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Constitutional Law—Equal Protection—Determinable Fee

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CONSTITUTIONAL LAW—EQUAL PROTECTION—DETERMINABLE FEE

A 1929 deed which conveyed land from private individuals to a city provided: ". . . . In the event said lands . . . shall not be kept and maintained as a park . . . for use by the white race only . . . the lands hereby conveyed shall revert in fee simple . . . ." In 1955 a declaratory judgment was sought to determine the validity of the restriction and reverter clauses. *Held*: the operation of such language created a fee simple determinable with a possibility of reverter. Since such reversion would be automatic and would not require any judicial enforcement by state courts, negroes who desired to use the park facilities would not be deprived of equal protection of the laws by state action.[1]

The instant case is of interest not only because of the court's holding; but also, because of the presence of two other problems which the court does not discuss. First, is the maintenance of the park by the city an action of the state which is within the proscription of the Fourteenth Amendment?[2] Second, is the restriction illegal?

Prior to the decisions of 1948[3] the problem of land transactions involving privately imposed racial restrictions had not been viewed as a problem of constitutional law. Rather, racial restrictions upon the use and occupancy of land were enforced upon various grounds.[4] However, the decision in *Shelley v. Kraemer*[5]

[1] Charlotte Park and Recreation Comm'n v. Barringer, 88 S.E.2d 114 (N.C. 1955).

[2] U.S. Const. amend. XIV, § 1: ". . . . No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[3] Hurd v. Hodge, 334 U.S. 24 (1948); Shelley v. Kraemer, 334 U.S. 1 (1948).

[4] Edwards v. West Woodridge Theater Co., 55 F.2d 524 (D.C. Cir. 1931) (restriction does not deprive citizen of any constitutional right); Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679 (1946) (give effect to intention of parties); Dooley v. Savannah Bank and Trust Co., 199 Ga. 353, 34 S.E.2d 522 (1945) (protection of property value to which restriction applied); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918) (not an unlawful restraint or against public policy); Queens-

clearly established the proposition that specific enforcement of such agreements by state courts is prohibited by the "equal protection" clause of the Fourteenth Amendment of the United States Constitution. Likewise, if a state court awards damages for breach of a covenant restricting the use and occupancy of real property to persons of the Caucasian race, non-Caucasians are deprived of equal protection of the laws in violation of the Fourteenth Amendment.[6]

The deed in the case at hand is not, as in *Shelley v. Kraemer,* a contract between private individuals; rather, the deed here provides that the city maintain the lands as a park. This provision puts the city in the position of discriminating against non-Caucasians. A city is a political subdivision of the state.[7] Thus, any action taken by the city is an action of the state.[8]

It is submitted that had the court considered this aspect of the problem it could only have rendered a judgment that the Fourteenth Amendment prohibits the city from maintaining a park which discriminates against any race. Such a restriction is illegal; thus, it should be declared void and the fee of the first taker rendered absolute.[9] Validity at time of inception does not legitimatize a restriction which is subsequently declared to be illegal.[10] Thus, the result would not be altered even if it were argued that such racial restrictions were not held to be illegal at the time of the conveyance.

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borough Land Co. v. Cazeaux, 136 La. 724, 67 So. 641 (1915) (liberty of contract).

5 334 U.S. 1 (1948).

6 Barrows v. Jackson, 346 U.S. 249 (1953).

7 City of Worcester v. Worcester Consolidated Street Ry., 196 U.S. 539 (1905); Texas Nat. Guard Armory Board v. McCraw, 132 Tex. 613, 126 S.W.2d 627 (1939); Streat v. Vermilya, 268 Mich. 1, 255 N.W. 604 (1934); Loeb v. City of Jacksonville, 101 Fla. 429, 134 So. 205 (1931).

8 George v. City of Portland, 114 Ore. 418, 235 Pac. 681 (1925).

9 Cf. VI American Law of Property § 26.34 (Supp. 1954). Clifton v. Puente, 218 S.W.2d 272 (Tex. Civ. App. 1949) (here it is not clear whether the court construed the condition as a condition subsequent with a right of re-entry or a determinable fee with a possibility of reverter); Ruhland v. King, 154 Wis. 545, 143 N.W. 681 (1913).

10 See Board of Comm'rs of Mahoning County v. Young, 59 Fed. 96 (6th Cir. 1893); Scovill v. McMahon, 62 Conn. 378, 26 Atl. 479 (1892).