

Constitutional Law: The Fourteenth Amendment's Effect Upon State Laws Governing the Use of Land: A Comment on *Evans v. Abney*

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COMMENTARY
THE FOURTEENTH AMENDMENT'S EFFECT
UPON STATE LAWS GOVERNING THE USE
OF LAND: A COMMENT ON *EVANS V.*
ABNEY

TRAYTON L. LATHROP*

I. INTRODUCTION

If a parcel of land is lawfully used in a certain way, it is axiomatic that the law has either generally or specifically provided for that use. In English-American jurisprudence, through a body of common and statutory law known as property law, the state has enabled individuals to acquire rights to possess land, including the highly discretionary right to determine how the land may be used—rights which, by virtue of law, are transferable *inter vivos* or upon death.¹ The state, by law, has enabled individuals, vested with such enforceable possessory rights, to build and use residences, plant and harvest crops, construct office buildings and manufacturing plants, cut timber, and extract minerals.²

The state has often limited or provided for limitation of the discretion otherwise granted. It has authorized holders of possessory rights in land to separate a limited right to govern the use of land, by contract or deed creating restrictive covenants or limitations, thereby causing one individual to hold possessory rights in a parcel subject to the enforceable rights of another to limit the use of the parcel in a particular way. Depending upon the terms of the governing instrument, the restriction on use may be enforced by an injunctive order of a court, a judgment for damages, a judgment for ejectment, or invocation of trespass rules which recognize

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1. See Wis. CONST. art. I, § 13, which provides that the common law in force in the territory of Wisconsin is to continue a part of the law until altered by the legislature, and art. I, § 14, which provides that all lands in the state are to be allodial, prohibits feudal tenures, and voids fines and like restraints upon alienation. See also *Hornby v. Smith*, 191 Ga. 491, 13 S.E.2d 20 (1941).

2. Without a state remedy to enforce exclusive use of mineral lands, crop lands, dwellings, and the like, there could be no property right. See *Truax v. Corrigan*, 257 U.S. 312, 329-30 (1921), wherein the Court held that the fourteenth amendment prohibited a state from stripping the property owner of all real remedy.

possessory rights in one person, rather than another, because of the operation of possibility of reverter or a power of termination for violation of a condition.³ The state has limited its grants of discretion in the use of lands by common law nuisance doctrine,⁴ so-called zoning laws and ordinances,⁵ and specific prohibitions and grants of monopolies.⁶

Although the fourteenth amendment to the United States Constitution arose out of a war which was fought over the existence of excessive property rights in members of one race and lack of property rights in members of another, it has been only in recent years that state property laws have been held to be as much subject to the amendment as any other type of state action.⁷ Despite this development, however, the United States Supreme Court, in *Evans v. Abney*,⁸ has held the fourteenth amendment inapplicable to a state property law which provides for reverter of title to a public park dedicated with racial restrictions. Because of the inconsistency thus introduced into this area of the law, this holding warrants comment.

II. A LOOK AT THE CASE

A. *State Law and Facts Involved*

Since 1905, the Georgia Code has provided that any person may grant or devise to a municipal corporation, in fee simple or

3. Ownership has been characterized as a "bundle of sticks or rights" from which one or more "sticks or rights" may be separated. *Mitchell Aero, Inc. v. Milwaukee*, 42 Wis. 2d 656, 662, 168 N.W.2d 183 (1969). Among the rights which state law has permitted to be separated are rights to enforce agreements limiting the use of land by the remedies stated above. RESTATEMENT OF PROPERTY §§ 528, 539 (1944).

4. "The nuisance doctrine operates as a restriction upon the right of an owner of property to make such use of it as he pleases." 39 AM. JUR. *Nuisances* § 2 (1942).

5. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Welch v. Swasey*, 214 U.S. 91 (1909).

6. Complete prohibitions of some types of use have occurred from time to time. *Mugler v. Kansas*, 123 U.S. 623 (1887). Regulation of use has also occurred historically by the granting of monopolies. See *Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873).

7. The fact that a state law is a "property law," rather than a "zoning law," does not exclude it from the injunctions of the fourteenth amendment. See *Food Employees v. Logan Valley Plaza*, 391 U.S. 308 (1968); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Marsh v. Alabama*, 326 U.S. 501 (1946). Compare *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) with *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), decided under the thirteenth amendment.

8. 396 U.S. 435 (1970). This case was the second of two United States Supreme Court decisions which involved Georgia law governing dedication of parks and a tract of park land in Macon, Georgia, once owned by U.S. Senator Augustus O. Bacon. The first decision was *Evans v. Newton*, 382 U.S. 296 (1966).

in trust, lands dedicated in perpetuity as a park or for other public purpose, with limitations upon use, including those based upon race.⁹ As a complement, municipalities were empowered to accept such a gift and, by appropriate police provision, to protect those persons for whose benefit the gift was made, in their exclusive use thereof.¹⁰ Further, the Georgia law provided for reversion of the land to the grantor or devisor or his heirs when a municipal corporation, which had accepted title and possession to land under the above statute, ceased to enforce the restrictions because of the fourteenth amendment—and this despite any improvements made to the land by the municipality.¹¹

In 1911, Senator Bacon executed a will, devising certain land to named trustees for the benefit of his wife and daughters during their lives. The will further provided that upon the death of the survivor, the property, including all remainders and reversions, was to vest in the Mayor and Council of the City of Macon, Georgia, to be used and held in trust as a park for the benefit of white women and children.¹² In 1920, prior to the death of the last surviving daughter, in order to permit the city to develop the land as a recreational area during her lifetime, the trustees conveyed the property to the City of Macon in consideration of the city's agreement to pay to the daughter \$1,665 annually during her life and to expend \$650 annually to improve the property.¹³ At the same time, the city also acquired the interest of another person who resided on the land, paying in all \$46,000 for the title.¹⁴ During the 1930's, the tract was transformed into a modern recreational facility by the United States Works Project Administration upon representation of the city that the tract was a public park.¹⁵ In later years, other capital improvements were made with federal and city money. Maintenance of the park fell under the direction of the city superintendent of parks, who treated the land in question the same as other city parks, expending funds therefor out of his appropriations—funds which, at least inferentially, amounted to several

9. The Georgia Code permits restrictions whereby land use is "limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only." GA. CODE ANN. § 69.504 (1967).

10. *Id.* § 69.505.

11. See note 35 and accompanying text *infra*.

12. *Evans v. Newton*, 220 Ga. 280, ____ 138 S.E.2d 573, 574 (1964).

13. *Evans v. Abney*, 224 Ga. 826, ____ 165 S.E.2d 160, 165 (1968).

14. *Evans v. Abney*, 396 U.S. 435, 451 (1970) (dissenting opinion).

15. *Id.*

thousand dollars annually.¹⁶ The income from certain bonds and real estate, given under the Bacon will to the Board of Managers (which was established under the will) for purposes of maintaining the park,¹⁷ was used to provide for additional improvements and maintenance of the land.¹⁸

The park thus created was deemed to be "a public facility for whites only" or a "park for whites only."¹⁹ After having maintained this facility pursuant to the racial restrictions set forth in the devise for many yeys, the City of Macon took the position that it could not constitutionally manage the park on a segregated basis and opened it up for use by blacks.²⁰

In 1963, members of the Board of Managers brought a proceeding in the Superior Court for Bibb County, Georgia, to have the City of Macon replaced as trustee on the ground that it was failing to enforce provisions of the will with respect to the exclusive use of the park.²¹ The city filed an answer, asserting that it could not legally enforce racial segregation and praying that the court set forth its duties. Intervening were Negro residents of the City of Macon and a number of the Bacon heirs and trustees for the Bacon estate.²² Subsequently, the city filed an amendment alleging that it had resigned and asking for acceptance of its resignation.²³ The Bibb County Superior Court accepted the city's resignation and appointed new trustees, but did not rule on a contention made on behalf of the Bacon heirs that the title reverted to them. The Supreme Court of Georgia affirmed.²⁴ On certiorari, the United States Supreme Court reversed, requiring the Georgia courts to reconsider the acceptance of the city's resignation, since "even in private hands the park may not be operated for the public on a segregated basis."²⁵

When the record was returned to the Georgia Supreme Court, it opined that the purpose of the trust had become "impossible of accomplishment" and thus terminated. Accordingly, the trial court

16. *Id.* at 451-52.

17. *Evans v. Newton*, 220 Ga. 280, ____, 138 S.E.2d 573, 574 (1964).

18. *Evans v. Abney*, 396 U.S. 435, 451 (1970) (dissenting opinion).

19. *Id.* at 436, 449; *Evans v. Newton*, 382 U.S. 296, 301 (1965).

20. *Evans v. Abney*, 396 U.S. 435, 437 (1970).

21. *Evans v. Newton*, 220 Ga. 280, ____, 138 S.E.2d 573, 574-75 (1964).

22. *Id.* at ____, 138 S.E.2d at 575.

23. *Id.* at ____, 138 S.E.2d at 576.

24. *Id.*

25. *Evans v. Newton*, 382 U.S. 296, 302 (1966). Justice Douglas wrote the opinion for the court; Justice White concurred; and Justices Black, Harlan, and Stewart dissented.

was directed to consider the contentions of the intervening trustees of the Bacon estate to the effect that title reverted to the estate.²⁶ The Georgia court further stated that there was no trustee, inasmuch as the City of Macon had resigned "because of its inability to carry out the provisions of the trust" and could not be forced to act as trustee.²⁷ Upon remand, the Bibb County Superior Court rejected the contention of the black interveners that the *cy pres* doctrine should apply to save the park and held that the property reverted by operation of law to the Bacon heirs.²⁸ The Supreme Court of Georgia subsequently affirmed, holding that the trial court's action in declaring that the trust failed and that the property had reverted did not constitute "action by a state court enforcing racially discriminatory provisions"²⁹—as was the case in *Shelley v. Kraemer*.³⁰ It was this holding that the Supreme Court of the United States affirmed in *Evans v. Abney*.³¹

To summarize, the essential facts in the litigation are quite simple. A private party granted to a political subdivision of a state possessory rights in certain land with the understanding that the land be used as a park for whites only; the government subdivision expended public funds to improve the land, discriminated against blacks in its use, and then ceased discriminating because of the command of the equal protection clause of the fourteenth amendment, which was in effect at the time of the grant. As a result, the state courts, pursuant to state property law, ordered that the land be returned to the heirs of the grantor.

B. *Standing of the Parties*

Although the City of Macon did not contest the court proceed-

26. *Evans v. Newton*, 221 Ga. 870, 148 S.E.2d 329 (1966).

27. *Id.* at _____, 148 S.E.2d at 330. This statement of the Georgia court involves a constitutional question, the solution of which is not exclusively vested in the state courts. One of the questions necessarily posed by the litigation was whether Georgia laws and the fourteenth amendment interacted so as to make it impossible for the city to carry out the trust. Thus, the city was very much an interested party until the end of the litigation. Because of the superior court's subsequent decree that the park reverted, the question of whether the city should continue to act as trustee was never reached.

28. *Evans v. Abney*, 396 U.S. 435, 439 (1970).

29. *Evans v. Abney*, 224 Ga. 826, _____, 165 S.E.2d 160, 166 (1968).

30. 334 U.S. 1 (1948).

31. 396 U.S. 435 (1970). Justice Black wrote the opinion of the court, in which Chief Justice Burger and Justices Harlan, Stewart, and White joined; Justices Douglas and Brennan dissented; and Justice Marshall abstained.

ings,³² the Attorney General of the state³³ did oppose the reverter in the trial court.³⁴ Representatives of the black residents of the city also opposed the reverter in that court and all others. In addition to their status as members of a class claiming discrimination against it by the state action involved, the black interveners had private rights as residents and, inferentially, as taxpayers, to assert, on United States constitutional grounds, that the city could not lawfully be forced or permitted to gratuitously turn over the park to private parties.³⁵ However, the Georgia Supreme Court assumed that the intervening Negro residents had no protectable rights on the ground that they were not objects of the bounty of Senator Bacon.³⁶

C. *The Major Issue*

The question posed by the litigation may be pinpointed by examination of a different situation with respect to the law and

32. Governmental officers and bodies asserting strictly governmental rights probably cannot claim that they are deprived of equal protection of the law or denied due process of law by the government of which they are a part. *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968). However, if a city claims title to a parcel of land through mesne conveyances, the validity of one of which depends on the rights of the grantor therein to assert the equal protection clause, the city, as his successor, should be able to assert those rights in order to defend its title. In the case at hand, the city's title depends upon the constitutional rights of certain of its residents to be free of discriminatory provisions of state law. Just as the white owner could assert the rights of blacks in *Barrows v. Jackson*, 346 U.S. 249, 255-59 (1953), the city could have asserted the rights of blacks in the *Baconsfield* litigation in order to defend its title.

33. GA. CODE ANN. § 108-212 (1967) makes the attorney general a legal representative of beneficiaries of charitable trusts. Although the Georgia Supreme Court held that the will expressed "no general charitable purpose," *Evans v. Abney*, 224 Ga. 826, _____, 165 S.E.2d 160, 163 (1968), it did treat the transaction as one establishing a charitable trust. *Evans v. Newton*, 220 Ga. 280, _____, 138 S.E.2d 573, 576-77 (1964).

34. *Evans v. Abney*, 396 U.S. 435, 439 (1970).

35. In the case at hand, a very substantial amount of public funds were invested in improvements in the park; and, if reverter to strictly a private use is caused by virtue of state law which exceeds limitations of power imposed by the United States Constitution, taxpayers in the city would have a legal standing in court to object to any acquiescence by the city in the attempted reverter and to object to the action requested of the courts. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Loan Assoc. v. Topeka*, 87 U.S. (20 Wall.) 665 (1874); *Fuller v. Volk*, 351 F.2d 323, 327 (3d Cir. 1965); *Reynolds v. Wade*, 249 F.2d 73, 76-77 (9th Cir. 1957). See also *Flast v. Cohen*, 392 U.S. 83, 98-102 (1968). The record does not show that the black interveners were taxpayers. However, it does show that they were residents of Macon. Since virtually all residents share the burden of property taxes through their rents and prices of goods and services charged by property owners, they have the interest of taxpayers in protecting the funds and property of the city. See *Phoenix v. Kolodziejski*, 399 U.S. 204, 210-11 (1970).

36. *Evans v. Abney*, 224 Ga. 826, _____, 165 S.E.2d 160, 166 (1968).

facts. Assume that there were no stipulation in the Bacon will that the land be used for whites only, but that the law of Georgia, either statutory or common law, provided that *in every case* where land is dedicated to a city or other governmental subdivision for purposes of creating a park, the city would be required to restrict the use of the land to one race only, and that upon its failure to do so, for whatever reason, the land would revert, on demand, to the grantor or his heirs. There should be no doubt that such a law would contravene the fourteenth amendment.³⁷ In both the actual and assumed situations, the city, when it accepts the dedication and makes improvements, knows that to keep possession of the land under state law, it must limit the use to one race only. In both situations, the state law provides that if the city were to fail in so restricting usage, the grantor or his heirs could obtain a court order requiring that possession of the land be given back. In both situations, if neither the grantor nor his heirs asked for court relief because of the city's failure to discriminate, the city could remain in possession, furnishing park services thereon to all members of the public. The only difference between the assumed situation and the actual situation is that in the actual situation, Georgia law, rather than requiring restricted use in all cases, delegated to the grantor the option³⁸ of determining whether the law providing for restricted use of the land should be invoked.³⁹ *Quaere*: Should this distinction save the state law?

D. *The Rule and the Sanction*

The majority opinion in *Evans v. Abney* did not consider the above-mentioned distinction. Rather, it held that the fourteenth amendment was not violated because the Georgia court's act in eliminating the park had the effect of eliminating all discrimination.⁴⁰ According to the Court, "the operation of neutral and non-discriminatory state trust laws, effectively denies everyone, whites

37. See *Adickes v. Kress & Co.*, 398 U.S. 144 (1970); *Buchanan v. Warley*, 245 U.S. 60 (1917). See also *New Orleans City Park Improvement Ass'n v. Detiege*, 242 F.2d 122 (5th Cir.), *aff'd*, 358 U.S. 54 (1958). Common law rules are as much subject to the fourteenth amendment as are statutory rules. See *Cantwell v. Connecticut*, 310 U.S. 296, 308-11 (1940). See also *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

38. It is only because of the delegated option that the discrimination could be referred to as a "private discrimination"—in the words of Justice Harlan. *Evans v. Newton*, 382 U.S. 296, 316 (1965) (dissenting opinion).

39. See note 9 *supra*.

40. 396 U.S. at 445.

as well as Negroes, the benefits of the trust"⁴¹

By reasoning in this fashion, the Court looked to the sanction and ignored the rule which is supported by the sanction. Identical statements could be made if a state statute provided that a city must discriminate in the use of its parks and that, where it did not so discriminate, the title to the park would revert to the last private owner or his heirs. The question must be whether the *rule* is unconstitutional. If it is, the sanction must be so also,⁴² regardless of whether the sanction is invoked by a private party, as in *Shelley v. Kraemer*,⁴³ or by a state official.

The reasoning of *Evans v. Abney* stems in part from *Shelley's* discussion of the question of whether a court decision constitutes state action. Undoubtedly, court action is state action and is governed by the fourteenth amendment,⁴⁴ but wherever a court decision is based on state law, there is another type of state action—namely, the creation and enforcement of the law.⁴⁵ In *Shelley*, the law under attack authorized property owners to make legally enforceable agreements restricting the use of lands on the ground of race.⁴⁶ *Shelley* necessarily held invalid that part of the state law which provided for discriminatory rules with respect to the use of lands when those rules were invoked by private parties. As the Court recognized:

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions.⁴⁷

Similarly, in *Evans v. Abney*, there was involved a state law which provided for discriminatory rules in the use of public park land when those rules were invoked by private parties.

41. *Id.* at 446.

42. The rule and the sanction are symbiotic. See Lathrop, *The Racial Covenant Cases*, 1948 WIS. L. REV. 508, 513-14. See also note 53 *infra*.

43. 334 U.S. 1 (1948). In *Shelley*, the U.S. Supreme Court overturned state court injunctions enforcing racial restrictive covenants.

44. *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680-82 (1930).

45. *Id.* The action of a state court may be nothing more than an enforcement of action taken by the state through the legislature or through the development of common law rules. On the other hand, as in the *Brinkerhoff* case, the action of the state court may find no basis in any prior law-making process.

46. See *Doherty v. Rice*, 240 Wis. 389, 3 N.W.2d 734 (1942).

47. *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (emphasis added).

III. PROBLEMS WITH THE DECISION

A. *An Inconsistency*

At least five significant state actions were involved in *Evans v. Abney*:⁴⁸ (1) the state statute which provided that a city could discriminate in the use of a park conveyed to it with statutorily sanctioned racial restrictions; (2) the state law which provided for reverter of possession and title to the grantor or his heirs should the city fail to discriminate in the use of the land; (3) the action of the city in accepting and improving the land; (4) the action of the city in excluding blacks from the land for so many years; and (5) the action of the state courts in enforcing the state law.

Holding, in *Evans v. Newton*, that "the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment,"⁴⁹ the Court ruled invalid the city's action in excluding blacks from the land. This holding was not overruled in *Evans v. Abney*, but served as a foundation for the state court's holding that the park reverted to the Bacon heirs because the testator's intent could not be carried out as a result of the fourteenth amendment. In holding the city's action invalid, however, the Court overlooked the effect on the underlying state laws. If the city could not discriminate in the use of the land, the state laws which authorized and enforce discrimination by the city must also be unconstitutional.⁵⁰

Since the unconstitutional provisions may be ignored,⁵¹ the

48. Justice Brennan recognized the following three types of state actions to be involved: (1) the action of the state, whereby it entered into an arrangement creating a private right to compel or enforce the reversion of a public facility; (2) where the city was willing to deal with both races, the action of the court in preventing it from doing so; and (3) the particular encouragement by the state of racial discrimination. 396 U.S. at 455-57 (dissenting opinion).

49. 382 U.S. at 302; *accord*, *Pennsylvania v. Board of Trustees*, 353 U.S. 230 (1957), wherein the court held that a city of Philadelphia board, acting as trustee under a will creating a "college," could not comply with the discriminatory provisions of the will.

50. See note 42 *supra*. The fact that the city was forced to cease discriminating by virtue of the operation of federal law (the fourteenth amendment) should not validate a sanction imposed by state law which would, in the absence of federal law, effectively require discrimination.

51. See *Norton v. Shelby County*, 118 U.S. 425, 442 (1886); *Marbury v. Madison*, 5 U.S. (1 Cranch) 368, 389 (1803). See also *Grayson Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 75 S.E.2d 161, *cert. denied*, 346 U.S. 823 (1953). If that portion of the Georgia law which provides for racially discriminatory provisions in conveyances of park lands is invalid, it could be argued that the entire body of law, both statutory and common law, which provides for dedication of park lands to a city is invalid on the ground that the invalid part is not severable from the balance. In the *Shelley v. Kraemer* context, this would be

Georgia law provided, at all times relevant, for dedication of parks to municipal corporations, but nothing more. It follows that the action of the city in accepting the dedication was, thus, valid.⁵² On the other hand, the action of the state courts in enforcing the state law necessarily attributed life to the rule of state law authorizing discrimination in a park dedicated with a discriminatory limitation through enforcement of rules requiring return of the park upon noncompliance with the discriminatory rule. Thus, in affirming the state court judgment, the United States Supreme Court gave effect to a rule of state law which it simultaneously held to be invalid.⁵³

B. Comparison with an Earlier Case

The holding of *Evans v. Abney* suffers most when it is com-

akin to saying that the invalid part of the common or statutory law which provides for enforceable discriminatory use restrictions is not severable from the balance of the law of conveyancing and that all law authorizing conveyances is invalid. Of course, the likelihood of any court's reaching such a conclusion is extremely remote. It is sufficient to say that neither the U.S. Supreme Court nor the Georgia court reached such a conclusion.

52. It might be argued that the law of Georgia provides that, if a dedication of park land has a stipulation which is held to be of no effect because of the operation of the U.S. Constitution, the ineffective part is not severable from the balance of the instrument, and the whole conveyance is ineffective. This, of course, was not the holding of the Georgia court or the U.S. Supreme Court. The argument would raise numerous questions relating to adverse possession, estoppel, *pari delicto*, and the like and, in any event, a question of whether a rule of state law, intended on its face to defeat the operation of a provision of the U.S. Constitution is valid. See *Palmer v. Thompson*, 91 S.Ct. 1940 (1971); *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218 (1964).

53. While impossibility of performance of a restraint may result in a reverter, this is not true when the restraint contravenes public policy.

When the goal sought to be achieved by a restraint contravenes public policy, thereby invalidating the restraint, *an excision of the restraint without affecting the gift and without regard to intent is necessary in order to accomplish the protection of society which the rule of invalidity is designed to afford.*

RESTATEMENT OF PROPERTY § 438, comment *a* at 2549 (1944) (emphasis added). Thus, with respect to the rule against restraints on marriage contained in a gift of land:

The stated rule invalidates such attempt as an antisocial restraint upon marriage. If the law were then to take away the same economic benefit on the ground that the restraint, although invalid, was, nevertheless, a stated condition to the enjoyment of such benefit, *the entire effect of the rule stated in this Section would be vitiated, and the conveyer would merely accomplish his purpose by another method.* The restraint alone is therefore stricken from the limitation and the gift declared absolute.

Id. § 424, comment *d* at 2478-79 (emphasis added). Similarly, when a dedication is made to the public (as in the case of a highway conveyance) with an illegal condition, the dedication is deemed valid and the condition is deemed inoperative. *Village of Grosse Pointe Shores v. Ayres*, 254 Mich. 58, —, 235 N.W. 829, 832 (1931); *Kuehn v. Village of Mahtomedi*, 207 Minn. 518, 292 N.W. 187 (1940); *City of Camden v. Sho-Me Power Corp.*, 361 Mo. 790, 237 S.W.2d 94 (1951); *Richards v. Cincinnati*, 31 Ohio St. 506, 513 (1877); *City of Fort Worth v. Ryan Properties*, 284 S.W.2d 211, 214 (Tex. Civ. App. 1955).

pared with *Barrows v. Jackson*,⁵⁴ wherein the Supreme Court held that a state court judgment awarding a recovery of damages from a white person for violation of a covenant against the use of lands by non-whites would deny equal protection of the laws.⁵⁵ In *Barrows*, as in *Evans*, if it were not for the intervention of the fourteenth amendment, possessory rights would have been lost because of state recognition of racial restrictions, although in *Barrows* the loss might have been of property other than the land restricted.

Frequently, agreements restricting the use of residential lands call for enforcement by reverter rather than by injunction or the recovery of damages.⁵⁶ If the reverter sanction were invoked as to a lot in a residential plat because *A*, the owner of possessory rights, leased them to *B*, a black, for his own use, the termination of *A*'s rights (and thereby *B*'s rights) would eliminate all possible future discrimination by *A*. To say, however, as *Evans* seems to say, that the severe sanction of termination *does not* contravene the fourteenth amendment, whereas the recovery of money or other property as damages for violation of racial restrictions *does* do so, is like saying that the hanging of an official because he fails to suppress criticism of the government would not violate the first and fourteenth amendments, whereas the recovery of fines from him would, because the hanging would eliminate all future possible suppression of criticism by the official!⁵⁷

It should never be forgotten that every sanction requires a course of conduct. The course required is a rule. To determine whether the fourteenth amendment has been violated, one must look to the rule as well as to the sanction. *Barrows* looked to the rule and stated:

54. 346 U.S. 249 (1953).

55. *Barrows* followed *Shelley v. Kraemer*. *Evans* did not discuss *Barrows* and dismissed *Shelley* on the ground that while *Shelley* involved a private scheme of discrimination against Negroes, the Georgia decision eliminated all discrimination by eliminating the park. 396 U.S. at 446.

56. See, e.g., Dane County, Wis., Nakoma Homes Agreement, Dec. 18, 1920, 48 Misc. 339.

57. See *Oyama v. California*, 332 U.S. 633 (1948), wherein the sanction consisted of a forfeiture of the land to the state. See also *Doherty v. Rice*, 240 Wis. 389, 3 N.W.2d 734 (1942). The nature of the use also does not afford a distinction. In *Evans*, at the time of litigation, the land was being used for a park. In *Shelley* and *Barrows*, the land apparently was being used for residence purposes. However, one of the two restriction agreements involved in *Shelley* and the agreement involved in *Barrows* prohibited use of the land by non-Caucasians for any purpose, residential, commercial, or recreational, regardless of whether the title was held privately or publicly.

To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. 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. If the State may thus punish respondent for her failure to carry out her covenant, *she is coerced to continue to use her property in a discriminatory manner*, which in essence is the purpose of the covenant.⁵⁸

Evans, on the other hand, failed to look to the rule—the rule set forth in the language of the instrument, expressly authorized by state law, and given force by a sanction also authorized by state law.

IV. CONCLUSION

The question of whether state action is discriminatory as to a certain race or whether it involves a denial of freedom of speech and press, through the use of property law,⁵⁹ cannot be solved by a single pronouncement affecting all possible fact situations. Many situations involve no problem. A man who, for the most arbitrary reason, excludes another from his own home is necessarily exercising a right vested in or delegated to him by state law. However, the concept, enshrined in the fourth amendment, that a man's home is his castle, precludes any holding that such law involves a denial of equal protection of the laws. Similarly, as pointed out by the majority opinion in *Evans v. Newton*, the concept of freedom of association, embodied in the first amendment and in the guaranty of liberty in the fourteenth amendment, requires that private, wholly unsubsidized schools, clubs, churches, and the like, be able to arbitrarily determine who shall be admitted.⁶⁰ On the other hand, when the law says that a governmental subdivision may discriminate in the use of its land, or when the law says that a private home owner *shall* discriminate with respect to his guests on the ground of race or religion or political party, the private property owner has been denied basic liberties, and others have been

58. 346 U.S. at 254 (emphasis added).

59. See, e.g., *Marsh v. Alabama*, 326 U.S. 501 (1946).

60. 382 U.S. at 298-99. However, as the Court pointed out in *Marsh v. Alabama*, "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." 326 U.S. at 506.

denied equal protection of the laws.

The nature of the sanction imposed by the law, whether fine, imprisonment, civil damages, injunction, or forfeiture of the land involved to the state or to a prior owner, is of no consequence. The fact that the law goes into effect only when it is called for by a transaction or an agreement between the possessor or owner of the land to his predecessor and another does not afford a distinction which would save it. The terms of the Bacon will, which attempted to invoke unconstitutional provisions of state law, were necessarily without constitutional effect; the Georgia decision should have been reversed.⁶¹

61. *Quaere*: Could the thirteenth amendment have been effectively invoked in *Evans v. Abney*? If the thirteenth amendment promises freedom to "go and come at pleasure," it would seem to be violated whenever a state or subdivision thereof, pursuant to state law, agrees to permit a highway or park to be used to the exclusion of one race. See *Sullivan v. Little Hunting Park*, 396 U.S. 229, 235 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968). If the thirteenth amendment, and 42 U.S.C. § 1982 (1970) enacted thereunder, prohibits a property owner from discriminating in the sale of his property, as held in *Jones* and *Sullivan*, then an owner cannot, by contract or stipulation, insist that the next owner discriminate. Once a man holds his property for sale, he cannot, under the thirteenth amendment, refuse to sell because of the race of a prospective buyer or because of a refusal on the part of a prospective buyer to discriminate. If an owner makes a public offer to sell a parcel for a certain sum of money to whoever first accepts the offer, with the stipulation that no sale will be made to a black man, the stipulation should be treated, under *Jones* and *Sullivan*, as inoperative, but the offer would be good. When Bacon, by his will, made an offer to dedicate, the stipulation with respect to race was void as contrary to the thirteenth amendment, but the offer was good. The right to acquire and hold property, as guaranteed by 42 U.S.C. § 1982, includes rights to use chattels and land with others, as held in *Sullivan*. Members of the public may, as such, have property rights. See note 35 *supra*.

