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Constitutional Law - Equal Protection - Damage Action for Breach of Racial Restrictive Covenant

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CONSTITUTIONAL LAW — EQUAL PROTECTION — DAMAGE ACTION FOR BREACH OF RACIAL RESTRICTIVE COVENANT—Petitioners sued at law for breach of a racial restrictive covenant,[1] alleging that respondent violated the covenant by conveying restricted realty without incorporating restrictions in the deed, and by permitting non-Caucasians to enter and occupy the premises. The trial court sustained a demurrer to the complaint, the California court of appeals affirmed,[2] and hearing was denied by the state supreme court. On certiorari the United States Supreme Court *held,* affirmed, Chief Justice Vinson dissenting. An award of damages by a state court for breach of racial restrictive covenants would constitute state action which would deprive the excluded class of equal protection of the laws in violation of the Fourteenth Amendment. *Barrows v. Jackson,* 346 U.S. 249, 73 S.Ct. 1031 (1953).

Prior to 1948 it had been assumed by the state courts that an action for damages would lie for breach of a racial restrictive covenant.[3] In that year the United States Supreme Court decided the *Restrictive Covenant Cases,*[4] which held that in granting specific performance of racial restrictive covenants the state courts acted to deny members of the excluded class equal protection of the laws in violation of the Fourteenth Amendment. The opinion made clear that the covenants, standing alone, are not constitutionally invalid[5] inasmuch as the prohibitions of the Fourteenth Amendment are directed only against state action.[6] Judicial enforcement of the covenant is the state action proscribed.[7] The opinion was not clear, however, as to the scope of the rule stated.[8] Left for determination was the question whether the doctrine extended to state court judgments for damages for breach of restrictive covenants. The issue was first squarely confronted in *Weiss v. Leaon,*[9] in which the Supreme Court of Missouri held that a judgment for damages is not precluded by the

[1] The agreement provided that no part of the restricted realty be used or occupied by any person or persons not wholly of the white or Caucasian race, and that the restriction should be incorporated in all papers and transfers of the lots. The agreement is quoted in part in Barrows v. Jackson, 112 Cal. App. (2d) 534 at 536, 247 P. (2d) 99 (1952).

[2] Barrows v. Jackson, note 1 supra.

[3] Eason v. Buffaloe, 198 N.C. 520, 152 S.E. 496 (1930); Chandler v. Zeigler, 88 Colo. 1, 291 P. 822 (1930); Wyatt v. Adair, 215 Ala. 363, 110 S. 801 (1926). The last named case was an action for breach of an implied covenant of quiet enjoyment.

[4] Shelley v. Kraemer, McGhee v. Sipes, 334 U.S. 1, 68 S.Ct. 836 (1948); Hurd v. Hodge, Urciolo v. Hodge, 334 U.S. 24, 68 S.Ct. 847 (1948). The latter two cases arose in the District of Columbia. Inasmuch as the Fourteenth Amendment is directed at state action, note 7 infra, the decisions therein were based on 14 Stat. L. 27 (1866), 8 U.S.C. (1946) §42. For convenience these four cases will be referred to as the Restrictive Covenant Cases.

[5] Shelley v. Kraemer, note 4 supra, at 13.

[6] Ibid. And see Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883).

[7] "It is clear that but for active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint." Shelley v. Kraemer, note 4 supra, at 19.

[8] See Groves, "Judicial Interpretation of the Holdings of the United States Supreme Court in the Restrictive Covenant Cases," 45 ILL. L. REV. 614 (1950).

[9] 359 Mo. 1054, 225 S.W. (2d) 127 (1949).

Fourteenth Amendment.[10] The court in that case confined the holding of the *Restrictive Covenant Cases* to equitable decrees operating directly upon members of the excluded class. A broader construction was adopted by the Michigan court in *Phillips v. Naff*,[11] which held that an action for damages is an indirect method of enforcement which operates "to inhibit freedom of purchase by those against whom the discrimination is directed."[12] The principal case likewise reasons that to compel the grantor to respond in damages amounts to state sanction which encourages the use of restrictive covenants.[13] The Supreme Court thus clarifies its holding in the *Restrictive Covenant Cases* by declaring that an award of damages constitutes state action which has the indirect effect of requiring members of the excluded class to pay a higher price for restricted land, i.e., a price inclusive of anticipated potential damages which the seller might incur. In drawing no distinction between equitable and legal enforcement of racial restrictive covenants in applying the Fourteenth Amendment, the Court logically extends the rule of its earlier decisions. The threat of retribution in the form of damages is as effective as injunctive relief in facilitating the continued discrimination which the amendment seeks to prevent. The dissent does not take issue with this conclusion,[14] but rather argues that the Court violates a recognized self-imposed restriction on jurisdiction by deciding a constitutional issue which is raised in defense by a party not within the class whose constitutional rights are allegedly infringed.[15] In substance, the objection of the Chief Justice goes to the admitted absence of an identifiable non-Caucasian who is denied rights of property.[16] Inasmuch as the application of the rule denying standing to raise another's rights would effectively have denied the adjudication of constitutional rights under the facts of the principal case, it

[10] A like decision was reached by the Oklahoma court in Correll v. Earley, 205 Okla. 366, 237 P. (2d) 1017 (1951). The suit was brought in tort for conspiracy to injure the value of plaintiff's property.

[11] 332 Mich. 389, 52 N.W. (2d) 158 (1952).

[12] Id. at 401. In accord with the Michigan decision, see Roberts v. Curtis, (D.C. D.C. 1950) 93 F. Supp. 604.

[13] "If the state may thus punish respondent for her failure to carry out the covenant, she is coerced to continue to use her property in a discriminatory manner, which in essence is the purpose of the covenant." Principal case at 254.

[14] "Coercion might result on the minds of some Caucasian property owners who have signed a covenant such as this, for they may now feel an economic compulsion to abide by their agreements." Dissent in principal case at 268. It is significant that Chief Justice Vinson, who wrote the dissenting opinion, was also the author of the opinions in the Restricted Covenant Cases.

[15] "This deep-rooted, vital doctrine demands that the Court refrain from deciding a constitutional issue until it has a party before it who has standing to raise the issue." Dissent in principal case at 264, citing Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972 (1939) (concurring opinion of Justice Frankfurter); Stearns v. Wood, 236 U.S. 75, 35 S.Ct. 229 (1915); Fairchild v. Hughes, 258 U.S. 126, 42 S.Ct. 274 (1922).

[16] The requirement of standing inherent in the doctrine of "party in interest" has its basis in the constitutional limitation on the jurisdiction of the Supreme Court to "cases" or "controversies." See Coleman v. Miller, note 15 supra. The principal case holds that the jurisdictional requirement is satisfied, since judgment against respondent would constitute a direct, pocketbook injury in an award of damages. The point of departure in the dissent is not that there was no "case or controversy," but that there was no "party in interest" to raise the constitutional issue.

would seem that the majority was correct in proceeding without regard to its usual rule of practice.[17] Procedural proscriptions on power which are intended to define the scope of the doctrine of judicial review of executive and legislative action should not prevail in such unique situations where the action of a state court would result in a denial of constitutional rights and would render it difficult, if not impossible, for the persons whose rights are asserted to present their grievances before any court. Though there is much to be commended in the consistent application of rules of practice, the more fundamental task of the Court is to render meaningful the guarantees of the Constitution.

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[17] For cases in which the rule was apparently relaxed, see Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925); Columbia Broadcasting System v. United States, 316 U.S. 407, 62 S.Ct. 1194 (1942); Truax v. Raich, 239 U.S. 33, 36 S.Ct. 7 (1915).