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Constitutional Law: State Action for Operation of Reverter after Grant of Determinable Fee

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NOTES

CONSTITUTIONAL LAW: State Action Required for Operation of Reverter After Grant of Determinable Fee

The Charlotte Park & Recreation Commission, a municipal corporation, is charged with the responsibility of administering and maintaining the park and recreation facilities for the city of Charlotte, North Carolina. In May of 1929, Mr. Osmond Barringer conveyed by deed to the Commission, as a gift, certain lands for use as a park, playground and recreational system of the city of Charlotte. In this deed was a provision that the lands so conveyed were "for the use of . . . persons of the white race only." The deed also provided that if this condition was not met, then the lands would revert to Osmond Barringer. On a part of these lands the Bonnie Brae Golf Course was established; it is the only golf course operated and maintained by the Commission. All Negroes were and are denied the right to use it.

More than twenty years after execution of the deed, the Commission, perhaps prompted by a petition signed by a number of Negroes who claimed that their constitutional rights were being violated, instituted an action for a declaratory judgment to determine what the legal effect would be if Negroes were allowed to use the Bonnie Brae Golf Course. This was the case of *Charlotte Park & Recreation Com'n v. Barringer*.[1] In 1955, the Supreme Court of North Carolina rendered its decision: The racially discriminatory provision was valid, and the lands, if used by non-whites, would "automatically" revert to Osmond Barringer. The United States Supreme Court denied a petition for certiorari.[2] If this decision is correct, then the North Carolina court has hit upon one of the few methods, if not the only one, which can be successfully used today for the purpose of perpetuating racial discrimination by means of restrictive provisions in land deeds. But this writer respectfully suggests that the decision is *not* correct.

Prior to 1948, it was generally conceded that privately created covenants or conditions restricting land against occupancy or use by persons of certain races, or by non-Caucasions in general, were valid and enforceable.[3] The state and federal courts were available, if necessary, to enforce these private arrangements. In 1948, however, the United States Supreme Court, in *Shelley v. Kraemer*,[4] ruled that the enforcement by state courts of covenants restricting the use or occupancy of real property to persons of the Caucasian race violated the equal protection clause of the 14th Amendment to the United States Constitution. In that case, the prayer was that the court restrain certain Negroes from taking possession of restricted property, and that judgment be entered divesting title out of the Negroes and revesting it in the grantor. The court denied such relief. This was the first case in which the United States Supreme Court was called upon to consider the enforceability in state courts of restrictive covenants based on race or color. In

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[1] Charlotte Park & Recreation Com'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955).

[2] 350 U.S. 983 (1956).

[3] Fairchild v. Raines, 24 Cal.2d 818, 151 P.2d 260 (1944); Gospel Spreading Assoc. v. Bennetts, 79 App. D.C. 352, 147 F.2d 878 (1945); Meade v. Dennistone, 173 Md. 295, 196 A. 330 (1938); Sipes v. McGhee, 316 Mich. 614, 25 N.W.2d 638 (1947—reversed 1948); Perkins v. Monroe Ave. Church of Christ, 79 Ohio App. 457, 70 N.E.2d 487 (1946); Doherty v. Rice, 240 Wis. 389, 3 N.W.2d 734 (1942).

[4] 334 U.S. 1 (1948).

one previous case, *Corrigan v. Buckley*,[5] the court had held that such agreements between private property owners were valid, but the question of state enforcement was not in issue. In *Hansberry v. Lee*,[6] the only other United States Supreme Court case which involved racial restrictive covenants prior to the *Shelley* decision, the court arrived at its conclusion without reaching the issues presented in the *Shelley* case. None of these three cases (*Shelley, Corrigan,* and *Hansberry*) involved a provision for "automatic" reverter of ownership for a breach of the covenant or failure of the condition. In the *Charlotte* case, however, an "automatic" reverter of ownership in fee to the grantor was provided for in case the condition was not performed; the grant, therefore, was of a determinable fee.[7] Thus it appears that the *Charlotte* case holds that a grantor may convey land in fee simple determinable, with a provision for racial restriction and a clause providing that the land will revert to the grantor if the condition is broken, and that such an arrangement, even if it subsequently operates to deprive the grantee of his land, is not within the inhibitions of the 14th Amendment to the United States Constitution. For this to be so, the process whereby ownership of the land reverts to the grantor must be accomplished without "state action," because the inhibition in the Constitution has been interpreted to mean that no agency of the state —legislative, executive, or judicial—no instrumentality, and no person, officer or agent exerting power of the state shall deny equal protection of the laws as guaranteed to all persons by the 14th Amendment.[8] The private agreements themselves may be valid, but they cannot be enforced by the use of any state facility. This principle was crystallized in the *Shelley* case, where the court said:

> ". . . [T]he restrictive agreements standing alone cannot be regarded as a violation of any rights guaranteed . . . by the Fourteenth Amendment. So long as the purpose of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there had been no action by the State and the provisions of the Amendment have not been violated."[9]

The North Carolina court in the *Charlotte* case conceded that this was the law, but went on to say that it was not applicable in the case of a determinable fee. The court said:

> "It is a distinct characteristic of a fee determinable upon limitation that the estate automatically reverts at once on the occurrence of the event by which it is limited . . . ."[10]

Later in the same opinion the court said:

> "The operation of this reversion provision is not by any judicial enforcement by the State courts of North Carolina, and Shelley v. Kraemer . . . has no application."[11]

In reference to this latter statement, it seems fair to assume that the North Carolina court probably meant to say that *no state action whatever* was involved, rather than limiting the statement to *judicial* action by the state. At least that

[5] 271 U.S. 323 (1926).

[6] 311 U.S. 32 (1940).

[7] 1 TIFFANY, REAL PROPERTY §§ 217–220 (3d ed. 1939); BURBY, REAL PROPERTY §§ 181–184 (1943).

[8] Virginia v. Rives, 100 U.S. 313, 318 (1880); U.S. Government Printing Office, Constitution of the United States Annotated, p. 411 (1953).

[9] 334 U.S. 1, 13 (1948).

[10] 242 N.C. 311, 321, 88 S.E.2d 114, 122 (1955).

[11] 242 N.C. 311, 322, 88 S.E.2d 114, 123 (1955).

would seem to be the requisite as laid down by the United States Supreme Court.[12] Our problem, then, is to determine whether the operation of a reverter provision involves state action in any form. If it does, then the North Carolina court's decision in the *Charlotte* case is necessarily inconsistent with the position taken by the United States Supreme Court in *Shelley* and related cases.[13]

First of all, the "automatic" feature of any reverter provision is not truly automatic—it obviously depends for its vitality on at least the *sanction* of some governing power, namely the state. Without this recognition, this positive acknowledgment, how could ownership be said to leave the grantee and revert to the grantor? This result cannot be achieved in a vacuum; definite concepts of law are involved. And law, in the sense here used, may be said to be the product of Man operating through his instrumentality, the state.[14] Whether it be common law, or statute, or whatever else it might be called, nevertheless the sovereign power is speaking, and where the sovereign speaks, state action exists. The opinion of the United States Supreme Court in *Barrows v. Jackson*[15] seems to support such a theory. The court there, speaking of the unconstitutionality of compelling a party to respond in damages for failure to perform a covenant to continue to discriminate against non-Caucasians in the use of real property, said:

> "The result of that *sanction* by the State would be to encourage the use of restrictive covenants. To that extent, *the State would act* to put its sanction behind the covenants."[16] (Emphasis added.)

And the court went on to say:

> "Thus it becomes not respondent's voluntary choice but the State's choice that she observe her covenant . . . ."[17]

Without the positive rules of real property law as recognized and applied by the state, the physical possession of all land might well be in the strongest. But instead, the state has determined the effect which must result from a given cause. If ownership reverts, it is only because the state has said that it will revert—the state must act.

Going a step further, let us suppose for a moment that a non-Caucasian insists that he be permitted to use the Bonnie Brae Golf Course, and forces his way onto the grounds. The Commission, waving its declaratory judgment from the North Carolina Supreme Court, seeks the aid of a policeman in removing the unwelcome visitor. Presumably the policeman's duty will be to take action against the intruder. It might be argued that the officer would be merely enforcing the owner's right to exclude others from his land, and that such is not state action of a discriminatory nature. But this view loses sight of the fact that the Commission as

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[12] See note 8 *supra*. Also, Shelley v. Kraemer, 334 U.S. 1 (1948); Barrows v. Jackson, 346 U.S. 249 (1953).

[13] It is outside the scope of this article to consider the possible reasons why the United States Supreme Court denied certiorari in the *Charlotte* case. The petition was denied without comment. 350 U.S. 983 (1956).

[14] For a comprehensive treatment of society's relationship to law, see SIMPSON AND STONE, LAW AND SOCIETY (1949).

[15] 346 U.S. 249 (1953).

[16] See note 15 *supra*, at 254.

[17] See note 15 *supra*, at 254.

a municipal corporation is itself a state organ,[18] and that the policeman is acting in his official capacity. And where, as in our example, two state agencies, a policemen and a municipal corporation, act with an eye upon a declaratory judgment of the highest court in the state, can it be said that there is no state action? The United States Circuit Court of Appeals for the Fourth Circuit, in *Flemming v. So. Carolina Elect. & Gas Co.*,[19] seemed to think that there was, in a somewhat analogous situation where bus drivers were sworn in as police officers in order that they might enforce racial segregation aboard busses in South Carolina. In that case a Negro woman brought an action for damages against a bus company because a bus driver, who was also a police officer, required her to change seats on a bus in accordance with the South Carolina segregation law. The district court dismissed the action, but this was reversed by the circuit court, which said:

> ". . . [W]e think it clear that he [the bus driver] was acting for the defendant [bus company] in enforcing a statute which defendant itself was required by law to enforce. He was thus not only acting for defendant, but also acting under color of state law."[20]

From this it seems reasonable to deduce that if a policeman ejects a non-Caucasian from the grounds of Bonnie Brae Golf Course under the circumstances related earlier, then he too is "acting under color of state law," and doing the same sort of thing which the circuit court in the *Flemming* case condemned—using his office to aid the state in enforcing racial discrimination.

And what would happen if the grantor brought an action of ejectment against the grantee to recover possession of the land for non-performance of the condition? It hardly seems necessary to point out that the courts would be requested to act in such a case, and that once again this could only be state action. After it was shown that the grantor had parted with his ownership to the grantee, the grantor would then have the burden of showing how ownership revested in him. Unless he relies on magic, he can only do this by pointing out the characteristics of a determinable fee—characteristics adopted, sanctioned and acted upon by the state.

The conclusion seems inescapable, then, that if an "automatic" reverter is to operate, it can only do so through state action. And the *Shelley* case has clearly set out the rule that a provision for racial discrimination in a deed cannot, because of the 14th Amendment to the United States Constitution, be enforced by state action. Hence this writer must disagree with the conclusion of the North Carolina Supreme Court in the *Charlotte* case, wherein that court held that a failure to comply with a racially discriminatory provision in a grant of a determinable fee would result in a reverter of ownership to the grantor. Such a result would appear to be contrary to both the letter and spirit of the *Shelly* case and those following it, as set out by the Supreme Court of the United States.

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[18] Trenton v. New Jersey, 262 U.S. 182, 43 S.Ct. 534 (1923); Batchelor v. Madison Park Corp., 25 Wash.2d 907, 172 P.2d 268 (1946); People *ex rel.* Curren v. Wood, 391 Ill. 237, 62 N.E.2d 809 (1945); Miller v. Memphis, 181 Tenn. 15, 178 S.W.2d 382 (1944); Buckhout v. Newport, 68 R.I. 280, 27 A.2d 317 (1942).

[19] 224 Fed.2d 752 (1955).

[20] See note 19 *supra*, at 753.