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# Further on Unenforceability of Racial Restrictive Covenants - Barrows v. Jackson

# FURTHER ON UNENFORCEABILITY OF RACIAL RESTRICTIVE COVENANTS

## *Barrows v. Jackson*[1]

Petitioners sued respondent at law for damages arising from a breach of a restrictive covenant entered into as owners of residential real estate in Los Angeles. The covenant provided that no part of the real estate should ever be used or occupied by non-Caucasians; and that such restriction should be incorporated in all deeds. Respondent conveyed one of the restricted lots without incorporating the restriction in the deed or making reference to it. The day after the respondent moved off the property, non-Caucasians moved in. The trial court sustained a demurrer to the complaint, the District Court of Appeals for the Second Appellate District affirmed, and the Supreme Court of California denied a hearing. The Supreme Court of the United States granted certiorari and *held: Affirmed.*

The precise question before the court was whether a restrictive covenant can be enforced at law by a suit for damages against a co-covenator who breached the covenant. The Supreme Court in a six to one decision, Justice Vinson dissenting vigorously on the ground the question was not properly before the court,[2] held that such a restrictive covenant could not be enforced against a co-covenator. The court held that since a restrictive covenant could no longer be enforced in Equity against non-Caucasian purchasers, because such enforcement would constitute state action denying equal protection of the law to the non-Caucasian purchasers, in violation of the Fourteenth Amendment,[3] the court would not enforce it indirectly by compelling the respondent to pay damages for breach of the covenant.

Mr. Justice Minton delivered the opinion of the court, and said:

> "To compel respondent to respond in damages would be for the State to punish her for her failure to perform her covenant to continue to discriminate against non-Caucasians in the use of her property. The result of that sanction by the State would be to encourage the use of restrictive covenants. . . . The action of a state court at law to sanction the validity of the restrictive

[1] 346 U. S. 249 (1953) ; and see Note, *Unenforcibility of Racial Restrictive Covenants*, 10 Md. L. Rev. 263 (1949), noting Goetz v. Smith, 62 A. 2d 602, 191 Md. 707 (1948).

[2] For discussion of this point see companion note which follows.

[3] Shelley v. Kraemer, 334 U. S. 1 (1948), cited 10 Md. L. Rev., *supra*, n. 1.

> covenant here involved would constitute state action as surely as it was state action to enforce such covenants in equity, as in *Shelley*. . . ."[4]

As was stated previously, the case of *Shelley v. Kraemer*,[5] held that where state action is called upon to enforce a restrictive covenant against non-Caucasian purchasers, there is a violation of equal protection of the laws guaranteed under the Fourteenth Amendment. But the Court stated that such agreements standing alone are not a violation of any rights guaranteed under the Fourteenth Amendment. So long as the agreements are carried out by voluntary adherence to their terms, and so long as there has been no state action, the provisions of the Constitution have not been violated.

In the instant case however, the parties had ceased relying upon voluntary action to carry out the covenant, and the state was asked to compel respondent to pay damages. As a result of such damages, a prospective vendor of restricted property would either refuse to sell to a non-Caucasian or else require a higher price from a non-Caucasian to reimburse the vendor for the damages he would incur for the breach of the covenant. Due to these circumstances, a non-Caucasian would be unable to purchase and enjoy property the same as a Caucasian. The prohibition of these rights by a State would be a denial of equal protection of the laws.

The Petitioners contended that to refuse to enforce the covenant is to impair the obligations of their contracts under Section 10 of Article I of the Constitution.[6] The court answered this by citing *Tidal Oil Co. v. Flanagan*,[7] which held the provision is directed against legislative action only, and not actions of the courts. Another contention of petitioners was that they were denied due process and equal protection of the laws by the failure to enforce the covenant. Mr. Justice Minton quoted from the *Shelley* case to answer this argument.

> " 'The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals'."[8]

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[4] *Supra*, n. 1, 254-5.
[5] *Supra*, n. 3.
[6] "No State shall: . . . pass any . . . Law impairing the Obligation of Contracts. . . ."
[7] 263 U. S. 444 (1924).
[8] *Supra*, n. 1, 260; *supra*, n. 3, 22.

Since the *Shelley* case in 1948, the state courts have construed the principle strictly, denying injunctive relief to enforce restrictive covenants.[9] Maryland in the case of *Goetz v. Smith*,[10] in 1948 was in accord, denying judicial enforcement of a restrictive covenant. However, conflict developed between the States as to the effect of the *Shelley* case on the question of whether a covenatee may recover money damages for the breach of the covenant.

Cases in Missouri and Oklahoma had held that money damages could be gotten for the breach. The Missouri Court in *Weiss v. Leaon*,[11] held that damages and injunctive relief are two different things, and that while *Shelley* had held that giving injunctive relief was unconstitutional, it had left the problem of damages open. In *Correll v. Earley*,[12] the Oklahoma Court reached the same result. There the Court, held a claim for damages may be maintained against a white seller, a straw man, and a non-Caucasian purchaser for a conspiracy to violate the covenant.

On the other side, the Michigan Court in *Phillips v. Naff*,[13] felt that while restrictive covenants themselves are valid, there could be no more then a voluntary adherence to their terms. The court felt that no state action could be taken at all, or the case would be brought into the prohibitions of the Fourteenth Amendment. Also, the United States District Court for the District of Columbia in *Roberts v. Curtis*,[14] held that the prohibition against injunctive relief as stated in *Shelley* was broad enough to cover an action for damages as well.

After the *Barrows* decision, there would seem to remain no room for doubt as to the all-embracing effect of the doctrine of *Shelley v. Kraemer* in precluding *any* type of State sanction for racially restrictive covenants.

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[9] Cummings v. Hokr, 31 Cal. 2d 844, 193 P. 2d 742 (1948); Rich v. Jones, 142 N. J. Eq. 215, 59 A. 2d 839 (1948); Woytus v. Winkler, 357 Mo. 1082, 212 S. W. 2d 411 (1948).

[10] 191 Md. 707, 62 A. 2d 602 (1948), noted, 10 Md. L. Rev. 263, *op. cit.*, *supra*, n. 1.

[11] 359 Mo. 1054, 225 S. W. 2d 127 (1949).

[12] 205 Okla. 366, 237 P. 2d 1017 (1951).

[13] 332 Mich. 389, 52 N. W. 2d 158 (1952).

[14] 93 F. Supp. 604 (D. C., D. C., 1950).