COMMENTS

CONSTITUTIONAL LAW—EQUAL PROTECTION OF THE LAWS—DAMAGES FOR BREACH OF A RACIAL RESTRICTIVE COVENANT, *Barrows v. Jackson*, 346 U. S. 249 (1953).

Plaintiff brought an action for damages for breach of a covenant prohibiting the use or occupancy of real property by non-Caucasians. Plaintiff alleged that defendant and another conveyed land bound by the agreement, without including the restrictive covenant in the conveyance as required by the agreement, and with knowledge that the land was to be occupied by members of a non-Caucasian race. The defendant's demurrer was sustained and on certiorari to the United States Supreme Court the judgment for defendant was affirmed. The Court held that to allow damages for the breach of such a restrictive covenant would be state action depriving citizens of equal protection of the laws in violation of the Fourteenth Amendment.[1]

This decision resolves the conflict among the states on the question of whether allowing an action for damages for the breach of a racial restrictive covenant is a violation of the Fourteenth Amendment.[2] The problem can be best understood in the light of its judicial history.

In 1917 it was held that a city ordinance which made it unlawful for a colored person to establish a residence in a block in which the majority of the residences were occupied by white people was not a legitimate exercise of the police power and was unconstitutional under the due process clause of the Fourteenth Amendment because it deprived a property owner of the right to sell his property to whomsoever he desired.[3] After this

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1. Barrows v. Jackson, 346 U.S. 249 (1953). This case went to the United States Supreme Court from the California District Court of Appeals on a writ of certiorari after the Supreme Court of California denied a hearing.

2. This question has arisen in four cases besides the principal case since 1948 when Shelley v. Kraemer, 334 U.S. 1 (1948), held that the Fourteenth Amendment prohibited specific performance of such covenants. Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949), and Correll v. Earley, 237 P.2d 1017 (Okla. 1951), both allowed the recovery of damages. Recovery was denied in Roberts v. Curtis, 93 F. Supp. 604 (D.D.C. 1950), and Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952).

3. Buchanan v. Warley, 245 U.S. 60 (1917).

decision litigation involving restrictive covenants became prevalent. Such agreements were first sustained in 1918 when the Missouri Supreme Court held that the common law prohibited only permanent or total restraints on the alienation of land, and that a covenant prohibiting the sale of land to a Negro for twenty-five years was not void.[4] The use of such agreements was given further impetus by the decision of the United States Supreme Court in *Corrigan v. Buckley*[5] that such agreements were not void under the Federal Constitution. It is important to note, however, that the only question before the Court in *Corrigan v. Buckley* was whether the restrictive covenant as such was void, and not whether its enforcement was contrary to the United States Constitution.

With only one exception[6] these racial restrictive agreements were unanimously enforced until the Restrictive Covenant Cases[7] were decided in 1948. Some states did refuse to enforce a covenant not to sell to certain racial groups as being a restraint on alienation,[8] but every jurisdiction that considered the question enforced covenants against the use or occupancy of the land.[9] In sustaining the constitutionality of these covenants the courts usually said the Fourteenth Amendment applied to state action only, and not to acts of private parties, that the enforcement of private contracts was not within the state action prohibited by the Amendment, and in some cases said that *Corrigan v. Buckley* had held that such covenants were constitutional.[10]

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4. Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918).
5. 271 U.S. 323 (1926).
6. Gandolfo v. Hartman, 49 Fed. 181, 182 (C.C.S.D. Cal. 1892). This decision by Judge Ross was never appealed and has been little cited. The brief opinion was remarkably prophetic of the decision in the principal case.
7. Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948).
8. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 Pac. 596 (1919); Porter v. Barrett, 233 Mich. 373, 206 N.W. 532 (1925); White v. White, 108 W. Va. 128, 150 S.E. 531 (1929). Although the covenants not to sell to certain racial groups were not upheld in these cases, covenants against the use or occupancy of the land by certain racial groups were not invalidated.
9. Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918); Doherty v. Rice, 240 Wis. 389, 3 N.W.2d 734 (1942).
10. Queensborough Land Co. v. Cazeaux, 136 La. 723, 67 So. 641 (1915); Meade v. Dennistone, 173 Md. 295, 196 Atl. 330 (1938); Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922). The court in *Meade v. Dennistone* cited *Corrigan v. Buckley* for the proposition that restrictive convenants were not unconstitutional. Here again it should be remembered that *Cor-*

In *Shelley v. Kraemer*,[11] the plaintiffs sought to enjoin Shelley, a Negro, from taking possession of land bound by a covenant prohibiting use or occupancy by Negroes or Mongolians, and to have the title revested in the immediate grantor. The Missouri Supreme Court held the covenant was valid and that its enforcement was not in violation of the Federal Constitution. A Michigan case[12] of similar facts and holding was joined with the Missouri case for joint consideration by the United States Supreme Court. That Court said that the restrictive covenants "standing alone" were not violative of any rights protected by the Fourteenth Amendment, and that there was clearly no state action involved as long as the covenants were voluntarily adhered to, but held that there was state action which violated the equal protection clause of the Fourteenth Amendment when the courts granted judicial enforcement of the agreement.[13]

Since *Shelley v. Kraemer*, four other cases have considered the question in the principal case of whether an action for damages could be maintained for breach of a restrictive covenant.[14] In a case allowing recovery the Missouri Supreme Court held that *Shelley v. Kraemer* had not ruled on the question and that the fact that an action for specific performance was unconstitutional did not necessarily mean that an action for damages was also unconstitutional.[15] In a Michigan case, which denied recovery,

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rigan v. Buckley only decided that such convenants were not void as such and did not pass upon the question of whether the enforcement of such restrictive covenants was contrary to the United States Constitution.

11. Cited as Kraemer v. Shelley, 355 Mo. 814, 198 S.W.2d 679 (1946).

12. Sipes v. McGhee, 316 Mich. 614, 25 N.W.2d 638 (1947).

13. These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.
Shelley v. Kraemer, 334 U.S. 1, 19 (1948).

14. Recovery denied in Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949), and Correll v. Earley, 237 P.2d 1017 (Okla. 1951). Recovery was denied in Roberts v. Curtis, 93 F. Supp. 604 (D.D.C. 1950), and Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952).

15. Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949).

the court pointed out the fallacy of denying an action for specific performance and then allowing indirect enforcement of such a restrictive covenant by allowing an action for damages.[16] The Court in the principal case adopts a view similar to that of the Michigan court, concluding that to allow an action for damages would be state action which would prevent non-Caucasians from purchasing and enjoying property on an equal basis with Caucasians just as much as granting specific performance of such a restrictive covenant.

The initial problem that confronted the Court in the principal case was whether the plaintiff had standing to raise the constitutional question.[17] The late Chief Justice Vinson dissented because he disagreed with the answer of the majority of the Court to this problem. He maintains that since the Caucasian vendor's constitutional rights would not be invaded by allowing an action for damages for the breach of the restrictive covenant she has no standing to raise the issue.[18] The Court simply states that they are making an exception to this rule of practice. They say very frankly, without any sophistry, that if this defendant is not allowed to raise the issue, by the very nature of the situation no one would ever be able to raise the question, because it is not possible for the real injured parties, the "unidentified but identifiable" future non-Caucasian would-be purchasers, to present their grievance in court. The Supreme Court made the big step in nullifying restrictive covenants by its decision in *Shelley v. Kraemer,* and the court is now in effect saying that they are not going to allow the result of the decision in the *Shelley* case to be abrogated because of a canon of judicial restraint.

The decision of the Court is a policy decision which is the natural sequel to the earlier decision of the court in the *Shelley* case. In this writer's opinion praise is deserved not only for the policy adopted but also for the candor of its presentation.

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16. Phillips v. Naff, 332 Mich. 389, 52 N.W.2d 158 (1952).
17. For a general discussion of "standing" and the requirements therefor, see ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 297, 298 (Wolfson and Kurland's ed. 1951).
18. *See* Barrows v. Jackson, 346 U.S. 249, 260 (1953) (dissenting opinion).