A Right Secured

BY LOREN MILLER

WHEN the United States Supreme Court, on May 3, held that judicial enforcement of agreements barring the sale of land to, or its occupancy by, Negroes violated the equal-protection clause of the Fourteenth Amendment, it knocked the last legal props from under residential segregation. The decision put the finishing touches on a job begun in 1917 when the court decided that segregation laws or ordinances violated the due-process clause of the same amendment. However, Chief Justice Vinson, who wrote the opinion, was careful to point out that “so long as the purposes of those agreements are effectuated by voluntary adherence to their terms it would appear that . . . the provisions of the amendment have not been violated.” Proponents of segregation are already engaging in vigorous campaigns to induce property owners to abide by the terms of existing restrictive covenants and, indeed, to enter into new agreements of like character with provisions for damages against violators.

At present the major metropolitan areas in the North and West, particularly suburban developments, are pretty thoroughly covered by race-restrictive covenants. State trial courts, backed by appellate-court decisions in sixteen states and the District of Columbia, have been enforcing them since 1915, and the Supreme Court itself, in a 1926 decision that was “distinguished away”—that is, differentiated from the present case—by Chief Justice Vinson on technical grounds, at least said, without making this the crux of its decision, that judicial enforcement did not run afoul of constitutional guaranties. Moreover, the federal government through FHA furnished a model race-restrictive clause for builders and subdividers from 1935 to 1947, and during that period the FHA refused to guarantee home-construction loans unless race restrictions were inserted in subdivision deeds. Racial covenants became a fashion, almost a passion, in conveyancing, and were demanded by banks and lending institutions in all real-estate developments.

It would be folly to expect an overnight reversal of social attitudes implemented by court decisions and rooted in custom. The importance of the recent decision from a practical standpoint is that it admits Negroes and members of other proscribed groups to the open housing market from which they have been excluded for three decades. That exclusion was onerous because it forced the Negro buyer or renter to pay whatever price was exacted in an artificial seller’s market. The Negro buyer can now drive a sharper bargain, and one of the immediate results may well be a decline in property prices in defined Negro neighborhoods.

However, real-estate speculators, by playing on existing antipathies, will still be able to exact premium prices when Negroes seek property outside those neighborhoods. Such premiums will undoubtedly be lower in communities adjacent to Negro neighborhoods, and expansion will occur there first. Well-to-do middle-class Negroes will certainly begin to seek homes in preferred residential districts, and by overbidding the market will just as surely find willing sellers. The present tendency of white home owners to flee from communities when a Negro moves in will diminish as such home owners come to understand that there are no “safe” districts. This, combined with the natural desire of Negro workers to find dwellings close to their places of employment, will gradually create a pattern of integrated living. The tempo of that tendency will depend on many factors, such as the earning power of the middle class, the creation of job opportunities for workers, the success or failure of damage suits against violators of agreements, and the willingness of law-enforcement authorities to protect the venturesome Negro home buyer from the sporadic violence that will occur here and there.

QUITE apart from the practical consequences, the decision is a landmark in constitutional law. To begin with, the court underscored the proposition, implicit in the 1917 segregation-ordinance case, that “among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own, and dispose of property.” Obviously no person can be secure in a private-property economy unless that complex of rights is recognized and protected. Proponents of race-restrictive covenants had always contended—successfully in the state courts—that judicial enforcement of covenants was beyond the reach of the equal-protection clause of the Fourteenth Amendment. They rested their contention on the language of the amendment, which provides that no

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state shall "deny to any person within its jurisdiction the equal protection of the laws."

Construing that and related clauses in the Civil Rights cases in 1883, the Supreme Court held that the Fourteenth Amendment did not protect the Negro from an "individual invasion of individual rights" and that he could claim constitutional protection only when the state acted to deprive him of a civil right. While proclaiming adherence to this principle, the court neatly turned the Civil Rights cases against those seeking to uphold covenants by pointing out that the decision exempts individual action from constitutional prohibitions only when the individual is able to work the discrimination without calling on the state for aid. It then went on to point out that it had long been recognized that judicial action in such matters as jury selection, maintenance of a fair trial, and the like is state action within the meaning of the amendment.

However, none of the cases had ever held or intimated that the action of a state court in construing a private contract, such as a restrictive agreement, and giving effect to its terms was state action. It was here that the court took its boldest step. "It is clear," it said, "that but for the active intervention of the state courts, supported by the full panoply of state-power, petitioners [Negroes] would have been free to occupy the properties in question without restraint. These are not cases . . . in which the states have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the states have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights."

That unequivocal language leaves no room to doubt that state courts may not, under the guise of enforcing private contracts in this or any other field, construe state laws in such a manner as to deny civil rights on the basis of race or color. The same result was reached for the District of Columbia by holding that although the Fourteenth Amendment is inapplicable, a federal statute forbids judicial enforcement of racial covenants. The court's attitude also negatives the suggestion made in some quarters that its decision does not apply to restrictive agreements of this character based on religion rather than on race.

The question of whether a damage action would lie against a signer who violated his agreement not to sell to Negroes was not involved, but the assertion that "the Constitution confers upon no individual the right to demand action by the state which results in the denial of equal protection to other individuals" would seem to prevent individuals from demanding that the courts levy a penalty on another individual who had exercised his right to sell his property to whomsoever he chose.

The successful termination of the long battle against racial covenants illustrates both the weakness and the strength of a political democracy, its weakness because the courts were so laggard in protecting a civil right that the highest court in the nation says has existed since 1868, its strength because a disadvantaged minority was finally able to vindicate that right. The manner of that vindication deserves a word of comment. The N. A. A. C. P., which spearheaded the struggle, began its opposition thirty years ago, but the question became less acute during the depression years as Negro migration to Northern and Western cities died down. The war brought both an acute housing shortage and a flood of Negro war workers to urban centers. Coincidentally war preparations and war boosted the income of the Negro middle class. The war workers had to find living space somewhere, and the middle class began to look around for better homes. The result was wholesale violations of racial covenants and a vigorous counter-attack. A staggering number of lawsuits were brought—approximately two hundred were filed in Los Angeles in a four-year period, and other cities had much the same experience.

As a crisis neared, the N. A. A. C. P. called a meeting of its rational legal committee in Chicago in 1944, and plans were made for a Supreme Court test of the issue. The success of the litigation is proof enough of the soundness of the legal strategy. It was also decided to fight a battle for public opinion on the ground that the issue was a critical test of democracy. The fact that Attorney General Tom Clark filed a brief on behalf of the Negro litigants and Solicitor General Perlman argued their case gives a prospect of success in that field. Also indicative is the fact that two dozen other briefs protesting against continued judicial enforcement of covenants were filed by such diverse groups as the A. F. of L., C. I. O., American Jewish Congress, American Jewish Committee, American Association for United Nations, Council of Protestant Churches, and various civil-liberties organizations.

This widespread public support is important, for now that the legal basis of residential segregation has been destroyed, the job of educating Americans to live together without strife and without reference to race rests on the very groups that filed supporting briefs in the Supreme Court. If they believe that the ghetto is the evil proclaimed in their briefs they should set about their educational task without delay. The legal victory will prove a hollow triumph unless the battle against residential segregation is also won in the field of public opinion.