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Restraints on Alienation

RESTRAINTS ON ALIENATION

Plaintiff corporation, owner of a lake development, brought an action to recover the unpaid balance on an installment contract for the sale of land. Defendant alleged the contract was void and against public policy because by its terms the purchaser is restrained from

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14. See Grossjean v. American Press Co., 297 U. S. 234, 250 (1936). "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information."
15. See Associated Press v. United States, 65 Sup. Ct. 1416, 1426 (1945) (Mr. Justice Douglas concurring). "The decree which we approve does not direct Associated Press to serve all applicants. It goes no further than to put a ban against competitors of its members in the same field or territory. —— If Associated Press, after the effects of that discrimination have been eliminated, freezes its membership at a given level, quite different problems would be presented."
16. See United States v. Associated Press, 52 F. Supp. 362, 375 (1945) (Judge Swan dissenting).
17. Small, "Anti-Trust Laws And Public Callings: The Associated Press Case" (1944) 23 N. C. L. Rev. 1. "In public calling cases, the finding of a business 'affected with a public interest' is an inflexible condition precedent to that type of regulation. It acts as a barrier beyond which the court cannot trespass. On the other hand, the 'effect on the public' as spoken of in anti-trust cases, is only a test, a method, or means to determine reasonableness and consequent validity. It is not a bar, but rather an economic weight to be measured with other elements, on the anti-trust balance scale in order to arrive at the ultimate reasonable or unreasonable nature inherent in the make-up of the combination."
18. Weston, supra note 12, at 60.

making a sale or permitting its use or occupancy by any person not a member of the Caucasian race; and, further, that such restraint on general alienation is illegal and void upon constitutional grounds forbidding discrimination. Held, for the plaintiff. The provision is not void as against public policy, nor within the constitutional prohibition against discrimination, nor an unlawful restraint on alienation.[1]

The United States Supreme Court in Buchanan v. Warley[2] held legislation restricting the right of a member of a particular race to live on certain land in violation of the Fourteenth Amendment. However, this prohibition has been construed as applying only to action by the state and not to individual action.[3] Yet in what seems to be the earliest American case in which the constitutional problem was considered, the court in holding a covenant void said that there was no real difference between legislative discrimination and discrimination founded on the common law of the state:

> "It would be a very narrow construction of the constitutional amendment in question and of the decisions based upon it, and a very restricted application of the broad principles upon which both the amendment and the decisions proceed, to hold that, while state and municipal legislatures are forbidden to discriminate against Chinese in their legislation, a citizen of the state may lawfully do so by contract, which the courts may enforce."[4]

This position has received scant attention in recent years. The courts have experienced no difficulty in finding that individual covenants and conditions against the purchase or occupancy of property by Negroes are outside the scope of the Fourteenth Amendment and therefore constitutionally unobjectionable.[5] This approach has obscured the real issue that so far as these agreements operate without state aid they are indeed purely the acts of individuals, but when the state through one of its instrumentalities, whether it be legislative, executive, judicial, or administrative, enforces such an agreement, state action has occurred.[6]

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1. Lion's Head Lake v. Brezezinski, —— N.J.L. ——, 43 A. 729 (1945). 729 (1945).
2. 245 U.S. 60, 81, 82 (1917); followed in Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler, 273 U.S. 668 (1927).
3. Civil Rights Cases, 109 U.S. 3, 11 (1883); United States v. Cruikshank, 92 U.S. 542, 554 (1875).
4. Gandolfo v. Hartman, 49 Fed. 181, 182 (C.C.S.D. Cal. 1892) (In the latter half of its opinion, the court indicated that enforcement of the covenant would also violate the most-favored nation clause of a treaty between the United States and China and was contrary to public policy, as well.).
5. Corrigan v. Buckley, 271 U.S. 323, 330 (1926); Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596, 598 (1919); United Cooperative Realty Co. v. Hawkins, 269 Ky. 563, 565, 108 S.W. (2d) 507, 508 (1937); Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1932); Martin, "Segregation of Residences of Negroes" (1934) 32 Mich. L. Rev. 721; Bowman, "The Constitution and Common Law Restraints on Alienation" (1928) 8 B. U.L. Rev. 1.
6. McGovney, "Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants, or Conditions in Deeds is Unconstitutional" (1945) 33 Calif. L. Rev. 5; Kahen, "Validity of Anti-Negro Restrictive Covenants: A Reconsideration of the Problem" (1945) 12 U. of Chi. L. Rev. 198.

Numerous theories have been advanced to deny enforcement to restrictive covenants. When the purpose and the object of the restriction have been destroyed by a change of conditions within the restricted zone, the restriction ceases to be binding.[7] If the party seeking enforcement has himself violated the restriction, enforcement has been denied on the theory of estoppel or waiver.[8] In cases of Negro segregation by covenant or condition, the weight of authority invalidates a total restraint on alienation for an unlimited time to all except one or more races because of a public policy which favors the free marketability of land.[9] Covenants have been sustained where the restraints are to particular persons or classes of persons provided there is a reasonable time limitation, on the theory that such partial restraints have never come within the rule prohibiting restraints upon alienation, construing it to apply only to restraints for an unlimited time.[10] Several courts place great emphasis upon use and uphold restraints on use and occupation as to a limited class for a reasonable time and even in some cases for a period which is unlimited when they will not sanction similar restraints on sale or alienation.[11] The distinction is made on the ground that the rules against restraints on alienations were only intended to make conveyancing free and unrestrained, and had nothing to do with use and occupancy.[12] The chief criticism of the rule against alienation as construed in these cases is that it stresses the form of the restriction rather than its actual effect, which should be the determining factor.[13]

The holding in the instant case, however, is correct, since it involved an action to enforce payment and not to enforce the condition.[14]

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7. Pickel v. McCawley, 329 Mo. 166, 176, 44 S.W. (2d) 857, 861 (1931); Note (1940) 7 U. of Chi. L. Rev. 710.
8. McGovern v. Brown, 317 Ill. 73, 79, 80, 147 N.E. 664, 666 (1925) (building restriction violated by complainant himself); Schwartz v. Holycross, 83 Ind. App. 658, 665, 149 N.E. 699, 701 (1925) (acquiescence in violation of building restriction).
9. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596, 597 (1919); Porter v. Barret, 233 Mich. 373, 206 N.W. 532, 535, 536 (1925); White v. White, 108 W.Va. 128, 150 S.E. 531, 539 (1929). Contra: Chandler v. Zeigler, 88 Colo. 1, 291 Pac. 822, 824 (1930). See Gray, Restraints on Alienation (2d ed.) pp. 25-33.
10. Queensboro Land Co. v. Cozeaux, 136 La. 724, 67 So. 641, 643 (1915) (twenty-five years); Koehler v. Rowland, 275 Mo. 573, 584, 585, 205 S.W. 217, 220 (1918) (twenty-five years); see Gray, Restraints on Alienation (2d ed.) pp. 33-42.
11. Los Angeles Investment Co. v. Gray, 181 Cal. 680, 186 Pac 596, 597 (1929); Meade v. Dennistone, 173 Md. 302, 307, 196 Atl. 330, 335 (1938); Parmalee v. Morris, 218 Mich. 625, 632, 188 N.W. 330, 332 (1922).
12. See note 11 supra.
13. Martin, "Segregation of Residences of Negroes" (1934) 32 Mich. L. Rev. 721.
14. American Railway Express Co. v. Lindenberg, 260 U.S. 584, 590 (1923); Simpson et al. v. Fuller, 114 Ind. App. 583, 587, 51 N.E. (2d) 870, 872 (1943) (Where the illegal can be severed from the legal part of the contract, the bad part may be rejected and the good retained.).