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## A Note on Racial Restrictions

by Wm. R. Kinney

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**T**HE UNITED STATES SUPREME COURT in 1949 held that restrictive covenants and agreements based upon racial discrimination are unenforceable by court action. *Shelley v. Kraemer*, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161.

At that time a collateral question arose concerning which there appeared to be a difference of opinion among attorneys, both locally and elsewhere. The same difference of opinion developed later among state courts.

The question was this: In view of the holding in the *Shelley* case, can the grantor in a deed have recourse to the courts to enforce a stipulated penalty contained in a discriminatory racial covenant (such as payment of damages or forfeiture of title) if the enforcement of such penalty does not directly involve the constitutional rights of third persons?

The matter now seems to be pretty well resolved by the recent decision of the Supreme Court in *Barrows v. Jackson*, 346 U. S. 249, 73 S. Ct. 1031, 97 L. Ed. 527. Factually the case may not be exactly in point because no *stipulated* penalty for breach was apparently involved, but the reasoning upon which the decision is based would seemingly apply.

The case originated in California and was an action for damages growing out of the alleged violation by respondent of a written agreement between respondent and other parties who owned properties in the same neighborhood by the terms of which all parties bound themselves, their heirs, executors, administrators, successors and assigns that no part of their respective properties should at any time be used or occupied by anyone not wholly of the white or Caucasian race and that such restriction should be incorporated in all transfers of their properties. Petitioners, being owners of properties covered by said agreement, claimed that respondent violated the agreement by failing to include the restriction in a deed conveying her property and by permitting non-Caucasians to move in and occupy the premises.

Basing their decision on the ruling in the *Shelley* case, the California courts sustained a demurrer to petitioners' complaint and the United States Supreme Court, by a six to one division,

affirmed this judgment, two members of the court taking no part in the consideration of the case or in the decision.

The majority of the court reasoned (in part) as follows: To compel respondent to respond in damages would be solely for the purpose of giving vitality to the restrictive covenant in question by punishing respondent for failure to discriminate against non-Caucasians in the use of her property; to that extent the State would put its sanction behind such covenants and respondent would be coerced to continue to use her property in a discriminatory manner, so that it would become not respondent's voluntary choice but the State's choice that she observe her covenant or suffer damages; that for a state court at law thus to sanction the validity of such a covenant would constitute state action as surely as it would be state action to enforce such covenants in equity. In view of all of which, the Court stated that it would not permit or require California thus to penalize respondent for failure to observe a restrictive covenant which California would not be permitted to enforce in equity or to incorporate in a statute.

The Court held further that even though no non-Caucasian was before the Court claiming to have been denied his constitutional rights, an award of damages would deprive non-Caucasians, "unidentified but identifiable," of equal protection of laws in violation of the 14th Amendment to the Federal Constitution, because such award would have the effect of rendering non-Caucasian "would-be users of restricted land" unable to own and enjoy property on the same terms as Caucasians, solely because of their race.

The Court also held that there was such close relationship between the sanctioning by a state court of the punishment of respondent for not going forward with her covenant and the purpose of the covenant itself, that the situation called for relaxation of the rule which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others.

Mr. Chief Justice Vinson filed a dissenting opinion based on the ground that there was no identifiable non-Caucasian before the Court who would be denied the right to buy, occupy or otherwise enjoy the properties in the law suit, or any other property, or whose rights would be impaired by requiring respondent to pay for the injury which it was claimed she had brought upon petitioners.

