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# Equal Protection of Law—Racial Restrictive Covenants—Damages for Breach Allowed

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# RECENT DECISIONS

## EQUAL PROTECTION OF LAW—RACIAL RESTRICTIVE COVENANTS—DAMAGES FOR BREACH ALLOWED

The defendants allegedly conspired to breach a contract restricting alienation of certain real property to persons of the Negro race. Joined as defendants were the grantor (a Caucasian), his mesne grantee (also a Caucasian who was financially unsound), and the ultimate grantee (a Negro). The plaintiff's prayer was for cancellation of the deeds and for damages for conspiracy to breach the contract. HELD: Judicial *enforcement* of racial restrictive covenants is unconstitutional but to award damages for their breach is not. *Correll v. Earley, . . . Okl. . . .*, 237 P 2d 1017 (1951).

In 1948 the Supreme Court of the United States held that State judicial enforcement of racial restrictive covenants was "State action" violative of the equal protection clause of the Fourteenth Amendment. *Shelley v. Kraemer (McGhee v. Sipes)*, 334 U. S. 1 (1948). The court also held in a companion decision that judicial enforcement of similar racial covenants in the Federal courts was prohibited by the Fifth Amendment. (The actual basis of the decision was upon Federal statute and public policy.) Civil Rights Act 16 Stat. 140 (1870), 8 U. S. C. Sec. 42 (1946); *Hurd v. Hodge (Urciolo v. Hodge)*, 334 U. S. 24 (1948).

Both the *Shelley* and *Hurd* cases clearly point out the important distinction between State imposed restrictions upon the *use* of private property which are constitutional when reasonably related to the common welfare and State imposed restrictions aimed at the individual *user* of private property which are unconstitutional when based upon race or color alone. Compare *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 395 (1926), with *Shelley v. Kraemer, supra;* See Rottschaefer, Constitutional Law Sec. 246 (1939). The *Shelley* and *Hurd* cases were actions in equity to prohibit the conveyance to a non-Caucasian or for cancellation of the deed. Whether an award at law of damages for breach would be unconstitutional was not decided by the court. A liberal construction of the words of Mr. Chief Justice Vinson would seem to preclude *any* judicial enforcement of these agreements by State courts:

> "We conclude, therefore, that the restrictive agreements *standing alone* cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by *voluntary* adherence to their terms, it would

appear clear that there has been no action by the State and the provisions of the Amendment have not been violated." *Shelley v. Kraemer, supra* p. 13. (Italics supplied).

In considering whether damages for breach of racial covenants is constitutional, it should be noted that although the Supreme Court has been explicit to indicate that such agreements are not in themselves invalid, *Corrigan v. Buckley,* 271 U. S. 323 (1926); it ignored the terms of the covenant in the *Hurd* case which prescribed damages as a penalty for its breach.

Since 1948 the State courts have unanimously refused to decree specific performance of racial covenants. *Earley v. Baughman,* 200 Okl. 649, 199 P. 2d 210 (1948); *Coleman v. Stewart,* 33 Cal. 703, 204 P. 2d 7 (1949); *Woytus v. Winkler,* 357 Mo. 1082, 212 S. W. 2d 411 (1948); *Kemp v. Rubin,* 298 N. Y. 590, 81 N. E. 2d 325 (1948); *Rich v. Jones,* 142 N. J. Eq. 215, 59 A. 2d 839 (1948). This is so whether the action is directed against the Caucasian grantor or the non-Caucasian grantee. *Tovey v. Levy,* 401 Ill. 393, 82 N. E. 2d 411 (1948).

The tendency has been to give a liberal interpretation to the language of the *Shelley* case and to extend the scope of its impact to preclude all judicial action by the States. A person imprisoned for contempt for refusal to comply with an injunction against his occupancy of restricted property will be released on habeas corpus. *In Ex Parte Laws,* 31 Cal. 846, 193 P. 2d 744 (1948). Judicial recognition of a racial covenant as a defense in an action to try title will be denied. *Clifton v. Puente,* 218 S. W. 2d 272 (Tex. Civ. App. 1948). A declaratory judgment on the validity of a racial covenant will not be granted. *Claremont Improvement Club Inc. v. Buckingham,* 89 Cal. App. 2d 32, 200 P. 2d 47 (1948). These decisions indicate the general reluctance of State courts to affirmatively recognize racial covenants.

Only three States since 1948 have directly considered whether an action at law for damages is constitutional. In *Weiss v. Leaon,* 359 Mo. 1054, 225 S. W. 2d 127 (1949), the petition was for injunctive relief or in the alternative for damages for breach. The Circuit Court dismissed the entire action but on appeal the Supreme Court of Missouri allowed damages against the Caucasian grantor *only,* on the ground (1) that a racial covenant is a valid contract, and (2) that to allow an action for damages for its breach was not judicial *enforcement* of the covenant. (The court dismissed without comment the plaintiff's action for damages for conspiracy to breach the agreement. Brief of the Appellants, p. 18-20.) The Oklahoma Supreme court in the instant case allowed recovery for conspiracy on substantially the same grounds. However, the Federal District Court for the District of Columbia in *Roberts v. Curtis,* 93 F. Supp. 604 (D. C. 1950) denied

recovery in an action for damages on the ground that the scope of the *Hurd* and *Shelley* decisions preclude any judicial action regardless of the form of remedy sought. This case may be distinguished from the rulings of Missouri and Oklahoma since the power of the Federal courts to enforce the terms of private agreements is always exercised subject to the limitations of the public policy of the Federal Government. *Muschany v. United States,* 324 U. S. 49, 66 (1945). On all issues of racial character this policy is well defined. See *Steele v. Louisville & Nashville R.R. Co.,* 323 U. S. 192, 203-4 (1944). As the *Roberts* case indicates, Federal public policy prohibits any Federal judicial action concerning racial covenants.

Each State is free within the framework of its Constitution, laws and decisions to determine its own public policy. If an award of damages by a State court for breach of a racial covenant is not unconstitutional, then each State would be free to allow recovery unless their public policy is contrary. Two lower court decisions in New York prior to 1948 held that racial covenants do not offend the public policy of the State of New York. *Ridgway v. Cockburn,* 163 Misc. 511, 296 N. Y. Supp. 936 (Sup. Ct. 1937); *Dury v. Neely,* 69 N. Y. S. 2d 677 (Sup. Ct. 1942). For the public policy of other States see Note, 3 Baylor L. Rev. 584, 587 (1951); Comment (on Michigan public policy), 12 U. Det. L. J. 81 (1949).

The philosophy of the framers of the Fourteenth Amendment recognized that equality and freedom in the enjoyment of private property rights is an essential pre-requisite to the realization of the other fundamental rights of man. *Slaughter-House Cases,* 16 Wall 36, 70, 81 (1873). These rights are guaranteed to the individual regardless of race or color or creed. *Oyama v. California,* 332 U. S. 633 (1948). Although the Amendment does not protect the individual from purely private discrimination, *Civil Rights Cases,* 109 U. S. 3 (1883); it does prohibit discrimination when such action can fairly be said to be that of the State. *Shelley v. Kraemer, supra* p. 13. State imposed restrictions based upon race or color which limit the right of a Caucasian vendor to freely convey his property deprives him of property without due process of law. *Buchaman v. Warley,* 245 U. S. 60 (1917); *Harmon v. Tyler,* 273 U. S. 668 (1927). Similarly, State imposed restrictions based solely upon the grounds of race or color which limit the right of a non-Caucasian to freely acquire property deprive him of the equal protection of the law. *Truax v. Raich,* 239 U. S. 33 (1915); *City of Richmond v. Deans,* 281 U. S. 704 (1930); *Allen v. Oklahoma City,* 175 Okl. 421, 52 P. 2d 1054 (1936). Although these cases represent "State action" in its legislative form, the same principles apply to a denial by State judicial action. The concept of "State action" has expanded vigorously since the era of the *Civil Rights Cases, supra.* Judicial action in any form is "State action" for purposes of the Fourteenth Amendment. *Brinkerhoff-Faris Co. v. Hill,* 281 U. S. 673, 680 (1930); Barnett, *What is 'State Action' Under the Fourteenth, Fifteenth, and Nineteenth Amend-*

*ments,* 24 Ore. L. Rev. 227 (1945); Rottschaefer, Constitutional Law Sec. 227 (1939). An award of a money judgment constituted "State action" in *Old Wayne Mutual Life Association v. McDonough,* 204 U. S. 8, 23 (1907). The Supreme Court will determine for itself whether the act complained of is "State action" for purposes of the Constitution and will not be bound by the characterization resorted to by the State courts. *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U. S. 278 (1913).

Most legal commentators after the *Shelley* case who speculated as to the possibility of an action being allowed for damages concluded that this remedy was also foreclosed. Scanlan, *Racial Restrictions in Real Estate—Property Values Versus Human Values,* 24 Notre Dame Law, 155, 182 (1949); Ming, *Racial Restrictions and the Fourteenth Amendment; The Restrictive Covenant Cases,* 16 U. Chi. L. Rev. 203, 217 (1948); Crooks, *Racial Covenant Cases,* 37 Geo. L. J. 514, 525 (1949); Lathrop, *The Racial Covenant Cases,* 1948 Wis. L. Rev. 508, 527.

The coercive power of the State alone, standing behind racial covenants, indirectly effectuates the discriminatory purposes of these agreements. A judgment for damages is simultaneously a State authorized sanction against willing vendors for their refusal to voluntarily adhere to the terms of the covenant and a deterrant upon other willing vendors which hinders the right of non-Caucasians to freely acquire property. A racially discriminatory covenant, as a matter of constitutional law, should be treated as valid, but unenforceable in any manner by State courts.

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## TESTAMENTARY TRUSTS—ACCUMULATIONS—CHOICE OF LAW

Testatrix died in 1940, domiciled in California. By her will she established a trust for the benefit of her son. The trustees were directed: "To pay one-quarter of the net income thereof to or for the benefit of (the) son, until he shall have attained the age of thirty years, and upon his attaining the age of thirty years to pay one-half of the net income to or for the benefit of (the) said son until he shall attain the age of forty-five years, and upon his attaining the age of forty-five years to pay the principal of said trust fund together with accumulated income thereon to (the) said son." The California court transferred the property to New York state where the beneficiary resided. The son having attained his majority demanded that the trustees pay over to him the entire accumulated income of the trust and annually pay him the future income. The Surrogate directed them to do so; holding that the provisions for accumulation of income beyond the minority of the beneficiary, though valid in California, were illegal in New York and that he was not required to substitute the policy and laws of a foreign state for those