# In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1952

Washington, D. C.

April 28, 1953

OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA,

Petitioners

vs.

LEOLA JACKSON,

Respondent.

No. 517

WARD & PAUL
1760 PENNSYLVANIA AVE., N. W.
WASHINGTON, D. C.

NATIONAL 8-4266 8-4267 8-4268 8-4269

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Washington, D. C.,
Tuesday, April 28, 1953.

The above-entitled cause came on for oral argument at 3:10 p.m.

PRESENT:

The Chief Justice, Honorable Fred M. Vinson, and Associate Justices Black, Frankfurter, Douglas, Burton, Clark, and Minton.

APPEARANCES:

On behalf of Petitioners:

J. WALLACE McKNIGHT, Esquire,
408 South Spring Street,
Los Angeles 13, California.

On behalf of Respondent:

LOREN MILLER, Esquire,
542 South Broadway,
Los Angeles 13, California.

# P R O C E E D I N G S

The Chief Justice: Case No. 517, Olive B. Barrows and others versus Leola Jackson.

The Clerk: Counsel are present.

The Chief Justice: Mr. McKnight.

## ARGUMENT ON BEHALF OF PETITIONERS

By Mr. McKnight

Mr. McKnight: If it please the Court, I would like to reserve 15 minutes for my closing argument.

After stating the facts in this case, I would like to cover the following topics: The constitutional right to make and enforce a contract; whether the State action sought in this case would be constitutional; the opinion of the Court below; the Shelley case, Shelley v. Kraemer; respondents' public policy argument; and the alleged indirect effect of the judgment for respondent upon persons unknown, not parties to this action, could not possibly be as claimed.

This case is here on certiorari, and there are three separate and independent claims for damages joined in conformity with the California rules of joinder. The facts are very brief and are contained in about one and two-thirds pages in the brief, page 6 of the brief.

In 1944, the respondent and two of the petitioners, petitioner Barrows and petitioner O'Gara, and the ancestor in title of the petitioner Pikaar signed an agreement, and for

consideration each promised that no part of his then owned property should ever at any time within 99 years -- and I refer to page 6 of the record -- be used or occupied by non-Caucasians.

Each promised to incorporate in all transfers of the property and all deeds that promise which they had signed.

In February, 1950, the respondent transferred title of her property and failed to include the agreement in the deed. In September of 1950, non-Caucasians began to use and occupy the lot which respondent had promised would not be occupied. As a result of this, the petitioners were each severally damaged in the amounts alleged. This is all admitted by demurrer.

We come here on a demurrer. The respondent demurred generally. The first, I think it is, five demurrers on page 7 are just general demurrers. Then the sixth and the seventh demurrers are based, I think, on constitutional grounds.

Now, the trial court sustained the demurrers without leave to amend. The court below held that the complaint states a cause of action for a breach of contract on common law principles, and I refer to the record on page 32 and page 34. On page 32, the court says:

> "We first consider whether a cause of action is stated for damages for breach of contract under common law principles."

And when they had considered that, then they held:

> "We hold that, apart from the constitutional issue,

the complaint states a cause of action for damages."

So that clearly shows that the court below held that the complaint states a cause of action for breach of contract on common law principles. But the court below sustained the demurrer on constitutional principles.

Now, the constitutional right to make valid contracts is well recognized. We do not need to quibble about whether this is a contract or not. The court below has held that a cause of action was stated for damages for breach of contract in those two sentences, which must be read together. The contract is valid.

The court in Corrigan versus Buckley, specifically held that the contract was valid. The Shelley versus Kraemer, held that the Constitution did not make the agreement involved in that case invalid on constitutional principles. Clearly, if an agreement is not invalid, if it is not constitutionally valid, then it is valid.

Now, the right to make and enforce a valid contract is recognized -- it is taken for granted in most cases. Most cases begin on the premise that it is taken for granted. It was expressly stated as one of the Civil rights in the Civil Rights cases.

Now, the idea of validity and remedy are inseparable. That has been held many times. Two cases in particular are Home Building and Loan versus Blaisdell and Von Hoffman versus

Quincy.

Now, both of those involve the impairment of contracts clause. But even if the impairment of contracts clause were not involved, those statements would still stand as defining what the contracts are and what the rights of contracts are.

Justice Frankfurter: Mr. McKnight, is there any other question in this case that can seriously be argued except the applicability of Shelley versus Kraemer? Is there anything else that is really worrying anybody?

Mr. McKnight: No, I do not think that there is, except that we get into that through the question of whose rights are being tried here.

Justice Frankfurter: You mean, standing?

Mr. McKnight: Standing. Now, let me get into that right away, your Honor.

Justice Frankfurter: I did not mean to suggest it. I just wonder why, when one has limited time, the attack is not made against the one real obstacle in the case, which I think is Shelley versus Kraemer.

Mr. McKnight: I am leading up to it, your Honor. So if we get by the question of contract, we come to whether or not the State action requested in this case is constitutional, and that is the question presented in the Shelley case.

Now, State action must be testified by the rights of the litigants. I do not know whether I need to cite authorities for

that, but a great number of the authorities are cited in note 13 on page 26 of the brief.

So the State action involved in this case must be tested by this respondent, and so if respondent has no rights which are being denied by this State action, then this State action would not be constitutional. The only right which respondent has claimed or claims is being denied here is the right to dispose of her property. But she has disposed of her property, and for consideration.

Now, the opinion below -- I may have to get into that more later --

Justice Black: You say that she has disposed of her property?

Mr. McKnight: She has disposed of her property.

Justice Black: What is the suit for?

Mr. McKnight: The suit is for the damages which resulted when her promise --

Justice Black: You mean, the suit is for damages on account of the fact that she did sell her property?

Mr. McKnight: No, your Honor.

Justice Black: What is it for?

Mr. McKnight: She promised that her property would not be used or occupied by non-Caucasians. Thereafter, it was occupied by non-Caucasians. Now, the sale of it is not a breach of the contract.

Justice Black: What is the breach of the contract?

Mr. McKnight: The breach of the contract is when non-Caucasians occupied the property. When non-Caucasians --

The Chief Justice: Is that not pretty fine?

Mr. McKnight: No, your Honor.

The Chief Justice: In other words, you had this contract, and she agreed that non-Caucasians would not live there in the block and occupy her property?

Mr. McKnight: That is correct.

The Chief Justice: Then she sold the property to permit the non-Caucasians to occupy it?

Mr. McKnight: Yes.

The Chief Justice: Does anything scare you off from the fact that it was a breach of contract?

Mr. McKnight: The breach of contract must be looked at from the standpoint of the terms of the contract. They did not promise not to sell. So we do not attack that. But what they did promise is what we say -- the thing they promised would not happen is what did happen.

Justice Black: What was the language?

Mr. McKnight: The language was that the property at any time would never be used by non-Caucasians.

Justice Black: And she guaranteed that?

Mr. McKnight: Right.

Justice Black: And you do not think the fact that she sold

it to a non-Caucasian would breach the contract?

Mr. McKnight: No, your Honor. If she sold it --

Justice Black: If that is not a breach of contract, and she sold it without breaching, how can she keep the people who own it now from using it, the colored?

Mr. McKnight: Your Honor, she could not.

Justice Black: How could you sue her for breach of contract, then, for letting them live on it?

Mr. McKnight: Because of the terms of the contract, your Honor.

Justice Black: But you say that she did not breach the contract in selling it, that she was only breaching it by not keeping them from living there, and you say that she did not have any right to keep them from living there?

Mr. McKnight: Your Honor, when the insurance company says that they will pay damages if the house burns down, you do not have to show that they set the fire.

Justice Black: I understand that. But that is not this case.

Mr. McKnight: No. But she did not say that she would not sell to anyone, but she did say that it would never be used or occupied by non-Caucasians, and she would --

Justice Black: And now it is being used. Now, can you tell us how she could keep them from using it?

Mr. McKnight: She does not have to keep them from using it,

your Honor.

Justice Black: For you to get damages -- you could not get damages merely because they were living in it.

Mr. McKnight: She promised that it would not be used. She did not limit it by the lengths of time that she owned it. She did not limit her promise --

Justice Black: This is a kind of penalty. She just agreed that if somebody lived in it that was not a Caucasian, she would pay you a certain amount?

Mr. McKnight: Your Honor, people make a contract, and we do not call them penalties. She made a contract. She was the original signer.

Justice Black: She made a contract to do exactly what and when?

Mr. McKnight: She made a contract that non-Caucasians would never use or occupy the property, just as a person who takes a performance bond, who makes a performance bond, if he makes a performance bond that a certain criminal will appear in court on a certain day, if the criminal --

Justice Black: You say she took on herself the burden of saying that no non-Caucasian should ever live on this property?

Mr. McKnight: Yes, sir.

Justice Black: Relying on herself for damages?

Mr. McKnight: That is right, your Honor.

Justice Black: That is pretty much of a perpetuity contract.

Mr. McKnight: Your Honor, the demurrer admits that that was the contract. If that was not her contract, they should have raised it by answer.

Justice Burton: She agreed that she should put a restriction in the deed that she conveyed, but she did not put it in?

Mr. McKnight: No, she did not put that in, either.

Justice Black: You are not suing her on that?

Mr. McKnight: Yes, we are.

Justice Black: You are?

Mr. McKnight: That is a distinct breach. That is the first breach. There are two distinct breaches alleged, the failure to include the covenant in the transfer, and the breach of the conditions of her agreement, just the same as when a criminal does not show up --

Justice Black: Suppose you tried to enjoin her from making the sale; could you do it under the terms of Shelley versus Kraemer?

Mr. McKnight: Under Shelley versus Kraemer, if we tried to enjoin her, that would be the rights of other people involved who had not signed the contract.

Justice Black: Could you enjoin her?

Mr. McKnight: No, your Honor, I do not think you could.

The Chief Justice: Aside from Shelley versus Kraemer in California, can you secure damages upon a contract which you seek to reform, and it has not been reformed?

Mr. McKnight: In one action, you might bring an action to reform the contract and recover the damages as reformed, your Honor. But I do not quite see your connection.

The Chief Justice: I am just speaking to your statement. I thought you said that your first count was for her not including in the contract the provision in respect to the covenant.

Mr. McKnight: We are not suing in equity, your Honor, to --

The Chief Justice: But how can you recover damages upon a piece of paper for each breach of it, when you say that it would be necessary to reform the instrument to have the covenant in it?

Mr. McKnight: Your Honor misunderstands. We are not suing on a contract which did not contain this provision.

The Chief Justice: Oh. But you said --

Mr. McKnight: No.

The Chief Justice: I thought you had it in two facets.

Mr. McKnight: We are suing on two breaches of her one contract.

The Chief Justice: All right. Now, what is the first?

Mr. McKnight: Her one contract contains two things: one, that the property would not be used by non-Caucasians; and, two, that when she transferred the property, she would include that agreement in her deed. But neither one was conditional upon the other, but both of them were breached. And we are not suing at all upon her transfer. We are not suing at all upon her deed in which she left out anything. We are suing upon her contract.

The Chief Justice: I thought you just got through saying that you were suing for failure to include it in the deed.

Mr. McKnight: Yes.

The Chief Justice: Then how can you keep from suing her on the deed?

Mr. McKnight: No. We are suing on her contract, because her contract said that she would include it in the deed. But we are not suing on her deed, because her deed, failing to include the agreement, is one of the breaches. We are suing on her contract, and the terms of her contract, the things that she agreed that she would be liable for, and the demurrer admits that she had agreed to be liable for those things that we have alleged she said she would be liable for, or said she would do -- well, not said that she would do, but that she said would not happen.

Justice Minton: You are suing her because she failed to include in the contract that non-Caucasians would not occupy these premises?

Mr. McKnight: No, we do not put it that way, your Honor. We sue her because something happened which she said would not happen, just the same as when --

Justice Minton: That was because somebody who was not a Caucasian occupied the lot?

Mr. McKnight: Right. Whether she had anything to do with that --

Justice Minton: How could she prevent that?

Mr. McKnight: She did not need to prevent it, any more than an insurance company --

Justice Minton: You mean, if a covenant is impossible of performance, she is liable on it?

Mr. McKnight: An insurance company cannot control the fires, either. She made the contract, and a guarantor cannot control the performance of some third person.

Justice Minton: The insurance company guarantees that if there is a fire they will pay.

Mr. McKnight: And her contract guarantees that if there is non-Caucasian occupancy, she will pay.

Justice Minton: That cannot possibly be prevented by her.

Mr. McKnight: Your Honor is basing questions on a defense which could be raised in an answer. If she says that she did not contract to this, that would be one thing. But she does not. She admits it, by demurrer.

The Chief Justice: Mr. McKnight, your time is running on. I would like to hear you speak to Shelley versus Kraemer.

Mr. McKnight: Fine. I would just like to state that the opinion below is based upon the rights of non-Caucasians, or the rights of strangers to this action.

Now, as to Shelley versus Kraemer, the facts of Shelley versus Kraemer were that -- I am going to point out a number of points in the facts -- first, the petitioners in Shelley versus Kraemer had no actual knowledge of any covenant having been

placed on that land. They purchased into an area which was mixed. They thought they were getting in a mixed territory.

The trial court below found that the convenant had not even been signed by enough people to make it valid. The real estate agent kind of committed a fraud on the purchasers, the petitioners, by selling property which belonged to him, to them, under a dummy name, and then finally the injunction was being sought against their occupying property which they had bought without knowing that there was any restriction on it, and not only that, but the title was being taken away from them without any apparent provision being made for them to recover what money they had paid on it. But the operating facts, I believe, were that the court there was concerned with what was being taken away from the petitioners. They were having property taken away from them, based on a covenant or an agreement, which they had no knowledge of, which they had nothing to do with. And the Shelley case reaches what I believe to be the crucial point, on page 13, where they recognized the validity of the agreement in that case:

> "Since the decision of this Court in the Civil Rights cases, the principle has become firmly mebedded in our constitutiona law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may thoroughly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrong-

ful. We conclude, therefore, that restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to the petitioners by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated."

Now, we come to the critical portion of this opinion. Here they say that so long as there is no court action, then clearly there is no State action; clearly the Constitution cannot be involved. But here there was more. So now, here there was State action.

"These cases are cases in which purposes of the agreements were secured only by judicial enforcement by State courts of the restrictive terms of the agreements."

Now, that does not answer the question. That shows that now we have more than just valid agreements between private parties.

The converse of what is said is not that it becomes void the minute the court comes in. The converse of what is said is that when the court steps in, then it is not clear that there has been no invalid State action.

The Chief Justice: How is that? If the court steps in,

it is not clear?

Mr. McKnight: It is not clear.

The Chief Justice: What?

Mr. McKnight: When the court steps in, then the test, which the Shelley case raises here, must be applied. Before the State comes in, you do not have to apply any test.

The Chief Justice: In the Shelley case, the contracts were not invalid.

Mr. McKnight: Right.

The Chief Justice: But the enforcement of them, as I understand, was State action, which caused enforcement to fall.

Mr. McKnight: Then you have to apply this test. The response urged that judicial enforcement of private agreements does not amount to State action, but in any event the participation of the States is so attenuated in character as not to amount to State action within the meaning of the Fourteenth Amendment.

Finally, it is suggested that even if the States in these cases may be deemed to have acted in consideration, in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment.

"We move to a consideration of these matters."

In other words, the test is this. First, is it State action? Then, if it is State action -- and it was State action -- if it is State action, does it deprive these petitioners of

rights guaranteed by the Fourteenth Amendment? And bearing on that test, they go to consider the rights of the petitioners in that case.

So in this case, we must go to consider the rights of the respondent in this case.

Now, in the Shelley versus Kraemer case, the case of Buchanan versus Warley was considered, you might say, controlling. It was applied. In answering this test, in answering the test of whether or not the petitioners in that case had been denied a constitutional right, they looked to the Buchanan versus Warley case.

I say that the Buchanan versus Warley case, which was an ordinance, might be applied in that case because the petitioners in that case had no part in framing the terms upon which the court acted.

The Chief Justice: Is that the Louisville case?

Mr. McKnight: Pardon?

The Chief Justice: Is that the Louisville case, Buchanan versus Warley?

Mr. McKnight: Yes, zoning.

The Chief Justice: Zoning, the Kentucky cases?

Mr. McKnight: Yes. A white property owner had a contract to sell to a non-Caucasian --

The Chief Justice: I do not see where that comes in particularly.

Mr. McKnight: That case came in very strongly --

The Chief Justice: I mean, though, here or any other place. It is interesting and pertinent. But there you have the action by the City Council.

Mr. McKnight: Yes.

The Chief Justice: And that was executive action.

Mr. McKnight: Yes.

The Chief Justice: And in Shelley, it was judicial.

Now, really what your case boils down to, Mr. McKnight, is this, or is it, that even though a restrictive covenant is not enforcible in the court, Shelley versus Kraemer concurring, you have to consider what the situation is in respect to an action in damages upon a contract which was said not to be invalid?

Mr. McKnight: Yes. May I reword it to show my position? Even though a racial agreement cannot be enforced against a person who was not a party to it and had nothing to do with those terms, yet we must now consider whether such a similar agreement can be enforced in damages against a particular individual who herself was a party to the terms. The terms are not the terms of the court. In the Shelley case the terms were the terms of the court.

The only connection that connected those terms to the petitioners in the Shelley case was the rules of the court, as was very much emphasized in the briefs for the petitioners in those cases.

But in this case, the terms are the terms of the respondent, and the respondent is not in a position to assert constitutional rights when the --

The Chief Justice: (interposing) The Negro asserted in Shelley versus Kraemer?

Mr. McKnight: Yes, your Honor. That is true.

The Chief Justice: That is what you are trying to say?

Mr. McKnight: That is what I am trying to say. The respondent said, in her own terms, she had a right to contract. She did contract. If the contract limited any of her constitutional rights, then she had a right to limit those constitutional rights. Our property rights are things which we have a constitutional right to dispose of for our benefit.

The Chief Justice: What constitutional right could she have limited?

Mr. McKnight: Well, she could -- her rights --

The Chief Justice: I mean, in terms of this contract.

Mr. McKnight: All her rights and property; her rights to be free from damages. And the petitioner --

The Chief Justice: That was not agreed upon, was it?

Mr. McKnight: Well --

The Chief Justice: I thought that was what you were trying to get, damages.

Mr. McKnight: Before the contract, she had a right to be free from damages, but after the contract, she did not have a

right to be free from damages. Contracts always limit the rights of the parties to those contracts, and nearly always they put a limitation -- nearly always contracting parties agree to do something or agree not to do something which legislation cannot order them to do or could not order them not to do. Most contracts require the parties to contracts to do something or not to do something that a court of law, in reliance on the legislation, could not order them to do or order them not to do. And so whereas in the Shelley case the court applied a test to these terms, the same test that they would apply to a statute, in this case we cannot apply the same test to these terms which you apply to a classification in a statute. The classifications in a statute have to be tested by the police power test. But the terms of a contract do not have to be tested by the police power test. We would raise Cain with our concept of contracts if we began to say, "Well now, this is State action, and so we have to test it by the police power test or the reasonable relation to a valid legislation purpose." We do not test contracts by that.

Now, even if a term like this were placed as a classification in legislation, as in the Buchanan case, and thereafter if the parties to the litigation had themselves adopted that statute and acted in response to it and reliance on it, they could not thereafter challenge the statute, ad is shown in the T.V.A. case.

The language in Ashwander versus T.V.A., I have on page 38 of the brief:

> "The court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits."

So in the Buchanan case, if the parties to that litigation had both of them availed themselves of the benefit of the ordinance complained of there, they could not have complained of the constitutionality of it. And so, in this case, whatever State action exists in this case, the parties contracting with reference to it and in reliance on it took the benefit of it. And so, no constitutional rights are involved.

Actually, the Buchanan case can be cited at this point to show that one of the things that it stands for is that a person has a right to sell his property rights. And when a person contracts with reference to his property, whatever contract he makes with reference to his property, it can be interpreted as a sale of some of his rights in relation to that property. And he has a right to do that.

Now, the idea of testing terms in private instruments when they are relied upon by a court, the way we would test State action based on legislation just cannot be adopted. At least, I do not think it can be adopted. If we begin to say that court action is State action and therefore it must be tested the way legislative State action is tested, and if we find the term in

the private instrument upon which the court action is based, which term would be bad if it became a classification in the statute, then that would prevent us from enforcing many wills or from following many wills.

If the testator was afraid for his daughter and did not want her to marry in a different religion, or if he did not want her to marry in a different race, he would put in his will that if she marries outside of her religion or outside of their religion, his estate will be set up in a trust. Now, there is a term which is based on religion. A term in a statute based on religion would be an unreasonable classification, and it would be bad.

Now, if a court undertakes to enforce a will with a term in it like that, we cannot say that the court is violating the constitutional rights of the daughter when she does not get something. There are many, many instances of it.

If an owner of an apartment house did not want his apartment occupied by some group -- maybe he did not want his apartment house occupied by non-Caucasians -- and he instructed his manager, or his agent, that his agent should not rent any of the apartments to non-Caucasians, and then thereafter, suppose the agent willfully did it, and maybe other tenants moved out as a result, and there would de monetary damages resulting to the owner of the apartment house, in other words, he could prove it, or maybe there was a demurrer and the manager admitted it,

when the employer would sue the manager of the apartment house for the breach of his fiduciary relation, for the damages resulting from it, the manager would say, "Well, that was our agreement. That was our written agreement of employment. But the court cannot recognize our term, the term that we put in our employment agreement." The court cannot recognize it because that would be State action, and that would be a term which would be bad if it were in a statute, and that is the comparison which was made in the Shelley case, that here we have a term which was bad, and if it was bad in a statute, therefore, it was bad in the court action. But in that case --

Justice Black: But why would not this case come under the Shelley case?

Mr. McKnight: In the case that I mentioned, the Shelley versus Kraemer doctrine is terms which were not the terms of the respondent. They were not the terms of the respondent. Only the court was applying those to them. In this manager case, the terms --

Justice Black: I understood you to say that your postulated case was if agreements were made with respect to a certain religion or certain cult renting a certain place to live. Why would that not come under the Shelley versus Kraemer case, if the court attempted to enforce it?

Mr. McKnight: My hypothetical case is not such as you think, I believe. I will repeat it.

Now, it is conceded that the owner of the property may let whoever he wishes use it on the basis of the color of their eyes, or if they are Irishmen and he is an Irishman, on purely his whim. The owner of the property on his own whim can decide who will occupy his house. If he does not like their looks, if he just does not like the way they look at him, because he has that right of whim, he can express his whim to his agent. In the case I gave is where he instructed his agent to rent that property according to limitations, and he placed limitations upon the people that the agent could accept as tenants, and the agent agrees to those terms --

Justice Black: And then breaches his contract --

Mr. McKnight: And then breaches his contract of agency.

Justice Black: Suppose under those circumstances there is an effort made at enjoining him to obey the terms under which he was to discriminate against people on account of their race or religion; why would that not be covered by Shelley versus Kraemer?

Mr. McKnight: If we brought in an injunction, it would bring in the people that he was trying to rent it to, and they would not agree to the terms of the agreement. So there would be terms imposed upon them --

Justice Black: Why would it bring them in?

Mr. McKnight: Because you just do not bring an injunction suit --

Justice Black: You brought it against the man who contracted you. I do not know. Maybe the Shelley versus Kraemer case does not apply. I was just mentioning it.

Mr. McKnight: The Shelley versus Kraemer case would apply wherever there were individuals before the court who had not agreed to the terms which the court was applying, possibly. I will not say that as actual. That is a little too broad, because I do not think that this court wants to make it that broad. But the Shelley case would not apply where there were no individuals before the court who had not themselves made the terms. But it is hard to conceive of an injunction case like this where they would not be enjoinging the agent from renting to somebody.

Justice Black: I suppose it is possible, under Shelley versus Kraemer, is it not, that the apartment house owner could fire his agent for not doing it, and yet maybe he could not go into court and enforce that right? Is that not right?

Mr. McKnight: I think not, your Honor, because if we begin to recognize rights which people have in their property, and then the court says, "You have rights in your property, but nobody is going to enforce them," I think that is a bad situation.

Justice Black: That is what Shelley versus Kraemer held, is it not?

Mr. McKnight: No, your Honor, I do not think that it did.

Justice Black: Would you discuss that, then?

Mr. McKnight: I would compare it to this. It is claimed that a contract between A and B cannot be enforced against C, and you can deny enforcement against C and still recognize the validity of the contract between A and B, and that is what I think Shelley versus Kraemer did. Now, we are coming in to enforce the contract between A and B. It was their contract. Those are the two that are involved in this. I think it is a contradiction of terms to say, when you have a case against C -- no. It would be a contradiction of terms anyway to say that this contract between A and B is valid, but it cannot be enforced in any way against anybody. It is a contradiction of terms and it is a contradiction of the language which has been used in many cases to the effect that the validity and enforcibility are inseparable. The case of Lynch versus The United States is a case which was on the Fifth Amendment. In Lynch versus The United States --

Justice Black: They held that Congress could not change the contract between itself and the Government in connection with insurance.

Mr. McKnight: Yes. That was a case where the Government was a party to these contracts with the G.I.'s, the soldiers, and the two points which are made in that case -- one of them is dicta, the other one is not dicta -- but the one which is dicta is a statement, a very clear statement, of what I think, must be accepted, and on page 580 of the reports, the Court says:

> "Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened."

Now they use the term "impaired," but this is not an impairment section. This case is under the Fifth Amendment, and so if Congress had passed a law removing the right to enforce contracts between private parties, Congress would have been violating the Fifth Amendment. Now, the Court here in Lynch versus United States draws a distinction of where the United States is a party to the contract as distinguished from when individuals are parties to the contract.

If the United States is a party to the contract, the United States -- a sovereign -- could withdraw its consent to be sued without violating the constitutional rights in that contract

because the sovereign has other methods of recognizing and discharging the contract. They have the legislature to appropriate the money, they have the various Commissions to observe the terms of the contract, and so the contention was made in the Lynch case that this legislation did not abrogate the contract, but it just withdrew the right to sue the United States. But the Court held that it did more than that; that it not only withdrew the right to sue the United States, that it also repudiated the contract, and that took away the constitutional right, the property right, which is in the contract.

I hope that distinction is clear, because --

Justice Black: As I say, I do not quite get why. Are you attacking Shelley and Kraemer because it did hold, as you said, that even though the contracts were not invalid, a state could not enforce them through its courts?

Mr. McKnight: No, your Honor; I am not attacking Shelley versus Kraemer because Shelley versus Kraemer was a case where a contract between A and B -- they were trying to enforce it against C, and C was not a party to the contract.

Justice Black: You mean -- let me see if I get you clearly -- suppose a contract is made here in the city of Washington, one man to sell his property to another, and they agree that they will not sell it to a colored person, and the parties are about to do that, and the other party to the contract goes into court to enjoin him. Could he enjoin him under Shelley and

Kraemer, that is, the very person with whom he made the contract?

Mr. McKnight: It would depend on whether they also joined--

Justice Black: Suppose they did not join him?

Mr. McKnight: O.K. If they did not join him, the person who wanted to buy it, the non-Caucasian who wanted to buy that property would have to intervene in that suit to get the benefit of Shelley versus Kraemer.

Justice Black: That is your distinction?

Mr. McKnight: That is my distinction.

Justice Black: That is what I was trying to get.

Mr. McKnight: The person whose rights needed to be protected, the person who had not contracted for this state action, would intervene in that action and say, "I have rights in that property because he wants to sell it to me, and I have not agreed to those terms which you are trying to apply."

Justice Black: But what happens if he does not intervene?

Mr. McKnight: If he does not intervene?

Justice Black: The Court has to grant relief?

Mr. McKnight: I think so.

Justice Black: Despite Shelley and Kraemer?

Mr. McKnight: Yes, your Honor.

Justice Black: And it would still be state action?

Mr. McKnight: It would still be state action; you bet it would be state action.

Justice Black: But you are taking the position that this

is a valid contract protected by the constitutional provision against impairment of contract?

Mr. McKnight: No, of course, your Honor, I would like to draw a distinction between enforcement in law and enforcement in equity.

Contracts may be denied enforcement in equity without destroying the property right in a contract, and so this action for injunction might be refused without violating -- without destroying a property right in that contract.

The Chief Justice: What is the difference between law and equity if you have not got some constitutional right involved? You are talking about injunctive relief. Your case that you make is A and B here -- it is a contract between them. What you are saying, if I understand you, is that C only could be in Shelley versus Kraemer, and had some constitutional rights, and this Court said that the contract between A and B is not invalid, but the state cannot enforce that contract against C because of his constitutional status?

Mr. McKnight: Right, that is correct.

The Chief Justice: What you are saying, if I understand it, is that here are A and B who made the contract; that Shelley versus Kraemer does not say that it is invalid, and you brought an action in damages upon a contract that, so far as Shelley versus Kraemer is concerned, was not invalid against B. C, with his constitutional rights as to color, is not involved, and

hence the contract is enforceable.

Mr. McKnight: That is correct, your Honor.

I would like to pass to the contention made by respondent on the ground of public policy.

The Chief Justice: I do not know whether you are going to have your 15 minutes or not, Mr. McKnight. Ordinarily I do not keep time; I leave that up to the lawyers. You have got less than 15 minutes now; you have got about 12 minutes.

Mr. McKnight: Well, I asked to reserve 15 minutes for my closing.

The Chief Justice: Then you cannot reserve but 12 minutes if you stop now.

Mr. McKnight: I would like to say this -- just a few words then. Respondent in their second section tries to say that the lower court based its opinion upon policy. In this section they call it the policy of the law. But every case they cite is a case where the court held that the contract was either invalid or else illegal.

In California, when enforcement of contracts is refused because of public policy, the contract -- they call it void or they call it illegal or they call it invalid; but in this case they called it valid.

The appellate department said that the contracts are constitutionally valid. More than that, they said the complaint states a cause of action for damages for breach of contract.

Now, that is absolutely inconsistent with any holding on public policy at all; and, of course, if it had been on public policy it would not be here -- this Court would not grant certiorari based on public policy.

The Chief Justice: What did they say about public policy?

Mr. McKnight: They quote from the Hurd case, a portion of the Hurd case, which refers to public policy, and they cite some cases, one case where a union, the policy of a union, in the matter of race, was held contrary to public policy. But that was in a note, and the basis for that opinion was that a union is a semi- -- kind of like a public utility because it gets so much force and benefit out of the state. But they did not cite it as any authority for basing their opinion on public policy.

The Chief Justice: Did they say that it is against the public policy of California?

Mr. McKnight: No, they did not, your Honor; but they said the complaint states a cause of action for damages. What they did say was that the Shelley case was based on the rights of the excluding race. In other words, what the court below based its opinion entirely on was the constitutional question, as they thought the Shelley case held it. They thought the Shelley case on page -- I have got it -- well, anyway, the record shows that the court below, among the four things they thought the Shelley case decided were that the court could not

affect the rights of the excluded race.

The whole opinion, wherever it refers to constitutional rights, either fails to say whose constitutional rights or else it specifies constitutional rights which could not belong to this respondent, but which would clearly respond to strangers to this action, and no place in the opinion below do they say "respondent's constitutional rights are denied."

In fact, the end of the record, the last sentence, says, "As a consequence of Shelley versus Kraemer we cannot grant enforcement," so they based it purely on constitutional grounds.

ARGUMENT ON BEHALF OF RESPONDENT

By Mr. Miller

Mr. Miller: May it please the Court, Mr. McKnight, this is a case in which not only the principles enunciated in Shelley versus Kraemer apply, but it is also a case in which the restrictive covenant itself was written long before Shelley versus Kraemer. It was written in 1944, and it was written to effectuate the same ends as those that were sought in the covenants that were drawn in issue in Shelley versus Kraemer and in Sipes versus McGhee.

I dare say as a matter of fact, if the covenants were laid side by side they would be indistinguishable one from the other, and in their original complaint in the California court, the lower court, the plaintiffs delineated the things that they were complaining about.

They set forth at great length that respondent, and two of the petitioners who them lived in the same area, entered into an agreement to forbid non-Caucasian use and occupancy of their premises.

Now, that was the end at which the covenant was aimed.

They complain of a breach on page 4 of their record, and their complaint as to the breach is the complaint that non-Caucasian occupancy had eventuated in direct contradiction to the agreement that they say they had entered into with respondent in 1944.

Our trial court had no difficulty at all in finding on page 15 of the record that this covenant was aimed at exclusion of non-Caucasians; that was the purpose for which it was entered into.

The breach complained of was that -- and when these petitioners got into our District Court of Appeals they had no difficulty at that point in telling our District Court of Appeals what they were complaining about -- they said that their fundamental and primary purpose, your Honors, was to prevent, first, use and occupancy of other real property by non-Caucasions-- this appears on page 2 of our brief -- and, second, to the reprehensible tactics "of unscrupulous real estate dealers who canvass a neighborhood afflicted by the breach of promise against use and occupancy and harass and intimidate and alarm the residents in an intensive drive for listings, and third, to the

appearance upon the streets of the afflicted neighborhood of an unusual number of strangers of a demeanor and countenance such as to cause concern for the safety of the wives and daughters of the residents, and, fourth, to the anxiety of parents that their children will grow up to marry, or worse, with a neighbor playmate of a different race."

Now, these four unwholesome factors and others, they say, do not consist in any part of sale to non-Caucasians, and all are traceable only to use and occupancy by non-Caucasians.

The object that petitioners had in filing this case, the reason that they are here, is to enforce a race restrictive covenant to achieve the ends at which they aimed when they first signed it, that is, to prevent non-Caucasian occupancy.

Now, the circumstances of which they make much is that they are here to enforce this covenant through the device of a damage action rather than, as was the case in Shelley --

The Chief Justice: But a damage action in which the non-Caucasian is not a party.

Mr. Miller: A damage action in which the non-Caucasian is not an apparent party.

The Chief Justice: Not an apparent party; he is not a party.

Mr. Miller: He is not a party to the action itself.

They did not sue the non-Caucasians in this instance. But the end sought of enforcement, the point I am trying to make,

and I shall develop the point as to non-Caucasians -- but the end sought is enforcement of the covenant of the agreement, with the belief that this enforcement will achieve the same result as was achieved directly in the -- sought to be achieved directly in the case -- that revolved around Shelley versus Kraemer.

Now, our District Court of Appeals, considering this matter, considered it first from the point of view as to what was the objective sought by enforcement, and our District Court of Appeals came to the conclusion that the objective sought was the very objective which the petitioners had outlined in their complaint and which they had outlined in their brief.

Now, our District Court of Appeals was confronted with this question, your Honor, as to the non-Caucasians, as to whether or not it would exert its power, which was the power of the state, to effectuate the end of racial residential segregation, and as to whether or not it could exert its power to effectuate that end.

So it finally came to the conclusion that -- and it sets forth specifically -- that discrimination was inherent --

The Chief Justice: How is that?

Mr. Miller: (Continuing) -- that discrimination was inherent in the racial covenant -- discrimination was in itself inherent, an inherent feature of the covenant; that enforcement of the covenant would result in racial discrimination; and then

it held that since that was the purpose of the covenant, since that was the end of the covenant, and since the effectuation of racial residential segregation would result if it granted damages in this action, that it would not entertain the suit, and would not assess damages.

Now, petitioners complain that in doing that the California courts were adjudicating the rights of non-Caucasians who were not before the courts.

But the basis for our court's decision, the rationale for our court's decision, lay in the fact that it, as an agency of the state of California, would not use its power to enforce racial residential segregation, and not that it was adjudicating the right of non-Caucasians who were not before the court as such.

Justice Burton: That is to say they would not enforce it against anybody?

Mr. Miller: Against anybody.

Justice Burton: Against Caucasians and non-Caucasians or anybody else, because it is still a racial covenant.

Mr. Miller: It is still a racial covenant.

Justice Minton: In other words, it is against the public policy of California.

Mr. Miller: The reason assigned by our court was not in so many words that it was against the public policy of the state of California. The reason assigned by our District Court

of Appeals was that since this court had held in Shelley versus Kraemer that the Fourteenth Amendment forbade the exertion of state power to directly effect racial residential segregation, since that appeared not only in Shelley versus Kraemer but in the preceding cases of Buchanan versus Warley and it was a state policy to stay the effect of racial residential segregation, that it, as an agency of the state of California would not do that.

Justice Minton: Do you understand Shelley versus Kraemer to say that the contract was void?

Mr. Miller: I understand Shelley versus Kraemer, your Honor, to say that the contract, standing alone, violated no constitutional rights, and I understand Shelley versus Kraemer to say that so long as voluntary adherence is had to that agreement that no complaint can be made.

Now, the California court did not attempt to strike down or to take away that right of voluntary adherence. It left that right of voluntary adherence just where this court defined it in Shelley versus Kraemer.

Justice Minton: It was said that it could not be enforced in Shelley versus Kraemer because it violated the constitutional rights of people discriminated against.

Mr. Miller: Yes.

Justice Minton: It violated the Fourteenth Amendment as being discriminatory because it denied equal protection of the

laws; is that correct?

Mr. Miller: Yes.

The Chief Justice: And people who were not a party to the contract.

Mr. Miller: It happened that the people in Shelley versus Kraemer were not parties to that contract.

The Chief Justice: Were not.

Mr. Miller: So our court simply left the parties where it found them, not by way of punishing either party, but it left the parties where it found them, the same as it would have left them if it had been confronted with a contract where there was a direct California statutory interdiction against enforcement or a direct interdiction by way of public policy. That is where the California court left the parties.

Now, in California prior to Shelley versus Kraemer, covenants against sales to non-Caucasians were never held valid. They were believed to violate the public policy and the statutory rules of the state.

The only kind of racial covenants that the California court enforced were those covenants against use and occupancy.

Now, in this case, it is for that reason that the plaintiffs, the petitioners here, based their cause of action upon the resulting occupancy rather than upon the sale, because under the state law of California, the sale was prior to Shelley, and would have given rise to no cause of action.

Now, in their pleadings in this case, they pleaded that the signing covenantor permitted the non-Caucasian occupancy.

It became apparent during the course of the argument, that this permission could not be extended for the very reason that the questions here have indicated, that after she had parted with the title, that she could no longer control the occupancy features, and then at a later stage of the proceedings, counsel for petitioners opened their argument to the effect that the mere occurrence of non-Caucasian occupancy, although it was attentuated so far as respondent was concerned, and although it was something which respondent could never control, the very occurrence of that occupancy itself gave rise to the cause of action for damages.

Now, they complain that California has impaired the obligation of a contract. The California courts have not done anything now within the purview of state law that they would not have done as far as Shelley versus Kraemer is concerned, because when petitioners pleaded that this was permissive use and occupancy, they had, so far as California is concerned, pleaded a perfectly good cause of action prior to Shelley versus Kraemer, so that the change, as far as the California courts are concerned, came about through the California court's assessment of what this court's holding was in Shelley versus Kraemer, and not due to any change as far as California law was concerned, because California law on this subject was always

a body of substantive law and never a body of statutory law.

As far as the complaint as to the impairment of obligations of contracts is concerned, we do not understand that a mere change of interpretation in the California law in any event, the state court's interpretation of the substantive law, would have resulted in any impairment of the obligation of any contract. But we do say to the court that the California court had not impaired a contract through a change in any state law, but through an assessment of what this court had held so far as Shelley versus Kraemer was concerned.

Petitioners here also seem to complain that they are denied due process of law because they say that they are denied the right to enforce a contract; they are prohibited from making and enforcing contracts, an ordinary right given and granted by the state of California; and they say that since 1944, at the time they entered into this contract, they could have enforced it, that there must be some enforcement rights left; and they say that the denial of that right to enforce it takes away due process of law.

Now, of course, as this Court demonstrated in Shelley versus Kraemer, the mere taking away of the right of enforcement based on the Fourteenth Amendment grounds does not violate due process of law, because one of the things that was taken away in Shelley versus Kraemer was the right to enforcement by a specific performance. The right of enforcement by specific

performance, upon which the covenantors had theretofore depended, was certainly withdrawn in Shelley versus Kraemer, and that on the ground that the exertion of that right would have violated the Fourteenth Amendment.

There is no reason, of course, why if all the other factors are present the denial of the remedy of damages, standing in and of and by itself, denies due process of law, always supposing that the exertion of the power that is sought to be exerted here, would have resulted in a denial of rights under the Fourteenth Amendment.

If this Court struck down the remedy of specific performance, as it did, then, of course, the striking down of the remedy of the granting of damages, all things else being equal, is no more than the denial of due process in one case than in the other case.

The Chief Justice: What constitutional right did B have in this contract upon which he could justify the vitiation of it?

Mr. Miller: B had the right of the disposal of his property free from considerations of race or color.

The Chief Justice: Let us get the positions. Who is A?

Mr. Miller: I was taking it, your Honor, that you were using A and B as covenantors.

The Chief Justice: A and B are covenantors.

Mr. Miller: A and B are property owners at the beginning.

The Chief Justice: All right.

Now, B, you say -- what happened to him constitutionally?

Mr. Miller: At the point when they first confronted each other, each of them has the right to free disposal of his property, free of considerations of race or color, and that is Buchanan.

Now, they enter into an agreement one with the other in which they agree -- not in California, because this could not result, but in some other state in which it could result -- that they will not sell to a non-Caucasian.

B later on sells to a non-Caucasian, and, I take it from your Honor's example, that B then becomes --

The Chief Justice: A sues B.

Mr. Miller: (Continuing) -- A becomes the -- A sues B.

The Chief Justice: What are the constitutional rights that B relies upon?

Mr. Miller: At this point A calls, of course, upon the state for action. He hopes the state will act out of the common law notions of his court that damages will ordinarily ensue from the breaching of a contract.

Now, we might suppose that the state had passed a statute in the meanwhile saying that every signer of a race-restrictive covenant who sells property shall become liable in damages.

There, I think, it would be clear that the state was exerting its power to assist in the maintenance and the upholding

of race-restrictive covenants, and I say to this Court that the state exerts its power no less when the courts draw from their common law notion the theory that damages can be assessed as against B.

So that the constitutional right that B has here is his constitutional right to be free from the control of the state to say to whom he shall or he shall not alienate his property; that the moment he confronts the non-Caucasian as a willing seller that the state may not exert its power to prevent him from consummating that sale.

That, of course, was something in the case of Urciolo versus Hodge, as your Honor will remember.

Urciolo was a white person selling to a non-Caucasian. He was enjoined in the District Court here.

Now, Urciolo was not an original signer of the covenant, but the exertion of state power in the Urciolo case was against Urciolo, the white person, to keep him from selling to a non-Caucasian.

So, to make a complete answer to your Honor, the exertions of state power to keep B from conveying his property to C after he has signed a race-restrictive covenant, will deny his due process of law.

That, of course, is much the same situation that occurred in Buchanan versus Warley. There the matter was initiated by ordinance; here it is asked to be drawn from the common law of

the state.

In either case, the state intervenes. The vice of the situation is the intervention of the state and not the contract agreement itself.

The Chief Justice: What was the remedy sought in Buchanan versus Warley?

Mr. Miller: Buchanan was the white person.

The Chief Justice: I say, what was the remedy that was sought?

Mr. Miller: Buchanan sued Warley for specific performance.

The Chief Justice: He asked for specific performance?

Mr. Miller: Right. Warley was the Negro.

The Chief Justice: So you amortized the specific performance to the action for specific damages here.

The point I am getting at you go back to Buchanan against Warley, and I do not just see exactly how that fits in with your case.

Mr. Miller: Oh, I see. Warley, the Negro, had agreed to buy from Buchanan, the white man. Warley breached the contract, and the reason that he breached the contract was because he said this ordinance would prevent him from buying the property. Buchanan then sued Warley to compel him to respond by specific performance.

Then Warley claimed the benefits of the ordinance saying, "I cannot occupy; therefore I cannot buy."

Now, when Buchanan sued Warley, the first objection made as to Buchanan was that the ordinance is directed against non-Caucasian occupancy, that is, Warley, and that Buchanan cannot claim Warley's constitutional rights, because those constitutional rights as to occupancy are if any there are, accrue to Warley not Buchanan, the white person.

But the court, in looking at the situation, said that although the interdiction is on the right of occupancy of Warley, the non-Caucasian, still that interdiction on occupancy redounds to the advantage of Buchanan because it clogs the sale of Buchanan of his property to Warley.

So, in our case, they say, the white person here, respondent here, Jackson, cannot claim whatever rights the non-Caucasians may have. But here, as in Buchanan, the attempt is to clog the sale of real property on the basis of the race of the prospective purchaser so that they become inextricably interwoven.

The Chief Justice: It is not to clog this sale; it may be used to prevent other transactions of that kind. But this has already been consummated.

Mr. Miller: Of course, when your Honor speaks of the sale being consummated, that is true. But the sale will be vitiated nonetheless. It will be vitiated because if petitioners prevail here, they will take from respondent the very increment of that sale.

Now, that is not to say that the non-Caucasian will not be in his house, but so far as the respondent is concerned she had as well not have made the sale, since any accrual to her will have been taken by the state and given to petitioners by way of damages.

The Chief Justice: But that does not prevent the sale -- the Constitution from being applied fully in regard to the non-Caucasion occupancy; that constitutional right prevails.

Mr. Miller: He is secure in that occupancy, sir.

The Chief Justice: You say in a constitutional right that when you take money in damages from somebody and give it to somebody else, that is the increment of the sale -- now, you are pretty good, I think, but you still hold her on close to this sale, and it is the increment of the sale. Now, that is dollars, that is money, and because the law, the common law contract, free from any constitutional question --

Mr. Miller: Yes, sir.

The Chief Justice: (Continuing) -- might take away that money from A or from B and give it to A --

Mr. Miller: Yes, under the ordinary circumstances --

The Chief Justice: (Continuing) -- that is not a constitutional right, is it, taking money away from somebody for damages?

Mr. Miller: Of course not, your Honor. The constitutional right arises when this question thrusts itself into the situa-

tion as to whether or not the state may, upon considerations of race or color, in the occupancy of real estate and real property, then take money from B and give it to A. May the state make that a test; may the state say to B, "If you, B, sell your property to a non-Caucasian, that then we will hold you in damages in favor of other persons with whom you have signed a covenant?" May the state do it by statute? It seems to me plainly, no. If the state of California had signed a statute saying that signers of race-restrictive covenants must respond in damages if they sell, if Negro occupancy eventuates, then it seems that none of us would have any difficulty; we would all say that that statute is unconstitutional, and California may not do that.

Justice Black: What statute would you say was unconstitutional?

Mr. Miller: Supposing California passed a statute saying that every signer of a race-restrictive covenant will be liable in damages, if the sale of his property eventuates in non-Caucasian occupancy of that property after he has signed the agreement.

Now, here the same result is sought to be reached through a substantive rule of law. This is a rule of law laid down by the court.

Justice Black: You have a different cause of action. Of course, you have a constitutional right, but one of them is an

action for damages, and one of them is not.

Mr. Miller: No, both of them are going to be actions for damages. The California statute is going to simply give a cause of action for damages if a sale of property eventuates in non-Caucasian occupancy; that is what they ask by this rule of law here, the same end, and the same end is reached, the same result is sought after.

Justice Burton: One is statutory and one is common law.

Mr. Miller: One is statutory and one is common law. But in either event the attempt is to levy the damage for the non-Caucasian occupancy, and thus it becomes clear that in that sort of example the state is now actively involved in and engaged in the attempt to enforce racial residential segregation, because surely the end result of the enforcement of that kind of a statute would be to enforce racial residential segregation, and surely the end result of a substantive rule of law of this kind would be to enforce racial residential segregation.

Now, that is the point at which our District Court of Appeals held that it would not intervene, and that it would leave the parties purely and surely where this Court had said in Shelley versus Kraemer that they should be left, at the point of voluntary adherence to the terms of their agreement.

Much is said here about a valid contract. The word "contract" is the word involved; the word "valid" is the word involved so far as legal procedure is involved. Once you put two words

together, "valid contract," then you arrive, of course, at a point where enforcement seems not only imminent but ultimately required.

Now, this Court in talking about the contracts in Shelley did not use the word "valid" to describe it. What this Court held in Shelley was that the right of voluntary adherence resided in all of the signers to a covenant.

Now, whether you say that it is not void or whether you say it is merely unenforceable, whatever term you use, you arrive at a different point than you do if you use the word "valid" and couple it up with "contract." As a matter of fact, this Court, in talking about the writings in Shelley, called them agreements, for the most part, except in an isolated instance or two.

(Whereupon, at 4:30 o'clock p.m., the Court arose.)

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1952

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| OLIVE B. BARROWS, RICHARD PIKAAR and M. M. O'GARA, Petitioners, vs. LEOLA JACKSON, Respondent. | No. 517 |

Washington, D. C.,

Wednesday, April 29, 1953.

The above-entitled cause came on for further oral argument at 12:05 p.m.

PRESENT:

The Chief Justice, Honorable Fred M. Vinson, and Associate Justices Black, Frankfurter, Douglas, Burton, Clark, and Minton.

APPEARANCES:

On behalf of Petitioners:

J. WALLACE McKNIGHT, Esquire,
408 South Spring Street,
Los Angeles 13, California.

On behalf of Respondent:

LOREN MILLER, Esquire,
542 South Broadway,
Los Angeles 13, California.

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P R O C E E D I N G S

The Chief Justice: Case on argument No. 517, Olive B. Barrows and others versus Leola Jackson.

The Clerk: Counsel are present.

The Chief Justice: Mr. Miller.

ARGUMENT ON BEHALF OF RESPONDENT -- Resumed

By Mr. Miller

Mr. Miller: May it please the Court, and counsel, yesterday, your Honors, in our discussion of rights that might have arisen as between the parties signatory to the agreement, we proceeded upon the assumption that all of the petitioners here, and the respondent, were alike signatories to that agreement, and I neglected to point out at that time that one of the petitioners here, Pikaar, is a successor in interest of an original signor.

Now, he, too, is here claiming damages as against respondent.

It is obvious that he cannot claim or assert those damages arising out of any mere contractual relationship because he was never a signer of that agreement, but that his claim for damages, if any, must rest upon the proposition expressed in the agreement itself, and shown on page 3 at the bottom paragraph V thereof, the last sentence, "That each provision in said Agreement was for the benefit for all the lots therein described."

So that Pikaar claims as a lot holder, he asserts his right to damages upon that basis, and so, in truth, and in fact,

do all other petitioners here, although they choose to pitch their claim on what they say is a contractual relationship.

Under California law, the benefits of such agreements accrued to lot holders, whether those lot holders were parties signatory or whether they were successors in interest of parties signatory.

Now, it is obvious that if Pikaar confronts this Court as a party plaintiff here, claiming damages because he is a successor in interest of a signer, that we have the same situation in reverse that was presented in Urciolo versus Hodge.

Urciolo, in that case, was a party defendant, and he was a party defendant because he, as a successor in interest of a signer, was alleged to have sold a lot to a non-Caucasian.

Now, interestingly enough, the agreement that was said to bind Urciolo not only provided for injunctive relief and the remedy of specific performance, but it also contained a direct liquidated damage provision.

Urciolo, like the respondent here, was a white person. As to him there attached none of the incidence that may be said to attach to a person of non-Caucasian descent in this situation. But in Urciolo versus Hodge this Court held completely and with finality that there was no cause of action cognizable in the District Court as against Hodge -- I mean as against Urciolo.

So it is plain that the intent of the commandment of the

Fourteenth Amendment does not fall on the individuals, as such, and that what it falls upon and what it paralyzes is state action undertaken to effectuate the end of the covenant, and that the impact of the Fourteenth Amendment falls not upon the individual but it falls upon the court, because there the state action arises, and there the state action ends as far as this type of case is concerned.

If in Urciolo versus Hodge the damage provision was inoperative, and if no damages could be granted as against him, it seems to me to flow equally that no damage can be levied against the respondent here.

I want to say a final word on this matter of contractual relationships, and that revolves around what respondent could or could not have done to effectuate the end purpose of this agreement after she had signed it.

After she had signed it in 1944, and after 1948, when she became a willing seller, she then decided to convey in such a manner that non-Caucasian occupancy eventuated.

Now, suppose that prior to her sale, prior to the consummation of her sale, to the person through whose ownership this non-Caucasian occupancy eventuated, she had decided to sell directly to a non-Caucasian, and a non-Caucasian who avowed it to be the intent of occupancy, the inquiry addressed to counsel for the petitioner yesterday was, could any injunctive action be maintained against her to prevent that sale; and I understood

counsel to answer that in the absence of intervention by the prospective non-Caucasian buyer, that an injunctive remedy might have been granted by the California courts to have prevented that sale from which non-Caucasian occupancy was certain to have eventuated.

That, it seems to me, is not the law. It runs counter to Shelley versus Kraemer; it runs counter also to Buchanan versus Warley because, as this Court epitomized the holding in Buchanan versus Warley and in Harmon versus Tyler, the succeeding case, the precise question before this Court in both the Buchanan and Harmon cases involved the right of white sellers to dispose of their property free from restrictions as to potential purchasers based on considerations of race or color; so that if the California court had acted in that situation in which the respondent here proposed to make a sale which was certain to eventuate in non-Caucasian occupancy, it could not have done so by virtue of the holdings of this Court in both the Shelley case and in the Buchanan case; because it must be remembered that in the Buchanan case it was the non-Caucasian buyer himself who was trying to claim the benefit of this proscriptive ordinance, and even he could not assert it as against his proposed white seller, and he could not assert it because of the dispositive right that rested in that white seller to sell his property free from considerations of any race or color.

Thus the respondent was free in this action to have sold that property and to have insured non-Caucasian occupancy through whatever agreement she might have had with the buyer.

But here we are confronted with the strange situation in which petitioners now claim damages because respondent did the very thing that she could always have done, despite any agreement that she had signed, the moment she assumed the status of a willing seller.

There was no power in the California courts to restrain that sale; there was no power anywhere to prevent the respondent here from permitting non-Caucasian occupancy because the hands of the California court were stayed, so she has done now precisely what she was free to do.

Now they say a cause of action for damages arises because she has done under the contract what she was free to do despite the signing of that contract.

It seems to me that it must strain legal process a good deal to conjure up a claim for damages in that situation.

Of course, that was not the situation that confronted the signers of this agreement in 1944 because it was prior to the decision in Shelley versus Kraemer, and because our courts had not yet grasped the concept that judicial action is state action. The enforced agreements of this kind, and if this cause of action had risen in 1945, it is perfectly obvious that if respondent had permitted non-Caucasian occupancy that she

might have been subjected to two remedies, either the remedy of specific performance with a command for her to obey that agreement that she had signed, or they might have assessed damages against her with a finding of a particular court that damages would better serve that purpose.

It is said here by petitioners also, and it was suggested from the bench, that because the buyer in this particular case, who is the non-Caucasian, is secure both in his ownership and in his occupancy, that no question arises or can arise as to whether or not upholding the right to damages in this case will result in the exertion of state power to create racial residential segregation.

What, they say, will an award of damages do by exerting state power to effect the end of this covenant? And the end of this covenant, it must always be kept in mind, was to effect racial residential segregation. At first blush a statement of that kind seems to be true, and yet when the situation is equated to the holding in Shelley versus Kraemer that statement emerges as only a half-statement that may work greater mischief than a complete negation of the facts.

For what the California courts were asked to do in this case was to formulate a common law rule that enforcement of covenants can be arrived at through a levy of damages against the signers of that covenant. That much is crystal-clear; that is the reason this case got to court, that is the reason we are

here.

Of course, the California court was asked to announce that rule in a specific context, in a suit between, if you will, A and B, but in that same series of specific contexts,each an individual lawsuit, our courts had once announced, prior to Shelley versus Kraemer, a rule of law that specific performance was available to enforce the covenants, and that was the rule that this Court struck down in the Shelley case, and it struck it down not for any narrow technical reasons, but for broad constitutional reasons, because the command of the Fourteenth Amendment -- because of the command of the Fourteenth Amendment for equal protection.

In these circumstances, in the circumstances of this case here today, where the California courts were asked to announce this rule of law, the Fourteenth Amendment was necessarily drawn into consideration. The California court could not be blind to the consequences of its action, and it was not blind to those consequences.

Every opinion, Mr. Justice Holmes once said, tends to become a law, and here that tendency was reality; here the law-making functions of the court is what these petitioners called upon.

The inquiry as to whether any state legislature could have done that, could any city council have done that -- could the executive have done that? How then may it be said that the

judiciary may also do that?

The answer is, no, because legislation is enforced state action, and the plain lesson of Shelley versus Kraemer, no matter what else it may stand for, is that judicial action is also state action, no less subject to constitutional scrutiny than legislative action or executive action.

The truth of the matter is that the Fourteenth Amendment is no mere rule of law that may be waived as between parties to the action where the consequences of their action will reach far beyond their narrow lawsuit, and redound to the ultimate detriment of other individuals.

It is a direct command laid upon the states, and it enjoins them to withhold exertion of their power when the exertion of that power will subvert the very purpose of the Fourteenth Amendment, its very equalitarian purpose.

The state cannot play fast and loose with the Fourteenth Amendment; it has to guide its every action by that Amendment, and it cannot subvert that Amendment through the pretext or through the device of seeming to enforce an agreement as between two parties.

Finally, I want to refer again to what our state court actually did in this matter, what our state court actually found in this matter. It was presented with an action ostensibly laid in damages for violation of an agreement imposing race restrictions because that is what this agreement was about.

It looked at that agreement, it looked at the type of action, and it came, as it had a right to come, to the conclusion that within the context of California law, within the context of the social policy of that state, that the enforcement of this damage action would result in racial residential segregation.

Now, our courts, prior to Shelley versus Kraemer, also knew that. They knew that when they exerted a command of specific performance that the command was for residential segregation, and they found as a fact in this case that if they enforced a damage action, the command was for racial residential segregation.

The only reason that they enforced such agreements prior to Shelley versus Kraemer was that they took the view that judicial action in construing and applying a private agreement of this kind was not state action.

After Shelley versus Kraemer then, of course, assimilated the rule of Shelley versus Kraemer to our law, and it now became apparent to them that judicial action in this context was state action. So now they had arrived at a place in which a new rule of law had been assimilated to our state law, and that is that judicial action in this context is state action.

Now, that is the point at which the California courts follow Shelley versus Kraemer out of their belief that enforcement of the claim for damages in this case would result in

racial residential segregation; and I submit, of course, that they had a right to draw that conclusion under our law, under our public policy; and having drawn it, and having seen clearly since Shelley, that this is state action, they refused to enforce the agreement.

So we are left now, as far as California is concerned, with the California courts holding that enforcement of a racial-restrictive covenant through a levy of damages upon a signer who later becomes a willing seller, will effectuate the end of racial residential segregation. That the California court said it would not do, it could not do, and it did not do in this particular case, in this particular action.

That, it seems to me, reduces the holding, the rationale of the California court,to its complete simplicity.

The California court went further to say that, "We do not deny you due process of law because we failed to do this, because the Supreme Court has held in the Shelley versus Kraemer case that due process of law is not denied by striking down of the remedy of specific performance; the remedy of damages stands in no greater -- has no greater claim than that. We do not deny you equal protection because you cannot by virtue of Shelley versus Kraemer -- your demand for specific performance had been stricken down by this Court; we do not deny you -- we do not impair the obligations of any contract, because our view of the California law is since every action that

we undertake as a state court in this particular context is state action, that we will not use the action of the California courts to enforce racial residential segregation."

Justice Frankfurter: Do you think the question of whether or not it is a state action is or is to be determined by the state court, when you say your courts decided it was state action?

Mr. Miller: No, I think --

Justice Frankfurter: Was your court --

Mr. Miller: I beg your pardon, sir.

Justice Frankfurter: No, I have finished.

Mr. Miller: I think that our courts arrived at that conclusion through a reading of Shelley versus Kraemer through its assimilation to our law.

Justice Frankfurter: But is it clear whether they assimilated it to your law or is the real question whether Shelley versus Kraemer requires that?

Mr. Miller: I think that is the true situation. A respect for Shelley versus Kraemer requires that realization.

Justice Frankfurter: If they assimilated it, would it make any real difference?

Mr. Miller: It would not make any difference.

Justice Frankfurter: Or if they did assimilate it, the compulsion required by Shelley versus Kraemer would not make any difference.

Mr. Miller: It would not make any difference; and that, it seems to me, leaves us in the situation where the inquiry is as to what Shelley versus Kraemer interdicts.

Now, a reading of Shelley versus Kraemer --

Justice Minton: If California simply keeps its hands off and refuses to give damages in this instance, whose constitutional rights are violated?

Mr. Miller: Nobody's.

Justice Minton: Then it is a state question, is it not? Why is the case here?

Mr. Miller: As a respondent here, your Honor, I do not quite know how to answer that question. But that was precisely the view that our state court took that it would keep its hands off the matter. It did not attempt to impinge on the right of voluntary adherence.

Justice Frankfurter: But if we should open the courts to the enforcement of the right that the petitioners have, then, by keeping its hands off it would deny constitutional rights which could be redressed in your court. If I have a contract --

Mr. Miller: Yes.

Justice Frankfurter: (Continuing) -- and everybody else can sue in court in California on a contract, but your court says, "No, we will not enforce your contract because we think the provisions of a decision of the Supreme Court prevents us from enforcing it, doesn't that entail a Federal question?

Mr. Miller: I think that entails a Federal question. I think when the matter is thus phrased, the matter entails a Federal question.

Justice Frankfurter: It is not a question of whether I phrased it correctly, but is that the correct situation?

Mr. Miller: That is the correct situation that is here. Now, the California courts could, of course, have refused to enforce this particular kind of an agreement.

Justice Frankfurter: On their own.

Mr. Miller: On their own, as a matter of state policy.

Justice Frankfurter: On their own as a matter of state policy?

Mr. Miller: On their own as a matter of state policy.

Justice Frankfurter: But that is not what they did.

Mr. Miller: No, that is not what they did. They simply said, "We are confronted here with an agreement, the enforcement of which will be to enforce racial residential segregation through our action, which is state action, and they said that is state which is interdicted in Shelley versus Kraemer.

Justice Minton: Whose constitutional rights are violated by that?

Mr. Miller: Petitioners' here -- they say that their constitutional rights were violated.

Justice Minton: Of course, you do not agree with that, do you?

Mr. Miller: No, sir.

Justice Frankfurter: But if they were right, you would agree with it?

Mr. Miller: If they were right, your Honor, I would feel like the California Court.

Justice Frankfurter: Pardon me?

Mr. Miller: If they were right, I would feel like the California Court. I would be bound by the ruling of this Court, of course. It is not a matter of an individual preference, again. It is simply a matter of the duty that every citizen owes to be bound by whatever are the laws of the land.

Justice Frankfurter: If the petitioners are right that Shelley versus Kraemer does not rule this case, then the California Court cannot rest a denial of their claim by invoking Shelley versus Kraemer.

Mr. Miller: That is true, your Honor.

Justice Frankfurter: Although they might invoke a local policy as to which this Court would have no say?

Mr. Miller: They might invoke a local policy as to which this Court has no say; they might invoke other constitutional principles not directly adjudicated in Shelley versus Kraemer, and thus win the assent of this Court. Any of those eventualities might exist.

The Chief Justice: What non-Caucasian's constitutional right has been impinged?

Mr. Miller: The constitutional right of no non-Caucasian in

this particular case has been impinged.

The Chief Justice: How is that?

Mr. Miller: The constitutional right of no particular non-Caucasian in this particular case has been impinged. The impingement of the constitutional right, as I tried to say yesterday,through an enforcement of this agreement, would be the constitutional right of the respondent, who as a seller might have her rights curtailed upon considerations of race or color, as the white seller in Urciolo versus Hodge, or the white prospective seller in Buchanan versus Warley.

The Chief Justice: There you do not have any question of race involved. It makes no difference whether he is Caucasian or non-Caucasian.

Mr. Miller: That is, the seller?

The Chief Justice: Yes.

Mr. Miller: That is right. The seller, just as a seller, has no particular race in the situation. Race comes into the situation where her right of free alienation is impinged as to the buyer.

The Chief Justice: Race came into the question in Shelley versus Kraemer.

Mr. Miller: Yes. Race came into the question in Shelley versus Kraemer. Race came into the question in Buchanan versus Warley. Race comes into this question.

The Chief Justice: Now, how does race come into this ques-

tion so far as the preservation of a constitutional right? It has been said that a constitutional right is personal, and on the race issue -- I am not talking about the other facet -- but so far as the race issue is concerned in a constitutional right, you could raise that?

Mr. Miller: The respondent here may raise it.

The Chief Justice: The respondent is Caucasian.

Mr. Miller: She is a Caucasian. But she may raise it because of the inhibition that is attempted to be levied upon her sale, because she is selling to a non-Caucasian. That, of course, as I said before, is the same way in which Buchanan versus Warley raised it. He had a Negro buyer. He himself was a Caucasian. He had a non-Caucasian buyer.

So the first inquiry in Buchanan versus Warley was this same question which your Honor poses to me now, as to how Buchanan could assert that issue in that case.

The Chief Justice: What effect, if any, do you think the Corrigan case has?

Mr. Miller: I beg your pardon. Which case?

The Chief Justice: Corrigan versus Buckley.

Mr. Miller: None at all, sir. I would not quarrel with the doctrine of the Corrigan versus Buckley case, which simply held that, standing alone -- and this, of course, was reaffirmed in Shelley versus Kraemer -- that these buyers were violating nobody's constitutional rights, that they were simply void.

The Chief Justice: Now, what effect would this contract have if damage might not flow from a breach?

Mr. Miller: It would have whatever effect it might exert as moral suasion. It would leave them perfectly free to enter into and to observe the agreement as between themselves.

The Chief Justice: They can do that without a contract.

Mr. Miller: Yes. But a contract might add to or might --

The Chief Justice: It is your position that there is no sanction and no way in which a breach might be resultant in damages?

Mr. Miller: That, your Honor, is my contention.

The Chief Justice: Or any other effect? In other words, it just has no effect?

Mr. Miller: I think it has an effect. I think in the world of reality it has an effect.

The Chief Justice: You say this is an agreement between them; this is a written contract. They can have a verbal contract.

Mr. Miller: Of course.

The Chief Justice: But it just stands there as an agreement between the two people without any other result to take place?

Mr. Miller: Without any other result to take place. That is the concept of voluntary adherence which this Court announced in Shelley versus Kraemer, because it seems to me that the threat of enforcement, the actuality of enforcement --

The Chief Justice: But still, in Shelley versus Kraemer, you have an angle that I think you have not here, and that is, the buyer was a Negro and claimed that his constitutional rights had been violated.

Mr. Miller: That is right. And what the Court struck down in Shelley versus Kraemer was the rule of law drawn from the common law of Michigan and of Missouri which gave the State courts the right to issue specific performance.

Now, here, except for the incident that the immediate person before the Court happens to be a Caucasian, the State courts --

The Chief Justice: The person who raised the constitutional question because of color --

Mr. Miller: (interposing) -- that is correct, because of color, was a Caucasian.

Here the States are asked to announce another rule of law drawn from their common law, no less calculated to achieve the end of racial residential segregation than the command of specific performance.

The Chief Justice: I thought you said that they had a State policy expressed, and that the California Court rested upon Shelley versus Kraemer. I thought you said that yesterday, and again today.

Mr. Miller: I said that, your Honor, because it seems in my view that the action that was interdicted in Shelley versus Kraemer was judicial action, court action, State action, and that

the interdiction did not fall on the remedy of specific performance alone, but that it fell on all State action, which I said. Now, of course, there is a circumstance here that here is the covenant or agreement, and actually there are three or more parties to it. The effect, taking it in its restricted sense here, of the levy of damages in this action, is to enforce this agreement as to all other parcels of land within that particular area, just in that restricted sense. Perhaps 500, perhaps 1,000, could enforce the agreement as to that particular area, and beyond that, of course, it is to enforce residential segregation. That is what they want here.

Now, as I say, it seems to me that our courts had a right to look to the result that would be achieved by announcing this rule of law even if they are only announcing it in a specific, narrow context as between A and B. They could not be blind to the consequences of what they were doing. They had in mind the admonition of this Court in Shelley versus Kraemer, that the purposes of the Fourteenth Amendment must never be forgotten, that the Fourteenth Amendment was no narrow statute, like the statute of limitations, to be waived at will between two persons.

The Chief Justice: What do you say to the discussion in Shelley versus Kraemer relative to the Corrigan case, and the issues being different, that in Corrigan it was urged, as I recall it, that the contract was void?

Mr. Miller: Yes.

The Chief Justice: What do you think about that discussion?

Mr. Miller: I think that that discussion, of course -- as I understand this Court, this Court affirms the ruling in Corrigan versus Buckley, insofar as this Court was not drawn into a discussion of void covenants. This Court said that Corrigan was correct.

The Chief Justice: This Court said that that issue of vo d was not present here.

Mr. Miller: Yes.

The Chief Justice: In other words, in Corrigan versus Buckley, they had not taken the approach; they had not considered the contract in the same wise as they were considering it here; that is correct, is it not?

Mr. Miller: That is the way I understand it, your Honor.

So that the agreement was left. Now, it is from that language that petitioners draw their conclusion that they have, (a) a contract, and (b) a valid contract, and thus erect the gaudy superstructure that enforcement must flow and that the courts must act blindly no matter what they may do because they say we have a valid contract. And, of course, once you use "contract" --

The Chief Justice: You agree that they had a contract?

Mr. Miller: They had an agreement, your Honor. A contract imports enforcibility.

The Chief Justice: I have heard that argument, too. They

had a piece of paper, both of them signatory, by which they agreed to certain terms; is that right?

Mr. Miller: That is right.

The Chief Justice: Now, you say that that is a valid contract?

Mr. Miller: I do not say so.

The Chief Justice: Please permit me to continue my statement.

As I understand you, you agree that there is a contract?

Mr. Miller: I agree that there is a writing. If "contract" is used only in the sense of writing, I agree.

The Chief Justice: A writing, to which people have agreed?

Mr. Miller: A writing to which people have set their signatures, yes, sir.

The Chief Justice: And that it is not such a writing, though it may be carried out -- the contract, I am saying, between the people signatory -- but it cannot be enforced in the court?

Mr. Miller: That, sir, is right.

The Chief Justice: And it is the latter part, enforcibility, that is really your case, is it not?

Mr. Miller: That is the latter part, enforcibility.

The Chief Justice: And you do not want to say that it is a valid contract or that it is not a non-enforcible contract, because you do not want to weaken the enforcibility end of that.

But, as a matter of fact, is it too strong to say that there was a contract entered into, valid between the parties, but from your viewpoint, not enforcible in the court because State action appears which strikes it down?

Mr. Miller: Yes, your Honor.

The Chief Justice: That is not too far from what you are saying, is it?

Mr. Miller: That is not too far from what I say. I would not use the words, "valid contract", but that is --

Justice Frankfurter: There is nothing unique or exotic or strange about an agreement between people which they can enforce as long as they please and as scrupulously as they please, but they cannot ask the court to enforce it. The whole law of restraint of trade, in English law, for 200 years rested on that distinction.

Mr. Miller: Yes, your Honor, and there are many kinds of agreements valid as between the parties in California and to which voluntary adherence may be given which the courts could not enforce.

The Chief Justice: You would not go that far at this time -- the use of the word "valid"?

Mr. Miller: Yes, your Honor. I think that that is correct, because when they use the term "valid" they use it as a word of art importing enforcement. That is the only quarrel that I have with it. That is the only quarrel.

## REBUTTAL ARGUMENT ON BEHALF OF PETITIONERS

By Mr. McKnight

Mr. McKnight: If it please the Court, and counsel, in counsel's discussion of the Shelley case, counsel only goes to half of the test which was laid down in the Shelley case. The test is laid down in two places in the Shelley case, one on page 13, where I read the other day, and again on page 18, the latter part of page 18, where it says:

"Against this background of judicial construction extending over a period of some three-quarters of a century we are called upon to consider whether enforcement by State courts of the restrictive agreements in these cases may be deemed to be acts of those States" --

That is the first part of the test -- "and if so, whether action has denied these petitioners the equal protection of the laws which the amendment was intended to insure."

Now, counsel only applies the first one. He thinks that when you come to the conclusion that it is State action, that does it. The test has two folds to it. You find that it is State action, and when you find that it is State action, then you look to see if the State action denies the individuals before the court any constitutional right.

In this case, there has been no constitutional right of this respondent which is, in the slightest, in effect, denied. Everything that has taken place here is a consequence of the

respondent's contract, the terms of the respondent's contract, which she established.

Counsel speaks of substantive law, but the substantive law is only that the agreement of the parties will be enforced; valid agreements, valid contracts, will be enforced.

Now, counsel speaks of a statute which said that racial covenants which had been signed could be enforced. According to Ashwander versus T.V.A., citing good authority, the Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.

If all of these people took the benefits of that statute and contracted in response to it and enjoyed its fruits and then thereafter respondent wanted to challenge the constitutionality of the statute, they could not challenge it. But this is not a statute. This is only a contract. And counsel's reasoning would apply to every contract, because every contract limits a person's conduct in a way in which the Legislature could not limit it. Whenever you enforce any contract, you call upon the rule of law that contracts will be enforced. A contract can be enforced because the individual has consented to that State action. That is what he has contracted for. That is what they had in mind when they signed the agreement.

I would like to cover a couple of things. Counsel speaks of Pikaar, and it is well to contrast the petition of Pikaar with Urciolo. Urciolo was a defendant who had not signed any-

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thing, who had not consented to any burden being placed upon him, but petitioner is a beneficiary, and the benefit which the petitioner Pikaar is looking for is part of the promise which the respondent made.

So everything in this case is what this respondent agreed to. It is part of what he said would be done, and he anticipated that the Court would take care of Pikaar, whereas Urciolo did not agree that any burden should fall on him.

In other words, it is a case where Pikaar can take the benefit of respondent's contract, but Urciolo could not take the detriment of a term which he had had no power over at all. That is the test which the Shelley case made. Every one of the petitioners in the Shelley and Hurd cases, in the Shelley and the Sipes and the two Hurd cases, every one of the petitioners had not been parties to the agreement.

Now, the next thing, the petitioner talks about racial segregation. This will not result in racial segregation.

Counsel talks about preventing occupancy in all the rest of the tract. As a matter of fact, I will have to leave the record a little bit, but there are 18 properties among these 60 properties which would not be affected by this action at all, for the reason that eight of them have been occupied since that sale involved here, and 10 more in addition to those eight are not covered by the covenant at all.

So there cannot be any segregation in that district. All

of the cases that have come to this Court have been from places where there was mixed occupancy. In the Hurd case, I think it was 11 and 20, and in the Shelley case, I think there were seven non-Caucasians in the neighborhood. I am not sure about that figure. But I know that they were mixed.

In other words, these restrictions do not prevent occupancy, but they compensate for an economic loss which is part of the thing which was contemplated by the signers of it.

Justice Frankfurter: Economic loss in relation to what?

Mr. McKnight: Economic loss, your Honor, in respect to the value of the property.

Justice Frankfurter: The value of the property is affected because it is aimed at the exclusion of certain people who happen to be colored rather than white; is that it?

Mr. McKnight: No. There are two elements in that, your Honor. One is that the demurrer admits a damage to each one of these in a considerable sum, and on the second matter, it would be a question for us to go into. All we are asking is an opportunity to put in evidence on whether or not this property literally and actually diminished on the market in value. We just want --

Justice Frankfurter: Suppose the answer is, "Yes, it did." Suppose the answer is that if you allow colored people in, it would diminish the property; what then?

Mr. McKnight: That, then, is what --

Justice Frankfurter: There is a certain diminution in the property that the Constitution does not allow?

Mr. McKnight: But these parties contracted to protect each other. It is their contract.

Justice Frankfurter: The question is whether they may so protect themselves.

Mr. McKnight: But the Constitution is personal to each one of them, your Honor, and each one of them has property rights in the property, and they can --

Justice Frankfurter: You mean, in some cases you could show it and in some cases you could not show it?

Mr. McKnight: No.

Justice Frankfurter: How does that affect it as to what the Court says about it?

Mr. McKnight: The Court will just give us a chance to show whether in this case there were the damages alleged, which I think we can prove.

Justice Frankfurter: The damages would be due to what?

Mr. McKnight: But that does not raise a constitutional question.

Justice Frankfurter: To what would the damages be due?

Mr. McKnight: The damage would be due to what the property would be worth on the market.

Justice Frankfurter: Because of what factor has this restrictive clause any relation to the diminution of the property

or not?

Mr. McKnight: The restrictive clause --

Justice Frankfurter: What was it put in there for?

Mr. McKnight: It was put in for two reasons: one, it was an agreement -- well, let me see. One, to discourage non-Caucasians coming into the area, but if they did come in, then they would be protected by the actual property damage.

Justice Frankfurter: It all goes back to the desire of a property owner to confine his use of property in a certain way.

Mr. McKnight: That is his constitutional right in his particular property.

Justice Frankfurter: That is the question, is it not?

Mr. McKnight: Well, no, your Honor. This Court has said that in the Buchanan case the man had a right to sell his property.

The Chief Justice: Your time has expired.

Mr. McKnight: In the Buchanan case the man had a right to sell his property. That was his constitutional right.

(Whereupon, at 12:52 o'clock p.m., the argument was concluded.)

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