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Notes

NOTES

The Renovation of Church and Spiegel

This paper is intended to present a brief review of the checkered career of Section 811(c)(1)(C) of the Internal Revenue Code which provides for the inclusion in the gross estate of the decedent any transfer made during his lifetime, "intended to take effect in possession or enjoyment at or after his death". At first glance the statute seems simple enough. A common sense interpretation of it would be that where it is necessary that the beneficiary survive the settlor to obtain possession or enjoyment then the transfer should be included in the gross estate for tax purposes. However, tax lawyers in zealously seeking "outs" and the Government with equal zeal in seeking to include transfers which Congress never intended to include presented many problems to the Courts for solutions. These solutions were not always meritorious, and twice within the relatively short period of nineteen years Congress has found it necessary to adopt resolutions correcting the Supreme Court's interpretation of this section. It is hoped that these observations will help clear up some of the obscurities of the past.

Shukert v. Allen[1], which was decided in 1927, is deemed to be a proper starting point for this article. In that case the decedent had transferred certain notes and bonds in trust with directions to the trustee that he accumulate the income and pay over to his (the settlor's) wife and children the accumulated income and principal some thirty years later. The Supreme Court of the United States, in holding that the transfer was not one intended to take effect in possession or enjoyment after the settlor's death, said that the transfer was immediate and out and out and left no interest in the decedent and the trust was the same whether he lived or died and that the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested by the failure of one to live until termination of the trust.

In 1929 when *Reinecke v. Northern Trust Company*[2] was decided, the Supreme Court held that the fact that the corpus would have been distributed at a stipulated period after the settlor's death if he

1. 273 U. S. 545 (1927).

2. 278 U. S. 339 (1929). In a series of trusts the settlor created a life interest in a designated beneficiary and directed that the corpus be distributed either at the death of the life tenant or five years after the death of the settlor, whichever occurred sooner.

predeceased the life tenant was not a sufficient basis for the application of section 811(c).

May v. Heiner[3], a 1930 case, held that a transfer in trust under which the income was payable to the transferor's husband for his life and, after his death, to the transferor during her life, with remainder to her children, was not subject to tax as a transfer intended to take effect in possession or enjoyment at or after death. In reaching this result, the Court was deciding *contra* to the holdings of many of the State Courts in their interpretations of like statutes, and consequently the decision was objected to in many quarters as erroneous.

In *McCormick v. Burnet*[4], *Morsman v. Commissioner*[5], and *Burnet v. Northern Trust Company*[6], the Supreme Court affirmed the result of *May v. Heiner,* thereby shocking Congress into speedy action, and on March 3, 1931, a Joint Resolution was adopted amending the section to tax expressly a transfer with reservation of a life estate to the grantor. *Hassett v. Welch*[7] held that the Joint Resolution was not retroactive and did not apply to trusts created before March 3, 1931.

Klein v. United States[8], decided in 1931, held that where the grantor conveyed to his wife by deed a life estate in certain lands, but in the event that she survived the grantor and in that case only she was to take the lands in fee simple, the corpus was to be included in the gross estate because the effect of the deed was that only a life estate was vested, the remainder being retained by the grantor; and whether that should ever become vested in the grantee depended upon the condition precedent that the grantor die during the life of the grantee. The grantor having died first, his death clearly effected a transmission of the larger estate to the grantee.

In 1935 the *St. Louis Union Trust Company*[9] cases held that if

3. 281 U. S. 238 (1930). The Court said, "At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event".
4. 283 U. S. 783 (1931).
5. 283 U. S. 783 (1931).
6. 283 U. S. 782 (1931).
7. 303 U. S. 303 (1938).
8. 283 U. S. 231 (1931).
9. Helvering v. St. Louis Union Trust Co., 296 U. S. 39 (1935), and Becker v. St. Louis Union Trust Co., 296 U. S. 48 (1935). In the former the decedent transferred securities to a trustee who was to pay the income to the decedent's daughter during her life, with remainder over to others; and if the daughter predeceased the grantor, the trust was to terminate. In the latter decedent provided that if the beneficiary should die before him, then the trust estate was to revert to him. The trust corpus was not included in the estate of the decedent in either of the cases.

the remainder interests are vested at the time of the creation of the trust, subject to divestment in the event the donee predeceases the donor, the gift is vested and not contingent on the donee's survivorship, and the trust corpus is not to be included in the decedent's estate. Therefore the technical language of the trust instrument controlled the imposition of the estate tax until the *St. Louis Trust Company* cases were repudiated by *Helvering v. Hallock*[10] in 1940, when the Court refused to recognize a distinction between transfers with a condition precedent and those with a condition subsequent. The Court held that if the remainderman had to survive the donor in order to enjoy his gift, the gift was contingent on the donor's death and should be included in the decedent's estate. Mr. Justice Frankfurter, writing for the majority, said that the "unwitty diversities of the law of property" had no place in a fair and workable tax system.

The Supreme Court of the United States decided the companion cases of *Commissioner v. Field*[11] and *Fidelity-Philadelphia Trust Co. v. Rothensies*[12] in 1945. In the first of these cases the settlor had an express reversionary interest in the event all the beneficiaries predeceased him, and he also had the right to reduce amounts by will; it was held that the corpus was includable because it was undetermined until decedent's death whether any of the corpus would pass to the beneficiaries. In the latter case the settlor reserved the right to appoint by will who would take in the event that the named beneficiaries died without descendants; it was held that the entire corpus of the trust was to be included because until the settlor's death it was uncertain whether the property would ultimately pass by power of appointment or by the trust instrument.

The contingent rights of the settlor were expressly stated in the *Hallock, Field,* and *Fidelity-Philadelphia* cases; however the Treasury thereafter sought to extend the rulings of these cases to trusts where the reverters arose by operation of law. It was ruled, by regulation[13] promulgated on May 1, 1946, that a trust is taxable as one intended to take effect in possession or enjoyment at death if:

> (1) Possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and
>
> (2) The decedent or his estate possesses a right or interest

10. 309 U. S. 106 (1940).
11. 324 U. S. 113 (1945).
12. 324 U. S. 108 (1945).
13. U. S. TREAS. REGS. 105, § 81.17.

in the property (whether arising by the express terms of the instrument or transfer or otherwise).

The regulation specifically provided that the reservation of a life estate in a pre-1931 trust does not constitute a right or interest in the property under subdivision (2), but the reserved life estate does serve to make subdivision (1) applicable. Therefore, if subdivision (2) is satisfied by the settlor's reservation of any other interest, express or implied, the trust is taxable. Of course, in a trust made after 1931 the mere reservation of a life estate makes the trust taxable. This regulation also provided relief for those trusts set up in reliance on the *St. Louis Trust Company* cases, but it made the Commissioner's determination as to whether the trust fitted in under the *Klein* case or the *St. Louis Trust Company* cases conclusive.

The courts split on the question of whether *Hallock, Field,* and *Fidelity-Philadelphia* were to be extended to reverters implied in law. It was this diversity of decisions that led to the granting of certiorari in the *Church*[14] and *Spiegel*[15] cases.

In the *Church* case the decedent had established a trust in 1924 reserving the income for life and, on his death, the principal was to be distributed to his descendants then surviving or in default thereof to his then living brothers and sisters. At the time of his death the decedent had five brothers and one sister living and many nephews and nieces. The Tax Court and the Court of Appeals for the Third Circuit held that the trust was not subject to estate tax because the reservation of a life estate in a pre-1931 trust was not sufficient to make the corpus taxable under *May v. Heiner,* and the possibility of a resulting trust under New York law, in the event the settlor survived all the remaindermen, arose only by implication of law and did not bring the case within the *Hallock* rule. The Supreme Court, of its own motion, ordered reargument of this case and the companion *Spiegel* case and directed that counsel consider whether the rule of *May v. Heiner* should be overruled. When the case came up again the Court overruled the *May* case saying: "Since we adhere to *Hallock,* the *May v. Heiner* interpretation of the possession or enjoyment provisions of section 811(c) can no longer be accepted as correct". Therefore the reason for overruling *May v. Heiner* was said to be the decision in the *Hallock* case.

In the *Spiegel* case, Mr. Spiegel, a resident of Illinois, created a trust with himself and another as trustees to pay the income to his children or grandchildren so long as Mr. Spiegel lived, and upon

14. 69 Sup. Ct. 322 (1949).
15. 69 Sup. Ct. 301 (1949).

his death the principal was to be distributed absolutely to his then living children, the then living descendants of any deceased child to take the parent's share. At the time of the creation of the trust, the settlor had three children. At the time of the settlor's death in 1940, the three children were still living and there were three grandchildren. No provision was made for the distribution of the corpus and its accumulated income in the event Mr. Spiegel survived all of his children and grandchildren. The Court of Appeals for the Seventh Circuit found that under Illinois law if all the children and grandchildren had pre-deceased the settlor there would have been a reverter to the settlor by operation of law, and, therefore, the entire value of the corpus was to be included. The Supreme Court ordered reargument of this case and posed several questions to be considered, among which were the following: (1) Whether the fact that the settlor was the measuring life of the trust was sufficient to include the corpus in the estate?[16] (2) Whether the principles of the *Clifford* case[17] were applicable to this case? (3) Whether retention of a mere possibility of reverter, no matter how remote, is sufficient to bring the trust into the estate? When the case came up again the majority answered the last question in the affirmative thereby making it necessary for federal courts to examine property laws of the States in order to determine whether or not there is the remotest possibility of reverter. Consequently the "unwitty diversities of property law", which had been cast aside in the *Hallock* case, were picked to play the leading role in determining whether the estate tax should be imposed or not.

Mr. Justice Burton vigorously dissented on the grounds that the majority had neither overruled *Reinecke v. Northern Trust Co.* nor held *Clifford* to be applicable and that the taxability of reverters should depend on the settlor's intent. He pointed out that the settlor's chance of outliving his children and grandchildren was extremely small, and that the value of the reversionary interest was $4,000 and because of this small $4,000 string the entire corpus worth $1,140,000 was hauled back into the estate and taxed to the tune of $450,000. Mr. Justice Burton felt that such a remote interest was very strong indication that there was no intent to reserve an interest.

16. Reinecke v. Northern Trust Co., 278 U. S. 339 (1949), *contra.*

17. Helvering v. Clifford, 309 U. S. 331 (1940). The settlor had set up a trust with himself as trustee to have control over how much of the income was to be paid to his wife and also other full powers, such as voting the stock, selling, etc. The trust was for a term of five years. The Court held that the income was to be taxed as the settlor's because of the short duration and the control left in the settlor.

The *Church* and *Spiegel* decisions caused no little concern among the tax bar and to say that Congress was as much shocked by the overruling of *May v. Heiner* as it was by the decision in the *May* case would be an understatement. Lawyers, clients, trustees, banks, trust companies were deeply alarmed as to whether any trust would be free from attack and legislative relief was sought. It was not long in coming.

On October 25, 1949, Congress passed an Act[18], amending the Internal Revenue Code, which made some salient changes in 811(c) and the effect of the *Church* and *Spiegel* cases. The Act provides that if a life interest is retained in a pre-March 3, 1931 trust, the trust is not subject to tax if the person dies before January 1, 1950, and it permits the settlor to release or assign the retained life estate prior to January 1, 1951, free of gift or estate tax. No provision is made to take care of those who rely on the period of grace (the year 1950) and die during that time, and consequently prompt action in the release or assignment of the life estate is essential. It goes without saying that there will be hardship cases where the life income is all that the settlor has to support himself.

In granting relief from *Spiegel,* the Act provides that transfers made prior to October 8, 1949, will be subjected to estate tax as an interest intended to take effect in possession or enjoyment at or after the settlor's death *only* if the settlor *expressly* retained a reversionary interest having a value immediately before his death in excess of five per cent of the value of the transferred property. The term "reversionary interest" includes the possibility that the property transferred may return to the settlor, or may be subject to a power of disposition by him, but it does include the possibility that the income alone may return to him or become subject to a power of disposition by him. Inasmuch as the value of the reversionary interest is to be determined immediately before the death of the decedent a watchful eye should be kept on an expressly retained interest, which was insignificant when the trust was created, to make certain that it does not increase, by reason of beneficiaries dying in the lifetime of the settlor, to more than five per cent of the trust corpus.

The Act has a retroactive provision permitting claims for refund[19] to be filed before October 25, 1950, for estates of decedents dying after February 10, 1939, where the tax was levied because of a reverter which arose by operation of law or one expressly retained of small value. Therefore the statute of limitations or prior court de-

18. PUB. L. No. 378, 81ST CONG., 1ST SESS. (October 25, 1949).
19. *Ibid.*, § 7(c).

cisions will not constitute a bar to the filing of claims for refund in cases where the Act is applicable. Much litigation is to be expected in respect to claims for refund in the cases where the Commissioner contended that the tax should be assessed under 811(c) on two or more grounds, one of which is now excluded, and where a compromise was reached. No decision is considered as having been rendered on just what ground the tax was assessed[20], thus opening these cases to further controversy.

There is no provision for the tax free release of expressly retained reverters of more than five per cent of the value of the corpus, and, evidently, the only method of disposing of it free of the gift tax is to give it to a charity, and even then it may be subject to attack as being in contemplation of death; however *Allen v. Trust Company of Georgia*[21] could be used to rebut that contention.

As to transfers made after October 7, 1949, taxability is based on the survivorship theory. An interest in the property transferred shall be includible in the gross estate (whether or not there is a retained interest) if possession or enjoyment of the interest can be obtained by a beneficiary only if he survives the settlor. Therefore where the settlor is the measuring life of the trust, the trust will be included in the gross estate. It is doubtful that a transfer in trust to be paid to a named beneficiary, his heirs and assigns, upon the settlor's death would escape taxation, although the beneficiary could assign the interest for value and the assignee would take the property on the settlor's death whether or not the named beneficiary survived the settlor. The Commissioner's argument in such a case would probably be that since the named beneficiary cannot personally enjoy the property unless he survives the settlor, those standing in his shoes would not be able to enjoy the property until the settlor's death, and consequently there is a condition of survivorship.

The new law also provides for the inclusion of the transfer in the decedent's gross estate if by the express terms of the instrument of transfer, possession or enjoyment of the property can be obtained only at the occurrence of (1) the settlor's death, or (2) some other

20. For a complete coverage of the refund provision see Mr. Edmund W. Pavenstedt's article, CONGRESS DEACTIVATES ANOTHER BOMBSHELL: THE MITIGATION OF CHURCH AND SPIEGEL, Vol. 5 No. 3 N. Y. U. Tax Law Rev. 309.

21. 326 U. S. 630 (1946). The decedent had established trusts in 1925 for his daughter and son and had retained a power to amend with the consent of the beneficiary. In 1937, after it was decided that reservation of such a power brought the corpus into the gross estate, the settlor executed an instrument renouncing the power to amend the trust. The Court held that the dominant motive was to rectify what the decedent thought was a completed gift in the first place and therefore was not in contemplation of death.

event, which other event did not in fact occur during the settlor's life. Thus a trust with the income to be accumulated and the principal and accumulated income be distributed to the beneficiaries at the end of thirty years or upon the settlor's death, whichever occurred earlier, would be includible in the decedent's gross estate if the decedent died before the end of the thirty years; however, a trust with the income to be accumulated and the principal and accumulated income to be distributed at the end of thirty years would not be included in the gross estate under *Shukert v. Allen,* which, apparently, is still good law with respect to the particular kind of trust involved.[22]

It remains to be seen whether or not the Government will seek to extend the Clifford principle[23] so as to include in the gross estate those trusts over which the settlor retained management and administrative powers as trustee. Such a course was suggested by the Supreme Court when it ordered reargument of the *Church* and *Spiegel,* but the general consensus seems to be that such an interest would not be sufficient to include the trust under 811(c), although by torturing the imagination it may be possible to fit it in under the broad general principles of 811(a).

A fitting conclusion to this article is that used by Mr. Edmund W. Pavenstedt[24] in his extensive and learned article on this subject:

> "The story of transfers intended to take effect in possession or enjoyment at or after death is a checkered one. Both extremes — the unrealistic interpretation concerning reserved life estates and that relating to an unintentionally 'retained' possibility of reverter by operation of law — resulted from Supreme Court decisions which were subject to immediate adverse criticism. It is, indeed, one of our great blessings that our system of government in such cases has provided for another arm, Congress, which can promptly correct doctrinaire interpretations of a statute — whether the doctrine has its roots in Tory or Liberal soil — which go far beyond a common sense understanding of its language. In short, both in 1931 and in 1949, Congress served as an invaluable brake on the Court."

JOHN J. IRWIN, JR.

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22. It may be that the Government will contend that where the trust is for a term of years far beyond the settlor's life expectancy, an implied condition of survivorship arises, but it is doubtful that such a contention would be upheld.

23. Taxing to the settlor the income from trusts over which he has retained extensive powers of control as trustee.

24. *Supra* footnote 20, p. 360.

DAMAGES FOR BREACH OF RESTRICTIVE RACIAL COVENANTS

The Supreme Court of Missouri recently allowed a recovery of damages for breach of a restrictive racial covenant.[1] The Missouri Court was careful to point out that the United States Supreme Court had not expressly ruled on this question in the precedent-shattering case of *Shelley v. Kraemer*[2], but whether or not the holding of the Missouri Court is in accord with the spirit of the decision of *Shelley v. Kraemer* is not free from doubt, and it is the purpose of this note to show why.

As a background to the *Shelley* case it is suggested that the reader see *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional,*[3] by D. O. McGovney. The practice prior to the *Shelley* case may be summarized by quoting from *American Jurisprudence:*

> "The ordinary remedy that is invoked in actions concerning restrictive covenants is the equitable remedy of injunction. An action at law for damages for a breach lies in favor of the covenantee and, according to some authorities, in favor of a subsequent holder of the property entitled to enforce the agreement."[4]

The Missouri Court appears to be the only court to have had the question before it since the *Shelley* case and various law reviews have disposed of the question in one of two ways, i. e., either by saying that the Supreme Court did not pass on the matter in the *Shelley* case or that it would be inconsistent to allow damages in view of the prohibition of state action as the term is used in the *Shelley* case. The Supreme Court stated through Chief Justice Vinson:

> "Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment,[5] refers to exertions of the state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.[6] * * * *

1. Weiss v. Leaon, 225 S. W. 2d 127 (Mo. 1949).
2. 334 U. S. 1 (1948), 3 A. L. R. 2d 441.
3. 33 CAL. L. REV. 5 (1945).
4. 14 AM. JUR. 663; also see 3 A. L. R. 2d 474.
5. AMEND. XIV, S 1, U. S. CONST.: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States".
6. See note 2, *supra*, p. 20.

> And it would appear beyond question that the power of the state to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.[7] * * * * It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint."[8]

The *Arkansas Law Review* reacted to the language of the Supreme Court by saying:

> "The concept of state action as now extended means that every private contract partakes of 'state action' the moment judicial aid is invoked to enforce it."[9]

The writer for the *George Washington Law Review* was obviously conscious of the weight of Chief Justice Vinson's word when he posed his, as yet unanswered, query:

> "If all state court judgments are 'state action' within the meaning of the Fourteenth Amendment, it may be wondered whether a union shop agreement is enforceable lest it discriminate against non-union labor as a class, or whether any contract of hire is enforceable, lest it discriminate against those who were not hired. Similarly, one may wonder whether a dealer-producer marketing agreement, the lease of an apartment, or any executory contract, could be enforced without an examination by the Court, to determine whether the parties had treated all outside persons with that scrupulous regard for fairness and equality which the Fifth and Fourteenth Amendments demand of those who enjoy the public trust as state and federal officials."[10]

One writer, among others,[11] thinks invocation of any court action based on a restrictive covenant would be unsuccessful and also states:

> "The decisions of the Supreme Court of the United States in the racial restrictive covenant cases may be subjected to varying interpretations but they are landmarks, admittedly, in legal and constitutional thinking. It is necessary to reconsider and revalue all the comments of judges and legal writers bearing a date prior to May 3, 1948."[12]

7. *Id.*, p. 22.
8. *Id.*, p. 19.
9. 3 ARK. L. REV. 96 (1948).
10. 17 GEO. WASH. L. REV. 398 (1949).
11. See 48 COL. L. REV. 1241 (1948) and 21 So. CAL. L. REV. 358 (1948).
12. 1 ALA. L. REV. 15 (1948)

Another writer asserts:

> "The Supreme Court will be reluctant to sanction the giving of legal effect to any discriminatory agreement, the enforcement of which would intensify the pressing social problem [of discrimination]."[13]

A well reasoned statement is made in the *University of Cincinnati Law Review* as follows:

> "These cases [*Shelley v. Kraemer, McGhee v. Sipes*[14]] failed to provide a specific answer to the question of whether a state court can enforce a provision incorporated in many racial covenants providing for liquidated damages for breach of the covenant. It is suggested that such a provision will be held unenforceable insofar as state court enforcement of a liquidated damage provision would be state action, and just as the covenant itself is unenforceable so surely would be one of its clauses specifying an alternative remedy. The damage provision is only an alternative method of attempting to effectuate the discrimination and has the same fatal defect of the covenant, that is, it has as its purpose the accomplishment of racial discrimination. For a state court to enforce it is for the state court to lend its aid and authority to consummate an otherwise incomplete individual act of discrimination,"[15]

The *Wisconsin Law Review* says:

> "It cannot be that Chief Justice Vinson was distinguishing between the different methods by which the covenants could be enforced so as to say the courts could enforce them by awarding damages but could not do so by fine or imprisonment arising out of an injunction. In the first place Chief Justice Vinson is talking about 'voluntary adherence'. You do not act voluntarily when to act otherwise your property would be diminished by an execution issued by a court. In the second place, such a distinguishment would be to make a mockery of the rest of his decision. * * * * Most certainly he did not mean to say that the covenant could be enforced by the obtaining of damages."[16]

In affirming the judgment of a lower court which sustained a demurrer to an action seeking to enforce restrictions against occupation

13. 61 HARV. L. REV. 1452 (1948).
14. Decided with Shelley v. Kraemer, *supra*, note 2.
15. 17 U. OF CIN. L. REV. 77 (1948), p. 82.
16. 1948 WIS. L. REV. 508.

of certain lots by non-Caucasians, the Supreme Court of California said:

> "Counsel for the respective parties have agreed that the decision of the United States Supreme Court in *Shelley v. Kraemer* * * * * holding that such restrictions cannot be enforced through court action, is controlling here. Accordingly, we do not reach the question as to whether any tenable cause of action for relief or recovery other than specific enforcement of the racial restrictions is, or could be stated."[17]

In a Texas case the plaintiff held the land under a deed executed to him by the owner of the reversion after breach of the condition in the defendant's chain of title that the land would not be sold to "persons of Mexican descent" (the defendant was such a person) and in the event of violation of the covenant "all title to the then owner and occupant shall be forfeited to the grantor, and upon demand, such property and all improvements thereon shall be surrendered to the seller". Although admitting that he could not maintain an action on the covenant in view of the *Shelley* case, the plaintiff contended that he was not precluded from relying upon the covenant as a defense to the defendant's cross-action (presumably to regain possession of the land) but the Court of Civil Appeals of Texas in affirming judgment for the defendant gave its interpretation of the holding of the *Shelley* case in clear language:

> "It is as much an enforcement of the covenant to deny to a person a legal right to which he would be entitled except for the covenant as it would be to expressly command by judicial order that the terms of the covenant be recognized and carried out. * * * * Under the decision of the Supreme Court, above referred to [*Shelley v. Kraemer*], judicial *recognition or enforcement* of the racial covenant involved here by a state court is precluded by the 'equal protection of the laws' clause of the Fourteenth Amendment."[18] (Emphasis added.)

Although it is not the writer's purpose to discuss alternative remedies for breach of restrictive racial covenants, there have been recent discussions of this problem which the reader may find informative.[19] Of particular interest to members of the bar in the South is a re-

17. Morin v. Crane, 32 Cal, 2d 896, 197 P. 2d 162 (1948).
18. Clifton v. Puente, 218 S. W. 2d 272 (Tex. 1948).
19. See 2 VANDERBILT L. REV. 123 (1948); 37 CAL. L. REV. 493 (1949); 3 A. L. R. 2d 473.

freshing article in the *Tennessee Law Review*[20] dealing with the practical aspect of the non-enforceability of such restrictive covenants in a Southern state.

The reluctance of the Missouri Court to extend the holding of *Shelley v. Kraemer* beyond the express language of that decision can be understood if one considers the long established practice of enforcing covenants of that type. It should be remembered that the Supreme Court did not declare such covenants unconstitutional but merely unenforceable by state action and the importance of that difference has yet to be fully appreciated, for, as one writer[21] observes, has the Supreme Court held the covenants to be unconstitutional that would have been the "go" signal for Congress to enact legislation making it a crime to enter into such agreements. However, it is felt that the spirit of the Supreme Court's decision, as expressed by its all-inclusive language defining "state action" to be "exertions of state power in all forms", does not permit an alternative remedy for breach of such covenants inasmuch as it is difficult to see how one type of action would be "state action" and the other not. Heretofore when a state court felt that it would be inequitable to enforce such a covenant, because of changed conditions or for other reasons, it would leave the petitioner to his remedy at law for damages. But there should be no confusing of this practice with the holding of the *Shelley* case because the Supreme Court's decision resulted from an application of the Fourteenth Amendment and not from a weighing of the equities. The Texas court seems to have correctly interpreted the Supreme Court's decision because any recognition of such a covenant in a proceeding in any state court will constitute action by the state.

HOOVER C. BLANTON.

20. TENN. L. REV. 679 (1949).
21. 11 GA. BAR J. 88 (1948).