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their popular meanings?²⁸ Furthermore, the settled law in this and other jurisdictions is that an indemnity bond is construed strictly against the party issuing it and in favor of the party purchasing it.²⁹ Therefore, by giving proportionate importance to all the facts, by recognizing the clear distinction between false pretense and forgery, by looking more closely to the intent of the contracting parties, and by applying the rule of construction in regard to contracts of this nature, the Court might well have allowed a recovery by the Bank on its indemnity bond because of a loss effected by false pretense. It seems that the Court fell a little short of the mark when it found a "falsely written" instrument, immediately labelled the loss as the result of forgery, and concluded that it was outside the coverage of the policy. It is conjectured that the Court had a feeling that the Bank was grossly negligent³⁰ in becoming ensnared in the framework of S Street Dick Drawer's playhouse, and thus it should not be allowed to recover.

The Court's decision denying recovery to Drawee Bank is inevitable conceding that its finding of forgery is correct. But this finding is questioned; for while it is true that one may be guilty of forgery if he signs an instrument and passes it as the instrument of another whose name is identical, here the essence of forgery is not present because the case is devoid of evidence that the checks were represented or purported as being made by any other than Dick Drawer of S Street. However, this Dick Drawer by false pretenses obtained money from the insured Bank, and it should be allowed to recover on its indemnity bond.

BARBARA M. STOCKTON.

Racial Restrictive Covenants—Damage Recovery for Breach— Shelley v. Kraemer Held Inapplicable

Since the United States Supreme Court ruled in *Shelley v. Kraemer*¹ that state courts could not enforce racial restrictive covenants by injunction, there has been widespread speculation as to other methods whereby

²⁸ In giving a construction to the terms in the policy, the court should seek the usual meaning as it is employed in its common usage. *Laird v. Employers Liability Assurance Corp.*, 2 Del. 216, 18 A. 2d 86 (Ct. Oyer & Ter. 1941); *Royal Ins. Co. v. Jack*, 113 Ohio St. 153, 148 N. E. 923 (1925). In the latter case, the court said: "We are constrained to give that construction to the word 'theft' that is understood by persons in the ordinary walks of life, and not the definition given it by the Kansas Court—one unknown to the laity." *VANCE ON INSURANCE* §279 (2d Ed. 1930); 13 *APPLEMAN INSURANCE LAW & PRACTICE* §7384 n. 56 & n. 62 (1943).

²⁹ 13 *APPLEMAN*, *op. cit. supra* note 28, §7401 n. 1 (1943); 44 C. J. S. *INSURANCE*, §297(c) (1) *et seq.*, and citations (1943).

³⁰ It is elementary that liability attaches if the drawee bank disburses the depositor's money other than on the depositor's order, however carefully the bank acted. 7 *AM. JUR.*, *BANKS* §506 n. 10 (1937).

¹ 334 U. S. 1 (1948).

the effectiveness of the covenants could be maintained.² One suggested sanction received judicial support when the Supreme Court of Missouri held in *Weiss v. Leason*³ that *Shelley v. Kraemer* did not preclude the award of damages for breach of racial restrictive agreements, and remanded the case for trial on that issue.

Shelley v. Kraemer held that state court enforcement of a racial restrictive covenant constitutes a violation of the equal protection of the laws clause of the Fourteenth Amendment, but nevertheless held that such covenants are valid.⁴ Commentators have been of the almost unanimous opinion that it also forbids a state court award of damages for breach of such covenants.⁵ The court in *Weiss v. Leason* argued that "the general rule of the law of contracts is well settled that in certain cases a breach of contract will give rise to two remedies, one an action at law for damages, the other a suit in equity for specific performance."⁶ They viewed *Shelley v. Kraemer* as merely prohibiting

² For discussions of possible methods of avoiding or mitigating the effects of the case, see Ming, *Racial Restrictions and the 14th Amendment*, 16 U. OF CHI. L. REV. 203 (1948); Scanlan, *Racial Restrictions in Real Estate*, 24 NOTRE DAME LAW. 157 (1948); Note, 27 N. C. L. REV. 224 (1949).

³ 225 S. W. 2d 127 (Mo. 1949).

⁴ A valid contract is generally thought of as one which can be enforced in the courts. Nevertheless, valid but unenforceable contracts are familiar in other fields of law, e.g., where a suit for breach is barred by a Statute of Limitation because of undue delay, and where an oral contract violates a Statute of Frauds which requires certain types of contracts to be in writing to be enforceable. But there the objectives causing their unenforceability are far different from the reasons which make it *unconstitutional* to enforce racial restrictive agreements.

The propriety of holding a contract valid when it would be unconstitutional to enforce that contract seems at least questionable. Certainly the precedents created by the cases involving the above-mentioned statutes do not necessarily support such a holding. Consider the following language from the decision of *Von Hoffman v. Quincy*, 4 Wall. 535, 552 (U. S. 1867), a case involving the impairment of the obligation of contract section of the Constitution: "Nothing can be more material to the obligation than the means of enforcement. . . . The ideas of validity and remedy are inseparable, and both are part of the obligation. . . ."

⁵ See the following: Note, 27 N. C. L. REV. 224, 230 (1949); Crooks, *The Racial Covenant Cases*, 37 GEO. L. J. 514, 524-525 (1949); Lathrop, *The Racial Covenant Cases*, 1948 WIS. L. REV. 508, 525, 527 ("Most certainly he [Mr. Chief Justice Vinson] did not mean to say that the covenant could be enforced by the obtaining of damages."); Ming, *op. cit. supra* note 2, at 235; Scanlan, *op. cit. supra* note 2, at 182-183; Note, 48 COL. L. REV. 1241, 1244 (1948) ("A narrow view of the doctrine of the case might limit it to contract cases and even there to cases in which injunctive relief rather than damages were sought. . . . But such an argument would be hardly tenable."); Note, 17 U. OF CIN. L. REV. 277, 282 (1948).

⁶ *Weiss v. Leason*, 225 S. W. 2d 127, 139 (Mo. 1949).

The following are cases which denied injunction but did award damages for breach of the agreements involved: *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691 (1892); *Bull v. Burton*, 227 N. Y. 101, 124 N. E. 111 (1919); *McClure v. Leaycraft*, 183 N. Y. 36, 75 N. E. 961 (1905); RESTATEMENT, PROPERTY §528 (1944). See the critical discussion by Dean Pound in *The Progress of the Law*, 33 HARV. L. REV. 813, 820-821 (1920). It should be noted that in none of the cases denying specific performance or injunction and awarding damages in lieu thereof was the reason for denying the affirmative equitable relief sought the fact that it would be unconstitutional for the court to enforce the contract.

Compare the following language from the concurring opinion of Mr. Justice Frankfurter in *Hurd v. Hodge*, 334 U. S. 24, 36 (1948) (companion case to

the suit in equity, but as not affecting the action at law for damages.⁷

It is clear that when the covenants are effectuated through voluntary adherence to their terms by the parties involved there is no state action. Questions of what is forbidden state action and its exact scope must await further Supreme Court decisions for complete demarcation. But, to hold that the state enforces through injunction and does not enforce by awarding damages is to create a distinction valid only in the sense that the former may be more effective in accomplishing the unconstitutional objective than the latter. *Weiss v. Leason* operates to discourage a breach of the covenant's terms by threatening a prospective vendor with a pecuniary loss if he sells to one whom the covenant sought to exclude. And this threat may be so deterring in effect that, for all practical purposes, the result *Shelley v. Kraemer* sought to obviate will remain a reality.⁸

When the state court awards damages for the breach of such a covenant, the court lends its aid and authority to the consummation of an otherwise incomplete individual act of discrimination. This constitutes that intervention of the state court, supported by the "full panoply of state power,"⁹ which lies within the proscription of the Fourteenth Amendment. The following language of Chief Justice Vinson, uttered over a year before the *Weiss* case, presents an apt answer to the problem which that case considered: "The Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection of the laws to other individuals."¹⁰

There is no reason to believe that *Shelley v. Kraemer* was bottomed on legal theory alone. Pressing social problems, especially those involving overcrowded housing and its many harmful consequences,¹¹ as

Shelley v. Kraemer, barring Federal court injunction): "An injunction is, as it always has been, 'an extraordinary remedial process, which is granted, not as a matter of right, but in the exercise of a sound judicial discretion.' Morrison v. Work, 266 U. S. 481, 490 (1924). In good conscience, it cannot be the 'exercise of a sound judicial discretion' by a federal court to grant the relief here asked for when the authorization of such an injunction by the States of the Union violates the Constitution . . . and violates it, not for any narrow technical reason, but for considerations that touch rights so basic to our society, that, after the Civil War, their protection against invasion by the States was safeguarded by the Constitution."

⁷ Had the Supreme Court acceded to pressure urging them to declare the covenants void rather than merely unenforceable, the damage question never would have arisen. A void instrument obviously cannot form the basis for any judicial relief.

⁸ Even conceding that the "valid but unenforceable" label pinned on the racial covenants is tenable (see note 4 *supra*), both the reasons for their unenforceability and the general tenor of Mr. Chief Justice Vinson's opinion urge the conclusion that anything other than purely voluntary adherence to their terms is not permissible. "You do not act voluntarily when to act otherwise your property would be diminished by an execution issued by a court." Lathrop, *op. cit. supra* note 5, at 525. Also see Ming, *op. cit. supra* note 2, at 217.

⁹ *Shelley v. Kraemer*, 334 U. S. 1, 19 (1948).

¹⁰ *Id.* at 22.

¹¹ Numerous studies have demonstrated beyond cavil the menace to health and

well as state court denial to Negroes of the privilege of ownership and use of land, influenced the decision of the Court.¹²

Hinging decisions on subtle casuistries will not produce a satisfactory solution to problems in a field where experience more than adequately demonstrates the necessity for measuring methods aimed at discrimination by their consequences rather than by their form. Disregarding the social and constitutional consideration which prompted *Shelley v. Kraemer*, the Missouri court in *Weiss v. Leason* has sought to evade its responsibility with a distinction that is merely formal.

CHARLES L. FULTON.

Vendor and Purchaser—Duty of Vendor to Accept Assignee's Notes and Mortgage

The defendant contracted to sell real property to the plaintiff's assignor. The contract stipulated that one-half of the purchase price should be paid in cash and the remainder by notes secured by a deed of trust, and that the seller would convey "to the purchaser, or assignee," upon the payment of the purchase price. The original purchaser assigned all of his rights under the contract to the plaintiff corporation, of which he was president, and which tendered the cash and its own notes and deed of trust. The defendant refused to accept the tender. In an action for specific performance, held, nonsuit of plaintiff reversed. The contention that such a contract necessarily imports that credit is given alone to the person with whom the transaction is personally carried out, thereby making it unassignable, is untenable in the absence of adequate expression in the instrument against assignment or some circumstances judicially recognizable *dehors* the agreement.¹

Contracts for the sale of land or for the sale of merchandise are generally assignable and entitle the assignee to specific performance.² However, the undisputed rule is that the vendee cannot by an assignment of the contract compel the vendor to accept the credit of the assignee.³ Hence if the performance of the assignor is construed as being

morals, media for crime, delinquency, etc., which a policy of legalized ghetto housing has caused. See, *e.g.*, DRAKE AND CLAYTON, *BLACK METROPOLIS* (1945); WOOFER, *NEGRO PROBLEMS IN CITIES* (1928).

¹² While the opinion of the Court does not refer to the sociological reasons urged by many who filed briefs as *amici curiae*, opposing the covenants, the decision must be analyzed with regard to these pressures. The cases were not decided by a court unaware of the results which racial residential segregation produce. See Crooks, *op. cit. supra* note 5, at 519.

¹ Cadillac-Pontiac Co. v. Norburn, 230 N. C. 23, 51, S. E. 2d 916 (1949).

² N. C. GEN. STAT. §1-57 (1943); 5 WILLISTON, *CONTRACTS* §1439A (Rev. ed. 1937).

³ Nelson v. Reidelback, 68 Ind. App. 19, 119 N. E. 804 (1918); Rice v. Gibbs, 40 Neb. 264, 58 N. W. 724 (1894); Atlantic & N. C. R. R. v. Atlantic & N. C. R. R., 147 N. C. 368, 61 S. E. 185 (1908); Golden v. Tentzen & Schneyer, 92 Pa. Super. 202 (1927); 2 WILLISTON, *CONTRACTS* §419 (Rev. ed. 1937).