Washington University Law Review

Volume 1950 | Issue 3

January 1950

Constitutional Law—Racial Restrictive Covenants—Action for Damges Held Outside Doctrine of Shelley v. Kraemer

A. Rodney Weiss
Washington University School of Law

COMMENTS

CONSTITUTIONAL LAW — RACIAL RESTRICTIVE COVENANTS — ACTION FOR DAMAGES HELD OUTSIDE DOCTRINE OF SHELLEY V. KRAEMER.—Plaintiffs were white persons who owned lots in Santa Fe Place in Kansas City, Missouri. Defendants, also white persons, owned lots in the same subdivision. The land of both the plaintiffs and the defendants was subject to a private restrictive agreement which provided that none of the lots could be devised, sold, leased, or occupied by Negroes. Both the plaintiffs and the defendants were parties to the agreement either as original makers or as successors in interest. The defendants in violation of the private agreement sold a lot to one Street, a Negro, and the plaintiffs filed a petition to restrain Street from buying and occupying and to restrain the defendants from selling to Street. The original petition was dismissed on the basis of *Shelley v. Kraemer*;[1] however, the Supreme Court of Missouri found that the plaintiffs' amended petition stated a cause of action for damages for the breach of the private agreement. The court, in remanding the case for trial, held that the United States Supreme Court's ruling in *Shelley v. Kraemer* did not prohibit the award of damages for a breach of racial covenant, but only prohibited specific enforcement of the covenant.[2]

Much has been written as to the extent and the meaning of the so-called "racial covenant cases"[3] but, until the decision by the Supreme Court of Missouri in the principal case, there has been a dearth of judicial interpretation and application of the principles there expounded. Several writers[4] have taken the position that the decisions in the racial covenant cases barred any recovery of damages for the breach of a racial covenant and that these cases extended the rights protected against state action in the

1. Shelley v. Kraemer, 334 U.S. 1 (1948).
2. Weiss v. Leaon, 225 S.W.2nd 127 (Mo. 1949).
3. Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948).
4. Gershan, *Restrictive Covenants and Equal Protection—The New Rule in Shelley's Case*, 21 SO. CALIF. L. REV. 358 (1948); Ming, *Racial Restrictions and The Fourteenth Amendment: The Restrictive Covenant Cases*, 16 U. OF CHI. L. REV. 203 (1949); Scanlan, *Racial Restrictions in Real Estate —Property Values Versus Human Values*, 24 NOTRE DAME LAW 157 (1949); Comment, 61 HARV. L. REV. 1450 (1948); Comment, 3 ARK. L. REV. 96 (1948).

Fourteenth Amendment of the Federal Constitution. The Missouri court, in authorizing an award of damages, dismissed such contentions as mere speculation, and held that their decision was not inconsistent with *Shelley v. Kraemer*, or *Hurd v. Hodge*.[5] It is submitted that the court's holding that *Shelley v. Kraemer* is not controlling on the issue of an award of damages is well taken.

In the *Shelley* case the validity of restrictive racial covenants was not denied. Twenty-two years previously, in *Corrigan v. Buckley*,[6] such covenants entered into by private individuals in respect to the control and disposition of their own property were held not to be voided by either the Fourteenth Amendment or the Civil Rights Act.[7] Thus the question before the Supreme Court in the *Shelley* case was not as to the validity of such covenants, but rather whether the enforcement of the admittedly valid covenants by a state court constituted *state action* of such a nature as to be violative of the Fourteenth Amendment. Chief Justice Vinson, in expressing the opinion of the Court, held that "judicial enforcement" of such covenants by a state court was state action within the meaning of the Fourteenth Amendment and further that such enforcement was discriminatory within the meaning of the equal protection clause and therefore prohibited by the amendment. The crucial phrase, of course, is "judicial enforcement," for upon its meaning rests the correctness or incorrectness of the Missouri Court's interpretation of that decision. If the phrase was meant to mean any and all relief that a court may award, then the giving of damages is necessarily forbidden. However, if the phrase was meant to be construed more narrowly and to pertain only to equitable remedies akin to specific performance and injunctive relief, then *Shelley v. Kraemer* clearly does not bar an award of damages for a breach of a racial covenant. For several reasons the latter interpretation, adopted by the Missouri court in the instant case, would seem more correct.

5. Hurd v. Hodge, 334 U.S. 24 (1948).

6. Corrigan v. Buckley, 271 U.S. 323 (1927). It has been suggested that this case was overruled by Hurd v. Hodge, 334 U.S. 24 (1948), see Note, 3 A.L.R.2d. (1948), but technically speaking it was not. The *Corrigan* case held that such covenants were not against the federal public policy. The *Hurd* case held that to enforce such covenants when state courts were denied the right to enforce them would be inconsistent and against public policy, but it did not invalidate such covenants.

7. 14 STAT. 27 (1866), 8 U.S.C. §42 (1946).

It is, of course, axiomatic that a court should only pass upon the precise issues at bar; any further declarations by a court, being nothing more than dicta, are not entitled to any compelling adherence under the doctrine of stare decisis. This in itself is sufficient reason to sustain the Missouri court's position that the *Shelley* case is not controlling, as the issue of an award of damages was not before the court in that case.

However, even disregarding this reason, there are other reasons which lend support to the Missouri court's interpretation of the ambiguous phrase "judicial enforcement." The opinions in both the *Shelley* case and the *Hurd* case seem to have been written with the conscious effort to decide only the exact question at hand and to leave all other questions which might arise concerning racial covenants for a later determination. There would seem to be no reason why, if the court meant to bar an award of damages, a declaration to that effect was not specifically included in the lengthy and well-considered opinions of the companion cases. Another indication that the phrase was not meant to include an award of damages is found in the concurring opinion of Justice Frankfurter in *Hurd v. Hodge*.[8] The learned Justice felt that, since the appeal for relief against the breach of the covenant was to the equity side of the court, the entire case could be dismissed on the basis of the "exercise of a sound judicial discretion." This is a strong indication that the Court only concerned itself with the equitable issues that were actually before it and did not pass upon the merits of the legal question of damages. Finally, it is presumed that the Court was well aware of the dissenting opinion of Judge Edgerton of the United States Court of Appeals for the District of Columbia in *Hurd v. Hodge*.[9] In developing the view which was later followed by the Supreme Court in the racial covenant cases when certiorari was granted, Judge Edgerton also used the rather unfortunate word "enforcement" and the Chief Justice may well have been acquainted with and influenced by Judge Edgerton's terminology. It is interesting to note the following explanation given by Judge Edgerton in relation to the question of whether "enforcement" included an award of damages:

8. Hurd v. Hodge, 334 U.S. 24, 36 (1948).
9. See Hurd v. Hodge, 162 F.2d 233, 235 (D.C. Cir. 1947).

> To say that the Constitution forbids direct and actual *enforcement* of a racial covenant by injunction — the only remedy which is intended to and necessarily does prevent Negroes from acquiring and using restricted property—is not to say that it forbids to a neighboring property owner such damages, if any, as an executed sale to a Negro may be shown to have caused.[10]

While the reasons here presented are obviously not conclusive that the Supreme Court in *Shelley v. Kraemer* meant a narrow construction of the phrase "judicial enforcement," they do afford a strong basis for the Missouri court's position that *Shelley v. Kraemer* is not controlling authority on the issue of an award of damages for a breach of a racial covenant.

However, granted that the *Shelley* case is not controlling on the issues presented by the principal case, the ultimate question still remains to be answered. Is an award of damages for the breach of a racial covenant state action and discriminatory under the equal protection clause of the Fourteenth Amendment? The Missouri court answered this question in the negative.

There would seem to be little or no basis upon which to deny that an award of damages by a state court is state action. Judicial action might very well have been found to be state action at any time after the decision in *Ex parte Virginia,*[11] and if any doubt remained it was removed by the court in *Sheley v. Kraemer* when it was said:

> That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the meaning of the 14th Amendment, is a proposition which has long been established by the decisions of this court.[12]

Thus the basic question is not whether the action is state action but whether the state action is discriminatory. The answer to this question is not found without difficulty.

It is immediately ascertainable that if any discrimination exists in awarding damages for the breach of a racial covenant the discrimination is *indirect.*[13] In a case involving an award of damages the individual Negro is in no way hurt, as under the doctrine of *Shelley v. Kraemer,* the Negro is and must be

10. *Id.* at 240 (Judge's Note 22).
11. *Ex parte* Virginia, 100 U.S. 331 (1880).
12. Shelley v. Kraemer, 334 U.S. 1, 14 (1948).
13. Inducing breach.

given the title and occupancy of the land he purchased. The only individual directly injured by an award of damages is the breaching party; and this injury is of course not of a discriminatory nature; neither is it in reality an injury but actually a remedial award for a breach of contract to which he is the breaching party. This is the theory of the principal case. But, while it is clear that there is no direct discrimination by an award of damages, it is equally clear that there is an indirect discrimination against the entire Negro race. A party to a racial covenant will be much more reluctant to break that covenant and sell to a Negro if he knows that he will be subjected to damage suits by other parties to the restrictive agreement. Further, the number of suits for damages against the breaching party can at least theoretically number as many as there are parties to the agreement, which in the case of a large subdivision may prove to be quite numerous. Thus the award of damages by a state court for the breach of a restrictive agreement does indirectly discriminate against the Negro race as it will have a tendency to bring about a drastic reduction in the number of willing sellers of land to Negroes. The ultimate question therefore is whether indirect discrimination by the state is prohibited by the Fourteenth Amendment. A search of the authorities has revealed no answer to this question, and it would seem that it has been seldom litigated.

If on appeal the instant case is reversed and indirect discrimination held to be violative of the Fourteenth Amendment, a perplexing question of private law will present itself. It is now well established that the racial covenants themselves, standing alone, are valid and not voided by the Fourteenth Amendment or by the Civil Rights Act.[14] Thus, since the covenants are not voided by the Constitution or any statute enacted in pursuance thereof, their validity becomes one of the public policy of each state, and under the doctrine of *Erie R. R. Co. v. Tompkins*[15] this declaration of public policy is not reviewable by the Supreme Court of the United States. Since the great majority of the states have held the covenants,[16] it would seem that their validity is unimpeachable. But can there be a valid contract if there is no remedy?

14. *Id.* at 13; Corrigan v. Buckley, 271 U.S. 323, 330 (1927).
15. Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
16. Note, 3 A.L.R.2d 486 (1948).

If they cannot be enforced, as was held in the *Shelley* case, and if it is held that damages for their breach will not lie, then are such covenants actually valid? The problem presents, at the very least, some real theoretical difficulties. A possible solution would seem to be to fit the covenants into the class which the Restatement of Contracts calls "Unenforceable Contracts."[17] Another possible solution was advanced in the racial covenant cases themselves but ignored in the decisions. It was suggested that in view of the ratification of the United Nations Charter by this country the covenants could be declared void on the basis of the treaty power.[18] While it would seem that the section referred to in that Charter was more a declaration of purposes than a commitment, it is possible that other treaties with individual nations might well support this contention. In the final analysis, however, as to this subsidiary problem, it is doubtful whether the court would be much concerned with the symmetry of the law if it decided that a civil liberty was being invaded by an award of damages.

In summary, it is submitted that the Missouri court's position that the *Shelley* case is not controlling on the issues of damages is well taken. It also would seem that the basic question on review is not whether there has been state action but whether the indirect result of that action is discriminatory within the meaning of the Fourteenth Amendment. While a reversal of the principal case is highly desirable and would be in keeping with the intents and purposes of the original framers of the Amendment, such a result would be of such magnitude in extending the coverage of that Amendment that it cannot be said with any conclusiveness that on appeal the instant case will be reversed.

A. RODNEY WEISS

17. RESTATEMENT, CONTRACTS §14 (1932). While this is a possible solution it is a solution which is open to debate. An unenforceable contract is defined as one which the law recognizes in some indirect or collateral way as creating a duty of performance, though there has been no ratification. Thus a contract the enforcement of which is barred by the Statute of Limitations may still have indirect legal consequences since a creditor, if he has security under the contract, may apply that security toward the debt. Likewise where a bargain is unenforceable because of the Statute of Frauds third persons may not defeat the claims of either contracting party as such a defense is only obtainable interparty. In the case of a racial covenant, however, what legal consequences would follow to make it analogous to these examples of unenforceable contracts? It would seem none.

18. Note, 3 A.L.R.2d 484 (1948).