INDEX.

Petitioners' Supplementary Brief in Support of Review by Certiorari.

INDEX.

Table of Authorities Cited.

INDEX.

Table of Authorities Cited (Continued).

Cases (Continued): PAGE

Constitution, Statutes, and Treaties:

Treaties:

Texts and Miscellaneous:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

J. D. SHELLEY; ETHEL LEE SHELLEY, HIS WIFE, AND JOSEPHINE FITZGERALD, PETITIONERS,

vs.

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

Supplemental Brief of Petitioners in Support of Review by Certiorari

STATEMENT.

Petitioners, by reference thereto in this Supplemental Brief, hereby adopt and include herein the following matters from their Petition for the Writ of Certiorari and their Brief in support thereof:

(a) Petition: Summary Statement of Matters Involved, Statement of Jurisdiction of this Court, Questions Presented, and Reasons Relied on for Granting the Writ of Certiorari.

(b) Supporting Brief: Specification of Errors, Summary of the Argument, and the Argument.

The main purpose of this Supplemental Brief is to call to the attention of the Court further matters relating to the questions presented and the issues implicit in this case, and additional decisions and authorities bearing upon the merits of the case which were not stressed in the original Brief of petitioners, believing that petitioners may thereby assist the Court to a clearer understanding of the matters relied upon by petitioners, and their contentions in regard to the principles of law governing the same. To that end the following Summary of the Argument and the Argument, together with their supporting authorities, are herewith submitted.

ADDITIONAL SUMMARY OF THE ARGUMENT.

I.

An agreement whose execution interferes with rights, privileges, or immunities secured to a citizen of the United States by the Constitution or laws thereof, whose enforcement by the courts of a state deprives, or tends to deprive the Federal citizen of such rights, privileges, or immunities, is void as being against public policy.

1. One of the privileges bestowed upon citizens of the United States in Section 1 of the Fourteenth Amendment is that of becoming a citizen of any state in which he desires to live by establishing therein a bona fide residence.

Const. U. S., 14th Amend., Sec. 1, First Sentence.
Const. of U. S., 14th Amend., Sec. 1.
Slaughter-House Cases, 16 Wall. 36, loc. cit. 72, 73, 74, 86.

2. Birth or naturalization in the United States and being subject to the laws thereof makes a person a citizen of the United States. In order to become a citizen of a state, the Federal citizen must exercise his privilege to become a citizen of the state of his choice by establishing his residence therein, within the meaning of the provision of the Amendment.

U. S. v. Anthony, 11 Blatch. U. S. 200, 24 Fed. Cas. No. 14,459.
Const. Amend., supra.
Slaughter-House Cases, supra.

3. The first inhibition of the Fourteenth Amendment to the states is: "No state shall **make** or **enforce** any law which shall abridge the privileges or immunities of citi-

zens of the United States." (Emphasis supplied.) Therefore, no state may pass a law prohibiting a citizen of the United States from becoming a citizen of the state, or enforce the same; nor can such state pass any law, or enforce any rule of law, statutory or common-law, or substantive rule of decision law, which will hinder, or prevent a citizen of the United States from doing the things necessary to comply with the requirements under the Federal Constitution to become a citizen of a state.

Const., 14th Amend., Sec. 1.
Buchanan v. Warley, 245 U. S. 60.
Am. Federation of Labor v. Swing, 312 U. S. 321.

4. A contract whose main purpose is to prevent citizens of the United States from acquiring real property and occupying the same for residence purpose is illegal and void because of being contrary to public policy, and in violation of Federal constitutional and statutory provisions securing the right to acquire and use real property to citizens of the United States, and is unenforceable in the courts of that state.

(a) Willful and intentional deprivation of rights secured to citizens of the United States by its Constitution or laws, is made a criminal offense under the statutes of the United States.

Tit. 18, U.S.C.A., Sec. 51 (Crim. Code, Sec. 19).
Tit. 18, U.S.C.A., Sec. 52 (Crim. Code, Sec. 20).
U. S. v. Morris, 125 F. 322.
Nixon v. U. S., 289 F. 177.
Tit. 8, U.S.C.A., Sec. 42.
Tit. 8, U.S.C.A., Secs. 43, 47(3).

(b) Conspiracies to prevent citizens of the United States from doing the necessary acts to perfect title to real property in order to own it under government grant of a Federal right to enter and acquire the same are punishable under the criminal statutes above cited under (a), and, by analogy, conspiracies to prevent the ownership and use of real property by a colored person who is a citizen of the United States, whether for the purpose of exercising his privilege of becoming a citizen of a particular state, or for any other purpose regarding the enjoying or exercising the rights or privileges secured to him by the Constitution or laws of the United States, are also punishable under said criminal sections.

U. S. v. Morris, supra.
Nixon v. U. S., supra.
Tit. 8, U.S.C.A., Secs. 42, 43, 47(3).
U. S. v. Waddell, 112 U. S. 76, 80.
Montoya v. U. S., 262 F. 759.

(c) The Federal right contended for here is also protected by or secured to petitioners and others of their racial class by statutes of the United States providing for the assessment of damages against such persons who, under color of any statute, ordinance, regulation, custom, or usage of any state, subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by its Constitution and laws.

Tit. 8, U.S.C.A., Sec. 43.
Tit. 8, U.S.C.A., Sec. 47(3).

II.

1. Agreement is contrary to the public policy of the United States.

(a) Public policy has been defined as follows:

"Public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be designated as it sometimes has been, policy of the law or public policy in relation to the administration of the law."

13 C. J., p. 425, Sec. 360.

(b) Agreements contrary to public policy:

"An agreement is against public policy if it is injurious to the interest of the public, contravenes some established interest of society, violates a public statute, is against good morals, tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society and in conflict with the morals of the times."

12 Am. Jur. 663.

(c) Test of violating public policy:

"The evil tendency of the contract, and not the actual injury to the public in a particular instance, is the test of whether a contract is against public policy; and, if the threatened injury may be consummated under the terms of the contract, the agreement is contrary to public policy whether the injury has been inflicted in a particular case or not."

13 C. J., supra.
Roberts v. Criss, 266 F. 296, 302.
Schibi v. Miller (Mo.), 268 S. W. 434, 435.

2. Sources of public policy.

"The public policy of the United States in reference to the right of colored citizens to acquire and use and enjoy real property for residence and other purposes is found in the Constitution (particularly the Thirteenth and Fourteenth Amendments), and in the declaration of equality in the Declaration of Independence; in Sections 41, 42, 43, 47, of Tit. 8, U.S.C.A.; Sections 51 and 52 of Tit. 18, U.S.C.A., and in the decisions of the Supreme Court of the United States, and the lesser Federal Courts, in construing the aforementioned constitutional and statutory provisions in reference to said right; and in the Treaties of the United States, particularly Act of Chapultepec and United Nations Charter, regarding the personal dignity of the individual and its accordance without regard to race, religion, or color, and the wiping out of discrimination based on the same, as a means of securing the peace of the world."

13 C. J. 426, Sec. 362.
Beasley v. Texas, etc., R. Co., 191 U. S. 492.

3. State policy must yield to Federal policy.

(a) "It is familiar doctrine that the prohibition of a Federal statute may not be set at naught, or its benefits denied by state statutes or common law rules * * * To the Federal statute and policy, conflicting state law and policy must yield."

Sola Electric Co. v. Jefferson, 317 U. S. 173, 176.
DePass v. Harris Wool Co. (Mo.), 144 S. W. (2d) 146.

(b) Agreement involved is contrary to public policy of United States, as set forth in sources above named, and its enforcement is contrary to inhibitions to the states contained in the Fourteenth Amendment.

Const. of U. S., 14th Amend., Sec. 1, 1st Sentence.
Tit. 8, U.S.C.A.,Secs. 41, 42, 43 and 47.
Tit. 18, U.S.C.A., Secs. 51 and 52.
Slaughter-House Cases, supra.
Virginia v. Rives, 100 U. S. 321, 317.
Civil Rights Cases, 109 U. S. 3, 22, 23.
Buchanan v. Warley, 245 U. S. 60, 75, et seq.
U. S. v. Morris, 125 F. 322.
Gandolfo v. Hartman, 49 F. 181, 182.
Steele v. Louisville & Nash. Ry. Co., 65 S. Ct. 225.
Ex Parte Virginia, 100 U. S. 339, 347.
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673.
Am. Federation of Labor v. Swing, 312 U. S. 321.

III.

The refusal of the Supreme Court of Missouri to grant petitioners relief from the conditions arising out of the enforcement of restriction agreements which imperiled their moral and physical welfare and placed added financial burdens, handicaps, and other exactions beyond those to which white citizens in Missouri are subjected, constitutes a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.

1. Petitioners are citizens of the United States and of the State of Missouri wherein they reside, and are entitled, under the provisions of Section 41 of Title 8 of the United States Code, to the same right to make and enforce contracts, and to be parties in actions in the courts of Missouri, and to "the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens of the state."

Virginia v. Rives, 100 U. S. 313, 317.
Buchanan v. Warley, 245 U. S. 60.
Civil Rights Cases, 109 U. S. 3, 22, 23.
Const. of U. S., Sec. 1, 14th Amend.
Secs. 51, 52, Title 18, U. S. Code.
Const. of Missouri, Art. I, Secs. 2, 10, 14.
Steele v. Louisville & Nashville Ry. Co., supra.

2. The ruling of the Supreme Court of Missouri, that correction of the conditions of peril to the health, moral and physical well-being, and the increased financial burdens placed upon petitioners and other members of the Negro race by reason of the use and enforcement of the restrictions contained in the agreement under consideration, and similar ones in agreements having the same

objective, purposes and import, is beyond the authority of the courts, constitutes a denial to the petitioners of rights secured to them by the Constitution and laws of the United States, and the denial of equal protection of the laws, as well as due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

See authorities cited under III, 1.
Steele v. Louisville & Nashville Ry., 65 S. Ct. 225.
Slaughter-House Cases, 16 Wall. 36, 71.
Buchanan v. Warley, supra.
Gandolfo v. Hartman, 49 Fed. 181.

3. The agreement in question here constitutes a conspiracy between the signers thereof, their privies, and the officers and members of the St. Louis Real Estate Exchange, willfully to deprive the petitioners, and other members of the Negro and Mongolian races in the City of St. Louis, or to subject them to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States, and for which offense the laws of the United States give both criminal and civil redress.

Secs. 51 and 52, Title 18, U. S. Code.
Secs. 43 and 47 (3), Title 8, U. S. Code.
United States v. Morris, 125 Fed. 322.
Screws v. United States, 325 U. S. 91.

ARGUMENT.

Invalidity of Contract.

Two basic principles of contract law underlie and govern the application of the Federal Constitutional and statutory provisions relied upon by the petitioners herein to the questions presented by them on the record in this case. They are:

1. An agreement which is contrary to a valid law or statute, whether expressly prohibited therein or not, or which in its execution contravenes the policy and spirit of a statute, is illegal and void and unenforceable; and the same is true where the agreement is contrary to public policy. 17 C. J. S., 555, Sec. 201; 12 Amer. Jur., 647, Sec. 163; Sprague v. Rooney, 16 S. W. 505, 508; Detteloff v. Hammond, Standish & Co., 161 N. W. 949, 955.

2. A court of equity is without jurisdiction to enforce an illegal contract, and will not lend its aid or assistance in the enforcement of its terms, when the enforcement, so far as the principal object is concerned, would be in violation of the state or federal laws, but will leave the parties where it found them, "unsanctioned by its favor and unaided by its process." Reisler v. Dempsey (Mo.), 232 S. W. 229, 231; Sprague v. Rooney, supra; Hagerty v. St. Louis Mfg. Co. (Mo.), 44 S. W. 1114, * * * ; Lehigh R. Co. v. United Lead Co. (N. J.), 133 A. 290.

The principal Federal statutes which petitioners contend are violated by the terms and purposes of the agreement which the Supreme Court of Missouri upheld and enforced are Sections 41 and 42 of Title 8 of the United States Code. They provide as follows:

> "Section 42. Property Rights of Citizens.—All citizens of the United States shall have the same right in

> every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property.
>
> "Section 41. Equal Rights under the Law.—All persons within the jurisdiction of the United States shall have the same right to make and enforce contracts, * * * and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subjected to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

These provisions of the two sections are derived from Section 1 of the Civil Rights Act of 1866, which was adopted by Congress under the sole authority of the Thirteenth Amendment (Civil Rights cases, 109 U. S. 3, 22), although it was re-enacted after the adoption of the Fourteenth Amendment in the Act of May 31, 1870. In Section 1 of the Act of 1866 the provisions above quoted from the two sections was followed with the phrase: "No law, statute, ordinance, resolution, or custom to the contrary notwithstanding". After the adoption of the Fourteenth Amendment, this last provision of Section 1 of the Act, as well as its first, which defined who are citizens of the United States, was dropped, but this concluding phrase was still in the statute when it was first construed by the federal courts.

Since the statutes in question were adopted under the authority of the Thirteenth Amendment, notice of the construction of that amendment as granting authority to Congress to enact this legislation is both important and necessary. Section 2 of that amendment reads: "Congress shall have the power to enforce this article by appropriate legislation." But the main purposes of the amendment are set out in Section 1 thereof. It reads: "Neither slavery nor involuntary servitude, except as a punishment for

crime, whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

This Court, in the majority opinion in the Slaughter-House cases (16 Wall. 36, 80), after naming a number of privileges possessed by a citizen which depend "upon his character as a citizen of the United States," stated: "To these may be added the rights secured by the Thirteenth and Fifteenth Articles of Amendments, and by the other clauses of the Fourteenth, next to be considered, meaning that portion of Section 1 of the Amendment, which reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Court, in this opinion, after reciting the facts connected with the institution of slavery and its burdens and disabilities, both in the United States and in the British West Indies, of which the members of Congress had knowledge (pp. 68, 69, 70), and which they had hoped to wipe out by the adoption of the Civil Rights Bill of 1866, but failed, stated that Congress passed "the proposition of the Fourteenth Amendment, and declined to treat as restored to their full participation in the government of the Union any of the States which had been in insurrection, until they had ratified that article by a formal vote of their legislative bodies." Experience soon proved that the provisions of the Thirteenth and Fourteenth Amendments and the laws passed under their sanction, were "inadequate for the protection of life, liberty, and property," as long as the laws were administered by white men alone,

and the former slaves were denied the right of suffrage in all those states. It was to complete the intended bestowal of equality of rights that the Fifteenth Amendment was proposed and adopted. The Court, in a recapitulation of these events which it declared were "almost too recent to be history," stated that (p. 71):

> "* * * the one pervading purpose found in them all, lying at the foundation of each (amendment), and without which none of them would have been suggested; (to be) the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free man and citizen from the oppression of those who had formerly exercised unlimited dominion over him."

It follows that the rights secured to petitioners and protected by the Thirteenth Amendment are: to be free from slavery and **involuntary servitude,** to have that freedom firmly established and protected, and to have the laws enacted under the authority of that amendment enforced in protecting those rights and privileges which belong to free men and citizens of the United States, whether they be fundamental rights, or privileges and immunities, so long as they are created by the provisions of the Federal Constitution and statutes. The right or privilege regarding those created by state laws is that they shall apply to all citizens equally, without regard to race, creed, or color.

Under the Fourteenth Amendment, petitioners have the right to have the inhibitions of its provisions applied to their rights to life, liberty, and property, and the equal protection of the laws.

Under Section 42, supra, petitioners are entitled to have the same right, "as is enjoyed by white citizens of Missouri," to acquire, own, occupy, use and sell real and per-

sonal property; and, under Section 41, supra, petitioners have the same right to make and enforce contracts and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and to be subjected to like punishment, pains, penalties, taxes, licenses, and exactions of every kind as white citizens of Missouri are subject to, and to the further right that they shall not be subjected to different and other punishments, taxes, exactions, etc., from those imposed upon, or required of white citizens of said State.

In Virginia v. Rives, 100 U. S. 313, 317, it is stated:

> "The plain object of these statutes, as of the Constitution which authorized them, was to place the colored race, in respect to their Civil Rights, upon a level with whites."

In the Civil Rights cases, 109 U. S. 3, 22, this Court ruled:

> "Congress * * * by the Bill passed in 1866, undertook to wipe out the burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, without regard to previous servitude, those **fundamental rights** which are the essence of civil freedom, namely, the **same right** to make and enforce contracts, to sue and be parties, give evidence, and **to inherit, purchase, lease, sell and convey property,** as is enjoyed by white citizens, * * * and to declare and vindicate those fundamental rights which appertain to the **essence of citizenship**, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." (Emphasis ours.)

At page 23, the Court further said:

> "The legislation, so far as necessary or proper to eradicate forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state action or not."

To the same effect is Clyatt v. U. S., 197 U. S. 207, 217.

In Buchanan v. Warley, 245 U. S. 60, 75, a case in which the above mentioned statutes and the inhibitions of Section 1 of the Fourteenth Amendment were applied to an attempt of a municipality of the State of Kentucky to inhibit occupancy and ownership of real property, solely because of the color of the proposed occupant of the premises, this Court held:

> "The Fourteenth Amendment and those statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him because of color."

The rulings in Buchanan v. Warley, supra, were followed and applied in Harman v. Tyler, 273 U. S. 668, and City of Richmond v. Deans, 281 U. S. 704, so that the principles of law enunciated in the Buchanan case have now become firmly established in our jurisprudence.

Thus it seems clear that the right of colored citizens to have the above quoted statutory and constitutional provisions enforced in regard to theis property and other civil rights, as well as the right to freedom from the incidents and disabilities of slavery and involuntary servitude, are rights secured to petitioners and protected by the Constitution and laws of the United States. Slaughter-

House Cases, supra; Civil Rights Cases, supra; Buchanan v. Warley, supra; U. S. v. Classic, 313 U. S. 299, 314; Hague v. C.I.O., 307 U. S. 496, 508, 513, 526, et seq.

Willful deprivation of the rights enumerated in the two sections of the statutes above cited, as well as of other civil rights enacted under the authority of the Thirteenth and Fifteenth Amendments, have been made criminal offenses, Secs. 51 (Criminal Code, Sec. 19) and 52 (Criminal Code, Sec. 20) of Title 18 of the U. S. Code; U. S. v. Morris, 125 Fed. 322; Screws v. U. S., 325 U. S. 91.

The agreement involved in this case, which restricts against the sale of real property to, or its occupancy by, members of the Negro and Mongolian races, and which provides for court actions to divest title out of a willing and able colored purchaser from a willing seller, violates the provisions of Section 42, supra, and its execution tends to, and does interfere with rights and privileges belonging to petitioners secured and protected by the Constitution and laws of the United States. Such an agreement is illegal and void. Sprague v. Rooney, supra (a contract to evade a statute prohibiting the leasing of property for purposes of conducting a bawdy house); Hagerty v. St. Louis Mfg. Co., supra (contract to store and refrigerate game during "closed" season and return to owner when season reopened for possessing game under state law); Reisler v. Dempsey, supra (contract to manage pugilist made in state forbidding prize fights); Lehigh Valley R. Co. v. United Lead Co., supra (contract to make rebates in freight rates paid to railroad in consideration of exclusive right to carry freight of Lead Company, contrary to Federal Statute prohibiting rebates).

Privilege to Become Citizen of Any State Granted by Fourteenth Amendment.

(a) But there is another regard in which the restrictions contained in this agreement interfere with rights and privileges secured and protected by the Constitution and laws of the United States. The first provision of the Fourteenth Amendment reads:

> "All persons **born** or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and **of the state wherein they reside.**" (Emphasis ours.)

In U. S. v. Hall, C. C. Ala. 1871, 3 Chicago Leg. N. 260, 26 Fed. Cas. No. 15,282, it is said that, by the original Constitution, citizenship in the United States was a consequence of citizenship in a state. By this clause this order of things is reversed, citizenship in the United States is defined; it is made independent of citizenship in a state, and citizenship in a state is a result of citizenship in the United States. So that a person born or naturalized in the United States, and subject to its jurisdiction, is, without reference to state constitutions or laws, entitled to all the privileges and immunities secured by the Constitution of the United States to citizens thereof. To the same effect is Sharon v. Hill, C. C. Cal. (1885), 26 F. 337.

In U. S. v. Anthony, C. C. N. Y. 1873, 11 Blatchf., U. S. 200, 24 Fed. Cas. No. 14,459, it is said:

> "The Fourteenth Amendment creates and defines citizenship of the United States. It had long been contended, and had been held by many learned authorities, and had never been judicially determined to the contrary, that there was no such thing as a citizen of the United States, except as the condition arose from citizenship of some state. No mode existed, it was said,

> of obtaining a citizenship in the United States, except by first becoming a citizen of some state. This question is now at rest. The Fourteenth Amendment defines and declares who shall be citizens of the United States, to-wit: 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof.' The latter qualification was intended to exclude the children of foreign representatives and the like. With this qualification, every person born in the United States or naturalized is declared to be a citizen of the United States and of the state wherein he resides."

In the Slaughter-House Cases, 16 Wall. 36, l. c. 72, 73, this Court stated that one of the privileges bestowed upon citizens of the United States in Section 1 of the Fourteenth Amendment is that of becoming a citizen of any state in which he desires to live, and that this privilege is one secured to the Federal citizen by the Constitution of the United States. As was held in U. S. v. Hall, supra, a person born or naturalized in the United States, and subject to its jurisdiction, is, **without reference to state constitutions or laws,** entitled to all privileges and immunities secured by the Constitution of the United States to citizens thereof.

This provision changed the order of becoming a citizen of a state. Prior to the adoption of the Amendment it was necessary to become a citizen of one of the states, in order to become a citizen of the United States. The states, by the exercise of their power to determine who should become citizens thereof, could prevent a person, although born in the United States, and subject to its jurisdiction, from becoming a federal citizen. But the greater change in regard to the acquirement of citizenship in a state which this provision wrought was the conferring on the federal citizen of the privilege to make a choice of which state he would become a citizen of. This he could accomplish

by establishing a bona fide residence in such state (Slaughter-House Cases, supra, 80). This privilege of becoming a citizen of any state he desired to live in was one of those which Mr. Justice Miller described as owing "their existence to the Federal government, its National Character, its Constitution, or its laws." To this list, he added the rights secured by the Thirteenth and Fifteenth Amendments, and by the prohibiting clauses of the Fourteenth (Slaughter-House Cases, supra).

Method of Becoming State Citizen.

(b) This privilege of becoming a citizen of a state required two things: (1) Being a citizen of the United States, and (2) establishing a bona fide residence in the state of his choice. Birth or naturalization under the jurisdiction of the United States determined the first prerequisite, but the second depended upon the ability of the federal citizen to acquire—by inheritance, purchase, lease or gift—real property in such state, and to establish on it his place of residence. This second requirement could only be done in this way. It is clear then that the property rights secured by the provisions of Section 42, supra, were necessary to enable a colored federal citizen to become a citizen of the state of his choice; in other words, to exercise his constitutional privilege in that regard. No one would seriously contend that a state could pass a valid law which would prohibit a colored person possessing the necessary federal citizenship prescribed by the amendment from becoming one of its citizens. Likewise, it could not pass a valid law prohibiting him from doing any act necessary in order to the exercise of his constitutional privilege of becoming such citizen. The right to enjoy this privilege is a fundamental right of citizenship secured to him by the constitutional amendment in question, and the right to acquire real property in which to live, for that or any

other legitimate purpose, is a federal right secured to him by the Constitution and laws of the United States. "The Fourteenth Amendment and those statutes enacted in furtherance of its purposes," says the Court in Buchanan v. Warley, "operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." The Court further says that the attempt to prevent alienation of the property to a person of color "is in direct violation of the fundamental law enacted in the Fourteenth Amendment to the Constitution preventing **State interference** with property rights except by due process of law." (Emphasis ours.)

The second provision of the Amendment forbids any state "to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It follows then that no state may pass any law, **or enforce one**, which shall in any manner prevent a citizen of the United States from exercising this privilege of becoming a citizen of such state, without action in violation of that inhibition of the Fourteenth Amendment.

It is well to remember, in this regard, that the Civil Rights Act of 1866 was re-enacted after the adoption of the Fourteenth Amendment, and in aid of its purposes. While it has been sometimes asserted that its re-enactment was due to doubt on the part of some persons that Congress had the power to enact its provisions under authority of the Thirteenth Amendment, there is no substantial proof that this was the reason for its re-enactment, nor has any court authoritatively so declared. But the first provision of the Amendment, defining citizenship in the United States, changing the method of its attainment, depriving the states of the power to determine who should become citizens of the United States, or even of themselves, and conferring the privilege on the individual citizen to make

choice of the state of which to become a citizen, carries within itself the real reason for the re-enactment of the Civil Rights Act of 1866. One of the provisions of that Act is found in Section 42, Tit. 8, U.S.C.A., and it deals with the right of the Federal citizen to do the very thing which is necessary to enjoy the privilege of becoming a citizen of a state, to-wit, establish a bona fide residence therein. This he cannot do, without occupying real property in such state. Whether he lives in a cave, a hole in the ground, a hut, or a mansion, he must occupy real property. It follows that his right to this Federal privilege is further protected by the provisions of Section 42, supra, which are necessary and apt for that purpose; and the provision of Section 41 of Tit. 8, which says that he shall have "the same full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens" of a state, is a further protection of his right to do the things necessary to the exercise of the privilege conferred in the first provisions of the Amendment. The whole is further protected by the inhibitions contained in Section 1 thereof, which also declare rights, privileges and immunities secured to the citizen by the Constitution of the United States, though negatively stated. This Court has declared that Congress intended, by the enactment of the Civil Rights Bill of 1866, "to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." This Court further declared that it was the intention of Congress, by enacting the Civil Rights Bill, "to wipe out the 'burdens and disabilities * * * constituting the substance and visible form' of slavery, and 'to declare and vindicate

those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery'."

The ruling of the Supreme Court of Missouri has abridged the above named rights, privileges and immunities of petitioners; and has deprived them of their property and civil rights without due process of law, as well as denied them the equal protection of the laws within the meaning of the Fourteenth Amendment.

An agreement whose execution and enforcement, both interferes with Federal privileges of citizens and requires deprival of rights, privileges and immunities secured by the Constitution or laws of the United States, is void for being against public policy. 12 Am. Jur. 663.

The Thirteenth Amendment abolished slavery as a public policy of the United States. The Civil Rights Bill of 1866, as well as the laws thereafter enacted in aid of the enforcement of its provisions, further declared that public policy with regard to the civil rights of colored persons. This was further declared, strengthened, and protected by the Fourteenth Amendment and further secured by the Fifteenth. Slaughter-House Cases, supra, loc. cit. 70.

Of the purpose of these Civil War Amendments, this Court, in the Slaughter-House Cases, declared (p. 71):

> "The one pervading purpose found in them all * * * (is) the freedom of the slave race, the security of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over them."

In Virginia v. Rives, supra, loc. cit. 317, this Court declared:

> "The plain meaning of those statutes, as of the Constitution which authorized them, was to place the colored race, in respect to civil rights, upon a level with the whites."

Question at Issue.

In Buchanan v. Warley, supra, and in Harmon v. Tyler, and City of Richmond v. Deans, supra, which followed the rulings of the Buchanan case, this Court further declared the public policy of the United States in regard to the identical question involved here:

> "May the occupancy, and necessarily, the purchase and sale of property of which occupancy is an incident, be inhibited by the State * * * solely because of the color of the proposed occupant of the premises?"

In its answer, this Court said:

> "We think the attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law."

State Sanction of Private Acts.

It has been held that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by wrongful acts of individuals, unsupported by state authority in the shape of laws, customs, or judicial or executive proceedings. But, when the state, acting through any of its agencies, adopts or sanctions the unlawful acts of private individuals, they become the acts

of the state, and constitute violation of the inhibitions of the Fourteenth Amendment.

Mr. Justice Fields, in his dissenting opinion, defined the term "involuntary servitude" in apt language which does not differ, in meaning, to the definition of that term in the majority opinion of the Court. He said:

> "The words 'involuntary servitude' have not been the subject of any judicial or legislative exposition, that I am aware of, except that which is found in the Civil Rights Act,* * * It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make everyone born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. **A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude** * * *" (pp. 90, 91, Slaughter-House cases.

In a number of the states, free persons of color could not own land or come into town except as servants, prior to the adoption of the Fourteenth Amendment (U. S. v. Rhodes, 1 Abb. 28, 27 Fed. Cas. 16, 151).

The attempt to prevent the acquirement and use of real property involved in Buchanan v. Warley, which this Court said was violative of the Fourteenth Amendment, was an effort to continue the burdens and disabilities of involuntary servitude.

Likewise, the enforcement of restrictions in deed covenants, and in the agreement under consideration here, and in others similar thereto, is an attempt to continue this disability of involuntary servitude which prohibited a colored person from acquiring and occupying real property from a willing vendor in whatever place he might desire to live. As was said by Mr. Justice Fields: "A prohibition to him to * * * reside in places where others are permitted to live would place him, as respects others, in a condition of servitude." Not only that, but the enforcement of the prohibition by court process would deprive colored citizens of the right to exercise the privilege of becoming citizens of the state of their choice. For, if one parcel of real property may be restricted against ownership or occupancy by a citizen of the United States, solely on account of his race or color, then all property in a state might be similarly restricted against him, so that he could not find residence in that state in furtherance of the exercise of his privilege to acquire citizenship in a particular state.

It is not necessary to show that such a result has happened in the case under consideration here in order to establish the invalidity of the agreement now before this Court. It is enough if such a result is possible of consummation under its terms. Roberts v. Criss, supra.

Comparable Federal Right.

A comparable federal right to the one just discussed is that of exercising the federal privilege of entering government lands for the purpose of homesteading them. Attempts to deprive citizens of the United States of the right to continue on said lands, or to do any other act in compliance with the federal requirements for perfecting their title thereto have been punished under the federal criminal statutes. U. S. v. Waddell, 112 U. S. 76; Nixon v. U. S., 289 F. 177. In these cases it was held that the homesteading citizen had the right to continue to live on the land and do the other things necessary to enable him to perfect his title and receive his patent. In other words, to complete the enjoyment of this federal privilege secured to him by the Constitution and laws of the United States.

Similarly, the right to enjoy the federal privilege of becoming a citizen of the state of his choice, is a right secured to him by the Constitution and laws of the United States. U. S. v. Morris, 125 F. 322; Screws v. U. S., 325 U. S.

Agreement Against Public Policy.

The agreement is against the public policy of the United States, as set forth in the Constitution, particularly in the Thirteenth, Fourteenth and Fifteenth Amendments, and in the two sections of the Federal Code relied on by petitioners, and in the two treaties which the United States recently entered into with other nations in an effort to secure the peace of the world, to-wit: the Act of Chapultepec, executed by this nation and the other nations of the Western Hemisphere; and the United Nations Charter.

It interferes with the rights of petitioners and other members of their race to inherit and to acquire real prop-

erty, or to purchase it at execution sales under judgment and other liens, and at tax sales and foreclosure proceedings, as provided for by the laws of Missouri, which make no distinction as to race or color.

"Public policy" has been defined as "that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good, which may be designated, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law." 13 C. J., p. 425, Sec. 360.

The sources of the Public Policy of the United States are found in its Constitution and laws, and the decisions of its courts construing them. Among those laws are the treaties which the federal government has made with other nations. They, together with the Federal Constitution itself, and the laws enacted under its authority, are made the supreme law of the land, and binding upon the judges in every state.

Among these public-policy declaring laws is the applicable provision of the Declaration of Independence declaring: "All men are created equal, and are endowed by their Creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness." The right to acquire and use property in which to live is one of the things necessary to the pursuit of happiness. The right to freedom from fear, that is, security of person and property from danger of injury or destruction, is another necessity for the enjoyment of happiness.

By its recent treaty with the nations of the Western Hemisphere known as the Act of Chapultepec, and by the United Nations Charter, the government of the United States has been attempting to secure the peace of the

world, and thereby the protection of its own citizens from fear of injury from war, by pledging itself to accord to all men, regardless of race, national origin, or religion, the dignity of person, and has agreed to "prevent with all means within (its) power all that may provoke discrimination among individuals because of racial and religious reasons; and to promote * * * uniform respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion." Undoubtedly, these treaty declarations are in accord with our declaration of the equality of men, and their common right to enjoy life, liberty and the pursuit of happiness upon equal terms, and without regard to race, or previous servitude.

An agreement, which in its execution disregards these principles, and which has for its main purpose the interference with the rights and privileges secured to colored citizens of the United States by the Constitution and laws of the United States, is void as against public policy; and since its main purpose is to perpetuate the burdens and disabilities of involuntary servitude, it undoubtedly comes within the purview of the legislation which, "so far as necessary or proper to eradicate the forms and incidents of slavery and involuntary servitude," this Court has declared, "may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not." Civil Rights Cases, supra, p. 23.

By upholding and enforcing this agreement, the Supreme Court of Missouri has deprived petitioners of their property without due process of law, and denied to them the equal protection of the laws, contrary to the Fourteenth Amendment. Buchanan v. Warley, supra; Brinkerhoff-Faris Co. v. Hill, supra.

CONCLUSION.

The history of the rise of restrictive covenants in deeds and agreements between private parties, so far as the same can be ascertained from the adjudicated cases, shows that this means was very seldom resorted to for the purpose of segregating American citizens of color from the rest of the people prior to the decision of this Court in Buchanan v. Warley; Gandolfo v. Hartman (1892), 49 F. 181; Queensboro Land Co. v. Cuzeaux (1915), 136 La. 734, 67 So. 641. Today, it is reliably estimated, there are more than 250 cases pending before the courts of the various states. The inevitable conclusion is that this method has been adopted to accomplish the same ends which were accomplished in regard to racial residential segregation before the decision in Buchanan v. Warley. They are one of the most effective means of denying the fundamental rights of freemen and citizens of the United States.

Restrictive covenants are illegal and void, but constitute one of the most effective means of denying colored citizens of the United States the rights, privileges and immunities secured to them by the Constitution and laws of the United States. They should be denied judicial enforcement under principles of law which this Court is urged to announce herein, in such unmistakable terms that no doubt will be left in the minds of reasonable men that this practice is at an end.

Respectfully submitted,

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