settled that the prohibitions of the fourteenth amendment operate only against the state and not the individual.⁶ It is held that the wrongful act of an individual unsupported by any statute or judicial or executive proceeding, is simply a private

1. *Kraemer v. Shelley*, 355 Mo. 814, 198 S. W. (2d) 679 (1946).

2. *Sipes v. McGhee*, 316 Mich. 614, 25 N. W. (2d) 638 (1947).

3. 49 Fed. 181 (S. D. Cal. 1892).

4. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. *Gandolfo v. Hartman*, 49 Fed. 181, 182 (S. D. Cal. 1892).

6. *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676 (1879); *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835 (1883); *Chandler v. Zeigler*, 88 Colo. 1, 291 Pac. 822 (1930).

wrong; an invasion of the rights of the injured party, it is true, but not a violation of the fourteenth amendment.⁷

Applying these principles, in 1915, twenty-three years after *Gandolfo* case, *supra*, the Supreme Court of Louisiana declared what was to be the law regarding racial restrictive covenants until 1948, by rendering its decision in *Queensborough Land Co. v. Cazeaux*.⁸ There the defendant breached a covenant not to sell or lease the land to a negro for a period of twenty-five years and the plaintiff brought an action to enforce the covenant. The Supreme Court of Louisiana upheld the covenant as not being violative of the fourteenth amendment nor against public policy.

Since the *Queensborough* case, *supra*, decisions on the question have been more frequent, cases having been decided in at least sixteen jurisdictions.⁹ A review of the cases shows that all of the decisions are in accord on the proposition that restrictive covenants against negro ownership or occupancy are not violative of the fourteenth amendment to the Federal Constitution nor against public policy.¹⁰ They are likewise in accord in holding that restrictive covenants against *use* and *occupancy* are not void as being an unlawful restraint on the alienation of the premises.¹¹ There is a conflict among the various jurisdictions, however, when the covenant restrains the *sale to* and *ownership by* negroes. Some courts have held that a restrictive covenant against negro ownership is void as an unlawful restraint on the power of alienation.¹² Others, however, have held that such restrictions do not contravene the rule against restraint of alienation, because the restraint is not general; and so, like restrictive covenants against use and occupancy, they are held valid and enforceable.¹³

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7. Civil Rights Cases, *supra* note 6; North American Cold Storage Co. v. Chicago, 151 Fed. 120, (C. C. Ill. 1907); United States v. Morris, 125 Fed. 322 (D. C. Ark. 1903).
 8. 136 La. 724, 67 So. 641 (1915).
 9. Corrigan v. Buckley, 299 Fed. 899 (App. D. C. 1924); Fairchild v. Raines, 24 Cal. (2d) 818, 151 P. (2d) 260 (1944); Chandler v. Ziegler, 88 Colo. 1, 291 Pac. 822 (1930); Dooley v. Savannah Bank and Trust Co., 199 Ga. 353, 34 S. E. (2d) 522 (1945); Burke v. Kleiman, 277 Ill. App. 519, (1934); Clark v. Vaughan, 31 Kan. 438, 292 Pac. 783 (1930); Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); Malicke v. Milan, 320 Mich. 65, 30 N. W. (2d) 440 (1948); Porter v. Pryor, 164 S. W. (2d) 353 (Mo. 1942); Lion's Head Lake v. Brzezinski, 23 N. J. M. 290, 43 A. (2d) 729 (1945); Dury v. Neely, 69 N. Y. S. (2) 677 (1942); Vernon v. Reynolds Realty Co., 26 N. C. 58, 36 S. E. (2d) 710 (1946); Williams v. Commercial Land Co., 34 Ohio 559 (1931); Hemsley v. Hough, 195 Okla. 298, 157 P. (2d) 182 (1945); Liberty Annex Corporation v. Dallas, 239 S. W. 1067 (Tex. 1926); Doherty v. Rice, 240 Wis. 389, 3 N. W. (2d) 734 (1942).
 10. Swain v. Maxwell, 355 Mo. 448, 196 S. W. (2d) 780 (1946); Steward v. Cronan, 105 Colo. 393, 98 P. (2d) 999 (1940); Hemsley v. Sage, 194 Okla. 669, 154 P. (2d) 577 (1944); Torrey v. Wolfes, 6 F. (2d) 702 (App. D. C. 1925).
 11. Swain v. Maxwell, *supra* note 10; Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); Scholtes v. McColgan, 184 Md. 480, 41 A. (2d) 479 (1945); and see note 162 A. L. R. 180, 182 citing Williams v. Commercial Land Co., 34 Ohio L. Rep. 559 (1931) as a case from an Ohio appellate court holding to the same effect.
 12. Meade v. Dennistone, *supra* note 11; Scholtes v. McColgan, *supra* note 11; and the following cases from appellate courts in Ohio as cited in note 162 A. L. R. 180, 182: Williams v. Commercial Land Co., 34 Ohio L. Rep. 559 (1931); Bulen v. Rice, 11 Ohio L. Abs. 175 (1931).
 13. Steward v. Cronan, 105 Colo. 393, 98 P. (2d) 999 (1940); Mays v. Burgess, 147 F. (2) 869 (App. D. C. 1945); Lyons v. Wallen, 191 Okla. 567, 133 P. (2d) 555 (1942); Dooley v. Savannah Bank and Trust Co., 199 Ga. 353, 34 S. E. (2d) 522 (1945).

In *Shelley v. Kraemer* and *McGhee v. Sipes*¹⁴ the United States Supreme Court did not overrule the law as to the validity of racial restrictive covenants, for it specifically stated that the covenants of themselves were valid.¹⁵ Rather, the court held that the state court's action in enforcing the restrictive covenants was unconstitutional as violative of the fourteenth amendment.¹⁶

The effect of the decision is to leave the landowner with a perfectly valid contract, for the breach of which he has no remedy—he has a right without a remedy.

At first glance this would appear to be an impairment of contract within the prohibition of Art. 1, sec. 10 of the Federal Constitution, for it is well settled that the obligation of contract embraces the remedy provided for its breach¹⁷ and that, while a state may alter or amend the remedy provided for a contract, it may not remove it entirely or reduce it to such a point that it remains a mere shadow.¹⁸ The Federal Constitution, however, only provides that no state "shall pass any . . . law" impairing the obligation of contract.¹⁹ The Federal courts and most of the state courts hold that this provision is against state legislative action only, and that a change of judicial decision does not constitute an impairment of contract.²⁰ The decision in the instant case is not, therefore, open to attack in that it results in an impairment of contract.

A majority of the state constitutions contain provisions which are the same as, or similar to, Art. 1, sec. 8 of the Constitution of the State of Wyoming.²¹ Such provisions have been interpreted as meaning that for every right violated a citizen must be given a remedy.²² When the problem of racial restrictive covenants again arises in one of the states whose constitution contains such a provision, the court will be faced with the necessity of following the *Kraemer* case, *supra*,

14. 334 U. S. 1, 68 Sup. Ct. 836, 92 L. Ed. 845 (1948).

15. *Ibid* at 842, "We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."

16. *Ibid* at 845, "We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand."

17. *Gunn v. Barry*, 15 Wall. 610, 21 L. Ed. 212 (U. S. 1873); *Louisiana ex rel Nelson v. Police Jury*, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574 (1884); see *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132 (1880).

18. *National Surety Co. v. Architectural Decorating Co.*, 226 U. S. 276, 33 Sup. Ct. 17, 57 L. Ed. 221 (1912); *Richmond Mortgage and Loan Corporation v. Wachavia Bank and Trust Co.*, 300 U. S. 124, 57 Sup. Ct. 338, 81 L. Ed. 552 (1937); *Honeyman v. Jacobs*, 306 U. S. 539, 59 Sup. Ct. 702, 83 L. Ed. 972 (1939).

19. U. S. Const. Art. I, sec. 10.

20. *People's Banking Co. v. Sterling*, 300 U. S. 175, 57 Sup. Ct. 386, 81 L. Ed. 586 (1937); *Guaranty Trust Co. v. Blodgett*, 287 U. S. 509, 53 Sup. Ct. 244, 77 L. Ed. 463 (1933); *Fleming v. Fleming*, 264 U. S. 29, 44 Sup. Ct. 246, 68 L. Ed. 547 (1924).

21. "Courts open to all.—All courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. . . ." Const. State of Wyo. Art. I, sec. 8.

22. *Feltz v. Central Nebraska Public Power & Irrigation District*, 124 F. (2d) 578 (C. C. A. Neb. 1942); *Daily v. Parker*, 61 F. Supp. 701 (N. D. Ill. 1945); *Ex parte Wetzel*, 243 Ala. 130, 8 So. (2d) 824 (1942); *Riggs v. Hill*, 201 Ark. 206, 144 S. W. (2d) 26 (1940); *Moon v. Bullock*, 65 Ida. 594, 151 P. (2d) 765 (1944).

and thereby flying in the teeth of its own constitution by denying a remedy for the violation of the covenant. It will be interesting to watch the future decisions to see whether the state courts can devise some method of giving effect to both the Supreme Court's ruling and their own constitutions.

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AUTOMOBILES—CHATTEL MORTGAGES—RECORDING

An auto, licensed and taxed in Wyoming, was taken to Colorado and mortgaged. The auto was then returned to Wyoming before the mortgage was recorded in Colorado. The defendant purchased the auto in Wyoming without notice of the mortgage, and after default in the payments by the mortgagor, the mortgagee, as was provided for in the mortgage, attempted to take possession of the auto. In an action by the mortgagee to replevin the auto, held: for the defendant. The plaintiff had not complied with the Colorado recording statute¹ providing for chattel mortgages to be recorded in the county where the mortgaged property is situated. *Mosko v. Smith*, 179 P. (2d) 781 (Wyo. 1947).

The validity of a chattel mortgage is to be determined by the law of the place where the mortgagee is executed, if the chattel was located there at the time. Therefore, the Wyoming court had to make their decision based upon the law of Colorado.² If the mortgage had been recorded according to the law of Colorado, it would have been valid against third parties wherever the property might be taken, so long as it was without the consent or knowledge of the mortgagee.³

This case interprets the Colorado statute to mean that the mortgage is to be filed where the property is situated at the time of the filing.⁴ The auto was not in Colorado at the time of such recording, therefore, there was no property to which the lien of the mortgage could attach;⁵ compliance with the statute became impossible by reason of the neglect of the mortgagee.⁶ This construction of the statute protected the Wyoming purchaser, but at the same time indicates that the method of recording chattel mortgages upon autos is inadequate. It is quite possible for an auto to be in another county or even in another state within a few hours and to hold that such a short delay may cause a mortgagee to lose his mortgage as to third parties is unjust and unreasonable.

1. (Colo.) Mills Ann. Stat. 1935 c. 32, sec. 1.

2. *Mosko v. Matthews*, 87 Colo. 55, 284 Pac. 1021 (1930); Restatement, Conflict Of Laws sec. 6 (1934).

3. *Ball Bros. Trucking Co. v. Sorenson*, 191 S. W. (2d) 908 (Texas 1945); *American Loan Co. v. See*, 298 Ky. 180, 182 S. W. (2d) 644 (1944); *McGlone v. Smith*, 293 Ky. 131, 168 S. W. (2d) 566 (1943).

4. See *Mosko v. Smith* 179 P. (2d) 784 (Wyo. 1947).

5. *Yund v. First National Bank of Shawnee, Okla.*, 14 Wyo. 81, 82 Pac. 6 (1905); *General Finance & Thrift Corporation v. Guthrie*, 227 N. C. 431, 42 S. E. (2d) 601 (1947).

6. The auto was mortgaged on October 25, 1944 and the mortgage recorded on November 3, 1944.