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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

J. D. SHELLEY and ETHEL LEE SHELLEY, His Wife, *Petitioners,*

vs.

LOUIS KRAEMER and FERN W. KRAEMER, His Wife, *Respondents.*

No. 1268

Respondents' Brief Opposing Issuance of Writ of Certiorari

OPINION OF COURT BELOW.

The case herein sought to be reviewed was decided by the Supreme Court of Missouri, being the highest Court in which a decision could be had, and was there entitled Louis Kraemer and Fern W. Kraemer, his wife, appellants, v. J. D. Shelley and Ethel Lee Shelley, his wife,

and Josephine Fitz-Gerald, respondents. The decision and rulings of the Court below appear in pp. 153 to 159 of the Record filed herein.

Said opinion is reported in 198 S. W. (2d) 679.

JURISDICTION OF THIS COURT.

Respondents concede that the writ of certiorari, provided for in Sec. 237 (b), Judicial Code, 36 Stat. 1156, as amended by Act of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 937, Title 28 U. S. Code, Sec. 344 (b), is the proper method of review by this Court of the instant case, provided: That a Federal question of substance is supported by the record made in the lower Courts.

Respondents contend, however, that the Record filed herein presents no Federal question of the kind and character this Court has, in previous decisions, demanded in order to establish and sustain jurisdiction.

REASONS URGED IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI.

I.

The Record fails to disclose that Petitioners were deprived of property without due process of law.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

Leeper v. Texas, 139 U. S. 462.

Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.

II.

The Record fails to disclose that Petitioners have been denied the equal protection of the laws.

16 C. J. S., p. 988, Sec. 502.

Barbier v. Connolly, 113 U. S. 27, 28 L. Ed. 923.

Plessy v. Ferguson (1896), 163 U. S. 537, 551, 16 S. Ct. 1138, 41 L. Ed. 256.

McPherson v. Blacker (Mich., 1892), 146 U. S. 1, 39, 13 S. Ct. 3, 36 L. Ed. 869.

III.

The Record fails to disclose that the State of Missouri has made or enforced any law which abridges the privileges or immunities of the Petitioners as citizens of the United States.

Slaughter House Cases (1873), 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.

Twining v. N. Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97.

Younger v. Judah (1892, Mo.), 111 Mo. 303, 19 S. W. 1109.

IV.

(a) The record fails to disclose the violation of any right of Petitioners arising from or out of the statutes, treaties, or Constitution of the United States.

Slaughter House Cases (1873), 16 Wall (U. S.) 36, 21 L. Ed. 394.

Civil Rights Cases (1883), 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 836.

McPherson v. Blacker (Mich., 1892), 146 U. S. 1, 39, 13 S. Ct. 3, 36 L. Ed. 869.

Virginia v. Rives (1880), 100 U. S. 313, 25 L. Ed. 667.

(b) Question of violation of treaties was not properly raised in Court below.

Rule 12 (1), Rev. Rules of Sup. Ct.

Godchaux Co. v. Estopinal, 251 U. S. 179, 40 S. Ct. 116, 64 L. Ed. 213.

Amer. Surety Co. v. Baldwin, 287 U. S. 156, 53 S. Ct. 98.

V.

The Fourteenth Amendment, and the Statutes enacted thereunder, are directed against State action and not against the actions or agreements of individuals.

Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835.

Slaughter House Cases, 16 Wall (U. S.) 36, 21 L. Ed. 394.

Corrigan v. Buckley (D. C., 1926), 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. (1905), 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65.

Virginia v. Rives (1880), U. S. 313, 25 L. Ed. 667.

VI.

A Federal question sufficient to sustain the jurisdiction of this Court cannot be created by mere assertions, conjectures or conclusions unsupported by the record.

Ennis Water Works v. City of Ennis, 233 U. S. 652, 658, 34 S. Ct. 767, 58 L. Ed. 1139.

U. S. Fid. & Guar. Co. v. State of Oklahoma et al., 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876.

Zucht v. King et al., 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194.

Delmar Jockey Club v. Missouri (1908), 210 U. S. 324, 28 S. Ct. 732, 52 L. Ed. 1080.

VII.

(a) This Court has denied the existence of a substantial Federal question on a record such as presented in this case.

Corrigan v. Buckley (1926), 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969.

(b) That a Federal question does not exist in such a case has been consistently held by State and Federal Courts.

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

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

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

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

Meade v. Dennistone (1938) (... Md. ...), 196 A. 330, 114 A.L.R. 1227.

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Stone v. Jones (1944), 66 Cal. App. (2d) 264, 152 P. (2d) 19.

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

Los Angeles Investment Co. v. Gary (1919) (... Cal. ...), 186 Pac. 596, 9 A.L.R. 115.

Queensborough Land Co. v. Cazeaux (1915), 136 La. 724, L.R.A. 1916B, 1201, 67 So. 641, Ann. Cas. 1916D, 1248.

Kohler v. Rowland (1918), 275 Mo. 573, 205 S. W. 217, 9 A.L.R. 107.

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

Dooley v. Savannah Bank & Trust Co. (1945) (... Ga. ...), 34 S. E. (2d) 522.

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

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

Hemsley v. Sage (1944), 194 Okla. 669, 154 P. (2d) 577.

Hemsley v. Hough (1945) (... Okla. ...), 157 P. (2d) 182.

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Swain v. Maxwell (1946) (... Mo. ...), 196 S. W. (2d) 780.

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

Russell v. Wallace (1929), 58 App. D. C. 357, 30 F. (2d) 981, Cert. Den. 279 U. S. 871, 49 S. Ct. 512, 73 L. Ed. 1007.

Grady v. Garland (1937), 67 App. D. C. 73, 89 F. (2d) 817, Cert. Den. 302 U. S. 694, 58 S. Ct. 13, 82 L. Ed. 536.

Herb v. Gerstein (1941), 41 Fed. Supp. 634.

SUMMARY OF ARGUMENT.

I.

The Courts below had jurisdiction over the subject-matter and the parties. The trial was fairly conducted in a Court of justice according to the modes of proceeding applicable to such a case under the laws of Missouri and petitioners had and enjoyed equal opportunity to be heard and defend. The laws under which the trial and review by the Missouri Supreme Court were had operate on all citizens alike.

Since no legislative enactment is here involved, the State of Missouri has not made or enforced any law which deprives petitioners of life, liberty or property without due process of law.

II.

The "equal protection" clause of the Fourteenth Amendment was designed to prevent a State from making arbitrary or capricious classifications in the enactment and enforcement of regulatory legislation. The Supreme Court of Missouri, in the case at bar, has enforced, by equitable principles applying equally to all citizens, a private contract of private citizens. The State of Missouri afforded to respondents a remedy in enforcing those substantive rights which accrued to respondents by virtue of the solemn contract to which the State of Missouri was not a party nor in which the State of Missouri had any interest. This system of equitable justice is available, in Missouri, to all citizens without regard to race, color, or creed. Hence the laws of Missouri protect all citizens equally.

III.

The "equal privileges and immunities" clause of the Fourteenth Amendment protects only against invasion by the State of privileges and immunities which accrue to persons by reason of Federal Citizenship. The privilege which petitioners assert is to use and occupy specific private property which was subject to and burdened with an equitable charge of which petitioners had legally sufficient notice prior to their actual use and occupancy.

Since this is not a privilege accruing to petitioners by virtue of their United States citizenship, the State of Missouri has not made or enforced any law abridging a Federally protected interest.

IV.

Since petitioners did not raise specifically in the Court below, and at the earliest possible stage of the proceedings, the question involving Clause 2 of Article VI of the Constitution of the United States, they cannot now urge a consideration of an alleged violation of that Article.

The violation, by the agreement involved in this case, of treaties to which this government is a signatory was not alleged in the trial Court, nor is it found anywhere in the Printed Record herein filed prior to the Motion for Rehearing filed in the Missouri Supreme Court following decision and judgment.

V.

Only State action is violative of the Fourteenth Amendment, and while State action includes legislative, executive and judicial acts, it is State action of a particular character which is prohibited. It must be the State itself acting before the Federal power proclaimed in the Fourteenth Amendment and Statutes enacted thereunder shall be brought to bear.

It has been consistently held by this Court and all the Federal and State Courts that the Fourteenth Amendment is not directed against the acts of individuals whether such individuals act singly or in groups, or whether such private acts result in, or have for their purpose, discrimination. And the same rule applies to the contracts of private individuals. Such are considered to be the internal affairs of a State, and are subject, exclusively, to State determination.

A Court, adjudicating the contested rights of litigants, is not acting in the sense of that State action prohibited by the Fourteenth Amendment.

VI.

The contentions of petitioners that restrictive agreements result in the dire conditions under whch some negroes live in some urban communities are based upon mere conclusions of petitioners, and are not founded upon any finding by the Courts below that there is any relation of cause and effect between agreements like the one here involved and the living conditions claimed to exist.

VII.

In the only two cases in which restrictive agreements have been before this Court it was felt that no substantial federal question is involved where a contract of private citizens has been sought to be enforced. Certiorari was recently denied in a similar case.

No court, sitting as a State or Federal Tribunal, has ever held that an agreement such as the one in this case is violative of the Fourteenth Amendment or the Statutes enacted thereunder. On the contrary, they have consistently held, in line with previous decisions of this Court, that the private contracts of individuals are not affected by the provisions of the Fourteenth Amendment or the Statutes thereunder.

ARGUMENT.

The purpose of this Argument is to point out that the Record in this case fails to reveal any basis for the Court assuming jurisdiction of the controversy by granting its Writ of Certiorari as prayed for by Petitioners.

If a substantial Federal question is not disclosed in the Record then, even though designated as such by Petitioners throughout the entire proceeding in the courts below, the writ should not issue.

> Corrigan v. Buckley (1926), 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969.

And the mere fact that the Supreme Court of Missouri has decided a Federal question in its decision will not warrant assumption of jurisdiction by this Court, if the Federal question decided does not appear to have been a substantial one.

> Sugerman v. U. S., 249 U. S. 182, 184, 39 S. Ct. 191, 63 L. Ed. 550.

And, further, a Federal question of sufficient color to sustain the jurisdiction of this Court may be precluded by reason of previous decision.

> Leonard v. Vicksburg R. R. Co., 198 U. S. 416, 422, 25 S. Ct. 750, 49 L. Ed. 1108.
>
> Corrigan v. Buckley, supra.

Petitioners partially ground their application for issuance of the writ on the first three clauses of the Fourteenth Amendment and on Sections 1977, 78 of the Federal Code (now Sections 41 and 42 of Title 8 United States Code). These are the Civil Rights Statutes and were enacted under the authority of the Fifth Section of the Fourteenth Amendment.

Since the statutes can go no farther than the Amendment under the authority of which they were enacted, it will suffice to examine the Record to determine if any Federal right under and by virtue of the Amendment is involved. Corrigan v. Buckley, supra. The statutes merely enumerate fundamental rights referred to generally in the amendment.

Strauder v. W. Va., 100 U. S. 303, 25 L. Ed. 664.

The Argument of respondents will concern itself with the separate clauses of the amendment.

I.

The Record fails to disclose that Petitioners were deprived of property without due process of law.

It is nowhere contended **specifically** in Petitioners' Brief in what manner or by what means they were "deprived of property without due process of law." The Record clearly discloses that the ruling of the Supreme Court of Missouri followed a contested trial in the Circuit Court of St. Louis which, under the laws of the State of Missouri, is a duly constituted court of original jurisdiction for the trial of equitable actions. The defendants were accorded the same rights in the trial of the case as are afforded to all citizens of Missouri of whatever race, color or creed. The Supreme Court of Missouri reversed the decision of the trial court by applying to the facts of the litigated controversy well-known and long established equitable principles deeply grounded in the substantive law of Missouri. These principles apply equally to the citizens of Missouri. Both Courts had jurisdiction over the matter and the parties. Both parties were accorded every opportunity to defend their conception of the facts

and of the applicability of the common law. Thus, all the essential principles of due process were present.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.
Leeper v. Texas, 139 U. S. 462.
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673, 74 L. Ed. 1107.

Petitioners cannot show where, in the Record, there appears any deprivation of their property. The Supreme Court of Missouri found that Petitioners had legally sufficient notice of the equitable charge upon the land which resulted from a solemn and sealed contract having been recorded in compliance with the statutory law of Missouri. Thus, Petitioners sought to acquire by purchase, and to use and occupy, property which they knew was subject to the equitable charge. What they acquired was at best a defeasible title subject to be divested by the application of rules of equity well-established in the common law of Missouri. By the attempted purchase they became parties to the contract as if they had executed it. They cannot assert a Federal right to the effect they were deprived of **their** property without due process of law.

Before the due process clause of the Fourteenth Amendment can be brought to bear, it must be shown by the Record that the act of the State was the subject of the controversy. No such conclusion can be drawn from this Record. The subject of the controversy was the act of private individuals of whom the Petitioners were one.

If it should be held that private citizens cannot control their individual private property by private contract because it might produce a result which the State could not affect by legislation; or if it should be held that a private

contract should not be enforced between individuals, though it has for its purpose the denial to a negro of a right which he has as a citizen of the State, then no contract could be made whereby a negro could be refused service in a restaurant; no contract could be enforced the provisions of which denied a negro participation at a dance place; no contract could be made whereby a party to it could refuse, because bound by a contract, to admit a negro to a private swimming pool. No one denies that a fundamental right of man is to work and earn a living and to make contracts of employment with an employer. But the law does not forbid an employer the right to refuse to hire a man even though the refusal to do so is based solely upon the fact the employer has entered into a contract to employ only union men. No man can be forced to breach his solemn contract unless those contracts are violative of public health, safety, morals or welfare.

If a contract were made by the terms of which the facilities of a business or enterprise set up under the contract were to be limited to males only, could it be said that a female could demand those services or facilities? Even though she is a citizen of the United States she has no right, protected by law, to the services or facilities in general, and those in control of such facilities need assign no reason for their refusing them to her. But no one doubts that such contracts can be made, and when enforced, they are not violative of the Fourteenth Amendment or of the statutes enacted thereunder.

If, as above asserted, the Record fails to disclose the denial to Petitioners, by the State of Missouri, of the equal protection of its laws, then, on this ground, the Writ should be denied.

While Petitioners rely heavily on the proposition that the Fourteenth Amendment was not properly applicable to the restrictions in Corrigan v. Buckley, supra, since the case arose in the District of Columbia, it must certainly be admitted that the decision correctly declares the law insofar as it holds that the due process clause of the Fifth Amendment is not violated.

Could it be held that enforcement of restrictions by the Federal courts is not a denial of due process under the Fifth Amendment, but that enforcement by a State court of similar restrictions is a denial of due process under the Fourteenth Amendment?

It has been held by this Court that the phrase "due process of law" has the same meaning in both the Fifth and Fourteenth Amendments.

> Levy v. Lewis, 295 U. S. 768, 55 S. Ct. 652, 79 L. Ed. 1709.

Thus it should be clear that both on the Record here presented, and the authority of Corrigan v. Buckley, supra, the State of Missouri did not deprive Petitioners of property without due process of law.

II.

The Record fails to disclose that Petitioners have been denied the equal protection of the laws.

The "equal protections" clause of the Fourteenth Amendment was designed to prevent a State from making arbitrary or capricious classifications in the enactment and enforcement of regulatory legislation. Nowhere has it been asserted that a court of competent jurisdiction deciding a case, as a Court of Equity, in which the

contract rights of private individuals was the subject matter, was violating the "equal protections" clause. In McPherson v. Blacker (Mich. 1892), 146 U. S. 1, 39, 13 S. Ct. 3, 36 L. Ed. 869, it is said:

> "The inhibition that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile **legislation**" (emphasis ours).

The Supreme Court of Missouri in 1892 stated the following in Younger v. Judah, 111 Mo. 303, 19 S. W. 1109:

> "These clauses (privileges and immunities and equal protection clauses of the Fourteenth Amendment) do not undertake to confer new rights, nor do they undertake to regulate individual rights. They are simply prohibitory of State **legislation,** and of State action" (emphasis ours).

The Record discloses no discriminatory legislation involved in this case. Petitioners do not specifically allege in what particular or by what manner or means they were denied the equal protection of the laws of Missouri. As for the allegations in Petitioners' Brief, they assert a denial to them of constitutional and fundamental rights without pointing out what rights were denied, whether or not they are such rights as accrue to them by their citizenship of the United States, or how there was denied to them the equal protection of the law. The Record discloses there was no denial or refusal to protect them equally under the law or to deny to them the application of equal laws.

What the Record does disclose is that the Supreme Court of the State of Missouri decided the legal questions

involved in a contested case, and, in its decision, applied well-established, equitable principles which are applied equally in Missouri to all citizens regardless of race, color or creed. The Record discloses no discrimination against Petitioners in the application of either substantive or procedural law. The principles by which the Court arrived at its conclusions are applied equally to all citizens and, while no such case has arisen, it should be assumed that, were the positions of the parties reversed and the agreement had been one to which negroes were a party, a violation by a white person would have been promptly enjoined by applying to such a case exactly the same principles employed by the Missouri Supreme Court in this case.

For several generations, following the reasoning of the decisions in the Slaughter House Cases, the Civil Rights Cases, and others, an unbroken chain of State and Federal decisions have uniformly held that the equal protection clause of the Fourteenth Amendment is directed, not against individuals nor their contracts or actions, but against the State or against individuals who, at the time they act in violation of the Amendment, are acting as and for the State.

III.

The Record fails to disclose that the State of Missouri has made or enforced any law which abridges the privileges or immunities of the Petitioners as citizens of the United States.

There is no intimation by Petitioners that any "immunity" guaranteed to them has been abridged. It is "privilege" which they assert has been abridged. It remains to

search the Record to discover what privilege it is that has been abridged and whether or not that privilege is one protected by the Fourteenth Amendment.

Corrigan v. Buckley settled the question 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 case came to the United States Supreme Court by appeal from the Court of Appeals of the District of Columbia. In the decision appealed from the Court had 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."

The United States Supreme Court, in affirming the judgment, decided:

> "* * * and the prohibitions of the Fourteenth Amendment 'have reference to State action exclusively, and not to any action of private individuals.' Virginia v. Rives, 100 U. S. 313. 'It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the right.' Civil Rights Cases, 109 U. S. 3."

In ruling on Sections 1977, 78 and 79, Revised Statutes of the United States (now Sections 41, 42 and 43 of Title 8 of the U. S. Code), the United States Supreme Court said:

> "* * * while they (the statutes) provide, inter alia that all persons and citizens shall have equal right with white persons to make contracts and acquire property, they, like the Constitutional Amendment under whose sanction they were enacted, do not in

any manner prohibit or invalidate contracts entered into by private individuals in respect to the control and disposition of their own property."

For earlier decisions that the "equal privileges and immunities" clause of the Fourteenth Amendment protect, against State action, **only** those rights which accrue by virtue of Federal Citizenship, see

Slaughter House Cases (1873), 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.

Twining v. N. Jersey, 211 U. S. 78, 29 S. Ct. 14, 53 L. Ed. 97.

Younger v. Judah (1892, Mo.), 111 Mo. 303, 19 S. W. 1109.

This Court, in many decisions, has held that, while the Fourteenth Amendment requires a State to provide equal public facilities to both whites and negroes, the Fourteenth Amendment protects equality but not identity of rights.

Gong Lum et al. v. Rice et al. (1927), 275 U. S. 78, 48 S. Ct. 91, 72 L. Ed. 172.

This same principal has been enunciated by the State Courts in cases involving educational facilities to white and colored students.

People v. Gallagher, 93 N. Y. 438, 451.

People ex rel. Cisco v. School Board, 161 N. Y. 598, 56 N. E. 81.

Even Congress has established separate school facilities in the District of Columbia.

Wall v. Oyster (App. D. C. 1910), 36 App. D. C. 50, 31 L.R.A. (N.S.) 180.

Segregation of negroes and whites in separate educational institutions has been the public policy of Missouri as set out in the Missouri Constitution of 1865, Section 2, Article IX; Constitution of 1875, Section 3 of Article XI; Constitution of Missouri 1945, Section 1 of Article IX; Section 10349, R. S. Mo. 1939; Section 10632, R. S. Mo. 1939. See also Lehew et al. v. Brummell et al. (Mo. Sup. Ct. 1891), 103 Mo. 546, 15 S. W. 765.

Petitioners assert, contrary to the authority of the many decisions of this Court and the courts of their own State and of other States, that the privilege of owning and acquiring property should carry with it the privilege to own the **specific** property involved or mentioned in the Record of this case. Such a holding would be contrary to all of the cases above cited and would be a deviation from an interpretation of the Constitutional provision that has stood for generations.

On the authority of Corrigan v. Buckley, supra, the Slaughter House Cases and many others, the Writ should be denied since no Federally protected right or privilege has been abridged by the State of Missouri through discriminatory or unequal laws.

IV.

The Record fails to disclose the violation of any right of Petitioners arising from or out of the Constitution, laws, or treaties of the United States.

The points raised by Petitioners under "Reasons Relied on for Granting Writ 3 (d)", and found in Appellant's Petition for Writ of Certiorari and Brief in Support Thereof, pp. 18 and 19, and in their Argument, pp. 39, 40 and 41,

undoubtedly are grounded upon 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."

Respondents wish to point out to the Court that the first time this point was raised by Petitioners in the lower Court proceedings was in Petitioners' "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.

Petitioners have no right to have the point considered now 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.

V.

The Fourteenth Amendment, and the Statutes enacted thereunder, are directed against State action and not against the actions or agreements of individuals.

That the prohibitions of the Fourteenth Amendment were directed only against the States was first proclaimed by this Court in the Slaughter House Cases (1873), 16 Wall 36, 21 L. Ed. 394. The Amendment has never been held to apply to the acts of individuals whether such acts involve private contracts or not.

In an unbroken chain of land-mark cases this Court has steadfastly retained the interpretation and construction proclaimed in the Slaughter House Cases, supra; and such construction of the Fourteenth Amendment, and the Statutes enacted under the authority of the Fifth Section of the Amendment, has never been assailed by any State or Federal Court. Following the lead of the Slaughter House Cases are:

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588.

Virginia v. Rives (1880), 100 U. S. 313, 25 L. Ed. 667.

U. S. v. Harris, 106 U. S. 629, 639, 118 S. Ct. 601, 27 L. Ed. 290.

Civil Rights Cases (1883), 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 836.

McPherson v. Blacker (1892), 146 U. S. 1, 39, 13 S. Ct. 3, 36 L. Ed. 869.

Hodges v. United States (1905), 203 U. S. 1, 27 S. Ct. 6, 51 L. Ed. 65.

Delmar Jockey Club v. Mo. (1908), 210 U. S. 324, 28 S. Ct. 732, 52 L. Ed. 1080.

Buchanan v. Warley, 245 U. S. 60, 38 S. Ct. 16, 62 L. Ed. 149.

Corrigan v. Buckley (1926), 271 U. S. 323, 46 S. Ct. 521, 70 L. Ed. 969.

While Petitioners seem to agree that it is only the action of a State, or of the State acting as a sovereign power, which is forbidden by the Fourteenth Amendment, they seek, by argument, to have this Court construe the judicial determination of litigants' rights to be such State action. It is unnecessary to point out that the cases cited by Petitioners in support of that contention do not support Petitioners' reasoning. None of the cases go farther than to expound the fundamental principle that a State may act, not only through its legislative department, but also through its executive and judicial department in a manner repugnant to the Fourteenth Amendment. This argument, that enforcement by a State of a private contract is "State action," within the meaning of the Fourteenth Amendment, is most effectively answered by the pronouncements of this Court in decisions which have stood for generations.

In the Civil Rights Cases, supra, this Court said:

> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."

And on page 13 of the same opinion:

> "* * * for the prohibitions of the amendment are against State laws and acts done under State authority."

That the Amendment does not prevent individuals acting singly or in a group from doing that which might result in discrimination is supported by all of the decisions above cited. In Virginia v. Rives, supra, it is said:

> "The provisions of the Fourteenth Amendment of the Constitution we have quoted **all** have reference to State action **exclusively** and not to **any action** of private individuals." (Emphasis ours.)

To the same effect is Hodges v. U. S. supra. The Supreme Court of Missouri has recognized the limitations of the Federal power under the Fourteenth Amendment when, in the case of In re Chambers Estate, 322 Mo. 1086. 18 S. W. (2d) 30, the Court said:

> "It seems clear that the provisions of the due process clause in the State Constitution and in the Federal Constitution, as well, are inhibitions upon the power of the State, and not upon freedom of action of private persons in respect to disposition of their own property."

The judicial interpretation and construction of the meaning of the Amendment was clearly expressed by the California Court in the case of Title Guaranty and Trust Company v. Garrott, 42 Cal. App. 152, 183 P. 470:

> "The Fourteenth Amendment * * * addressed itself to the State Government and its instrumentalities, to its legislative, executive and judicial authority, and not to contracts between individuals. It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. The Fourteenth Amendment, it is true, applies to the judicial as well as the legislative department of the State Government. But the judiciary does not violate this provision of the Federal Constitution merely because it sanctions discriminations that are the outgrowth of contracts made by individuals * * * The 'equal protection' clause of the Fourteenth Amendment makes but one demand upon the State, and gives to the State but one right. It is that the State shall make, execute, and interpret its laws without discrimination. It must not grant rights to one which, under similar circumstances, it denies to another."

That the internal affairs of a State are not the subject of Federal jurisdiction unless some constitutional provision is violated is long settled. And on the authority of Corrigan v. Buckley, supra, and numerous other decisions of this Court Respondents submit that neither the Fourteenth Amendment nor Sections 41 and 42 of the United States Court create any new rights. They merely enumerate and guarantee, against invasion by State legislation, rights which are the fundamental rights of all. The right to contract respecting one's own property is one of the most fundamental of such rights, and the right to use and dispose of one's property is the fundamental right which would have to be denied to Respondents if Petitioners' request is to be granted and the well-reasoned decisions of this Court and all the State and Federal Courts overthrown.

VI.

A Federal question sufficient to sustain the jurisdiction of this Court cannot be created by mere assertions, conjectures, or conclusions unsupported by the record.

Petitioners rely heavily on what they contend to be the living conditions of Negroes in urban centers as a basis for invoking the jurisdiction of this Court. While it may be conceded that some of the cases cited by Petitioners support the general statement that segregation of Negroes by the State is not to be condoned, there is nothing in this record from which the many conclusions drawn by the Petitioners can be based.

The Petitioners call to this Court's attention many times the finding made by the Chancellor in the trial Court below. That finding is set out in full in the Printed Record, page 141, being finding No. 7, and reads as follows:

> "The Negro population has greatly increased in recent years, and now numbers in excess of 100,000. Some parts of the area in which they live are overcrowded, which is detrimental to their moral and physical well-being."

Petitioners re-quote that finding throughout their Brief and assume what is not in the record of the evidence, and certainly is nowhere to be found in the finding of the Chancellor, namely, **that the overcrowded condition mentioned by the Chancellor is the result of this restriction agreement or others like it.** That the relation of cause and effect exists between these private contracts and the conditions under which some Negroes live in large urban centers is merely the assumption and assertion of Petitioners, and is totally unsupported by the record or the Court's findings.

Respondents refer the Court to the Printed Record, page 134, where Petitioners agree that Fannie Cook also testified, upon cross examination, that **white people** in St. Louis live in overcrowded and congested conditions which result in crime, juvenile delinquency and disease; that John T. Clarke (Record, page 135), testified that large areas in St. Louis were populated by whites who lived in overcrowded, congested, and unsanitary conditions, and that great areas in St. Louis were not restricted by these agreements or otherwise. To the same effect was the evidence brought out upon cross examination of all of Petitioners' witnesses.

Petitioners rely heavily, too, on the expression by the Missouri Supreme Court (Record, page 159):

> "The Chancellor found the Negro population in St. Louis has greatly increased in recent years, and now numbers in excess of One Hundred Thousand;

> and that some of the sections in which Negroes live are overcrowded which is detrimental to their moral and physical well-being.
>
> "Such living conditions bring deep concern to everyone, and present a grave and acute problem to the entire community. Their correction should strikingly challenge both governmental and private leadership. It is tragic that such conditions seem to have worsened although much has been written and said on the subject from coast to coast."

In Petitioners' "Application and Brief" [page 18 (c) (d)], Petitioners actually state that the agreement has for its purpose the establishment of racial segregation * * * and that its enforcement is injurious to a large number of citizens of Missouri; violates public statutes, and tends to injure public welfare. No finding by either of the Courts below supports those allegations. And the mere statement by Petitioners of their own conclusions, not borne out by a finding of either of the Courts who heard the matter, is not sufficient for this Court to consider. Petitioners, in their Brief (page 20, paragraph 5), reassert allegations contained in their "Return and Answer," but those allegations were not found by the Courts below to have been proved. The Courts below were unable, from the record, to find that the condition under which some Negroes live in St. Louis is traceable to, or the result of, restriction agreements.

On page 22 of Petitioners' Brief, in the second paragraph thereof, Petitioners insert much information with which the lower Courts were not concerned in the adjudication of the case and which are not part of the record presented to this Court. No one disputes the fact that in some urban communities areas populated by Negroes are overcrowded. No one disputes that ill health, juvenile de-

linquency, and crime can be traced to overcrowding. But Respondents assert that these conditions exist also in urban areas populated by whites and that Petitioners did not prove, but merely conclude and assume for their own purposes, that the outlawing of the right of people to contract regarding the disposition of their property will solve all the Negroes' health, crime and slum area problems. The Courts below did not so find and such a conclusion cannot be reached by this Court unsupported by the record.

In their Brief [page 27 (4) (7)]; on page 28 I; page 29 (3); pp. 38 and 39; page 42 II; page 53 IV; pp. 54, 55; and in all of the matters therein set out, Petitioners assume, without foundation in the Record or in the findings of the Court below, that restriction agreements have racial segregation as their purpose; that they have discrimination as their purpose and result; that the State of Missouri is segregating Negroes into unhealthful environments, and that the State of Missouri is discriminating against Negroes with the result they are suffering ill health and that crime and juvenile delinquency is present among them. Most of Petitioners' Brief is made up of such argument based upon nothing more solid than their own assumptions and conjectures without actual foundation in this Record or in the findings of the Courts.

VII.

On a record similar to the one here presented, this Court has denied the existence of a substantial Federal question and State courts and Federal courts without exception have followed this Court's ruling.

Corrigan v. Buckley, supra, considered a restriction agreement almost exactly like the one involved in this

case. The decision denied that a Federal question was presented in a case involving such a contract between private citizens. No court has held that such an agreement violates either the spirit or letter of the Fourteenth Amendment and the Statutes enacted thereunder, but have consistently ruled that no Federal question of substance is involved.

CONCLUSION.

It is asserted, then, that the foregoing is conclusive that no Federal question of substance is presented by this Record and that the Writ of Certiorari should be denied on the ground that the State of Missouri has not made nor enforced any law violating Petitioners' rights, and that the absence of such right in this kind of case has been affirmatively asserted by this Court in prior decisions.

Wherefore, respondents urge that the Writ of Certiorari be denied.

Respectfully submitted,

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