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Constitutional Law - Equal Protection of the Laws - Is the Conveyance of Property in Violation of Reacially Restrictive Covenant by a Co-Convenantor an Actionable Breach of Covenant

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were the rules liberally construed, with the exceptions gaining wide and varied application, the result might be more equitable but it would bring about an increase in the number of actions.[18] The theoretical difference between the "liberal" interpretation and the "strict" or "literal" interpretation of the rule against splitting causes of action lies in the definition of "cause of action"; whether it be a small group of operative facts to which the possible exceptions are numerous,[19] or whether it be a large group of facts, which would be all conclusive of the rights of the parties, barring most, if not all, subsequent actions.[20] Policy, as a result, controls the adjudication of actions which involve this question and the Kentucky court has unequivocally allied itself with the proposition that the rules are to be administered with due concern for the plight of unwary and unfortunate litigants.

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CONSTITUTIONAL LAW — EQUAL PROTECTION OF THE LAWS — IS THE CONVEYANCE OF PROPERTY IN VIOLATION OF A RACIALLY RESTRICTIVE COVENANT BY A CO-COVENANTOR AN ACTIONABLE BREACH OF COVENANT?—Defendant conveyed her real estate to a non-Caucasian in violation of a written covenant, which she had endorsed, providing that the property should not be occupied by persons other than of the Caucasian race and that this restriction should be contained in all papers transferring the stipulated land. Plaintiff asked $11,600 damages for the breach of covenant. *Held* that to permit damages would discourage the sale of restricted land to other than Caucasians except at a premium to secure the seller for anticipated damages. This would deny non-Caucasians the right to buy property on the same terms as Caucasians and would be a denial by the states of equal protection of the laws. *Barrows v. Jackson*, 73 S.Ct. 1031 (1953).

In his dissent Chief Justice Vinson listed the following points as the basis for his disagreement:

1. The court has no jurisdiction since the party before the court is not within the class of persons whose constitutional rights may be impaired.[1] Although it is the general rule that no person may question the constitutionality of a statute who does not belong to the class of persons discriminated against, the rule is not applicable to every case.[2] When the constitutional rights of a person or class of persons are to be determined by a federal court it must determine them on the evidence presented.[3] There is no definite rule that will solve the question of Equal Protection of the Laws in every instance,

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18. *See* Clark v. Kirby, 243 N.Y. 295, 153 N.E. 79, 82 (1926) "All procedure is merely a methodical means whereby the court reaches out to restore rights and remedy wrongs; it must never become more important than the purpose which it seeks to accomplish."

19. McCaskill, *Actions and Causes of Actions*, 34 Yale L. J. 614 (1925).

20. Clark, Code Pleading, 137 (2d ed. 1947).

1. *See* Barrows v. Jackson, 73 S. Ct. 1031 (1953) (dissent).

2. Quong Ham Wah Co. v. Industrial Acc. Commission, 184 Cal. 26, 192 Pac. 1021, 1023 (1920); Green v. State, 83 Neb. 84, 119 N.W. 6, 7 (1908); *accord*, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

3. Law v. Mayor and City Council of Baltimore, 78 F. Supp. 346, 351 (D. Md. 1948).

but only general principles to guide the court in reaching a decision.[4] An exception to the general rule stated above permits persons affected by the state action to raise the constitutional question even though not a member of the class discriminated against, if no member of that class is in a position to urge its unconstitutionality.[5] This exception is applicable to the instant case where a judgment adverse to the respondent would result in a direct injury of $11,600 to her.[6]

2. Judgment for the plaintiff would invoke no direct injury to any identifiable non-Caucasian and therefore the ruling in Shelley v. Kraemer is not in point.[7] The basic objective sought to be obtained by the framers of the fourteenth amendment was the erasure of undue favor and hostile discrimination and oppression of persons or classes, as well as the extension of federal protection to the "recently emancipated race" from unfriendly action by the states.[8] As was pointed out in *Shelly v. Kraemer*, "Equality in the enjoyment of property rights was regarded by the framers of that amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the amendment was intended to guarantee".[9] The courts will not permit a "quibbling distinction" to overturn a principle which has the protection of a fundamental right as its aim.[10] One of the general principles established demands that the rights of all persons under similar circumstances be judged by the same rules. This applies to all powers exercised by the state affecting a class of people or their property.[11] It is generally agreed that action by the state courts constitutes action by the state,[12] and it has been held that covenants of this nature cannot therefore be enforced by judicial action of any kind.[13]

3. The majority, in upholding the contentions of the respondent, imposed a

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4. Louisville Gas Co. v. Coleman, 277 U.S. 32, 37 (1928); Magoun v. Illinois Trust & Savings Bank, 170 U.S. 283, 293 (1898) "What satisfies this equality has not been and probably never can be precisely defined."; Kentucky Railroad Tax Cases, 115 U.S. 321, 337 (1885) "The rule of equality, in respect to the subject, only requries the same means and methods to be applied impartially to all the constituents of each class."

5. Quong Ham Wah Co. v. Industrial Acc. Commission, 184 Cal. 26, 192 Pac. 1021, 1023 (1920) (employer permitted to contest the constitutionality of a Workmen's Compensation Act which permitted residents of California to proceed against the employer for injuries sustained but which did not grant the privilege to non-residents, since no non-resident could ever have the opportunity to raise the constitutional question); Green v. State, 83 Neb. 84, 119 N.W. 6, 7 (1908) "Where such a law is sought to be enforced against any person, whether belonging to the classes discriminated against or not, it should be declared void." (Defendant's conviction of violating a statute which made "blackmail" a crime only against citizens or residents of Nebraska reversed).

6. Barrows v. Jackson, 73 S. Ct. 1031 (1953).

7. *See* Barrows v. Jackson, 73 S. Ct. 1031 (1953) (dissent).

8. Buchanan v. Warley, 245 U.S. 60, 76 (1917); *accord*, Shelley v. Kraemer, 334 U.S. 1, 20 (1948); Truax v. Corrigan, 257 U.S. 312, 334 (1921).

9. Shelley v. Kraemer, 334 U.S. 1, 10 (1948).

10. United States v. Jeffers, 342 U.S. 48, 52 (1951) (where repondent left a package of narcotics in the room of another and officers entered and searched the room without a warrant, held that an invasion of privacy was a good defense).

11. Louisville Gas Co. v. Coleman, 277 U.S. 32, 37 (1928); Magoun v. Illinois Trust and Savings Bank, 170 U.S. 283, 293 (1898); Kentucky Railroad Tax Cases, 115 U.S. 321, 337 (1885).

12. *E.g.*, Shelley v. Kraemer, 334 U.S. 1, 14 (1948); Civil Rights Cases, 109 U.S. 3, 17 (1883) (civil rights guaranteed by the Constitution can only be impaired by state action in the form of laws, customs, or judicial or executive proceedings); Correll v. Early, 205 Okla. 366, 237 P.2d 1017, 1021 (1951).

13. Roberts v. Curtis, 93 F. Supp. 604 (D. D.C. 1950)

"novel constitutional limitation" upon the state's power to enforce their contracts.[14]

According to construction by the courts in prior decisions this constitutional limitation on the states to enforce their contracts was imposed by the fourteenth amendement.[15] The rule was laid down in *Shelly v. Kraemer* that the enforcement of racially restrictive covenants by the courts is state action in violation of the equal protection clause of the fourteenth amendment.[16] This rule is generally accepted by the courts and the decision in the instant case which follows it is neither new nor novel.[17] Any other would have effectively nullified the decision in *Shelley v. Kraemer* and denied to the negroes the protection from discrimination which the framers of the fourteenth amendment intended them to have.[18]

BAYARD LEWIS

CRIMINAL LAW — INDIANS — STATUTORY RAPE NOT A BASIS FOR JURISDICTION UNDER TEN MAJOR CRIMES ACT — Defendant, a Menominee Indian, was indicted by a federal grand jury for the statutory rape of an Indian girl on the reservation. He moved to dismiss the indictment on the grounds that the federal court lacked jurisdiction to try him. It was *held,* that the motion should be granted. The crime of rape enumerated in the Ten Major Crimes Act[1] must be defined in accordance with the law of the state where the crime is committed, and in Wisconsin, it does not include the carnal knowledge of a female under the age of consent. *United States v. Jacobs,* 113 F.Supp. 203 (E.D. Wis. 1953).

No federal court has jurisdiction to try an Indian for a criminal offense committed on a reservation unless his crime is one covered by the so-called Ten Major Crimes Act.[2] The Act enumerates ten crimes considered offenses if committed by one Indian against another on an Indian reservation. These are murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny. Carnal knowledge, assault with intent to rape and assault with intent to do great bodily harm were stricken from the Act as amended. Thus, these latter crimes are no longer federal offenses with the meaning of the Act. In respect to the crime of rape, the court will follow the law of the state where the crime was committed.[3] It is interesting to note, however, that as to the other crimes in the Act, this is apparently not so, and the federal courts will disregard state law and follow federal definitions or tribal law where they are concerned.[4]

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14. *See* Barrows v. Jackson, 73 S. Ct. 1013 (1953) (dissent).
15. Shelley v. Kraemer, 334 U.S. 1, 17 (1948); Roberts v. Curtis, 93 F. Supp. 604 (D. D.C. 1950); *see* Correll v. Earley, 205 Okla. 366, 237 P.2d 1017, 1021 (1951).
16. Shelley v. Kraemer, 334 U.S. 1, 17 (1948).
17. Shelley v. Kraemer, 334 U.S. 1, 17 (1948); Roberts v. Curtis, 93 F. Supp. 604 (D. D.C. 1950); *cf.* Civil Rights Cases, 109 U.S. 3, 17 (1883).
18. See the discussion in Nixon v. Herndon, 273 U.S. 536, 541 (1927) (denying negroes the right to vote in Democratic Party primary elections in Texas held violative of fourteenth amendment); see also Buchanan v. Warley, 245 U.S. 60, 77 (1917).

1. 47 Stat. 337 (1932). 18 U.S.C. §548 (1946).
2. State v. District Court, 125 Mont. 398, 239 P.2d 272 (1951).
3. United States v. Jacobs, 113 F.Supp. 203 (E.D. Wis. 1953).
4. Toy Toy v. Hopkins, 212 U.S. 542 (1909); United States v. Kagama, 118 U.S. 375 (1886); *cf.* Earle v. Godley, 42 Minn. 361, 44 N.W. 254 (1890).