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Real Property--Restrictive Covenants--Fourteenth Amendment (Shelley v. Kraemer, 92 L. Ed. 845 (1948))

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up as a public consultant on the law of his specialty.[8] New York courts in connection with tax matters have prevented recovery by an accountant on a contract for rendering an opinion as to the law or the meaning of a tax statute,[9] and have granted an injunction against the giving of specific advice and opinions to effect compliance with tax laws and take advantage of tax savings,[10] as being an unlawful practice of law. Under the *Bercu* decision the view taken is that accountants can be permitted as a practical matter to prepare tax returns and deal with incidental legal questions that may arise in connection therewith. When, however, a taxpayer is confronted with a tax question so involved and difficult that he must go beyond his regular accountant and seek outside tax law advice, such advice must be sought from a qualified lawyer.

This decision indicates the aggressive policy of the legal profession to reclaim as fully as possible the highly lucrative field of tax practice which has been more or less abandoned to accountants. However, the concession that accountants may prepare tax returns and give advice in connection therewith still leaves a wide overlapping field which must be narrowed before any clear-cut distinction appears as to the point where the accountants' work ends and the lawyers' begins.

J. C. G.

REAL PROPERTY — RESTRICTIVE COVENANTS — FOURTEENTH AMENDMENT.—In 1911, the owners of forty-seven parcels of land in a district including fifty-seven parcels signed an agreement restricting the use and occupation of the property for a period of fifty years to members of the Caucasian race. Five of the remaining parcels were owned by Negroes. In August, 1945, petitioners Shelley, who are Negroes, purchased the parcel in question having no actual knowledge of the restrictive agreement which had, however, been recorded. In 1945, respondents, as owners of other property, brought an action for an injunction to restrain Shelley from taking possession of the property and requested that a judgment be entered revesting title in the immediate grantor. The trial court denied relief on the ground that the restrictive covenant had never become effective since it was not signed by all the owners in the district as was intended when the agreement was drawn up. The Supreme Court of Missouri reversed this decision holding that the agreement was effective and that enforcement of its provisions did not constitute a vio-

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[8] Matter of N. Y. County Lawyers' Ass'n (Bercu), 273 App. Div. 524, 78 N. Y. S. 2d 209 (1st Dep't 1948).

[9] Mandelbaum v. Gilbert & Barker Mfg. Co., 160 Misc. 656, 290 N. Y. Supp. 462 (City Ct. 1936).

[10] Matter of N. Y. County Lawyers' Ass'n (S. T. & M. Corp.), 181 Misc. 632, 43 N. Y. S. 2d 479 (Sup. Ct. 1943).

lation of the rights guaranteed by the Federal Constitution. *Held,* judgment reversed. Enforcement by state courts of private covenants restricting use or occupancy of property to members of the Caucasian race constitutes state action and is a violation of the "equal protection clause" of the Fourteenth Amendment. *Shelley v. Kraemer,* — U. S. —, 92 L. ed. 845 (1948).[1]

The decision in this case is one of the most important handed down in recent years dealing with rights of minority groups under the Fourteenth Amendment. Since 1926, when dictum in the case of *Corrigan v. Buckley*[2] indicated that judicial enforcement of private restrictive covenants was not unconstitutional, the courts have almost uniformly held them valid.[3] In that case the issue squarely decided was that such covenants are valid since the constitutional prohibitions against discrimination are aimed at governmental, not private, action. The contention of the defendants that court enforcement of such agreements deprived them of their liberty and property without due process of law in contravention of the Fifth and Fourteenth Amendments was not properly raised by the pleadings and the court declined to pass on the constitutional question,[4] but indicated disapproval by saying, "Assuming that such a contention, *if of substantial character,* might have constituted ground for an appeal . . . it was not raised by the petition. . . . *and it likewise is lacking in substance.*"[5] (Italics ours.) And it is this dictum which has led to much controversy and litigation due to the tendency of the state courts to ignore the fact that the statement was merely dictum, and not controlling in a case where the Constitutional question was directly presented. However, the fact that certiorari has not been granted in any action of this nature since the decision in the *Corrigan* case, may indicate that the state courts' interpretation of the dictum was not contrary to the policy of the Supreme Court during this period.

That judicial action of the courts constitutes state action is not a new doctrine, and has been recognized by the courts for many years.[6] But cases so holding have generally dealt with circumstances where the court's action was the essence of the wrongful conduct and not an instance where the court was enforcing a valid private agreement. This case therefore, extends the doctrine of judicial en-

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[1] The case of McGhee v. Sipes, 316 Mich. 614, 25 N. W. 2d 638, is decided in the same opinion. Since the facts in that case do not differ materially from those in the *Shelley* case we have not related them.

[2] 271 U. S. 323, 70 L. ed. 969 (1926).

[3] Kemp v. Rubin, 188 Misc. 310, 69 N. Y. S. 2d 680 (Sup. Ct. 1947); Ridgway v. Cockburn, 163 Misc. 511, 296 N. Y. Supp. 936 (Sup. Ct. 1937) (nor were these restrictive covenants held to violate public policy).

[4] Since the action was brought in the District of Columbia, the Fifth but not the Fourteenth Amendment, could have been involved.

[5] Corrigan v. Buckley, *supra* note 2 at 331, 70 L. ed. at 973.

[6] *See* Virginia v. Rives, 100 U. S. 313, 318, 25 L. ed. 667, 669 (1880); Twining v. New Jersey, 211 U. S. 78, 90, 91, 53 L. ed. 97, 102, 103 (1908).

forcement as state action to situations where the courts are attempting to enforce valid private agreements, when such action will deny to a citizen the protection of his rights to acquire, enjoy, own and dispose of property. It should be noted that the decision in this case in no way invalidates such restrictive covenants between individuals, merely denying to the parties the use of court facilities in enforcing them.

M. O'D.

TAXATION—PLANNED SALES OF PRODUCE TO PUBLIC PRECLUDE EXEMPTION FOR FARM OWNED BY RELIGIOUS CORPORATION.—Relator is a corporation organized under the Membership Corporation Law of New York State and is the legal and governing body of a group who call themselves "Jehovah's Witnesses." Relator owns and operates a large, well equipped and highly fruitful farm in Tompkins County, New York. Respondents, the local Board of Assessors, held said farm to be not exempt from taxation under Section 4(6) of the Tax Law,[1] on the ground that the property was being used for purposes other than those of a religious corporation. Relator brought proceedings to have their action reviewed, claiming that the property was being used primarily to feed its "ministers" gratuitously, a purpose entitling it to tax exemption. The alleged "ministers" consist of some 250 individuals, all of whom are members of relator's sect and all of whom live at a building maintained by relator in Brooklyn, N. Y. The evidence does not indicate that they do any work of a religious nature or that they are ordained in any accepted sense of the word. In return for services ordinarily performed by laymen, these "ministers" are paid $10.00 per month, plus "free" food, housing and other necessities. Not only is the produce of the farm used for feeding this group, but a large portion of it is sold to the general public for profit. Relator has always known well in advance that such sales were to be made and has consistently derived substantial profit therefrom. Relator claims that these are merely incidental sales of surplus not affecting the exempt status that should be granted because of the primary purpose of the property. Respondents made a motion for judgment. *Held,* motion granted and petition dismissed on the grounds that the so-called "ministers" are but

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[1] "The following property shall be exempt from taxation: . . .
"6. The real property of a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, . . . charitable, . . . missionary, . . . educational, . . . purposes, . . . or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes. . . . The real property of any such corporation not so used exclusively for carrying out thereupon one or more of such purposes but leased or otherwise used for other purposes, shall not be exempt, ..."