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Damages in Lieu of Specific Performance in Restrictive Covenant Cases

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DAMAGES IN LIEU OF SPECIFIC PERFORMANCE IN RESTRICTIVE COVENANT CASES

The Supreme Court of Oklahoma on November 20, 1951, in *Correll v. Earley*,[1] overruled a lower court's decision that no award of damages could be obtained for breach of a restrictive covenant against the disposition of real estate to persons not of the Caucasian race. The white owners of lots in a certain block in Oklahoma City, Oklahoma, entered into a written agreement with each other wherein they covenanted that no owner, his heirs, successors, or assigns of the covenanted property would sell, lease, or give any property in said block to any person of the Negro or African race. The covenantors also agreed that any deed so given would be void and could be set aside by petition of one or more of the parties to the covenant. This agreement was duly recorded May 6, 1927.

Plaintiff alleged that the parties to the covenant had voluntarily adhered thereto until April 6, 1945, when defendant conveyed part of the property to Earley, another white person, who was without financial responsibility, with the understanding that Earley would subsequently deed the property to certain negroes; and that the property was in fact later conveyed to the negroes. Plaintiff further alleged that by such conspiracy on the part of the defendant, the property belonging to him was depreciated in value in the amount of $10,000.00, for which he prayed actual damages.

Held, that ultimate grantees and land owners who conspire to evade racially restrictive covenants and to avoid liability in damages for breach of contract containing such covenants by having the property conveyed to a mense grantee, who was without financial responsibility, in order that such mense grantee might then convey to members of the race against which the covenant was directed, would be liable in damages for any injury resulting from the conspiracy. This conspiracy between the ultimate grantee and the land owner must be premeditated and of a vicious nature. *Correll v. Earley,* 237 P.2d 1017 (Okla. 1951).

The landmark case on the problem concerning racially restrictive covenants is *Shelley v. Kramer*[2]—therefore the cases decided before and after the *Shelley* case must be considered briefly.

In the cases prior to the *Shelley* case, state courts had entertained actions for damages for breach of racial covenants without questioning their right to do so. For example: a white purchaser of racially restricted property was held to have a cause of action against his vendor based upon the latter's breach of a covenant that none of the lots in a subdivision should

1. Correll v. Earley, 237 P.2d 1017, (Okla. 1951).
2. Shelley v. Kramer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).

be sold to or occupied by Negroes.[3] In a Colorado case,[4] purchasers of lots were held entitled to recover damages in an action for deceit based on the vendors fraudulent representation that all the lots in the subdivision were racially restricted. The measure of damages for false representation in selling the lots is the difference between the value when purchased, and what the greater value would have been had the representations been true.

The Supreme Court of the United States in May, 1948, in the case of *Shelley v. Kramer*[5] ruled that the restrictive agreement standing alone canot be regarded as a violation of any rights guaranteed to the Negro defendant by the 14th Amendment of the federal Constitution, so long as the purposes of those agreements are effectuated by voluntary adherence to their terms. It would appear clear that up to that point there has been no action by the state, and that the amendment has not been violated. But where the enforcement of the racial covenants can be secured only by judicial enforcement by the state courts of the restrictive terms of the agreement, the state has acted to deny petitioner the equal protection of laws guaranteed by the 14th amendment. Thus the *Shelley* case tells that the agreement itself may be valid, but it is not enforceable by state action.

The first case subsequent to *Shelley,* passing on the question of whether an action for damages for breach of restrictive covenant prohibiting the sales of real estate to Negroes would constitute a violation of the 14th amendment, was a decision by the Supreme Court of Missouri.[6] This was an action for damages against a white property owner for breach of a covenant that his property would not be "devised, sold, leased, or occupied by negroes." The court held that the action would lie, distinguishing the *Shelley* case on the ground that although the enforcement of a racially restrictive covenant might involve state action contrary to the equal protection clause of the federal Constitution, this did not necessarily imply that an award of a money judgment was state action in violation of the 14th amendment. The Missouri court reasoned that since the *Shelley* case found the restrictive covenant itself to be valid against a charge of unconstitutionality, perhaps the problem is simply one of what is the proper remedy. Thus it may follow that an action for breach, rather than enforcement, will lie. The fact that another remedy, spefific performance, is ruled out because of constitutional reasons does not necessarily effect the remedy by way of damages.

A Michigan court[7] expressly rejecting the principle of the *Weiss* case adopted broad construction in concluding that an action for damages is in reality an indirect method of enforcement of the covenant and hence falls within the bar of the constitutional restrictions.

3. Eason v. Buffaloe, 198 N. C. 520, 152 S. E. 496 (1930).
4. Chandler v. Ziegler, 88 Colo. 1, 291 P. 822 (1930).
5. Supra note 2.
6. Weiss v. Leaon, 359 Mo. 1054, 225 S.W.2d 127 (1949).
7. Phillips v. Naff, 52 N. W. 158 (1952).

The writer in the Washington Law Quarterly, June, 1950,[8] takes a somewhat different attitude toward the problem. His view is that the basic question is not whether the action is state action, but whether the state action is discriminatory. The only party directly injured by the award of damages is the breaching party—not the Negro—thus the Negro is not directly discriminated against by such an award of damages. If the Negro is discriminated against, it will of necessity be an indirect discriminaton. As to whether this indirect discrimination by the state against the Negro is a violation of the 14th amendment apparently has never been decided.

Mr. Ming, Associate Professor of Law, University of Chicago,[9] points out that various schemes and plans have been devised to get around the objection that state action in enforcing restrictive covenants is unconstitutional. One of these plans is to require each party to the covenant to make a cash deposit, or give a bond, to assure his voluntary adherence to the agreement, with provision for forfeiture to the other signers in case of breach.

Another device is the "club membership" plan, which calls for the formation of a club to hold the title to all the property, and the exclusion of the objectionable class of persons from membership in the club. The members of the club would hold shares of stock which entitle them to occupy certain property in the area. Considering these and numerous other proposals, Professor Ming reaches the conclusion that the restrictive covenant decisions render ineffectual any device for maintaining residential segration, the usefulness of which depends on utilization of governmental authority to achieve its end. It is the conclusion of that writer that entertaining an action for damages in a state court in state action in violation of the 14th amendment, within the rule of the *Shelley* case.

The Oklahoma and Missouri courts seem to think that since the agreement itself is valid standing alone, then of necessity a right of damages must follow for its breach. It appears evident that if by the breach of a valid agreement one of the parties thereto has suffered a substantial depreciation in the value of his property he should be protected by an award of damages.

There are vigorous writings[10] for and against the decisions of *Correll v. Early*[11] and *Weiss v. Leaon*[12] but the holdings of the Oklahoma and Missouri Supreme Courts appear to follow sound reasoning and unless overruled will apparently be stare decisis.

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8. 3 Wash. U. L. Q. 437 (1950).
9. 16 Univ. of Chi. L. R. 203 (1949).
10. 48 Col. L. R. 1241 (1948); 61 Harv. L. R. 1450 (1948); 16 Univ. of Chi. L. R. 203 (1949); 3 Wash. U. L. Q. 437 (1950); 15 Mo. L. R. 313 (1950); 63 Harv. L. R. 1062 (1950); 17 Geo. Wash. L. R. 398 (1949).
11. Supra note 1.
12. Supra note 6.