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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

J. D. SHELLEY AND ETHEL LEE SHELLEY, HIS WIFE,
PETITIONERS,

vs.

LOUIS W. KRAEMER AND FERN E. KRAEMER,
HIS WIFE, RESPONDENTS.

On Writ of Certiorari to the Supreme Court of Missouri.

RESPONDENTS' BRIEF

STATEMENT.

Respondents accept the statement of the case set out in petitioners' Petition for Writ of Certiorari but assert that the only issues involved in this review are: (1) Whether the agreement entered into by respondents violates public policy and is, therefore, unenforceable, (2) whether the enforcement of such an agreement by a State Court is State action within the meaning of the Fourteenth Amendment,

(3) whether the petitioners have the right to assert any defenses in a suit which seeks injunctive relief against petitioners' grantor which relief affects, only incidentally, the petitioners; and where, as here, such grantor is not a party to the petition for this review, and (4) whether a State Court or this Court has the right to deny to respondents their property rights or their fundamental rights to have their legal and valid contracts enforced.

Respondents adopt, by reference thereto, all matters and things asserted, set out and argued in their Brief opposing issuance of the Writ of Certiorari and adhere to their position that there is involved in this case no substantial Federal question sufficient to sustain the jurisdiction of this Court; that the legal questions involved are matters of State law and State public policy.

OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Missouri is set out in full in the Transcript of the Record at page 153 and is officially reported as Kraemer et al. v. Shelley et al., 198 S. W. (2d) 679.

JURISDICTION OF THIS COURT.

Following a petition for the issuance of a writ of certiorari to the Supreme Court of Missouri, which petition was opposed by respondents, this Court granted the writ. [Judicial Code, Sec. 237(b), 28 U. S. Code 344(b), 28 U.S.C.A. 344(b).]

SUMMARY OF ARGUMENT.

I.

The agreement enforced by the Supreme Court of Missouri is one which the parties have a right to make in Missouri. Such agreements do not violate the Civil Rights Statutes enacted under the Fourteenth Amendment and violate no valid laws of Missouri or of the United States. Since the Civil Rights Statutes can go no farther than the Amendment under the authority of which they were enacted, it follows that nothing prohibitory can be read into them beyond that which the Congress had the right to enact. Neither the Amendment nor the Statutes confer rights. The Amendment merely protects the fundamental rights of all men against State invasion, and the Statutes enumerate rights referred to in the Amendment.

The public policy, derived from the Constitution and laws of a state or nation, is not offended by a contract when the Constitution and laws are not only not positive on the point but indicate a clearly contrary policy. And it is the State's public policy which must determine the validity of a contract between citizens of the same State and which is to be wholly performed in that State and affects realty lying exclusively within that State. The public policy of a State respecting the enforcement, judicially, of a private contract concerning private property, is not affected, controlled, and certainly not changed, by indirect implications in general statements contained in international agreements.

The United States Supreme Court will not only refrain from interfering with the public and social policy of one of the States, but will follow such policy as determined by the decisions of the highest Court of the State.

II.

Although it is possible for a State to offend against the Fourteenth Amendment through its judiciary since rules of law involved by State Courts have the same legal efficacy as Legislative acts, Missouri has evolved no rule that falls within the scope of the prohibition.

The rule of the Missouri judiciary in this case is simply permissive of private discrimination—not mandatory of public discrimination; and it is this rule of law, judicially evolved as annunciative of Missouri's public policy, and only this rule, that must be measured by this Court under the requirements of the Fourteenth Amendment.

The contract itself cannot be void under the Amendment, nor can the filing of the suit by the respondent. Nor can the judgment of the Supreme Court of Missouri be the offensive feature.

Although the right of individuals to control their private property by contract is subject to the State police power, this right was not created by the State nor delegated to the Federal Government by virtue of the Federal Constitution. A doctrine recognizing the primary right of control to be in the State is not in keeping with American tradition.

The Amendment is prohibitive of State action only when the State acts as a sovereign in its own right, not when a State Court is called upon to decide private rights that are distinct from the State. All previous authority affirms this doctrine, and authorities cited by petitioners are not in conflict with respondents' position.

Measured against any previous standard defined by this Court, the rule of law announced by the Supreme Court of Missouri has not offended against the Fourteenth

Amendment. Private property used as a home does not fall within the scope of the "public use" test as to constitute those who use it agents of the State; nor does this case fall within the scope of the "direct agency" test since the parties who signed the contract and their heirs in title did not sign or agree to be bound under or by virtue of State compulsion.

Petitioners, urging that a judgment be favorable to them irrespective of the reasoning of the State Court as to the application of the Fourteenth Amendment to private action, are involved in a contradiction.

In the last analysis it is "State inaction" and not "State action" of which petitioners complain.

III.

The petitioners have no real standing in this Court when urging Constitutional questions in connection with the restriction agreement of their grantor. They are asserting rights and the deprivation of alleged rights which they never had. They are, in reality, asserting defenses belonging strictly and exclusively to their grantor who is neither a party to this review nor one who sought the review.

For what they assert is that their grantor had no right, by contract, to limit her own (grantor's) right of alienation by restricting the use of her property. This defense would be one limited strictly to the promisor against one asserting such right. Petitioners are incidentally and merely accidentally parties to this litigation. They acquired no right and, therefore, could lose none. They have no defenses of their own and could, consequently, assert none.

Petitioners actually seek, by the arguments advanced, to have this Court rule in such a way as to command the

Courts of Missouri not to enforce contracts like the one here involved. The result of such mandate would be to deprive respondents and other parties to the contract of their property without due process of law; it would forbid to respondents their fundamental rights to property and the use thereof and would deny to them access to the Courts for the adjudication of their contract and property rights, thus denying them the equal protection of the laws, and the privileges and immunities granted to other citizens. It would deny to respondents the very rights the petitioners complain are being denied to them.

In the face of the United States Constitution and the laws of the United States, nothing short of an Amendment to the Constitution could deprive respondents of the right to privately contract regarding their own property and to have those contracts enforced in the Courts.

IV.

The decision of the Supreme Court of Missouri, in holding that the recording of the instrument of restrictions was adequate to give constructive notice of the restrictions, is a State matter.

V.

The petitioners were not denied any right protected by any of the several clauses of the Fourteenth Amendment as these clauses have been heretofore construed by this Court. All the essentials of due process were accorded petitioners.

ARGUMENT.

I.

The agreement here involved is one which the parties have a right to make; is not contrary to any valid law, and is not contrary to public policy.

a.

Petitioners indicate in their Brief that they rely on a Constitutional or substantial Federal question by contending that the restriction agreement involved here either violates treaties of the United States, or that the agreement is invalid because contrary to public policy and that such public policy is expressed in the treaties and other international agreements referred to by them.

Such contention could only be grounded, as a Constitutional or Federal question, on the provisions of the Second section of Article VI of the United States Constitution, which reads:

> "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State notwithstanding."

This point was first raised by petitioners in their "Motion for Rehearing" filed in the Supreme Court of Missouri after that Court had handed down its decision (Printed Record, p. 166, ground No. 6). Neither the point nor the Constitutional Article relied upon were raised by petitioners in their amended "Return to Order to Show Cause," nor in their "Answer" filed in the trial Court (Printed

Record, pp. 9-16, incl.). It is not raised in "Extracts from Petitioners' Brief" filed in the Missouri Supreme Court and set out in the Printed Record, pp. 149-152, incl.

The point that the agreement involved here is invalid by virtue of being contrary to public policy, or is unenforceable for such reason, was not raised in the trial Court in petitioners' "Amended Return to Order to Show Cause and Answer" (Printed Record, pp. 9-16, incl.), which was their first pleading in the case. The point is first mentioned in petitioners' "Extracts from Respondents' Brief" filed in the Missouri Supreme Court [Printed Record, p. 152(d)]. Even there, no contention is made that the agreement is violative of the public policy of Missouri. It is stated merely that Missouri had "modified and liberalized" its public policy. The point is next raised in petitioners' "Motion for Rehearing" filed after decision of the Missouri Supreme Court (Printed Record, p. 166, para. 6). There the matter of violation of public policy is squarely grounded on Article VI of the United States Constitution set out above.

Petitioners have no right to have either point considered by this Court. Rule 12(1), Revised Rules of the Supreme Court; Godchaux Co. v. Estopinal, 251 U. S. 179, 40 S. Ct. 116, 64 L.Ed. 213; American Surety Co. v. Baldwin, 287 U. S. 156, 53 S. Ct. 98.

Further, the defense that a contract is void or unenforceable as against public policy is an affirmative defense and must be pleaded as such. Barnes v. Boatmen's National Bank (Mo.), 156 S. W. (2d) 597. Petitioners, as defendants in the trial Court, did not plead either point, thereby depriving the Court of the right to rule such defenses. An Appellate Court in Missouri could not have considered the defenses not pleaded.

b.

The defense of "public policy," even though properly and duly pleaded and preserved, does not present a substantial Federal question sufficient for this Court to assume jurisdiction.

This case could not have been brought originally in a Federal Court by the plaintiff nor removed to such Court by the defendant. No Federal question appears in the plaintiffs' petition. It is not a case originally cognizable in a Federal Court. Tennessee v. Union and Planters Bank, 152 U. S. 454, 14 S. Ct. 654, 38 L.Ed. 511.

It could not have been removed by defendants because of diversity. Both parties, plaintiff and defendant, are residents of Missouri. No Federal question appears in the plaintiffs' petition. It could not have been removed because defendants were "denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States" (Judicial Code, Sec. 31; 28 U.S.C.A., Sec. 74). Such a right prevails only when there is State legislation of a character thought to deprive the defendant of his civil rights. Kentucky v. Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L.Ed. 633; Gibson v. Mississippi, 162 U. S. 565, 16 S. Ct. 904, 40 L.Ed. 1075.

Public policy that will void or invalidate a contract between citizens of the same state—a contract entered into and to be completely performed in that state—is the public policy of the State. While it is true that cases cited by petitioners correctly hold that where the Federal public policy comes into conflict with State policy the State policy must yield, still the burden remains on petitioners to show affirmatively that a contract, and the contract

here involved, is contrary to any public policy. Respondents submit there has been no such showing.

This Court has held that the public policy is to be ascertained by reference to the laws and legal precedents, and not from general considerations of supposed interests. There must be found definite indications in the law of the sovereignty to justify the invalidation of a contract as being contrary to public policy. Muschany v. United States, 324 U. S. 49, 65 S. Ct. 442, 89 L.Ed. 744.

Petitioners certainly have pointed out no clear and unmistakable law or legal precedent to support the declaration of a Federal public policy against which the contract involved here is invalid.

The sources of public policy are the Constitutions, the Statutes, and judicial construction and announcement. In determining what is the public policy, the Supreme Court and State Courts must ascertain the law of each, its general policy, and the usages sanctioned by the Courts and Statutes. Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L.Ed. 1481; Wheeler v. Smith, 50 U. S. 55, 9 How. 55, 13 L.Ed. 44; Preston's Heirs v. Bowman, 19 U. S. 580, 6 Wheat. 580, 5 L.Ed. 336.

Missouri requires that her public policy be determined from her Statutes, "and when they have not spoken, then in the decisions of the Courts." Reed v. Jackson County, 142 S. W. (2d) 862; State ex rel. Equality Assn. v. Brown, 334 Mo. 781, 68 S. W. (2d) 55.

One of the most thorough discussions of the sources of "public policy" is to be found in the opinion of the Missouri Supreme Court deciding In re Rahn's Estate, 361 Mo. 492, 291 S. W. 120, 51 A.L.R. 877. The Missouri Court adopted the theory and words of a Federal Court:

> "Vague surmises and flippant assertions as to what is the public policy of the State, or what would be shocking to the moral sense of its people, are not to be indulged in. The law points out the sources of information to which Courts must appeal to determine the public policy of a State * * * The only authentic and admissible evidence of the public policy of a State on any given subject are its Constitution, laws and judicial decisions. The public policy of a State, of which Courts take notice, and to which they give effect, must be deduced from these sources * * *
>
> It seems clear to us, therefore, from the great weight of judicial authority, that no act or transaction should be held to be void as against public policy unless it contravenes some positive, well-defined expression of the settled will of the people of the State or nation, as an organized body politic, which expression must be looked for and found in the Constitution, Statutes, or judicial decisions of the State or Nation, and not in the varying personal opinions and whims of judges or Courts, charged with the interpretation and declaration of the established law, as to what they themselves believe to be the demands or interests of the public.
>
> So it necessarily follows that Courts should exercise extreme caution in declaring any act or transaction void as against public policy, unless it clearly appears that the transaction contravenes the Constitution, some positive Statute, or some well-established rule of law announced by the judicial decisions of the State or Nation."

But despite petitioners' failure to point out any clear mandate or prohibition in the United States Constitution or the Constitution of their own state, and despite their failure to direct attention to any positive Statute of the State or Nation or to any clear pronouncement of any Court that the contract involved here is void as against "public policy," they still assert, in vague and indefinite

argument, that the contract should not be enforced because its enforcement would be against "public policy." Reduced to a point, petitioners' argument is that such an agreement should not be enforced because the enforcement is distasteful to them.

Petitioners, in their general statements as to the "public policy" (and it is not quite clear whether they refer to Missouri's public policy or that of the United States), refer to the various sections of the Fourteenth Amendment. This Amendment, as has been decided many times, created no rights and declared no policy. It prevented the States from making or enforcing laws, the result of which would be the prohibited deprivations or denials enumerated generally in the Amendment. Neither do the Statutes enacted under the authority of the Amendment confer any rights nor proclaim any policy. They merely enumerate the fundamental rights which the Amendment protects against State invasion. And the power given to Congress to pass this legislation is limited by what the Amendment prevents. Civil Rights cases, 109 U. S. 3, 3 S. Ct. 18, 27 L.Ed. 836; Strauder v. W. Virginia, 100 U. S. 303, 25 L.Ed. 664.

It is said by petitioners that the treaties and some recent international agreements, to which the United States is a party, declare a national public policy and it is argued such policy is binding on the Courts of Missouri and on this Court. Yet there is nothing in any quoted portions of these agreements that could be said to affect the private contracting of private citizens of Missouri on a subject and with an effect purely intra-state. Even the treaty-making power is limited by the Constitution, and respondents deny that Congress has the power, by international agreement, to indirectly, and by inference from such agreement, deprive the State of Missouri of the right to enforce or refuse to enforce a property restriction agreement of

its own citizens concerning realty exclusively within its own jurisdiction. Treaties refer to foreign, not internal policy. They are primarily a compact between nations, and enforcement or matters of infraction are subjects for international negotiation and are matters with which Courts have nothing to do. Head Money cases (Edge v. Robertson), 112 U. S. 580, 5 S. Ct. 247, 28 L.Ed. 798. The treaty-making power is a broad power but it cannot amend the Constitution. It extends to subjects which, in the intercourse of nations, had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States. Holden v. Joy, 17 Wall. 211, 243, 21 L.Ed. 523; United States v. Reece, 5 Dill. 405. They are to be construed reasonably so as not to override state laws or impair rights arising under them. Guaranty Trust Co. v. United States, 304 U. S. 126, 58 S. Ct. 785, 82 L.Ed. 1224.

Petitioners seek to have this Court declare void and unenforceable a contract approved by the highest Court of Missouri as being valid and not contrary to public policy. And as grounds for this nullification of Missouri judicial decision, petitioners advance an argument based on indirect implications from generalizations in an international agreement regarding matters not even remotely connected with the subject of this litigation. We cannot believe the point will even be considered.

c.

Federal Courts have always felt themselves bound to follow the construction and interpretation which State Courts have placed on their own Constitutions and laws. 11 Am. Jur., p. 106, Sec. 107. Missouri Courts, in deciding and declaring again and again that contracts such as the

one here involved are not contrary to public policy must have searched the Constitution and laws of Missouri to arrive at the conclusion. It must be assumed, even in the absence of a great discussion in the opinions, that Missouri Courts followed the law in declaring the State's public policy. The Federal Courts should follow the State's public policy and accept, as the State's policy, that which has been proclaimed to be such policy by the highest Court of that State from an examination, construction, and interpretation of its own Constitution, laws and judicial pronouncements.

This Court has recognized the judicial decision of a State as a source of the State's policy. Griffin v. McCoach, 313 U. S. 498, 61 S. Ct. 1023, 85 L.Ed. 148, 134 A.L.R. 1462. In fact the Supreme Court of the United States must depend on such pronouncements of State Courts to determine the public policy of the State. Wheeler v. Smith, 50 U. S. 55, 9 How. 55, 13 L.Ed. 44; Preston's Heirs v. Bowman, 19 U. S. 580, 6 Wheat. 580, 5 L.Ed. 336.

Only when the public policy of a State is clearly violative of the Constitution or laws of the United States can that public policy be ignored or voided. In Hartford Insurance Co. v. Chicago, M., and St. Paul Ry., 175 U. S. 91, 20 S. Ct. 33, 37, 44 L.Ed. 84, this Court said:

> "Questions of public policy affecting the liability for acts done or upon contracts made and to be performed within one of the States of the Union, when not controlled by the Constitution, laws, or treaties of the United States, or by the principles of the commercial or mercantile law, or general jurisprudence of national application, are governed by the law of the State as expressed in its own Constitutions and Statutes, or declared by its highest Court."

The United States Supreme Court has been always reluctant to void a contract on public policy grounds. "It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of Courts of justice is rather to maintain and enforce contracts than to enable parties thereto to escape from their obligations on the pretext of public policy, unless it clearly appears that they contravene public right or the public welfare." B. & O. R. R. v. Voight, 176 U. S. 498, 20 S. Ct. 387, 44 L.Ed. 560; also Twin City Pipeline Co. v. Harding Glass Co., 283 U. S. 353, 51 S. Ct. 476, 75 L.Ed. 1112; Globe and Rutgers v. Draper, 66 F. (2d) 985; Vidal v. Girard's Extrs., 43 U. S. (2 How.) 127, 197, 11 L.Ed. 205.

Within its own sphere, the State, as a commonwealth, has a public policy distinct from questions of public policy affecting the nation at large. In the determination of whether an agreement is against public policy there must be kept in view the rule that where there is no statutory prohibition, the Courts do not readily pronounce the agreement invalid, but, on the contrary, are inclined to leave men free to regulate their affairs as they think proper. 12 Am. Jur., p. 671, Sec. 172.

The public policy of Missouri is easily ascertained from her Constitution and Statutes. That policy is one of separation of the Negro and white races in educational and social pursuits. Section 1 of Art. IX of the Missouri Constitution of 1945 provides:

> " * * * Separate schools shall be provided for white and colored children, except in cases otherwise provided for by law."

This same provision, worded slightly differently, appeared in Sec. 3, Art. XI, of the Missouri Constitution of 1875:

> "Separate free public schools shall be established for the education of children of African descent."

The same provision appeared in Sec. 2, Art. IX, of the Missouri Constitution of 1865. It did not, of course, appear in the Constitution of 1820. These provisions and the laws enacted thereunder, have been held to be Constitutional from the Federal point of view. Lehew v. Brummell (Mo. S. Ct. 1891), 103 Mo. 546, 15 S. W. 765; Mo. ex rel. Gaines v. Canada, 305 U. S. 337.

It will be noted that a change in wording appears in the 1945 Constitution not limiting the separation to "children of African descent." The separation mandate appearing in the last Constitution resulted after long and serious debate. Needless to say, the provision was opposed by representatives of Negro organizations who raised the technical "African descent" question. The people of Missouri overwhelmingly approved the provision as it appears in the Constitution. This separation has ever been the public and social policy of Missouri and the cities of Missouri. In St. Louis, separate parks and playgrounds are provided; separate libraries, community centers, bath houses, public hospitals, educational institutions of all kinds. Separation in restaurants is an accepted standard of conduct. In only one theatre, separation is not the rule and even in that theatre separation within the theatre is the standard. The same separation exists in Kansas City, Joplin, Springfield and the other larger cities. It has been and remains the public policy of the State to separate the races in the public sphere. It is the policy and practice of the citizens of Missouri to separate the races in residential environ-

ment and in social pursuits. Federal and municipal housing projects in cities and in the State recognize the desire for separation.

And respondents earnestly submit this is not segregation nor discrimination. It is separation which is the will and desire and determination of the people.

Statutory law specifically enacts the Constitutional mandate and further declares the policy of Missouri on the question of Negro and white relationship.

Section 3361, Revised Statutes of Missouri 1939, first enacted in 1835 and unchanged to the present, declares marriages between white persons and Negroes to be prohibited and absolutely void. A license may not issue for such a marriage in Missouri.

Section 4651, R. S. Mo. 1939, enacted in 1879, and unchanged, declares it to be a felony for either party to the marriage if one party is white and the other has one-eighth part or more of Negro blood.

Article 4, Sections 9021-9033, R. S. Mo. 1939, sets up and provides for the regulation of a "State Industrial Home for Negro girls." Article 3, Sections 9009-9020, R. S. Mo. 1939, sets up "State Industrial Home for (white) girls."

Section 10349, R. S. Mo. 1939, enacted in 1889 and substantially unchanged, provides for separate schools for colored and white children and makes it unlawful for one to attend the school of the other. The same mandate is given to Boards of Directors for all school districts within the State: Sec. 10350, R. S. Mo. 1939. (Enacted in 1866.) In another section, enacted 1877, these Boards of Directors are given power to establish and maintain separate libraries and public parks and playgrounds for the use of white and colored persons: Sec. 10474, R. S. Mo. 1939.

Section 10488, R. S. Mo. 1939, enacted in 1917, provides for the establishment of Negro high schools. In 1921, the legislature provided for the formation of Negro consolidated school districts: Sec. 10489-10492, R. S. Mo. 1939.

Section 10632, R. S. Mo. 1939, enacted in 1901, sets up institutes for colored teachers.

A comprehensive resume of Missouri Public Policy and the Constitutional and statutory expressions of that policy can be found in the Missouri Supreme Court opinion in State of Missouri ex rel. Gaines v. Canada, 342 Mo. 121, 113 S. W. (2d) 783. This Court recognized that public policy but reversed on other grounds. Certiorari granted and case reversed, 305 U. S. 337, 59 S. Ct. 232, 83 L.Ed. 208.

Missouri has always recognized, as consistent with her public policy, the desire and determination of its citizens to maintain the separation of the races in residential environment. In Keltner v. Harris, 196 S. W. 1, a deed was cancelled when it was disclosed a white buyer, acting as agent and straw party for a Negro, purchased property from a white seller who had refused to sell to a Negro. In ruling, the Court said:

> "On the other hand, if it was distasteful to plaintiff to have a colored man as his adjoining neighbor, he had the legal right to refuse to sell him or his agents the property in controversy. In other words, no man is bound to sell his property to a proposed purchaser whose presence is unsatisfactory to him as a neighbor, whether he be black, or white, or some other color."

Missouri has never held a restriction agreement void as against public policy whether the restriction be imposed by subdivision plat, by deed, by devise, or by private agreement. Every Missouri Court, whether trial Court, intermediate appellate Court, or Supreme Court en banc,

has held such agreements to be one which the parties have a right to make and one which is not contrary to public policy.

Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. (2d) 529.
Koehler v. Rowland, 275 Mo. 573, 205 S. W. 217, 9 A.L.R. 107.
Thornhill v. Herdt (Mo. App.), 130 S. W. (2d) 175.
Swain v. Maxwell (S. Ct.), 196 S. W. (2d) 780.

No other jurisdiction has ever held such agreements to contravene public policy. But many State and Federal Courts have uniformly and consistently held such restrictions are not violative of public policy.

Queensborough Land Co. v. Cazeau (1915), 136 La. 724, 67 So. 641.
Parmalee v. Morris (1922), 218 Mich. 625, 188 N. W. 330.
Schulte v. Starks (1927), 238 Mich. 102, 213 N. W. 102.
Corrigan v. Buckley (1924), 55 App. D. C. 30, 299 Fed. 899.
Russell v. Wallace (1929), 58 App. D. C. 357, 30 Fed. (2d) 981.
Cornish v. O'Donoghue (1929), 58 App. D. C. 359, 30 Fed. (2d) 983.
Meade v. Dennistone (1938), 173 Md. 295, 196 A. 330.
Chandler v. Zeigler (1930), 88 Colo. 1, 291 Pac. 822.
Ridgeway v. Cockburn (1937), 163 Misc. 511, 296 N. Y. Supp. 507.
Steward v. Cronon (1937), 105 Colo. 393, 98 Pac. (2d) 999.
Lion's Head Lake v. Brzezinski (1945), 23 N. J. Misc. 290, 43 A. (2d) 729.
Lyons v. Wallen (1942), 191 Okla. 567, 133 Pac. (2d) 555.
People v. Gallagher, 93 N. Y. 438, 448.
Mays v. Burgess (1945), 147 F. (2d) 869, 872.
Burkardt v. Lofton, 63 Cal. App. (2d) 230, 239.

There are many other cases so holding, and the public policy of these jurisdictions cannot be changed until the people or the legislature has spoken. Certainly the Supreme Court of the United States will not, by judicial fiat, attempt to declare and change the public policy of the State of Missouri in the face of her own Constitution, Statutes, and uniform judicial decisions. For a Federal Court will recognize a State policy and will refuse to enforce a contract which is contrary to that policy. Jamison Coal Co. v. Goltra, 143 F. (2d) 889, 154 A.L.R. 1191, certiorari denied, 323 U. S. 769, 65 S. Ct. 122; Holland Furn. Co. v. Connelly, 48 Fed. Supp. 543; Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L.Ed. 2079; Tademy v. Scott, 157 F. (2d) 826.

And the Supreme Court will not interfere with a State's public policy. Avery v. State of Alabama, 308 U. S. 444, 60 S. Ct. 321, 84 L.Ed. 377.

Respondents urge, therefore, the affirmance of the Missouri Supreme Court on the public policy ground. The reasoning set out above, and the argument, are not that of respondents. It comes from the prior rulings of this Court and the well considered opinions of many jurisdictions. To hold such agreements to be unenforceable as against public policy would not only require ignoring all previous law in this Court, but in effect, the overruling, by implication, of everything said by the State and other Federal Courts on this point.

II.

The State of Missouri has not, through its Judiciary, infringed any right of petitioners protected by the Fourteenth Amendment to the Federal Constitution.

a.

Petitioners urge and rely on the proposition that the Missouri Supreme Court has infringed rights protected by the Fourteenth Amendment and Sections 41 and 42 of the Federal Code (Petition for Writ of Certiorari, pp. 11, 12, 13) (Amended Return to Order to Show Cause and Answer, Printed Record, pp. 10, 11, 13).

Missouri has not invaded any right of petitioners protected by the Fourteenth Amendment or any section of the Federal Code.

It may be stated as a general proposition that the propriety of the judicial function of a State may be measured by this Court against the prohibitions of the Fourteenth Amendment and the United States Statutes passed by Congress pursuant thereto. That a State Court may act in a manner prohibited by the Amendment is a question settled by this Court and Courts of lesser jurisdiction. Brinkerhoff-Faris Trust and Savings Company v. Hill, 281 U. S. 673, 50 S. Ct. 86, 74 L.Ed. 648; Bridges v. California, 314 U. S. 252, 62 S. Ct. 190, 86 L.Ed. 192; Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L.Ed. 158; Duane v. Merchants Legal Stamp Company, 120 N. E. 370, 231 Mass. 113, Cert. Den., 249 U. S. 613, 39 S. Ct. 388, 63 L.Ed. 802; Central Kentucky Natural Gas Company v. The Railroad Commission of Kentucky, 37 Fed. (2d) 938.

While the usual form of State offense against the Fourteenth Amendment is through legislative acts, yet the decrees of persons and agencies performing the executive

function under color of State authority have also been the subject of inquiry. Sunday Lake Iron Company v. Township of Wakefield, 247 U. S. 350, 38 S. Ct. 495, 62 L.Ed. 1154; Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 59 S. Ct.. 232, 83 L.Ed. 208.

The basic reason underlying the rule that the action of a State Court may be questioned under the Federal Constitution is that the executive and legislative branches of government are not the only sources through which the law of the State is called into being or enforced against the individual citizen. From the earliest traditions of American Jurisprudence State Courts, entirely unaided by statute or legislative act, have laid down rules according to the general principles of the common law. The rules pronounced in the decisions of the State Courts are, under the doctrines of res adjudicata and stare decisis, just as much law, as if the State Legislature had adopted the rules of decision by Statute. The force of State judicial decisions as law has long been recognized by this Court and is the foundation of the rules announced in Erie Railroad v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, and Prudential Life Insurance Company of America v. Cheek, 259 U. S. 30, 42 S. Ct. 516, 66 L.Ed. 1044, 27 A.L.R. 27.

It follows, therefore, that the State Courts must, in their interpretation of **internal law** of the State, even when no State Statute is involved, declare and lay down rules of law not incompatible with any provision of the Federal Constitution.

The specific question presented is and must be whether or not the Missouri State Courts have interpreted the **internal law** of Missouri in a manner repugnant to the Fourteenth Amendment.

Missouri has laid down a rule that private individuals, irrespective of their race and color, **may** contract in respect to their own property and place thereon such restrictions as to occupancy and ownership as **they** deem best for their own protection or benefit. This rule of law has been controlling in Missouri from the very beginning of Missouri's judicial history and was the basis upon which this case was decided in the Supreme Court of Missouri (Printed Record, p. 157).

In spite of the logical necessity of stating the question in the manner above set out, petitioners do not seem to agree that this is the issue. Petitioners urge that the **agreement** itself is "void" under Sections 41 and 42 of the Federal Code (Amended Return to Order to Show Cause and Answer, paras. 5, 6, 7) (Printed Record, pp. 10, 11), and that the **enforcement** of the agreement is prohibited by the Fourteenth Amendment (Amended Return to Order to Show Cause and Answer, paras. 8, 12) (Printed Record, pp. 11, 13).

b.

It is obvious that since the Fourteenth Amendment is not directed against individual action, Civil Rights cases, 109 U. S. 3, 3 S. Ct. 18, 27 L.Ed. 835; Slaughterhouse cases, 16 Wall. U. S. 36, 21 L.Ed. 394; Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L.Ed. 969; U. S. v. Cruikshank, 92 U. S. 542, 23 L.Ed. 588; U. S. v. Harris, 106 U. S. 629, 1 S. Ct. 601, 27 L.Ed. 290; Hodges v. U. S., 203 U. S. 1, 27 S. Ct. 6, 51 L.Ed. 65; Virginia v. Rives, 100 U. S. 313, 25 L.Ed. 667; and since Sections 41 and 42 of the Federal Code can be of no greater efficacy than the Amendment itself, Strauder v. West Virginia, 100 U. S. 303, 25 L.Ed. 664, there can be no offense against the Fourteenth Amendment in the making of a contract. The argument of the petitioners that the **contract itself** is void under the Constitution is a

manifest absurdity. In fact, petitioners, and others filing Briefs amicus curiae, also urge that the contract, unenforced, is not violative. They say it is "void."

The parties to the contract, or their assigns, respondents here, filed suit. This they did voluntarily and without compulsion on the part of the State. Therefore, the filing of the suit is not prohibited by the Fourteenth Amendment since only individual action is involved up to this point.

Can it be the judgment of the Supreme Court of Missouri which of itself offends? (Printed Record, p. 159.) Respondents answer in the negative.

The elimination of the judgment of the State Court as the possible source of offense is found by analogy in the construction of the contract clause of the Federal Constitution (Article I, Section 10, Constitution of the United States). The prohibition against interruption by a State of the obligations of contract is called into play only when the decision of the State Court relied on is founded on a State Statute, in which case it is the statute and **not the judgment** which is the objectionable feature. Tidal Oil Co. v. Flanagan, 263 U. S. 444, 44 S. Ct. 197, 68 L.Ed. 382.

The judgment is merely the judicial conclusion based upon reasoning compelled by the Statutes. It is not a resolve or decree of the Court but the sentence of the law pronounced by the Court on the action or question before it. Allis-Chalmers Co. v. U. S., 162 Fed. 679, 680; Groton Bridge Co. v. Clark Pressed Brick Co., 136 Fed. 27.

While it can be admitted that the term "State action" under the Fourteenth Amendment includes judicial action, yet, when a contract is present as the subject of the action, we must preclude **the judgment itself** as the objectionable feature. Since there is no State Statute in issue in this case, and since the contract itself cannot be the proper subject

matter of the Amendment, all that is left to offend against the Fourteenth Amendment is the **particular means** that the State Court used in arriving at its judgment. This particular means is, in this case and in every case in which no Statute is involved, the **internal law** of the State itself. It is the validity of this law and this law alone that is before this Court, and just as it is the offensive statute that is unconstitutional under the contract clause of the Federal Constitution, Fleming v. Fleming, 264 U. S. 29, 44 S. Ct. 246, 68 L.Ed. 547; Columbia Railroad Gas and Electric Company v. State of South Carolina, 261 U. S. 236, 43 S. Ct. 306, 67 L.Ed. 629, so too, it must be the **internal law** of Missouri, if anything, that offends against the Fourteenth Amendment and not the contract itself, the filing of the suit or the judgment of the Supreme Court of Missouri.

c.

Having established that it is the rule of law, as laid down by the Supreme Court of Missouri, that is herein being questioned under the Fourteenth Amendment, it remains but to show that the Missouri rule in no way invades any rights of petitioners under the Fourteenth Amendment.

As stated before, the Supreme Court of Missouri has merely interpreted the internal law of Missouri to mean that the individual citizens of Missouri, regardless of their color or race, have a right to restrict their property against sale to or occupancy by any group regardless of its color or race (Printed Record, p. 157, and cases cited therein).

There is no law of Missouri, the result of judicial decision or Statute, to the effect that individuals **must** restrict property against sale to or occupancy by Negroes or any other group. The State internal law merely recognizes the individual **right** to do so. There is no obligation imposed.

The right is, therefore, in the individual, not in the State. The restriction in this case was made by a group of individuals, not by the State of Missouri. The State was not, directly or indirectly, a party to the contract. The Missouri rule is **permissive**, not mandatory. Absent the contract there is no prohibition against conveyance to or occupancy by Negroes, and petitioners have not and cannot cite such a prohibition anywhere or in any form of the law of Missouri. If Missouri, by its judicially formed rules of law, were to subscribe to a doctrine to the effect that no Negro could purchase or occupy property simply because he is a Negro, or that no white man could sell to a Negro or permit occupancy by a Negro simply because he is a Negro, then the Fourteenth Amendment would be applicable to the rule just stated. For in such case the Negro would be affected by the rule without any action on the part of any private individual. In such case the discrimination would be in and by the State and would be a direct violation of rights protected by the Fourteenth Amendment. Such a rule as hypothesized above would deny the Negro equal protection of laws and deprive him of property without due process of law, for admittedly the Missouri Legislature could not enact such a rule into law. Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L.Ed. 149; Harman v. Tyler, 273 U. S. 668, 47 S. Ct. 471, 71 L.Ed. 831. And a decision to the same effect by a State Court would be equally offensive. Prudential Life Ins. Co. v. Cheek, 259 U. S. 30, 42 S. Ct. 516, 66 L.Ed. 1044, 27 A.L.R. 27.

The liberty of contract recognized by the States is not absolute but subject to the State police power through its Legislature. Levy Leasing Company v. Siegel, 258 U. S. 242, 42 S. Ct. 289, 66 L.Ed. 595; Home Building and Loan Association v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231, 78 L.Ed. 413, 88 A.L.R. 1481.

The police power of the States over private contract rights may also be asserted by the State Judiciary. McCoy v. Union Electric Railroad Company, 247 U. S. 354, 38 S. Ct. 504, 62 L.Ed. 1156; Guillod v. Kansas City Power and Light Company, 11 S. W. (2d) 1036, 321 Mo. 586.

Although the agreement here in question **might** have been declared invalid under State law for reasons of public policy, it was not. In this respect Missouri has followed its unvarying and uniform rule on this question. Respondents do not, therefore, urge or rely on the proposition that Missouri could not have declared this contract invalid under its police power, but this point was decided against the petitioners in the Court below and is not a proper issue for this Court to consider.

The real question before the Court is whether or not Missouri is prohibited by the Fourteenth Amendment from recognizing the distinct right of petitioners to contract in regard to their own private property. In short, is Missouri under **obligation,** by virtue of the Fourteenth Amendment, **not** to recognize and enforce private rights of contract irrespective of the motives or reasons underlying the making of the contract?

There is no more fundamental concept in the American form of government than that private rights are not created by the State but are vested in the people. The State right is derived only from the people.

This proposition has been included in the Missouri Constitution from earliest times and the State of Missouri has always subscribed to it as a necessary tenet in its governmental philosophy of securing personal liberty to the citizens of Missouri.

> "All political power is vested in and derived from the people; all government of right originates from

the people, is founded upon their will only, and is instituted solely for the government of the whole."

Article I, Sec. 4, Constitution of Missouri, 1865.
Article II, Sec. 1, Constitution of Missouri, 1875.
Article I, Sec. 1, Constitution of Missouri, 1945.

"All Constitutional government is intended to promote the general welfare of the people; all persons have a natural right to life, liberty and the pursuit of happiness and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government and that when government does not confer this security, it fails of its chief design."

Article I, Sec. 1, Constitution of Missouri, 1865.
Article II, Sec. 4, Constitution of Missouri, 1875.
Article I, Sec. 2, Constitution of Missouri, 1945.

"The people of this State have the inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their Constitution and form of government whenever they may deem it necessary to their safety and happiness, provided that such change be not repugnant to the Constitution of the United States."

Article I, Sec. 5, Constitution of Missouri, 1865.
Article II, Sec. 2, Constitution of Missouri, 1875.
Article I, Sec. 3, Constitution of Missouri, 1945.

Since the right to contract is a property right, Lindsley v. Patterson, 177 S. W. 826, L.R.A., 1915 F. 680; Andrus v. Business Men's Accident Association of America, 283 Mo. 442, 223 S. W. 70, 13 A.L.R. 779, it is obvious that this right was not created by the State of Missouri. The State was granted a regulatory and supervisory right over the private right to the extent made necessary for the adequate function of the police powers of the State. Even the police power of the State resided originally in the people. State ex rel. Eaton v. Curtis, 319 Mo. 660, 4 S. W. (2d) 819; Marsh v. Bartlett, 343 Mo. 526, 121 S. W. (2d) 737.

Since the right to contract is not in the State, but in the individual, the State has a duty to enforce the contract through its judicial fora which the people of Missouri have established for the enforcement of their own contract rights.

Missouri has recognized this duty in its Constitution.

> "The Courts of justice shall be open to every person and certain remedy afforded for every injury to persons, property or character, and that right and justice shall be administered, without sale, denial or delay."
>
> **Article I, Sec. 14, Constitution of Missouri, 1945.**

Since the right to limit and control private property, irrespective of the motive or reason underlying the right, is an inherent right, it is obvious that the parties do not seek in the law of the State the grant or creation of the right, but only its vindication in the event of injury. It is for the State, pursuant to the will of the people, to provide a remedy. Can the State by giving remedy to the right it did not create offend against the Fourteenth Amendment? Respondents submit that to hold that a State under the Fourteenth Amendment **must** deny a remedy to a right in itself valid under the Fourteenth Amendment is to hold that a State must in effect deny the very **existence** of the right, or, more accurately, to hold that a State is the creator of a private right and must now destroy its creature.

Such a doctrine is almost a definition of a totalitarian state—a form of government which has been repugnant to Americans from the very foundation of this nation.

Since the right is in the individual and not in the State, it must follow that the Fourteenth Amendment, admittedly limited in effect to "State action," cannot control

or affect the right where the right does not exist. What right? The right to restrict private property against sale to or occupancy by people of any race or color. Obviously, this right of restriction is not in the State, as already pointed out. Respondents admit that if the State were to assume such a right in itself and enforce law pursuant to that right through any of its governmental departments, it would be acting contrary to the Fourteenth Amendment and the Statutes passed pursuant thereto. Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L.Ed. 149; Harmon v. Tyler, 273 U. S. 668.

Respondents further submt that the individual's right to control his own property was not delegated or transferred to the control of the Federal Government by virtue of the Fourteenth Amendment or any other clauses of the Federal Constitution. Since the Fourteenth Amendment is, by nature, prohibitive of State action, certainly it cannot be construed to mean that any private right was sacrificed thereby. Civil Rights Cases, 109 U. S. 3, 11, 12; U. S. v. Cruikshank, 92 U. S. 542, 23 L.Ed. 588; Virginia v. Rives, 100 U. S. 313, 25 L.Ed. 667; Ex parte Virginia, 100 U. S. 339, 25 L.Ed. 676.

Under what clause of the Constitution did the people of Missouri grant to the Federal Government the right to pass on their right to control their own private property? Obviously nowhere. Indeed, these rights were specifically retained by the States and the people.

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."
>
> Amendment 9, Constitution of the United States.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
>
> Amendment 10, Constitution of the United States.
>
> "It has been held that the powers reserved to the several States, extend to all the subjects which, in the ordinary course of affairs, concern property and the rights of property of individuals, as well as to the internal order, improvement, and prosperity of real estate." King v. The American Transportation Company, 1 Flip. U. S. 1, 14, Fed. Cas. No. 7787; Frew v. Bowers, 12 F. (2d) 625.

It is clear, therefore, that the entire reasoning of petitioners in support of their "State action" argument is predicated upon the subtle and subversive fallacy that the right of control of private property is in the State, not in the individual, and that individuals derive their rights from the State.

The Fourteenth Amendment sought to prohibit States from making and enforcing laws injurious to the fundamental rights of individual citizens. Can the remedy applied by the Missouri Courts be construed to be included in the term "law" as contemplated by the Fourteenth Amendment? Respondents submit that it cannot be so construed.

A law within the meaning of the Fourteenth Amendment is a promulgation by the State through any of its departments that binds all citizens similarly situated whether they like it or not. It is true that only one injured by it can complain, but the law itself seeks to obligate in effect all citizens similarly situated completely irrespective of their desires and completely beyond their power of control to avoid the operation of the law whatever it might be.

The judgment of the Court below binds only the parties and their privies. It affects only the specific piece of property involved. It does not seek to impose burdens independently of what the parties to the contract voluntarily assumed.

In discussing the right of a State Court to lay down a rule of law to the effect that corporations had no lawful right to enter into a combination or agreement the effect of which was to take from them the right to employ whomsoever they deemed proper, this Court held that since the Legislature might have enacted a Statute denying the parties the same right, the rule of law as laid down by the Court is as valid as the Statute would be.

> "It seems to us clear that the State might, without conflict with the Fourteenth Amendment, enact through its Legislative Department a Statute precisely to the same effect as the rule of law and public policy declared by its Court of last resort. And, for the purposes of our jurisdiction, it makes no difference, under that Amendment, through what department the State has acted. The decision is as valid as the statute would be." Prudential Life Insurance Company of America v. Cheek, 259 U. S. 30, 42 S. Ct. 516, 66 L.Ed. 1044, 27 A.L.R. 27.

Measured by the above rule, the question therefore becomes: Could the Missouri Legislature have passed a statute to the effect that private citizens of Missouri, regardless of their race or color, have a right **voluntarily** to limit their property against sale to or occupancy by any group of citizens regardless of their race or color? Obviously, the answer to this question must be in the affirmative. Such a Statute would be merely permissive to **private discrimination**, not mandatory of the **public discrimination** that the Fourteenth Amendment seeks to forbid. It is true that no such Statute exists in Missouri, for statutes are usually

prohibitive of action or mandatory of action. They are rarely permissive in character. But the fact that no such statute exists is of no importance. There is no Constitutional provision prohibitive of such a statute and there can, therefore, be no Constitutional prohibition against a rule of decision to the same effect. It must follow, therefore, that measured by the rule as laid down by this Court in the Prudential case, the Missouri courts have not by their judicial interpretation of the internal law of Missouri offended against the prohibitions of the Fourteenth Amendment to the Federal Constitution.

d.

Petitioners have cited various cases in an effort to bring this case within the scope of the general rule that judicial action may be "State action" within the scope of the Amendment. These cases should be distinguished from the case at bar.

Ex parte in the matter of The Commonwealth of Virginia and J. D. Coles, petitioners, 25 L.Ed. 676. This was an application by a State judge for a writ of habeas corpus and a writ of certiorari to review the record of U. S. District Court charging him with excluding, from grand and petit jury service, Negroes, simply because of their color. He was indicted under Section 4, Act of Congress, March 1, 1875 (18 Stat., Part 3, 336). This Act stated that:

> "No citizen possessing all the qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any Court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or

> fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor and be fined not more than $5,000.00."

The Act was held constitutional and the writ of habeas corpus was denied.

A careful examination of this case will show that it is law **only** for the proposition that **only** a person clothed with authority by the State may be penalized and not individuals not so clothed. Here the petitioner was acting for and on behalf of the State and doing that which was positively forbidden the State—excluding jurors because of their race. In so doing the petitioner was interpreting the **internal law** of the State of Virginia in a manner hostile to the Fourteenth Amendment. If a Court so acts, it then offends against the Fourteenth Amendment in the sense that the rule declared by it is hostile to the prohibitions of the Fourteenth Amendment. But the offense lies in the **law** that it seeks to enforce. Here there is no penalty imposed on individual citizens for their action as regards one another, but only upon one clothed with authority by the State and acting in the name of the State. In excluding jurors, the petitioner was violating a State Statute which it is not necessary to set out. But it is clear that this case is not and cannot be interpreted as authority for the proposition that petitioners here seek to uphold.

Petitioners also rely on the case of **Twining v. State of New Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L.Ed. 97.** This cause came to the Supreme Court of the United States by writ of error from the Court of Errors and Appeals of the State of New Jersey. In this case, a trial judge in commenting to the jury in a criminal case on failure of the defendants to testify in their own defense, in effect withheld from the defendants the privilege against self-incrimi-

nation. The case simply decides that the privilege against self-incrimination is not one protected by the Fourteenth Amendment against invasion by a State or a State Court in the interpretation of the law of a State, even though the privilege is protected against Federal action by the Fifth Amendment.

Whether the privilege is or is not protected by the Fourteenth Amendment against State action is wholly irrelevant to the issues here. The case simply decides that a State Court in the **interpretation** of its own **internal law,** common or otherwise, must interpret that law in a manner not forbidden by the Federal Constitution or, more accurately, may not lay down a rule of law contrary to any provision of the United States Constitution. Here again there is no question of applying the Fourteenth Amendment to individual action but only to the internal law of New Jersey as declared by its Courts. It must, therefore, be concluded that this case is not authority for petitioners' position.

Petitioners cite **Brinkerhoff-Faris Trust and Savings Company v. Hill, 281 U. S. 673, 50 S. Ct. 86, 74 L.Ed. 648,** as a favorable authority. This case simply holds that a State may not, through its Courts, deprive a person of all existing remedies for the enforcement of a right, unless there was an opportunity afforded for him to protect that right. It is true that the litigants here were not State officers, nor were they in any way acting under color of State authority, but one of them was denied by a State Court the opportunity to be heard and present whatever defenses might be available. Obviously any internal rule of law to the effect that no hearing may be had by a litigant is a direct denial to that litigant of due process of law, since the litigant has never had his day in court. Respondents have no quarrel with the rule laid down in this case and

again it is declared that it is the internal rule of a State that must be measured against the requirements of the Fourteenth Amendment and not the action of individuals or of individual litigants. Respondents submit that this case also must be distinguished from petitioners' position.

Petitioners cite **Raymond v. Chicago Union Traction Company, 207 U. S. 20, 28 S. Ct. 7, 52 L.Ed. 78.** This case simply decides that the discriminatory action of a State Equalization Board is reviewable under the Fourteenth Amendment. Since a State Tax Equalization Board is acting for and under the authority of a State as an agency of the State, there can be no doubt but that its action as sanctioned by the State laws is the proper subject of review by this Court. Obviously, it is the rule laid down and interpreted by the State Board as being the law in a particular jurisdiction that is the only possible offensive feature under the Fourteenth Amendment. Here again there is no individual action of any kind involved, and the conclusion is inescapable that this case cannot help the petitioners.

Petitioners cite **Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 59 S. Ct. 232, 83 L.Ed. 208.** This case simply reviews the action of the curators of a state university in refusing admission of a Negro into the law school of the university. Since all State universities are supported by State tax money, they are considered agencies of the State within the meaning of the Fourteenth Amendment. Their policies, whatever they may be, are interpreted as the internal law of the State and as such the rules laid down by such agencies are reviewable. It is quite obvious again that this case is easily distinguishable from the issues herein presented.

Petitioners also cite **Bridges v. California, 314 U. S. 252 62 S. Ct. 190, 86 L.Ed. 192.** This case deals with the power

of a State Court to punish for contempt acts committed outside of the Court's presence. The question here involved is whether a State Court in the interpretation of its own **internal laws** as to contempt has acted in a manner denying the right of free speech guaranteed by the Federal Constitution. There is no thought, expressed or implied, of applying the Fourteenth Amendment to govern individual conduct in this case. The rule herein laid down is precisely in accord with the other cases cited and is not law for petitioners' theory.

Petitioners cite **Cantwell v. Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L.Ed. 1213,** as authority for their position. This was a criminal prosecution in which there was drawn into question the validity of a State Statute regulating religious freedom. This case is not in point at all and has absolutely nothing to do with judicial action except insofar as the Court construed and applied the State Statute to the defendants. This case cannot help petitioners by the widest stretch of imagination.

Petitioners also rely on **Powell v. Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L.Ed. 158.** The question presented in this case was whether or not a Court could interpret the State internal law to the effect that defendants in a criminal action had no right to counsel for their defense. Here again, as in all the other cases cited, the question is whether or not the **internal law** of a State is in violation of the Fourteenth Amendment. There is no individual action involved.

Petitioners rely on **Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 26, 90 L.Ed. 265.** Other decisions of this Court in similar cases have also been urged. Jones v. The City of Opelika, 319 U. S. 103, 63 S. Ct. 890, 87 L.Ed. 1290; Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 882, 891, 87

L.Ed. 1292, 146 A.L.R. 81; Martin v. Struthers, 319 U. S. 141, 63 S. Ct. 862, 882, 87 L.Ed. 1313. This Court in the Marsh case decided that the State of Alabama could not construe a criminal trespass statute to preclude an individual from exercising the right of religious freedom and the press in spite of the fact that the right was sought to be exercised on property which was admittedly privately owned. Respondents have no direct quarrel with these decisions insofar as this case is concerned. This Court in these decisions has simply protected rights guaranteed by the First Amendment (which rights were absorbed by the judicial construction of this Court into the Fourteenth Amendment) against invasion by any State in the form of a criminal prosecution on the part of the State. In so doing, while this Court evolved a new doctrine that seemed to subordinate property rights to individual Constitutional rights, it is clear that this Court did not, and could not, go to the extent of saying that, in the absence of an attempted prosecution by á State of the trespasser involved in the Marsh case, there would have been any "State action" as the term has been previously used by this Court. The fact that the place of the alleged offense was a "town" (although privately owned) was a substantial factor in this Court's decision to ward off attempted criminal action on the State's part. There is no town or any quasi-public place involved in the case at bar. The entire property involved consists in one house and lot (Printed Record, p. 154) (Amended Return to Order to Show Cause and Answer, para. 1, Printed Record, p. 9). Nor is there any criminal prosecution attempted here under color of any State statutory law.

Indeed, the majority decision in the Marsh case carefully limited the "State action" involved to the application of the criminal statute.

> "In our view the circumstances that the property rights to the premises wherein the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of the State Statute. **Insofar as the State has attempted to impose criminal punishment** on appellant for undertaking to distribute religious literature in a company town, its action cannot stand." Marsh v. Alabama, 326 U. S. 501, 509, 90 L.Ed. 265, 270. (Emphasis ours.)

But, as respondents read the decision, the Court did not force appellant's presence on the "town" to the extent of holding that appellant would have been excluded from civil liability for trespass. If such an action had been brought by the "town," would recognition of the private owner's property rights by the State Courts of Alabama in the form of a plaintiff's judgment be "State action" within the meaning of the Fourteenth Amendment? Respondents submit that such a holding would be a confiscation by the United States of individual property rights, and of States' rights, and neither the Marsh case nor its ancestors in principle can be said to sustain such a doctrine.

Petitioners have not been denied the right of freedom of religion, the press, or speech, or any other right which has heretofore been recognized by any construction of Constitutional law or supported by the decisions of this Court. Petitioners had no Federally protected right before the making of the contract herein and have acquired none since except those rights which petitioners seek to invent for the purpose of this action.

This Court, in determining what is "State action" within the meaning of the Fourteenth Amendment, in the **Marsh case** and the **Swing case, infra,** applied what may be called the "public use" test and in the **Steele case** and the **Smith case** the "agency" test.

These "tests" are simply different aspects of the same principle. If the Federal Government or the State by law authorizes a person, a group of persons, a corporation, or any legally recognized interest to discriminate, the acts of discrimination are those of the State or Federal Government. If a legally recognized interest is engaged in a business, or performing a function directly affecting the public, the right to engage in the business or perform a public function is dependent on the will and law of the State, at least insofar as the State is prohibited from granting the power to engage in business or perform the public function without limiting the power to non-discrimination in its exercise. Cf. Steele v. Louisville-Nashville Railroad Company, 323 U. S. 192, 65 S. Ct. 226, 89 L.Ed. 173, Vid. 45 Mich. L. Rev. at pp. 745-746.

Thus a State may not authorize a corporation to operate a town in a manner calculated to prevent the people thereof from enjoying the free exchange of ideas and religious information, nor may a State authorize an individual or company to operate a business to exclude "peaceful persuasion" on the part of others in the form of picketing, nor may a State create or appoint by law any group to perform any lawful function on a discriminatory basis.

Neither of these tests nor any mixture of them includes this case within their scope. Respondents are holders of the fee simple title to the private property through which they derived their right to bring this suit in the first instance and to defend their claim in this Court (Printed

Record, p. 1). Petitioners derived their title from a fee simple title owned by parties who were signers of the agreement herein (Printed Record, pp. 1, 2).

Respondents have emphasized that the right to own and control real property in Missouri is not dependent on a grant of power from the State, and through no plentitude of rhetorical devices can petitioners disguise the fact that a doctrine so holding is far from American governmental idealism. Therefore, respondents cannot be said to be agents of the state in their private discriminatory actions.

Nor is the right to own or control private property a right in which the general public has a direct interest. Respondents own a private home. They are not engaging in any business or performing a public function in or with their home. The use of a house as a private dwelling cannot be tortured into having any public significance which may be the basis for linking the owners with the state so as to call private action "State action" under the Fourteenth Amendment.

The case of **American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L.Ed. 855,** relied on by petitioners, decides that a State may not assume a right in its judicial policy to forbid peaceful picketing even when there is no direct quarrel between the employer and his employees.

Smith v. Allwright, 321 U. S. 649, 64 S. Ct. 757, 88 L.Ed. 987, decides that when an act of a State Legislature entrusts placing names on ballots to political parties, the parties so entrusted are then the agents of the state and may not exclude any individual from voting in primary elections by the simple expedient of excluding him from the party.

Steele v. Louisville and Nashville Railroad Company, 323 U. S. 192, 65 S. Ct. 226, 89 L.Ed. 173, simply decides that when Congress has by legislative act conferred upon a union selected by majority of a craft the power to represent the entire craft in all bargaining matters, the union must represent its members without discrimination as to color or race. See also Tunstall v. The Brotherhood of Locomotive Firemen, 323 U. S. 210, 65 S. Ct. 235, 89 L.Ed. 187.

It is clear that State or Federal law, empowering one group of persons to represent the rights of others, necessarily creates an agency between the empowered group and the individuals it represents. It must follow that the acts of the group are the acts of the State or the Federal Government and as such may be questioned under the Fourteenth or Fifth Amendments.

> "The question is whether the Railway Labor Act, 48 Stat. 1185, 45 U. S. C. 151 et seq., imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation." 323 U. S. 192, at pp. 193, 194, 65 S. Ct. 226 at p. 228.
>
> "For the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights." 323 U. S. 192 at p. 198, 65 S. Ct. 226 at p. 230.

The Court makes it clear that the power so granted must be used in a non-discriminatory fashion and that a statute

authorizing discriminatory conduct would be unconstitutional under the Fifth Amendment (and by inference under the Fourteenth Amendment if done by a State).

> "But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the act would bear the stigma of unconstitutionality under the Fifth Amendment in this respect." 323 U. S. 192 at p. 208, 65 S. Ct. 226 at p. 235.

The State of Missouri has passed no statute authorizing anyone to discriminate against Negroes or anyone else. Neither respondents nor their ancestors in title were appointed by any State statute to enter into the contract herein. Their action is not, therefore, that of the State.

e.

Respondents submit that the prior decisions of this Court are affirmative authority for the proposition that private citizens have a right to restrict their property against occupancy by Negroes even though discrimination be the motive in so restricting their property.

Respondents, in this respect, rely on the Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L.Ed. 835. There were before the Court five (5) cases which are jointly referred to as the Civil Rights cases. Two (2) of these cases, United States v. Stanley and United States v. Nichols, originated in indictments against the defendants for denying to Negroes accommodations at an inn or hotel. Two (2) cases, United States v. Ryan and United States v. Singleton, arose in indictments for refusing Negroes seats in a theatre. The fifth (5th) case involved private litigants, Robinson et ux. v. Memphis & Charleston Railroad Company. This

suit sought damages for the denial of permission by the railroad company to a Negro to ride in a car reserved exclusively for white people.

All these cases came up to the Supreme Court under Sections 1 and 2 of the Civil Rights Act passed March 1, 1875.

Section 1 provided:

> "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres and other places of public amusement; subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color regardless of any previous condition of servitude."

Section 2 provided:

> "That any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color, and regardless of any previous condition of servitude, the full enjoyment of any of the accommodations, advantages, facilities, or privileges in said section enumerated, or by aiding or inciting such denial, shall for every such offense forfeit and pay the sum of $500.00 to the person aggrieved thereby, to be recovered in an action of debt, with full costs; and shall also, for every such offense, be deemed guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $500.00 nor more than $1,000.00, or shall be imprisoned not less than thirty days nor more than one year. Provided, that all persons may elect to sue for the penalty aforesaid, or to proceed under their rights at common law and by State Statutes; and having so elected to proceed in the one mode or the other, their right to proceed in the other jurisdic-

> tion shall be barred. But this provision shall not apply to criminal proceedings, either under this Act or the criminal law of any State: And provided further, that a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively."

In passing these Statutes, which respondents have set out in full for the convenience of this Court, Congress sought to regulate the rights of individual American citizens in their actions and relationships with each other. It was the intent of Congress to lay down rules, not to regulate State laws or rules of law promulgated by State Courts, but to regulate **directly** the standards of conduct of individuals when these individuals were performing acts based upon discriminatory motives. In ruling upon the Constitutionality of these sections, this Court said:

> "Individual invasion of individual rights is not the subject matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all State Legislation and State action of every kind, which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty or property without due process of law or which denies to any of them the equal protection of the laws. * * * It does not invest Congress with power to legislate upon subjects which are in the domain of State Legislation; * * * but to provide modes of relief against State Legislation or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights. * * * Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and against State proceedings affecting those rights and privileges and by power given to Congress to legislate for the purpose of carrying such prohibition into effect."

In declaring these sections unconstitutional as beyond the power of Congress under the Fourteenth Amendment, this Court not only excluded individual action from the scope of the Fourteenth Amendment, but in effect confirmed the natural right of individuals to discriminate against one another **as far as direct Federal regulation is concerned.**

Petitioners, seeking to distinguish these cases from the case at bar by insisting that Missouri has "sanctioned" the contract in recognizing the rights and duties arising thereunder and giving judgment accordingly, emphasizes that no "State action" was remotely possible under these decisions because the cases arose in the United States Courts and were never before any State judicial body.

It will have to be admitted that the Civil Rights Cases do lay down the affirmative rule that Congress has no right under the Fourteenth Amendment to regulate directly the affairs of individual citizens in the disposition and control of their own private property. Thus, the right to discriminate, insofar as that right is vested in private persons, exists beyond Federal power of control or regulation. A necessary corollary of this rule is that the Fourteenth Amendment itself, although self-executing in its prohibitive clauses, cannot be construed to regulate directly rights which Statutes passed pursuant to it cannot reach.

As respondents have already shown, the contract itself, the filing of the suit and the judgment of the Supreme Court of Missouri must be eliminated as possible sources of the offense.

The remedy provided in the Missouri Courts is all that remains. That there is a sharp distinction between a right and its remedy is a fundamental concept and finds a gen-

eral expression in the phrase "ubi jus ibi remedium." Does the remedy provided by Missouri for invaded contract rights alter or enlarge the rights themselves? Obviously not. Such a holding would be necessarily predicated on the foreign doctrine that all rights of private property are derived from the State. How then is the private right, which is admittedly free from Federal control under the doctrine of the Civil Rights cases, changed by the intervention of the State Courts in this case? Since the State cannot give rights it has no power to bestow, or withhold rights not subject to its power, no change could be affected.

To sustain a claim that the State of Missouri has offended against the Fourteenth Amendment by providing a remedy for an admittedly valid right is in effect to control directly the rights of individual citizens as between themselves. The Civil Rights cases cannot be distinguished from the case at bar, and stand as a bulwark against Federal attempts to regulate private action under the Fourteenth Amendment. That petitioners and those filing Briefs in their behalf argue that the Federal Government, either by legislative enactment or judicial fiat, should deprive private citizens of their inherent rights gives further credence to their advancement of the doctrine of State supremacy that is so repugnant to the American ideal.

Respondents cite the case of Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L.Ed. 969, as further authority for the proposition that this question of judicial action has already been settled by this Court in their favor. In this case the question herein presented was directly before this Court, and it was then held that a restrictive agreement arising in the District of Columbia did not violate the Fifth Amendment of the Federal Constitution. The

Court also stated in the course of the opinion that the Fourteenth Amendment was not violated. Before this case reached the Supreme Court of the United States two (2) Federal Courts of lesser jurisdiction had already ruled in favor of the validity of the restrictive covenants. Can it be pretended that the right of individuals to discriminate against Negroes was not recognized by this Court in this case? Respondents submit that the case is a rule of decision favorable to their position.

The case of United States v. Harris, 106 U. S. 629, 1 S. Ct. 601, 27 L.Ed. 290, is direct authority for respondents' position. This case arose in a criminal indictment under Section 5519 of the Revised Statutes of the United States charging that the defendant and nineteen others beat, bruised, etc., four men lawfully under State detention in custody of a deputy sheriff of a State County.

Section 5519 was held unconstitutional as being beyond the power of Congress in that it enabled Congress to lay down rules of law **directly** affecting individual action. In holding this section unconstitutional this Court recognized and enforced the right of individuals to discriminate against one another without Federal interference. It follows that this case, as direct affirmative authority for respondents' position, must be overruled if the judgment of the Supreme Court of Missouri is to be reversed.

Respondents rely in part upon the case of Hodges v. U. S., 203 U. S. 1, 27 S. Ct. 6, 51 L.Ed. 65. This case arose in an indictment under Sections 1977, 1978, 1979, 5508 and 5510 of the Revised Statutes of the United States. The defendants were charged with threatening violence to Negroes while the said Negroes were at work and with causing said Negroes to stop work and leave their positions. This Court ordered demurrers sustained to the in-

dictments on the theory that no offense under the laws of the United States was charged. Obviously, this Court again affirmed the rule that it is a legal impossibility for the Fourteenth Amendment or any law passed pursuant thereto to reach or affect directly any individual private citizen because of any act he has performed, although discrimination is admittedly the motive for his act.

Respondents cannot escape the conviction that the often used argument of petitioners that enforcement of the contract herein is "State action" within the meaning of the Fourteenth Amendment is really nothing more than a well settled doctrine of this Court attempted to be changed by petitioners through the simple expedient of calling the settled doctrine by a new name and disguising it in diction not previously used. It is impossible to distinguish in principle the case at bar and the cases above cited by respondents as authority for their position. No amount of innovation or literary machination can change the underlying rule of law. Certainly, it is impossible to categorize this case as involving a problem not heretofore presented to this Court. Such a view completely and totally disregards the settled decisions of this Court upon which respondents and many other citizens of the United States have relied in regulating their property and their lives.

The argument of petitioners in its ultimate distillation requires this Court to construe the Fourteenth Amendment to control individual action on the theory that judicial recognition and enforcement of private rights is an arrogation and adoption on the part of the State of those rights as part of its law.

Respondents cannot believe that this Court is prepared to subscribe to such a doctrine.

Since this Court has decided beyond all question that the Fourteenth Amendment has no proper application to acts of private individuals, the State Courts are bound to follow the rule laid down by this Court as the final arbiter of a Constitutional question. The State Courts cannot decide that individuals are prohibited by the Fourteenth Amendment from entering into the agreement, for to do so would be to reach a conclusion which would set at naught the decisions of this Court. All that is left for the Courts to decide is that individuals are not prohibited by the Fourteenth Amendment from entering into such an agreement. When this conclusion has been reached under the compelling necessity of the prior decisions of this Court, the State Court must give judgment accordingly and enforce the contract.

Petitioners, however, would add a third alternative. Petitioners, in effect, urge that even though the State Court has reached the correct conclusion of law, it cannot give judgment accordingly and enforce the contract but must refuse enforcement and thereby reach the same conclusion that it would have reached had it erroneously decided to apply the Fourteenth Amendment to the contract itself. In short, petitioners seek a favorable judgment no matter how the State Court has decided the Federal question. This position of petitioners involves a direct contradiction so manifestly absurd that no State Court or Federal Court has ever accepted the argument. On the contrary, every Court that has had the question before it has followed the Civil Rights cases and others to hold that individual action is not the subject matter of the Amendment.

Queensborough Land Co. v. Cazeau (1915), 136 La. 724, 67 So. 641.

Koehler v. Rowland (1918), 275 Mo. 573, 205 S. W. 217.

Los Angeles Inv. Co. v. Gary (1919), 181 Cal. 680, 186 Pac. 596.

White v. White (1929), 108 W. Va. 128, 150 S. E. 531.

Parmalee v. Morris (1922), 218 Mich. 625, 188 N. W. 330.

Porter v. Barrett (1925), 233 Mich. 373, 206 N. W. 532.

Torrey v. Wolfes (1925), 6 F. (2d) 702, 56 App. D. C. 4.

Schulte v. Starks (1927), 238 Mich. 102, 213 N. W. 102.

Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L.Ed. 969.

Russell v. Wallace (1929), 58 App. D. C. 357, 30 F. (2d) 981.

Cornish v. O'Donaghue (1929), 58 App. D. C. 359, 30 Fed. (2d) 983.

Meade v. Dennistone (1938), 173 Md. 295, 196 A. 330.

Letteau v. Ellis (1932), 122 Cal. App. 584, 10 P. (2d) 496.

Chandler v. Ziegler (1930), 88 Colo. 1, 291 Pac. 822.

Edwards v. West Wood Theater Co. (1931), 60 App. D. C. 362, 55 F. (2d) 524.

United Coop. Realty Co. v. Hawkins (1937), 269 Ky. 563, 108 S. W. (2d) 507.

Ridgeway v. Cockburn (1937), 163 Misc. 511, 296 N. Y. Supp. 936.

Steward v. Cronon (1940), 105 Colo. 393, 98 P. (2d) 999.

Dooley v. Savannah Bk. (1945), 34 S. E. (2d) 522, —(Ga.)—.

Lion's Head Lake v. Brzezinski (1945), 23 N. J. Misc. R. 290, 43 A. (2d) 729.

Lyons v. Wallen (1942), 191 Okla. 567, 133 P. (2d) 555.

Doherty v. Rice (1942), 240 Wisc. 389, 3 N. W. (2d) 734.

Burke v. Kleeman (1934), 277 Ill. App. 519.

Hurd v. Hodge (1947), 162 Fed. (2d) 233.

Nor can it be reasonably asserted, as petitioners do, and in the face of the above decisions, that the enforcement by a Court, whether trial or intermediate Appellate Court, is State action within the meaning of the Fourteenth Amendment. In every case that has reached the highest Court of the jurisdiction there was one or more decisions by Courts of lesser jurisdiction. In most, if not all, of the cases above cited the "State action" argument was advanced. No Court ever held that it must reverse a lower Court on that ground.

Would it not be absurd to say that in every case coming to the United States Supreme Court for review, in which the Fourteenth Amendment was involved and where this Court held that the action complained of was not violative of the Amendment, that it was in error because it failed to regard the action of the lower Courts in determining the controversy to be violative State action. No Court has ever held that in determining the contract rights of party litigants the Court was taking forbidden State action within the meaning of the Amendment.

If petitioners' argument that enforcement of the contract involved here is State action forbidden by the Fourteenth Amendment, then the Judges of the Supreme Court of Missouri should be liable civilly under Section 43 of Title 8, U. S. C.; and be liable criminally under Sections 51 and 52 of Title 18, U. S. C. This conclusion is strongly hinted at by the petitioners in their Supplemental Brief, p. 4, para. 4, (a), (b), (c); p. 9, para. 1; p. 10, para. 3. It would seem to follow a logical compulsion that if the judgment and mandate of the Missouri Supreme Court constitutes forbidden State action then petitioners should sue them for civil damages and the United States of America should prosecute under the penal sections of the Code.

Again relying on the decisions of this Court that individual action is not the proper subject matter of the Fourteenth Amendment, respondents cannot emphasize too strongly their position that to sustain the claim of the petitioners would completely ignore settled law.

After a State Court has reached the conclusion that the contract is not prohibitive under the Fourteenth Amendment for it then to decide that it may not enforce the private agreement because of petitioners' theory of "State action," necessitates the State Court taking from the contract the right of remedy in the Courts. In short, the State Court must, to follow petitioners' view, refuse to enforce an otherwise valid agreement. Since the right of remedy is in the individual signers of the contract or their heirs in title, and not in the Court, the State Court must, if petitioners' view is to prevail, interpret the Fourteenth Amendment as prohibiting the individual action of enforcement. To interpret the Fourteenth Amendment in accord with petitioners' view is to hold in effect that the Fourteenth Amendment can and does completely confiscate respondents' right to enforce a contract which in itself is admittedly valid under the Federal Constitution.

Such a confiscation of respondents' rights would result in a denial to them of a fundamental Constitutional right —access to the Courts.

It was upon this ground that the Supreme Court of Mssouri refused to sustain petitioners' claim (Printed Record, p. 158).

It is elemental that the Fourteenth Amendment created no rights, but merely provided a shield against invasion of certain fundamental rights by the action of a State sovereign. It is further true that Congress could not en-

act, under the Fourteenth Amendment, any law that would in effect regulate the affairs of individual citizens as to each other.

> "The Fourteenth Amendment nullifies and makes void all State Legislation and State action of every kind which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty or property without due process of law or which denies to any of them the equal protection of the laws. It not only does this, but in order that the national will, thus declared, may not be a mere brutum fulmen, the last section of the Amendment invests Congress to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. * * * This is the legislative power and the whole of it." Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L.Ed. 835.

It is clear that if Congress could not have enacted any laws pursuant to the Fourteenth Amendment which would in effect regulate private rights, the Amendment itself, the fountain-source of the law-making power of Congress, cannot regulate private rights. Such a holding would invite the inevitable conclusion that the Constitution does not grant to Congress adequate powers to enforce it.

It has never been denied by petitioners that this cause arose in private contract. Indeed, they admit that the subject of the action throughout the entire litigation was the agreement signed by respondents' ancestors in title (Amended Return to Order to Show Cause and Answer, pars. 5, 6, 7, 8) (Printed Record, pp. 10-11).

There is not and never was involved in this litigation at any stage of the proceeding any question beyond the existence and legality of the agreement referred to (Printed Record, pp. 19, 20) and other State questions incidental thereto. To this agreement petitioners were not parties.

The only persons bound were those who signed it and their heirs in title. The agreement created all rights and obligations that could possibly arise under it. Since it is undeniable that the agreement is in itself lawful, how can petitioners assert any Federal right under a contract to which they were not a party? Obviously, they cannot. Where then does this alleged "right" of petitioners arise? It is already established that this "right" could not arise under the Fourteenth Amendment because that Amendment **protects** rights. It does not **create** them. It must follow that petitioners have no rights—at least none that are protected by the Federal Constitution or this Court. Beyond this inquiry, this Court has no jurisdiction to proceed. The petitioners may be disappointed that the agreement conferred no rights upon them but the only material point here is that the agreement denied them no rights. They are in no position to complain in this Court.

Could it be urged that a Negro could sue a white man and compel conveyance to him of the white man's property in the absence of a contract to that effect? Manifestly not. If the State Courts were thus to deny the Negro the right to buy in such case, would this constitute State action within the meaning of the Fourteenth Amendment? Obviously not.

Petitioners, and those filing Briefs in their behalf, urge upon this Court the proposition that Sections 41 and 42 of Title 8, U. S. Code, give them the "right" of which the Missouri Supreme Court, by its judicial determination, has deprived them. They would argue that the sections above quoted bestow upon them a right (the sections confer no rights but merely enumerate those fundamental rights protected by the Amendment itself) to own specific property. Corrigan v. Buckley, cited supra, settled the question in ruling that the right to own specific property

was not a right recognized or protected by the laws of the United States on any theory of Constitutional limitations. The Court said:

> "Appellant seems to have misconstrued the real question here involved * * * the Constitutional right of a Negro to acquire property does not carry with it the Constitutional power to compel sale and conveyance to him of any particular private property."

If petitioners, and those urging the same point, were to carry that argument to a conclusion they would further assert that if one refused to make a contract to sell property to a Negro merely because he was a Negro the Negro could sue for specific performance on the reasoning that Section 41 gives him the right "to make and enforce contracts." If petitioners have a right to buy the property involved in this suit, or have the right not to have their use or occupancy barred, because Section 42 gives them the right to purchase property, then they have a right to sue on contracts which persons refuse to make with them under Section 41. Reduced to an absurdity they would have the right also to inherit any specific property they chose to inherit because Section 42 gives them the right to "inherit" property.

This argument of petitioners has never impressed any Court and it seems unbelievable they would seriously urge such reasoning on this Court.

In Missouri the distinction between what a legislature may not do by statute and what may be done by individuals whose contracts will be enforced in the State Courts has long been recognized by specific Constitutional provisions.

The following provision has appeared in the last three Missouri Constitutions:

> "That no person can be compelled to erect, support, or attend, any place or system of worship, or to maintain or support any priest, minister, preacher, or teacher of any sect, church, creed or denomination of religion; but if any person shall voluntarily make a contract for any such object, he shall be held to the performance of the same."
>
> Article I, Section 10, Missouri Constitution, 1865.
> Article II, Section 6, Missouri Constitution, 1875.
> Article I, Section 6, Missouri Constitution, 1945.

If petitioners' argument regarding enforcement of a contract being State action is to be followed then the above quoted sections of the Missouri Constitution are unconstitutional from the Federal standpoint.

f.

In the final analysis of discrimination against Negroes simply because of their color there are only two general categories through which a State may be a party to such discrimination in any way whatever, so that its "action" may be questioned under the Fourteenth Amendment.

1. A State may discriminate affirmatively against Negroes by passing Statutes through its Legislature or by evolving rules of law through its Courts the effect of which is mandatory discrimination in and by the State completely independently of individual action and such discrimination by the State through its Legislature or Judiciary may be measured by this Court against the requirements of the Fourteenth Amendment.

2. A State probably may prohibit discrimination on the part of its citizens in their private capacity by passing Statutes through its Legislature or by evolving rules of

law in its Courts the effects of which are prohibitive of private discrimination and these Statutes or rules of law may be measured by this Court against the requirements of the Fourteenth Amendment.

It is admitted that a State may not through its legislative or judicial function, independently of contract or private action of any kind, affirmatively discriminate against its citizens by reason of their color in forbidding them the right to buy or occupy real property. Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L.Ed. 149; Harmon v. Tyler, 273 U. S. 668, 47 S. Ct. 471, 71 L.Ed. 831.

With this contention respondents have no quarrel.

However, as has already been pointed out, Missouri has passed no Statute nor evolved any rule of law, independently of private agreement, demanding discrimination or making discrimination an obligation on the part of its citizens rather than a right.

It is further admitted that the State might prohibit, through its Legislature or its judicially evolved rules of law, individual action based on discrimination. Although this point is not directly involved it seems probable that a Statute or rule of law prohibiting private action would be held by this Court not to violate the Fourteenth Amendment. Cf. Railway Mail Association v. Corsi, 326 U. S. 88, 65 S. Ct. 1483, 89 L.Ed. 2072, in which this Court held that a State might prohibit a union of railway clerks, operating under and by virtue of New York statutory law, from denying membership in the union to any one by reason of race, color or creed.

> "A State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence, in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment

> as a sword against such State power would stultify the Amendment." (Concurring Opinion of Mr. Justice Frankfurter, Railway Mail Association v. Corsi, 326 U. S. 88, 98, 65 S. Ct. 1483, 1489.)

Admitting (in order to put the case in the best possible light for petitioners) that a State may affirmatively oppose private discrimination on the part of any of its citizens in regard to the sale or occupancy of private real property, and admitting further that this prohibition might be called into play through its judiciary alone and that the rule of law evolved by a State Court, in the event of such action, is reviewable by this Court, respondents submit that this case involved neither affirmative discrimination on the part of the State through any of its departments nor a prohibition by the State of discrimination by private citizens.

If a State should decide through its Judiciary that it will not enforce agreements of this type on the grounds of public policy or for some other reason, the State has, through its Courts, in effect prohibited the legal efficacy of such private agreements. A rule of non-recognition of private discrimination on the part of the State and a positive Statutory prohibition of private discrimination, are in legal effect, identical. It is true that a State may by a Statute prescribe a penalty for discrimination in the form of a fine or imprisonment and thus bring private acts of discrimination within the realm of the criminal law. Obviously a criminal penalty could not be assessed by judicial decision unaided by a Statute. But aside from the penal aspects, there is no distinction in effect between legislative prohibition and judicial prohibition through non-recognition. In either event, the contract would avail the parties to it nothing in the eyes of the law.

Since the Fourteenth Amendment is merely prohibitive of State action and not mandatory of it, it is clear that no construction of the Fourteenth Amendment can **force** the State to affirmative prohibitive action either through its Legislature or its Judiciary. In short, while it is admitted for the sake of argument that a State **may** prohibit private discrimination under the Fourteenth Amendment, respondents emphasize that a State **need not** prohibit private discrimination under the Fourteenth Amendment. Cf. Concurring Opinion of Mr. Justice Frankfurter in Railway Mail Association v. Corsi, 326 U. S. 88, 98, 65 S. Ct. 1483, 1489, where he said:

> "Of course, a State may leave abstention from such discriminations to the conscience of individuals."

Respondents submit that petitioners' true complaint is, and must be, not that Missouri has, through its Courts, affirmatively discriminated against them but that Missouri has through its judicially evolved policy **refused to prevent** private citizens from discriminating against them. In short, petitioners complain not of State "action" but of State "inaction". It is clear, therefore, that since a refusal on the part of a State to act may not be properly questioned under the Fourteenth Amendment, petitioners cannot prevail.

III.

a.

It is seriously urged by respondents that petitioners Shelley have no standing in this Court and had none in the Supreme Court of Missouri at least to the extent of defending against the plaintiffs' (respondents') attempt to enforce the restriction contract involved in the case. The suit was one in equity to enjoin the breach of the contract.

Only a white person in privity of contract with plaintiffs could commit a breach. Only one breaching or threatening to breach could be properly enjoined. That person, insofar as the present case is concerned, was the defendant FitzGearld. She was a white person and was in direct line of privity of estate from the signer of the contract, S. Warner (Transcript of Record, p. 1, para. 1a).

There is no actual showing anywhere in the Record that the defendant FitzGearld was represented by counsel or was even defending in the case. The counsel for defendants Shelley, in his "Amended Return * * * and Answer" (Transcript of Record, p. 11, para. 6) pleads, as a defense, that "said restrictive contract, if enforced and upheld, will abridge the rights of the defendant Josephine FitzGearld which are enjoyed by other white citizens of Missouri with regard to the making and enforcing of contracts and the full and equal benefit of all laws and proceedings for the security of property as is enjoyed in this State by other members of her race." Josephine FitzGearld was a white person and it is obvious counsel, regardless of whom he was representing, was stating an available ground of defense and was advancing it on the part of the only person who could assert it, namely, the defendant FitzGearld, against whom the injunction was being sought. It is shown affirmatively nowhere in the Record that Josephine FitzGearld was represented in the Missouri Supreme Court. She is deliberately and obviously not a petitioner for the review in this Court. The Petition for Writ of Certiorari is expressly limited to J. D. Shelley and Ethel Lee Shelley (Petition for Certiorari, p. 1.) It remains to see if the petitioners here have any rights of which they could be deprived or any rights to even petition for Certiorari. Assuming, for the sake of discussing only this point, that the contract involved here is a restriction against sale to a

Negro as well as a restriction against use by Negroes (although the restriction here is obviously only a restriction against Negro use and occupancy and not one against ownership by Negroes), let us examine the position of plaintiffs with respect to the Negro defendants as compared to the white defendant, FitzGearld, the grantor of the Negro defendants.

A contract is executed by a number of people, all of whom own the realty which is to be the subject of the contract. They formally agree not to sell, lease, etc., their property to Negroes; nor will they permit their respective properties to be used or occupied by Negroes. They describe their property by location, sign the instrument and record it. They have provided that the restriction shall be a charge upon and shall run with the land; that the restriction, for a period of 50 years, shall bind their grantees, devisees, heirs and assigns. Each one has a contract with the other which they have expressly agreed may be enforced at law or in equity. They do not agree that it must be enforced, they merely agree that any signer may enforce it.

Section 1683, R. S. Mo. 1939, provides for remedy, by injunction, when "an irreparable injury to real or personal property is threatened * * *." Let us assume that the defendant FitzGearld, a white person, and bound to the plaintiffs Kraemer by the contract in question, should threaten to commit a breach by a sale to a Negro or by permitting the property to be used by a Negro. Under the statutory law of Missouri, the plaintiffs could sue in equity to enjoin the threatened breach. Obviously no other defendant but FitzGearld would need to be included in the suit. Obviously the prospective Negro buyers would not have to be named as defendants. In fact, they could not be so named. Obviously, too, it would be possible for

the trial Court to grant the injunction if it decided to enforce the contract. Such a decree would operate upon and bind only the defendant FitzGearld, but would, incidentally only, prevent the purchase or use and occupancy by the prospective Negro purchaser or tenant.

What defense could she advance in such a suit? Any defense, Constitutional or otherwise, could be reduced to this: that the defendants' grantor (or her grantor's grantor back through the chain of title to the signer) could not limit or restrict his own property as provided in the contract, or that the plaintiffs seeking the injunction could not enforce it for some reason. In either case she would be asserting defenses available to her as a white person charged with a threatened breach. Could she, as a grantee of property legally charged with a restriction (which Missouri courts regard as a negative easement), successfully assert these defenses? Respondents think not. She acquired property subject to an easement running to the benefit of plaintiffs. Meder v. Wilson, 192 S. W. (2d) 606, and cases there cited; Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. (2d) 529; State ex rel. Britton v. Mulloy, 332 Mo. 1107, 61 S. W. (2d) 741. She may not defend against the attempted enforcement of the easement by claiming she or her grantors had not the right to grant it. Certainly she could not interpose the Fourteenth Amendment as a defense. She is being deprived by the State of no property, privilege or immunity and is not being denied the equal protection of the law. Swain v. Maxwell (Mo. Sup.), 196 S. W. (2d) 780.

Assume a further step. FitzGearld executes a written contract to sell the restricted property to a Negro. The breach is practically complete if the restriction is against sale to a Negro; it is still a threatened breach if the restriction is against use and occupancy. What has changed

as far as plaintiffs' rights are concerned? What has changed as far as FitzGerald's available defenses are concerned? Obviously nothing has changed. Under Missouri law the prospective Negro purchasers could or could not be named as defendants in the suit depending on plaintiffs' theory. If he wanted them subject to the Court's jurisdiction for any purpose he would name them. They certainly would not have a right to intervene and interpose Constitutional defenses against the plaintiffs whose rights, emanating from the contract, have not changed. The plaintiffs' requested relief would be the same. They seek an injunction against FitzGearld to stop the threatened sale or stop the threatened use or occupancy by Negroes. But the injunction they seek is still directed only against their, plaintiffs', promisor, FitzGearld. If FitzGearld interpleads her prospective purchasers to protect herself against a possible suit for specific performance, that is another matter and, under Missouri procedural law, no doubt such a matter could be adjudicated along with the primary question. But still the relief prayed for by the plaintiffs would not affect, nor be affected by, the presence or absence of the prospective Negro purchasers as defendants in the case.

Assuming one further step to bring the case to its present condition, we have FitzGearld, not only having threatened a breach of the restriction agreement; not only having executed a contract of sale to the Negroes Shelley, but she has given them a deed which they have recorded. And they have occupied the property. Have the rights of plaintiffs been changed merely by this additional step in the chain of transactions between FitzGearld and Shelleys? How could their rights be affected? Has FitzGearld's breach changed her position in relation to plaintiffs? Has she acquired any new rights against plaintiffs merely be-

cause of the additional step she took in passing a deed? Obviously not. She cannot create new rights, not previously possessed, nor give rights, against the plaintiffs, to her grantees, by an act to which plaintiffs were not a party, or by a breach. In what better position is she or they, then, when plaintiffs sue in equity seeking the same injunctive remedy they sought when they sue at the other developing stages of her transaction? If the forbidden action is merely threatened, it may be restrained by injunction, if it has been completed, a mandatory injunction may be issued to undo it. Swain v. Maxwell, 196 S. W. (2d) 780.

Unless equity can give full and completely adequate relief, the established doctrines of equity would become nonsense. To remedy the breach plaintiffs complain of (if it is a restriction against sale) the only adequate remedy is to revest title in a white owner. That this can be done only by divesting it from a Negro grantee is merely incidental. The fee cannot be in both at the same time. The decree of the Court, in revesting the title in the white grantor, is acting directly only on the white defendant who breached. It acts only incidentally and indirectly on the Negro grantee out of whom the fee is divested. He, the Negro grantee, is still not a necessary party to the decree. As to him a decree revesting title in his grantor would be automatic. That result is only the incident of equitable and adequate relief necessarily granted to plaintiffs. If the restriction is against the use and occupancy, as here, then the injunction may operate on the Negro defendant. But its operation is still to be analyzed on the same reasoning as above applied.

Out of this analysis comes the rights which the present petitioners assert. From the automatic and incidental revestiture of title in their white grantor, they create "rights"

which they now proclaim are being taken from them by the State of Missouri without due process of law. Their "rights" are privative ideas of absent entities. Their "rights" have no more real existence than "blindness" or "evil." They have, if they have anything, a privation of a right—the right itself existing in their grantor Josephine FitzGearld, who is not even a party to this review and who did not petition this Court for the review. Petitioners are in the position of asking this Court to determine rights and defenses, which if present and available at all, are present in and available to Josephine FitzGearld, who is not before this Court either in person or by attorney.

If then, petitioners have no rights and no property of which the State of Missouri could possibly deprive them; if the decree of the Missouri Court concerns them only incidentally; if what they acquired from their grantor was merely land subject to an equitable charge or easement; if whatever title they acquired was defeasible and subject to divestiture should any of those other parties to the agreement choose to sue for the enjoining of a breach, what, in the eyes of the law have they lost? And what defenses have they a right to assert in any Court, much less in this Court?

It is doubtful to respondents, if, under the doctrines of Erie R. R. v. Williams, 233 U. S. 685, 34 S. Ct. 761, 58 L.Ed. 1155, 51 L.R.A. (N.S.) 1097, and Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 35 S. Ct. 167, 59 L.Ed. 365, and others, petitioners can assert Constitutional defenses of their grantor or grantors even if they were available to their grantor. It might seriously be urged also that, even if FitzGearld has Constitutional defenses available to her, she would be estopped to assert them after 39 years of benefits to her and her grantors under the contract she should seek to attack. The Record shows no violations of the contract

since 1911, when it was signed. The violation which brought the filing of this suit was the first. The purpose of the restriction and the benefits thought by the signers to flow from such a contract had been accepted by S. Werner, owner of petitioners' property, and all the intermediate white grantors up to and including FitzGearld. Could she be heard now to say she seeks the cancellation or voiding of the contract after 39 years of benefits have been accepted under it? If such estoppel could be urged against FitzGearld or her grantors, it can be urged against her grantees, the Shelleys.

What are these "rights" of which petitioners say they have been deprived? They could arise only from the fact of receiving a deed from FitzGearld. No other action could be pointed to. What, then, did petitioners receive from FitzGearld? They could receive only what she had to deed. And the right of the Negro defendants to occupy the premises did not pass with the deed because their grantor had no such right she could pass to them.

Restrictions on the use of property create negative easements. Pierce v. St. Louis Union Tr. Co., 311 Mo. 262, 278 S. W. 398; Porter v. Johnson, 115 S. W. (2d) 529; Swain v. Maxwell, 196 S. W. (2d) 780. The easement runs to each and every signer in the property of each and every other signer. The property so burdened is charged with the restriction. Such was the property when title was in FitzGearld. Obviously all she could convey to petitioners was property so charged. That is what petitioners received. Would it not be specious to say that petitioners acquired rights of which they have been unconstitutionally deprived, and acquired them by a deed that passed property subject to an easement against the very thing they assert as the right? Respondents contend petitioners did not and could not acquire any rights by the deed that passed this

property; nor can they complain, under the Fourteenth Amendment, of being deprived of rights they never had and do not have now.

What defense could FitzGearld assert? Could she successfully contend her grantors had no right to voluntarily restrict their own power of alienation? Missouri holds that such agreements are not total restraints on alienation and void thereby, but that the restriction constitutes only a partial restraint on the alienation. Koehler v. Rowland, supra; Swain v. Maxwell, supra. May not an owner of property so limit his own power to alienate?

If a man would merely refuse to sell his property or to lease or rent it to a Negro purely and simply because he was a Negro, would that man violate any law or be subject to any judicial penalty? Clearly he would not. No man may be forced to deal with any other man, black or white, unless he chooses to do so. Frisbie v. United States, 157 U. S. 160, 165, 15 S. Ct. 586, 39 L.Ed. 657. If a man can refuse to sell his property to a Negro merely because he is a Negro, would he have a right to refuse to devise it in a will to Negroes? Could a man promise another man he would not sell or rent his property to a Negro? And if that promise was reciprocal and consideration existed on both sides, why should such a contract not be enforceable? Respondents assert that what a man may legally and rightly do, he may promise another. And the Courts are charged with the duty of enforcing those promises unless some positive and established rule of law forbids the enforcement.

And it is in this that petitioners and all those filing Briefs in their behalf mistake the American system of government. For petitioners and those supporting their position assert that respondents have no **right** to make such a contract and the State has no **right** to enforce it.

This is a philosophy foreign to America. In this country, the people have all rights except those given by them to their States or to their National Government. And for the State Courts to enforce valid contracts of their citizens is not a "right" of the State but a duty imposed on the State by the people. "This is a right neither derived from the State or Federal Government nor within their power to forbid."

Under the Tenth Amendment the States retain all power not given to the Federal Government nor denied, by the States to themselves. Nowhere have the people of Missouri given Missouri the right to deprive them of contracting regarding their own property for a valid and legal purpose. Nowhere has a right been given by the people or by the States to the Federal Government to either determine the public policy of a State or to deny the State the right and duty to enforce the contracts of its citizens which contracts the State holds to be valid and enforceable by State policy and State law.

Respondents admit that the right to contract is not an absolute or unqualified right, but the right is strong and vigorous under our Constitution. It is a part of the liberty of the individual protected by the Fifth and Fourteenth Amendments. Adkins v. Children's Hospital, 261 U. S. 525, 545. (Respondents are aware the Adkins case was overruled in West Coast Hotel Co. v. Parrish, 300 U. S. 379, 57 S. Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, but the principles of the Adkins case were not overruled.) The right to contract necessarily implies a right to a process of law to protect it. These "defenses" of petitioners actually seek a judicial fiat which would invade and destroy respondents' right and power to contract regarding their own property.

Petitioners are here in Court seeking to deprive respondents of a definite and positive right and, in order to effectuate that result, are asserting "rights" in themselves which never existed and do not now exist; and they seek a judicial decree by the nation's highest Court to bring about that deprivation of respondents' rights by appealing to that Court to protect their "rights" against spoliation by the State of Missouri because such spoliation would be forbidden by the Fourteenth Amendment. Plainly and baldly stated and stripped of all the haze of clever rhetoric, that is the proposition being urged. And it is being urged by parties who have no right to even request a review of the matter because no rights or property of theirs is involved, and because they are in no position to defend against the plaintiffs' attempt to enjoin their, petitioners', grantor, from a contract breach.

The right of a citizen to alienate freely his own property was upheld by this Court in Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L.Ed. 149. There a city ordinance was held unconstitutional, not because the Negro in the case was deprived of any rights by the ordinance, but because the white owner was unduly deprived, by the ordinance, of his right to sell his property to whom he chose. It was the white litigant's power of alienation—one of the incidents of ownership—that was unduly restricted, and the ordinance was condemned as violative of the Fourteenth Amendment. It is the same incident of ownership, the power to alienate and voluntarily restrict the alienation, that petitioners are here seeking to destroy.

Respondents suspect that neither the State legislatures nor the Congress would have a Constitutionally sanctioned right to prevent or forbid the owner of property to make an enforceable promise as the signers of the contract here made between themselves. Respondents feel that the

Constitution itself, and the Fifth and Fourteenth Amendments to it, forbid such legislative interference with a citizen's inalienable rights to property.

When petitioners urge that the enforcement of this and similar contracts by a Court is the "State Action" forbidden by the Fourteenth Amendment, they seek to deprive respondents of a Constitutional right and privilege, namely, access to the Courts. (See opinion of Missouri Supreme Court, Transcript of Record, p. 158.) For when a Court is asked to adjudicate the rights of litigants where the plaintiff asserts an alleged breach of a contract, and the defendant asserts the contract is violative of the Fourteenth Amendment, only two alternatives would ordinarily be available to the Court. It must decide, first, whether the contract is violative. If it decides it is violative, the case is determined on that basis; if it decides it is not violative, it then enforces it. But petitioners urge a third procedure. They assert the Court cannot enforce it even if the contract is not itself violative because the act of enforcement would be "State action" forbidden by the Fourteenth Amendment. Such a conclusion, forbidding the Court to act even after deciding the contract was not violative of the Amendment would, in effect, deny the litigants the access to the Courts contemplated in Sec. 2 of Art. IV of the Federal Constitution and Art. I of Sec. 14 of the Missouri Constitution of 1945. In either case, as petitioners argue, they must win. Should this Court hold, as petitioners urge, that the contract, itself, is not violative of the Fourteenth Amendment, but that its "enforcement" is violative; then no Court could enforce any contract if the defense set up is that such enforcement of a valid contract is violative of the Amendment. To such ridiculous conclusions do petitioners urge this Court by their "State action" arguments.

b.

Respondents have a positive property right of which they would be deprived without due process of law, if the enforcement of this contract would be denied by the Courts of Missouri or of the United States.

The decisions of the State Courts determining their own property law will be followed by, and are binding on, the Federal Courts. In re Shyvers, 33 Fed. Supp. 643; Koval v. Carnahan, 45 Fed. Supp. 357; Dayton and Michigan R. Co. v. Commissioner of Internal Revenue, 112 F. (2d) 627, 630, and cases therein cited; Kemp-Booth Co. v. Calvin, 84 F. (2d) 377.

The Courts of Missouri have uniformly and consistently held that contracts of the kind involved in this case create reciprocal negative easements. Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. (2d) 529; Meder v. Wilson, 192 S. W. (2d) 606, and cases therein cited. Other jurisdictions, including the District of Columbia, have also held such contracts create easements. Queensborough Land Co. v. Cazeau, 136 La. 724, 67 So. 641; White v. White, —W. Va.—, 150 S. E. 531, 66 A.L.R. 529; Russell v. Wallace, 58 App. D. C. 357, 30 F. (2d) 981; Meade v. Dennistone, —Md.—, 196 A. 330.

These cases decided by the Courts of Missouri, particularly, determine property law binding on this Court. For State law is what the highest Court of the State says it is. West v. Amer. Tel. and Tel. Co., 311 U. S. 223, 61 S. Ct. 179, 85 L.Ed. 139. It is not for the Supreme Court to determine the correctness of a State Court decision of a non-federal question or ground. Radio Station WOW v. Johnson, 326 U. S. 120, 129, 65 S. Ct. 1475, 89 L.Ed. 2092.

And easements are property. They are encumbrances on land. Adams v. Henderson, 168 U. S. 573, 18 S. Ct. 179,

42 L.Ed. 384; Lynn v. United States (C.C.A. Ala.), 110 F. (2d) 586, 589; Batchelor v. Hinkle, 125 N. Y. S. 929, 930, 140 App. Div. 621. Therefore, they are protected by the Fifth and Fourteenth Amendments to the Constitution. Meder v. Wilson, 192 S. W. (2d) 606, and cases therein cited; 114 A.L.R. 1242.

When petitioners seek to have this Court, or a State Court, hold that the enforcement of the right to an easement, a property right, is invalid and must be denied, then petitioners actually seek to deprive respondents of property without due process. Respondents have an easement in the property which is the subject of this suit. They had that easement when the property was in FitzGearld. They have it now. But a refusal or denial of a Court to enforce, by injunction, the right inherent in that easement is a deprivation, by the Federal Government or the State, of property. And to so hold would deny to respondents access to the Courts. It would deny to them the equal protection of the laws and the protection of equal laws. Their fundamental privilege of having property rights enforced by due process would be taken from them. For of what value is an easement or any other property right, if valid in itself, but one the Courts would arbitrarily refuse or arbitrarily be forbidden to enforce? And, for 39 years prior to the breach herein sought to be enjoined, this property right—this easement—this reciprocal restriction contract had value. There was no breach during that period and all apparently enjoyed the benefits from such tranquility and observance by the signers and an uncounted number of subsequent grantees, devisees, and assigns. It was only when two unscrupulous real estate manipulators purchased the property from an aged and ailing Mrs. Mathilda Sohlmann, who "had chances to sell it to colored but I refused" (T.R., p. 22), and then passed

the property through a white "straw party" that the breach occurred and this suit was begun to protect the easement of value for 39 years. To hold that such property right can neither be asserted nor enforced would be to reduce equitable principles and remedies to nonsense.

And there is a further point. The very right to contract about a valid subject matter is a property right protected by the Fifth and Fourteenth Amendments. Lynch v. United States, 292 U. S. 571, 54 S. Ct. 840, 78 L.Ed. 1434, for, as said there, "Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States * * * 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."

To encumber property by debt or otherwise has always been held to be an inviolable incident of ownership. People v. Common Council, 70 Mich. 534, 38 N. W. 470, 471; Boston Elevated R. Co. v. Commonwealth, 310 Mass. 528, 39 N. E. (2d) 87, 106, 108. Such rights are protected by the Constitution of the Nation and by those of the States. "The right of property is a fundamental, natural, inherent, and inalienable right. It is not ex gratia from the legislature, but ex debito from the Constitution. In fact, it does not owe its origin to the Constitutions which protect it, for it existed before them." It transcends Constitutions. The Missouri Court, in Porter v. Johnson, 232 Mo. App. 1150, 115 S. W. (2d) 529, said:

> "A restrictive agreement creates an easement in favor of the owner of one parcel of land within the restricted district in and to all other parcels located therein. This easement is a property right which may not be taken away against the will of the owner, by reason of Constitutional provisions * * * Such property right, created by contract, will be protected by injunc-

tion where the issues are between parties to the contract * * * The property rights of every citizen, black or white, are equally under the protection of the Constitution. Defendants' position, if sustained on the ground urged, would result in overriding the very constitutional and statutory provisions upon which the Negro race places chief reliance for safety and security."

The Missouri Supreme Court in Swain v. Maxwell (1946), 196 S. W. (2d) 780, said:

"Enforcement of valid and proper restrictive covenants affecting real property is one of the well-established functions of equity. Equitable principles govern their enforcement. A threatened violation may be restrained by injunction. If the forbidden act has been done, a mandatory injunction may be issued to undo it * * *

In this case the deed made in violation of the restriction was voidable at the will of the parties to the agreement or their successors. Accordingly, the estate grantee acquired was, from its inception, subject to divestiture. Therefore, when it was divested the grantee lost nothing in the eyes of the law * * * on the other hand, cancellation of the deed had the effect of revesting title in the grantor. So the grantor lost no estate * * * It is entirely within the right and power of the grantor to impose a condition or restraint upon the power of alienation in certain cases to certain persons, or for a certain time, or for certain purposes."

The Missouri Court, speaking again in Meder v. Wilson, 192 S. W. (2d) 606, said:

"The right of a property owner to the protection of a restrictive covenant is a property right just as inviolable as is the right of one to the free use of his property when its use is unrestricted, and the Courts will not hunt out a way to defeat such a contract."

It seems clear that, in order to invalidate contracts such as the one here, much law and many rights grounded in antiquity and the deathless pronouncements of Statesmen and Courts must be abrogated. Respondents vigorously assert that they, too, have rights—definite and positive—not ephemeral, or vague, or owing their existence to generalizations and indirect interpretations of phrases and words snatched from the context of their settings and played upon with clever verbiage. Respondents request the preservation, protection and maintenance by this Court of their own indisputable rights of property, liberty and freedom as guaranteed to them by the Constitution of their Nation and by the Constitution, laws and decisions of their sovereign State of Missouri.

IV.

Petitioners, in their Petition for the Writ of Certiorari at p. 51, Point III, assert that the "Supreme Court of Missouri in holding and deciding that petitioners are in no position to complain of lack of notice of the restrictions contained in the agreement denied the petitioners the equal protection of a well-settled rule of law in Missouri." To support the argument they cite Ozark Land and Lumber Company v. Franks, 156 Mo. 673, 57 S. W. 540, 543. This case involved a deed which omitted from the description of the land the **township** in which the town lay. In Gatewood v. House, 65 Mo. 663, relied upon by petitioners, there was involved a deed from which was omitted even the name of the county and in which, from the face of the deed, there was embraced in the description some 6,000 acres, whereas only 160 acres sought to be conveyed.

Neither of these cases could be even remote authority for petitioners' argument, for the contract involved in the case at bar definitely defined the restricted area:

> "This contract of restriction made and entered into by the undersigned, the owners of the property fronting on Labadie Avenue in Blocks 3710b and 3711b between Cora Avenue on the West and Taylor Avenue on the East * * * and do place and make upon the real estate fronting on Labadie Avenue and running back to the alley on the North and South sides of Labadie Avenue between Taylor Avenue and Cora Avenue * * *"

The express wording of the agreement could not be clearer. The point even contradicts petitioners' own agreed statement of facts (T. R., p. 2, para. 1, e).

The ruling by the Missouri Supreme Court on this point was reached by interpretation and construction of the Missouri Recording Statute, being Sections 3426-3427, R. S. Mo. 1939. The decision is property law of Missouri binding on this Court. 11 Am. Jur., p. 106, Section 107. It is not for the Supreme Court to question the correctness of a State Court decision on a non-Federal matter. Radio Station WOW v. Johnson, 326 U. S. 120, 129, 65 S. Ct. 1475, 89 L.Ed. 2092.

V.

Although it is impossible to give an exact and comprehensive definition of the phrase "due process of law," Owen v. Battenfield, 33 Fed. (2d) 753; Cert. Den., 280 U. S. 605, 50 S. Ct. 88, 74 L.Ed. 649, in reference to judicial proceedings the phrase simply means a law which hears before it condemns and which proceeds on inquiry and renders

judgment only after trial. Pennoyer v. Neff, 95 U. S. 714, 24 L.Ed. 565; Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, 66 L.Ed. 254.

The Courts below had jurisdiction over both the subject matter and the parties and the case was tried in accord with the general equitable principles of the laws of Missouri. These general remedies of Missouri's equity jurisdiction are available to all persons irrespective of race or color. Petitioners had an equal opportunity to be heard and present their defenses. Thus all essentials of due process were present. U. S. v. Cruikshank, 92 U. S. 542, 23 L.Ed. 588; Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 74 L.Ed. 1107.

The equal protection clause of the Fourteenth Amendment was designed to prevent the State from making arbitrary or capricious classifications in the enactment and enforcement of regulatory legislation. McPherson v. Blacker, 147 U. S. 1, 13 S. Ct. 3, 36 L.Ed. 869.

Since the equal privileges and immunities clause has been held to protect only those rights which accrue by Federal citizenship, Slaughterhouse Cases, 16 Wall. (U. S. 36), 21 L.Ed. 394; Walker v. Sauvinet, 92 U. S. 90, 23 L.Ed. 678; Maxwell v. Dow, 176 U. S. 581, 20 S. Ct. 448, 44 L.Ed. 597, petitioners necessarily assert by invoking this clause the right to own the specific piece of real property herein involved.

This argument was answered in Corrigan v. Buckley, 271 U. S. 323, 46 S. Ct. 521, 70 L.Ed. 969. Respondents have adequately covered this point heretofore.

CONCLUSION.

Although petitioners, seeking to prevail, have sought refuge in several different clauses of the United States Constitution, their only claim of any Constitutional substance whatever must in the final analysis be measured by this Court against the requirements of the Fourteenth Amendment. In an attempt to overcome the insurmountable barrier that the Fourteenth Amendment was never adopted to regulate the actions of private persons in their individual capacity, petitioners, through literary niceties, have injected the element of "State action" into their argument.

In so doing petitioners have asked this Court to promulgate a doctrine that would, through the Fourteenth Amendment, establish direct Federal control of the individual citizens of the United States and set State sovereignty at naught.

At no time in American judicial history has it been supposed that an individual citizen acquires his property rights from the State so as to constitute him by judicial construction a creature of the State. The implications of such a doctrine are incompatible with the most cherished American notions of individual liberty and dignity.

Respondents and countless others in the United States have for many years relied upon the doctrine of individual freedom from Federal interference under the Fourteenth Amendment. If this Court should now adopt the opposite view, the individual citizen of the United States would be deprived, not only of property held and controlled in reliance on previous decisions, but would no longer enjoy the right of freedom guaranteed to him by the American tradition.

Petitioners are not here asking for Constitutional interpretation, but rather do they seek Constitutional amendment.

Respondents cannot believe that this Court will follow petitioners' suggestion and assume that right. As was said by Mr. Justice Sutherland, "* * * the meaning of the Constitution does not change with the ebb and flow of economic events * * * the judicial function is that of interpretation; it does not include the power of amendment under guise of interpretation."

On the law respondents respectfully request that the judgment of the Supreme Court of Missouri be affirmed.

Respectfully submitted,

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