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Due process as secured by the Fourteenth Amendment is very flexible, and can be enlarged or contracted according to the policy of the Supreme Court at a given time. Confessions cannot always be tested to fit a Procrustean bed, but must be measured in the light of a flexible due process requirement that state courts observe that fundamental fairness essential to the protection of the accused by refusing to use a confession obtained by physical or psychological coercion. It is to be hoped that we are not entering upon "a new regime of constitutional law,"⁶² in which the rights of the accused are valued less highly than is the efficient functioning of the machinery for the administration of justice, but rather that a resilient Due Process Clause will reassert in succeeding cases the principles that nearly a generation of decisions has evolved.

JAMES ALBERT HOUSE, JR.

Constitutional Law—Racial Restrictive Covenants—Recovery of Damages for Breach

Since 1948 when the Supreme Court held that racial restrictive covenants could not be specifically enforced by injunction in state or federal courts,¹ legal writers have speculated² and the courts have disagreed³ on the recovery of damages. Now the Supreme Court in *Barrows v. Jackson*⁴ has settled the issue by holding the award of damages by a state court for the breach of racial restrictive covenants to be state

sions under the Due Process Clause, but also facing the same problem are those jurisdictions in which the voluntariness of the confession is a question of law for the court. The latter must decide whether a conviction now must be reversed when the trial judge admits a confession which may have been involuntary, but there is, however, other sufficient evidence on which the jury could have found the accused guilty. And just how much coercion the Supreme Court is now likely to say is of "such gravity and magnitude" to require a reversal is an unknown measure and a problem facing all jurisdictions.

⁶²Stein v. New York, 73 Sup. Ct. 1077, 1102 (1953) (dissenting opinion of Douglas, J.).

¹Shelley v. Kraemer, 334 U. S. 1 (1948) (state courts); Hurd v. Hodge, 334 U. S. 24 (1948) (federal courts) (discussed in Notes, 27 N. C. L. REV. 224 (1949), 28 N. C. L. REV. 442 [1950]).

²Barnett, *Race Restrictive Covenants Restricted*, 28 ORE. L. REV. 1 (1948); Crooks, *The Racial Covenant Cases*, 37 GEO. L. J. 514 (1949); Groves, *Judicial Interpretation of the Holdings of the United States Supreme Court in the Restrictive Covenant Cases*, 45 ILL. L. REV. 614 (1950); Heard, *Race and Residence: The Current Status of Racial Restrictive Covenants*, 1 BAYLOR L. REV. 20 (1948); Howell, *Recent Developments in the Law of Racial Restrictions on Real Property*, 1 INTRA L. REV. OF ST. LOUIS 222 (1951); Kiang, *Judicial Enforcement of Restrictive Covenants in the United States*, 24 WASH. L. REV. 1 (1949); Lowe, *Racial Restrictive Covenants*, 1 ALA. L. REV. 15 (1948); Ming, *Racial Restrictions and the Fourteenth Amendment: the Restrictive Covenant Cases*, 16 U. OF CHI. L. REV. 203 (1949); Scanlan, *Race Restrictions in Real Estate-Property Values v. Human Values*, 24 NOTRE DAME LAW. 157 (1948).

³See notes 10 and 11 *infra*.

⁴73 Sup. Ct. 1031, 97 L. Ed. (Adv. p. 961) (1953).

action in violation of the Fourteenth Amendment, in that it deprives racial minorities of the equal protection of the laws.⁵

The principal case involved an agreement between adjoining land owners in Los Angeles, each of whom covenanted that no part of his real property should "be used or occupied by any person or persons not wholly of the white or Caucasian race."⁶ Upon the sale by defendant to a non-Caucasian in 1950, plaintiffs instituted an action at law for damages against the seller. The Superior Court of Los Angeles County sustained defendant's demurrer to the complaint. On appeal to the District Court of Appeal, it was held that

a state may not by judicial process enforce private rights derived from consensual agreements of private individuals, where to do so would result in the infringement of civil liberties guaranteed by the Constitution of the United States;

therefore the demurrer was properly sustained.⁷ In interpreting and extending the rule of the *Shelley* case, the California Court further stated: "The coercive device of retribution in the form of damages is as effective as the coercive effect of injunctive relief, although not as immediate."⁸

On certiorari, the United States Supreme Court held:

- (1) A state court in awarding damages for breach of a racial restrictive covenant is taking state action under the Fourteenth Amendment, and is acting in violation of the equal protection clause.
- (2) A person defending the breach of a racial restrictive covenant may rely on the denial of constitutional rights of a racial minority group, although no member of the group is before the court.⁹

⁵ Until the *Shelley* case, it was assumed that damages could be recovered for the breach of racial restrictive covenants. *Eason v. Buffalo*, 198 N. C. 520, 152 S. E. 496 (1930).

⁶ *Barrows v. Jackson*, 73 Sup. Ct. 1031, 1032 (1953).

⁷ *Barrows v. Jackson*, 112 Cal. App. 2d 534, —, 247 P. 2d 99, 103 (1952). The Supreme Court of California denied petition for hearing on October 2, 1952. The California decision in the *Barrows* case is discussed in Notes, 38 CORNELL L. Q. 236 (1953), 4 HASTINGS L. J. 57 (1952), 37 MINN. L. REV. 65 (1952), 25 ROCKY MT. L. REV. 112 (1952), 26 SOU. CALIF. L. REV. 201 (1953), 26 TEMPLE L. Q. 320 (1953).

⁸ *Barrows v. Jackson*, 112 Cal. App. 2d 534, 247 P. 2d 99, 112 (1952).

⁹ The late Mr. Chief Justice Vinson dissented on this point, saying in part: "The majority identifies no non-Caucasian who has been injured or could be injured if damages are assessed against respondent for breaching the promise which she willingly and voluntarily made to petitioners. . . . Because I cannot see how respondent can avail herself of the Fourteenth Amendment rights of total strangers—the only rights which she has chosen to assert—and since I cannot see how the Court can find that those rights would be impaired in this particular case by requiring respondent to pay petitioners for the injury which she recognizes she has brought upon them, I am unwilling to join the Court in today's decision." *Barrows v. Jackson*, 73 Sup. Ct. 1031, 1038, 1041 (1953).

- (3) The refusal of a state court to enforce such covenants does not violate the constitutional guaranty against impairing the obligation of a contract, because that guaranty is only directed against legislative action.
- (4) Plaintiffs are not themselves denied due process and equal protection by a refusal to enforce the covenants, because no one can demand state action which would result in a denial of equal protection of the laws to other individuals.

Before *Barrows v. Jackson* and after *Shelley v. Kraemer*, four courts had dealt with the problem of awarding damages in this type case; two granted damages¹⁰ and two denied recovery.¹¹ Clearly, as a result of the *Barrows* decision, state courts and probably federal courts cannot enforce racial restrictive covenants in any form of action.¹² The covenants themselves have not been held to be invalid; rather they are merely unenforceable in the courts.¹³ However, this decision does not preclude a later holding that racial restrictive covenants are void because opposed to the express public policy of the United States as set forth in the Civil Rights Act¹⁴ and in the Charter of the United Nations.¹⁵ The courts have thus far either rejected¹⁶ or ignored¹⁷ contentions that the cove-

¹⁰ *Correll v. Earley*, 205 Okla. 366, 237 P. 2d 1017 (1949) (where damages were granted in a suit against the original covenantor, an intermediate vendor, and the non-Caucasian vendee for a conspiracy to violate the covenant); *Weiss v. Lacon*, 359 Mo. 1054, 225 S. W. 2d 127 (1949). These decisions were criticized in *Notes*, 3 ALA. L. REV. 379 (1951), 4 ALA. L. REV. 289 (1952), 63 HARV. L. REV. 1062 (1950), 28 N. C. L. REV. 442 (1950), 13 U. PITTSBURGH L. REV. 647 (1952), 24 ROCKY MT. L. REV. 380 (1952), 38 VA. L. REV. 389 (1952).

¹¹ *Roberts v. Curtis*, 93 F. Supp. 604 (D. C. D. C. 1950); *Phillips v. Naff*, 332 Mich. 389, 52 N. W. 2d 158 (1952).

¹² These cases on the Fourteenth Amendment apply to all minority groups, although the cases have usually arisen in suits by Negroes. *Amer v. Superior Court of California*, 334 U. S. 813 (1948); *Yin Kim v. Superior Court of California* 334 U. S. 813 (1948); *Kentucky v. Powers*, 201 U. S. 1, 33 (1905).

¹³ *Barrows v. Jackson*, 73 Sup. Ct. 1031, 1033 (1953).

¹⁴ 14 STAT. 27 (1866), 8 U. S. C. § 42 (1946).

¹⁵ CHARTER OF THE UNITED NATIONS, Arts. 55(c), 56 (1945).

¹⁶ The High Court of Ontario in *Re Drummond Wren* held racial restrictive covenants were void because opposed to Canadian public policy. In ascertaining that public policy, the court relied on the CHARTER OF THE UNITED NATIONS and the Atlantic Charter as well as Canadian Statutes. 4 D. L. R. 674 (1945) O. R. 778. However a later decision by the Supreme Court of Canada ignored these public policy considerations and held the covenants invalid as illegal restraints on alienation. *Re Noble and Wolf*, 1 D. L. R. 321 (1951) S. C. R. 64 (discussed in *Comment*, 29 CAN. BAR. REV. 969 [1951]). Similarly, a California Court held that restrictions under the Alien Land Law were invalid under the CHARTER OF THE UNITED NATIONS; but on appeal, the Supreme Court of California held that the UNITED NATIONS CHARTER was not self-executing and would not supercede inconsistent local laws, but that the restrictions violated the Fourteenth Amendment. *Fujii v. State*, 97 Cal. App. 154, 217 P. 2d 481 (1950), *aff'd on other grounds*, 38 Cal. 2d 718, 242 P. 2d 617 (1952).

¹⁷ Judge Edgerton of the District of Columbia Court of Appeals vigorously asserted that the covenants should be void in his dissenting opinion in *Hurd v. Hodge*, 162 F. 2d 233, 235-246 (1947). But although the Supreme Court reversed the lower court's decision, it passed over this argument. *Hurd v. Hodge*, 334 U. S. 24 (1948).

nants are void as opposed to public policy, but it is possible that the decision in the segregation cases now pending before the Supreme Court will strengthen public policy against racial discrimination.

The *Shelley* case stated that acts of the executive and legislative branches of state governments are as much state action as are judicial acts.¹⁸ The recognition and enforcement of discriminatory zoning ordinances, passed and administered by county and municipal officials, has been held to be unconstitutional state action.¹⁹ Whether the *Barrows* case can be construed to bar purely administrative acts tending to effectuate racial restrictions, such as the recordation of deeds containing discriminatory covenants, is uncertain. The covenants are by recordation given official recognition, which tacitly implies that state government officials condone discriminatory practices, although they cannot positively enforce them. A possible analogy in reverse can be drawn between the function performed by a county registrar of deeds and that of a county registrar for voting. The Supreme Court in the latter situation has held that a refusal to register qualified Negroes is state action forbidden by the Fourteenth and Fifteenth Amendments.²⁰ It would appear that the language in the *Shelley* case is broad enough to preclude the acts of administrative officers,²¹ should such acts be challenged on the ground that they are acts of the state.

Yet so long as the covenants remain only "gentlemen's agreements" and are not brought into court, they can under the *Barrows* decision continue to flourish. The Court in *Barrows v. Jackson* very clearly retained the principle established in *Corrigan v. Buckley*²² and restated in *Shelley v. Kraemer* that "so long as the purposes of those 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."²³

However, the purposes of the covenants can (and undoubtedly will) be effectuated by extra-legal means. One of the most effective methods of discouraging prospective purchasers who are "undesirable" is by "visits" from a neighborhood committee, which suggests that another residential area might be found more congenial.²⁴ In addition to social

¹⁸ *Shelley v. Kraemer*, 334 U. S. 1, 14 (1948).

¹⁹ *Richmond v. Deans*, 281 U. S. 704 (1930); *Buchanan v. Warley*, 245 U. S. 60 (1917); *Clinard v. Winston-Salem*, 217 N. C. 119, 6 S. E. 2d 867 (1940).

²⁰ *Smith v. Allwright*, 321 U. S. 649 (1943); *Byrd v. Brice*, 104 F. Supp. 442 (1952); *Dean v. Thomas*, 93 F. Supp. 129 (1950).

²¹ "The action of state courts and of *judicial officers in their official capacities* [italics added] is to be regarded as action of the state within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U. S. 1, 14 (1948).

²² 271 U. S. 323 (1926).

²³ 334 U. S. 1, 13 (1948).

²⁴ For a description of some methods of social ostracism against Negroes who move into white neighborhoods, and a catalogue of extra-legal devices used, see 14 POPULAR GOVERNMENT (No. 6) 8, 11 (June 1948) (Institute of Government, Chapel Hill, N. C.); Frank, *The United States Supreme Court: 1947-1948*, 16 U. CHI. L. REV. 1, 21-28 (1948).

pressure, the refusal of real estate agents even to show Negroes houses in restricted residential areas, and the disinclination of banks to furnish loans for such purchases will serve to retain the effect of the restrictions for a long time to come.²⁵ Other devices are the use of cash deposits, neighborhood clubs or corporations, options to repurchase, land trusts, and long-term leases.²⁶ Only time, education, and the gradual disappearance of emotional prejudices can bring to an end these devices.

LINDSAY TATE

Contracts—Inducing Breach—Intentional Interference with Contractual Relations—Justification—Privilege

Plaintiff, a contract carrier, alleged that he had contracted with various persons to carry them to and from Camp Lejeune, and that defendant induced these named persons to break their contracts with plaintiff and ride on defendant's bus instead. In sustaining an order overruling a demurrer to this cause of action, the court affirmed the general principle that a party may be held liable in damages for inducing another to breach his contract.¹

The principle of tort liability for inducing breach of contract is relatively new. The first significant case, *Lumley v. Gye*,² held that the defendant's inducement of a famous singer to breach her contract to sing at plaintiff's theater was actionable.³ The principle was first recognized in North Carolina in *Haskins v. Royster*⁴ where the defendant induced a servant of plaintiff to breach his employment contract with the plaintiff,⁵ and was affirmed and extended in *Jones v. Stanly*⁶ where the de-

²⁵ Scanlan, *Racial Restrictions in Real Estate*, 24 NOTRE DAME LAW. 157, 179 (1949).

²⁶ These are discussed in detail by Ming, *Racial Restrictions and the Fourteenth Amendment*, 16 U. CHI. L. REV. 203, 216-221 (1949); Scanlan, *Racial Restrictions in Real Estate*, 24 NOTRE DAME LAW. 147, 179-181 (1952); Notes, 1 INTRA L. REV. (U. C. L. A.) 14, 16-18 (1952), 27 N. C. L. REV. 224, 229-234 (1949), 13 U. PITTSBURGH L. REV. 646, 661-665 (1952).

It seems obvious that some of the means formerly employed are now outlawed by the *Barrows* decision. Declaratory judgments and advisory opinions by state courts would be state action in violation of the Constitution. Also the inclusion of racial restrictions as conditions in a fee simple determinable or a conditional fee is probably now illegal, at least so far as enforcement is concerned. The effect of the *Barrows* decision should be kept in mind when reading the articles cited throughout this note.

¹ *Bryant v. Barber*, 237 N. C. 480, 75 S. E. 2d 410 (1953).

² (1853) 2 Ell. & Bl. 216.

³ The chief significance of this case being a holding that the action would lie even though the means used were *not tortious to the singer*, which had long been a requisite. (Italics supplied.) See: *Garret v. Taylor*, (1621) Cro. Jac. (K. B.) 567.

⁴ 70 N. C. 601 (1874).

⁵ It is said that rights to the performance of a contract are property rights. *Second National Bank v. M. Samuel and Sons*, 12 F. 2d 963 (2d Cir. 1926); *Kock v. Burgess*, 167 Iowa 727, 149 N. W. 858 (1914); *Winston v. Lumber Co.*, 227 N. C. 339, 42 S. E. 2d 218 (1947).

⁶ 76 N. C. 355 (1877).