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CONSTITUTIONAL LAW-EQUAL PROTECTION-JUDICIAL ENFORCEMENT OF RACE RESTRICTIVE COVENANT

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RECENT DECISIONS

CONSTITUTIONAL LAW—EQUAL PROTECTION—JUDICIAL ENFORCEMENT OF RACE RESTRICTIVE COVENANTS—The highest courts of Missouri [1] and Michigan,[2] and the Court of Appeals for the District of Columbia,[3] had held that restrictions against occupancy of land by negroes were enforceable by injunction. On certiorari, *held,* reversed. Enforcement of such restrictions by state courts constitutes a denial of equal protection of the laws. Enforcement by courts of the District violates the Civil Rights Act of 1866,[4] and also it is contrary to the public policy of the United States to allow a federal court to enforce an agreement which a state court could not constitutionally enforce. *Shelley v. Kraemer,* (U.S. 1948) 68 S.Ct. 836. *Hurd v. Hodge,* (U.S. 1948) 68 S.Ct. 847.

The Court, in a unanimous opinion by Chief Justice Vinson, cited several authorities to demonstrate that judicial action is state action within the meaning of the Fourteenth Amendment and that a state court may act unconstitutionally when declaring a rule of common law. Then it was pointed out that the full coercive power of the state court had been used to dispossess persons solely because of race or color, and the conclusion was drawn that these persons had been denied equal protection of the laws. The author of a comment in the *Michigan Law Review* [5] has demonstrated that all legal rights owe their existence to the authority of the state, and has suggested that the Fourteenth Amendment should properly be applied only to action consciously initiated by a state or by a body exercising power of a governmental nature under state authority.[6] The principal cases follow the lead of *Marsh v. Alabama* [7] in extending the concept of state action to a situation in which the state has merely provided sanctions for enforcing the supposed legal rights of private individuals. But the court clarifies a point which was not made clear in the *Marsh* opinion by indicating that the state action found is that of the court alone and that the private acts of themselves do not violate the Constitution.[8] The possibility that myriad private activities will have to be squared with the due process and equal protection clauses, if questions about them are raised in court, opens a vast and unpredictable field for litigation. An apparent limitation on possibilities here is that one seeking to attack private action will have to show some sort of legal right in himself. The Negro purchasers in the principal cases possessed deeds on

[1] Kraemer v. Shelley, 355 Mo. 814, 198 S.W. (2d) 679 (1946).
[2] Sipes v. McGhee, 316 Mich. 614, 25 N.W. (2d) 638 (1947).
[3] Hurd v. Hodge, (App. D.C. 1947) 162 F. (2d) 233.
[4] U.S. Rev. Stat. (1878) § 1977, 8 U.S.C. (1940) § 41.
[5] 45 MICH. L. REV. 733 (1947).
[6] On discrimination by a political party in prescribing qualifications for primary voters as state action, see 46 MICH. L. REV. 793 (1948).
[7] 326 U.S. 501, 66 S.Ct. 276 (1946), involving freedom of speech in a company-owned town. See 44 MICH. L. REV. 848 (1946).
[8] The court cited Corrigan v. Buckley, 271 U.S. 323, 46 S.Ct. 521 (1926), which many state courts had cited as authority that enforcement of racial restrictions is not unconstitutional. The court here said that that case decided only that the private agreements standing alone were not unconstitutional.

which their claims were founded. Since one man has no claim that another make a contract with him or sell to him, it is hard to see that the decision can be used to combat discrimination in employment or in the offering of public services. Of particular interest is the application of the principal case to other legal problems regarding housing. It appears from the facts of the several appeals consolidated in the principal cases that a court cannot enforce a forfeiture or award damages if the rights asserted are grounded on an instrument calling for a racial distinction.[9] Less certain is the status of agreements giving others, such as adjoining owners or a real estate concern, a veto over prospective purchasers.[10] A final point is that the principal case adds nothing to *Buchanan v. Warley* [11] as authority for a claim that all forms of segregation under state authority are unconstitutional.

Charles B. Blackmar, S. Ed.

[9] The case of Shelley v. Kraemer involved an obscurely worded forfeiture clause, and Hurd v. Hodge contained a provision for damages against owners selling to Negroes. Injunctive relief was sought in both cases, but it seems that if the alternate remedies might be enforceable then there should have been a remand for further determination of rights.

[10] If the significant fact in the principal case is that the court is called on to enforce an agreement which is racially discriminatory on its face, then provisions for approval of purchasers might be perfectly valid. But if the courts are precluded from giving effect to plans seeking racial segregation in housing, then, following the famous case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886), it seems that the court would be required to look behind any scheme to see whether it is being used to put a prohibited plan of segregation into effect. Such agreements might be held by state courts to be illegal restraints on alienation. Investment Realty Co. v. Serio, 156 Md. 229, 144 A. 245 (1928). And if private restrictions on property are subject to the same constitutional tests as are zoning ordinances by the force of the present decision, enforcement might be precluded on the basis of Gorieb v. Fox, 274 U.S. 603, 47 S.Ct. 675 (1927). Another scheme for avoiding the force of the decision might involve the use of options, but this would be very expensive and would require severe restraints on title.

[11] 245 U.S. 60, 38 S.Ct. 16 (1917), holding that zoning ordinances imposing racial segregation are unconstitutional. In other fields, principally education, the Supreme Court has shown no inclination to hold that mere segregation is unconstitutional discrimination. See 46 MICH. L. REV. 639 (1948).