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CONSTITUTIONALITY OF TESTAMENTARY RACIAL OR RELIGIOUS RESTRAINTS ON MARRIAGE

By JUDSON A. CRANE*

There have been recently decided two cases involving restraints on marriage imposed by testamentary trust provisions. They are *United States National Bank of Portland v. Snodgrass*,¹ and *In the Matter of the Petition of Tanburn, re Will of Rosenthal*.²

In the *Snodgrass* case the testamentary trustee under the will of Rinehart sought a judgment declaring the validity and correct interpretation of a will which provided that the testator's daughter should on reaching the age of 32 take the corpus of a trust amounting to over \$15,000, provided she had not before reaching that age embraced the Catholic faith or married a man of that faith. Prior to reaching the age of 32 in 1951 she had, in 1944, twelve years after the death of the testator, married a man of the Catholic faith. It was held that the provisions effecting a forfeiture were valid and that the corpus passed to other beneficiaries by gifts over. This was a case of first impression in Oregon.

In the *Tanburn* case the testator Rosenthal had by his will created a power of appointment in his grandson, who exercised the power as to corpus in favor of his daughter, the petitioner, subject to certain life estates. The will provided that no legacy, devise, power of appointment or of disposition given to any descendent of the testator should take effect if such descendent married a person not born in the Jewish faith and of Jewish blood. The estate appointed to Jean Tanburn, the petitioner, testator's great-granddaughter, had not yet vested in possession as prior life estates were still in effect. The interest appointed exceeded \$600,000 in value. She became engaged to marry a man not of the Jewish faith or blood, and filed a petition in the Surrogate's Court of the County of New York, asking for construction of the will of Rosenthal, the creator of the trust and donor of the power. The Surrogate held that if petitioner married as she proposed to do her rights as appointee would be forfeited, as reading the whole will it was apparent that the intent of the testator was that disability of descendants who married non-Jews to take extended not only to legacies and devises, but also to appointments, even though not expressly mentioned.³

The decree of the Surrogate was reversed by Appellate Division, First Department, by a majority of three to two. It was held that appointees

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¹Ore....., 275 P.2d 860 (1954).

² 307 N.Y. 715, 121 N.E.2d 539 (1954), aff'g 283 App.Div. 316, 708, 127 N.Y.S.2d 558.

³ 204 N.Y. Misc. 120, 123 N.Y. Supp.2d. 326 (1952).

were not for this purpose legatees or devisees, and the failure to include them along with legatees, devisees and donees of powers, excluded them from the provision, the will being obviously drawn with painstaking care. This decision was affirmed per curiam by the Court of Appeals, three justices dissenting.

In both of these cases the validity of the restraint on marriage was attacked in argument of counsel, on constitutional grounds, relying on *Shelley v. Kraemer*⁴ and cases which follow it. The New York courts assumed partial restraints on marriage were valid and not against public policy. The Oregon court discusses the matter at length, citing and following the many authorities approving such restraints, and disposed of the constitutional issue raised in the *Shelley* case by distinguishing state action from individual conduct.

In *Shelley v. Kraemer*⁵ the Supreme Court on certiorari reversed the decree of the Missouri court enforcing by injunction a restriction by covenant against use and occupancy by any person not of the Caucasian race. This was followed by *Barrows v. Jackson*,⁶ refusing recovery of damages for violation of such a covenant. The New York judges did not refer to the constitutional question as by the majority of the judges the restriction was not applicable. It was assumed that such restraints were valid, but doubt as to validity may have had some weight in the construction of the will of Rosenthal. Judge Bodin in the Appellate division, writing the majority opinion, affirmed per curiam in the Court of Appeals, stated.

"While it has been held that 'Conditions in partial restraint of marriage, which merely impose reasonable restrictions upon marriage, are not against public policy' (citing New York cases) certainly there is not involved herein any affirmative public policy which would impel us to strain to fashion a testamentary intent from such speculative and muddled ingredients."⁷

The Oregon Court cited many authorities from other states approving the sort of restraint involved and disposed of the constitutional issue by quoting from *Shelley v. Kraemer*. "That Amendment (Fourteenth) erects no shield against merely private conduct, however discriminatory or wrongful."⁸

Two questions appear. First, is the action of the court, as in the Oregon case, state action or individual action? Second, if it is state action is it unconstitutionally discriminatory?

As to the first question, it is submitted that when a court construes the

⁴ 334 U.S. 1, 3 A.L.R.2d 441 (1948).

⁵ See note 4 *supra*.

⁶ 346 U.S. 249 (1953), aff'g 112 Cal.App.2d 534, 247 P.2d 99.

⁷ 307 N.Y. at 720, 121 N.E.2d at 542.

⁸ See note 4 *supra*.

meaning and validity of a testamentary provision, and decrees distribution of a trust estate which results in a beneficiary being divested of a vested interest by operation of a condition subsequent, validity of which is judicially upheld, or in failure of an interest to vest by reason of non-performance of a condition precedent, held to be a valid condition, there is state action. This position is supported by the *Shelley* and *Barrows* cases.

Secondly, it is submitted that state action in restraint of marriage between persons of different races or religions is in violation of the Fourteenth Amendment, and unconstitutional. We are speaking as of today in the light of the recent decisions of the courts condemning discrimination and segregation. Freedom to marry is as much a constitutional right as freedom to occupy real estate and to go to school. This has been recently recognized in California in the case of *Perez v. Sharp*.⁹ In this case it was held that a writ of mandamus should be issued to compel the County Clerk of Los Angeles County to issue a marriage license to a white person and a Negro. The miscegenation statutes of over a hundred years standing were held unconstitutional. This involved racial discrimination.

Justice Edmunds, writing the opinion of three of the justices, would apparently feel the same way about religious discrimination, as he said. "If miscegenous marriages can be prohibited because of tensions suffered by the progeny, mixed religious unions could be prohibited on the same ground."¹⁰ There are miscegenation statutes in many states, and the California Supreme Court appears to be the first to declare such legislation unconstitutional. There do not appear to be any statutes prohibiting marriage between persons of different religious faiths. Such statutes would certainly be invalid. They would be recognized as quite unreasonable and unsupported by considerations of public policy.

One may make an outright gift to whom he pleases, and for reasons of his own, fail to provide by intervivos gift or by will for the natural objects of his bounty. What is objected to is the exercise of economic pressure by restrictions in will or intervivos trusts in the attempt to enforce, long after a testator or trust creator is dead, compliance by his descendents with his racial and religious prejudices. Under present case law the ancestor may die with the assurance that long after his death, within the period of the rule against perpetuities, his efforts will be backed up by the aid of the state through judicial action in the administration of his estate.¹¹ This, it is submitted, is unconstitutional interference by state action with the exercise of the fundamental rights of freedom of religion and freedom to marry.

⁹ 32 Cal.2d 711, 198 P.2d 17 (1948), noted 62 HARV. L. REV. 307.

¹⁰ 32 Cal.2d at 727, 198 P.2d at 25.

¹¹ Cases collected in annotation, 25 A.L.R. 1523. See also 1A BOGERT, TRUSTS § 211.