Case No. S168047

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

KAREN L. STRAUSS, et al.,

Petitioners,

v.

MARK D. HORTON, as State Registrar of Vital Statistics, etc., et al.,

Respondents;

DENNIS HOLLINGSWORTH et al.,

Interveners.

REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PETITION FOR REHEARING; DECLARATION OF ERIN BERNSTEIN

NATIONAL CENTER FOR LESBIAN RIGHTS
Shannon P. Minter (Bar No. 168907)
Christopher F. Stoll (Bar No. 179046)
Melanie Rowen (Bar No. 233041)
Catherine Sakimura (Bar No. 246463)
Ilona M. Turner (Bar No. 256219)
Shin-Ming Wong (Bar No. 255136)
870 Market Street, Suite 370
San Francisco, CA 94102
T: (415) 392-6257 / F: (415) 392-8442

MUNGER, TOLLES & OLSON, LLP
Gregory D. Phillips (Bar No. 118151)
Jay M. Fujitani (Bar No. 129468)
David C. Dinielli (Bar No. 177904)
Michelle Friedland (Bar No. 234124)
Lika C. Miyake (Bar No. 231653)
Mark R. Conrad (Bar No. 255667)
355 S. Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
T: (213) 683-9100 / F: (213) 687-3702

Additional Counsel Listed on Next Page:
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
ACLU FOUNDATION OF NORTHERN CALIFORNIA
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES
LAW OFFICE OF DAVID C. CODELL
ORRICK, HERRINGTON & SUTCLIFFE LLP

Attorneys For Petitioners Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmund Wu, James Tolen and Equality California

Additional Attorneys for Petitioners Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmund Wu, James Tolen and Equality California

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
Jon W. Davidson (Bar No. 89301)
Jennifer C. Pizer (Bar No. 152327)
Tara Borelli (Bar No. 216961)
3325 Wilshire Boulevard, Suite 1300
Los Angeles, CA 90010
T: (213) 382-7600 / F: (213) 351-6050

ACLU FOUNDATION OF NORTHERN CALIFORNIA
Alan L. Schlosser (Bar No. 49957)
Elizabeth O. Gill (Bar No. 218311)
39 Drumm Street
San Francisco, CA 94111
T: (415) 621-2493 / F: (415) 255-8437

ACLU FOUNDATION OF SOUTHERN CALIFORNIA
Mark Rosenbaum (Bar No. 59940)
Clare Pastore (Bar No. 135933)
Lori Rifkin (Bar No. 244081)
1313 W. 8th Street
Los Angeles, CA 90017
T: (213) 977-9500 / F: (213) 250-3919

ACLU FOUNDATION OF SAN DIEGO AND IMPERIAL COUNTIES
David Blair-Loy (Bar No. 229235)
P.O. Box 87131
San Diego, CA 92138-7131
T: (619) 232-2121 / F: (619) 232-0036

LAW OFFICE OF DAVID C. CODELL
David C. Codell (Bar No. 200965)
9200 Sunset Boulevard, Penthouse Two
Los Angeles, CA 90069
T: (310) 273-0306 / F: (310) 273-0307

ORRICK, HERRINGTON & SUTCLIFFE LLP
Stephen V. Bomse (Bar No. 40686)
405 Howard Street
San Francisco, CA 94105-2669
T: (415) 773-5700 / F: (415) 773-5759

Pursuant to Rules 8.520(g) and 8.252(a) of the California Rules of Court and California Evidence Code sections 452 and 459, Petitioners Karen Strauss and Ruth Borenstein, *et al.* ("Petitioners") respectfully request that this Court take judicial notice of the following documents:

EXHIBIT A: Opening Brief of Plaintiff/Appellant Clifton Hill in *Hill v. Miller* (1966) 50 Cal.Rptr. 908, vacated and revd. on rehg., 64 Cal.2d 757.

EXHIBIT B: First Reply Brief of Respondent Crawford Miller in *Hill v. Miller*.

EXHIBIT C: Reply Brief of Appellant Clifton Hill in *Hill v. Miller*.

These briefs are relevant to the accompanying petition for rehearing by Petitioners requesting that this Court modify its opinion in *Strauss v. Horton* (May 26, 2009, S168047), __ Cal. 4th __ [2009 WL 1444594], because they demonstrate that in the briefs filed in *Hill v. Miller* (1966) 50 Cal.Rptr. 908, vacated and revd. on rehg., 64 Cal.2d 757, a companion case to *Mulkey v. Reitman*, *supra*, 64 Cal. 529, the argument was raised that Proposition 14 (1964) was an improper revision of the California Constitution. This request is based on the Declaration of Erin Bernstein, attached hereto.

Dated: June 5, 2009

Respectfully submitted,

SHANNON P. MINTER
CHRISTOPHER F. STOLL
MELANIE ROWEN
CATHERINE SAKIMURA
ILONA M. TURNER
SHIN-MING WONG
National Center for Lesbian Rights

GREGORY D. PHILLIPS
JAY M. FUJITANI
DAVID C. DINIELLI
MICHELLE FRIEDLAND
LIKA C. MIYAKE
MARK R. CONRAD
Munger, Tolles & Olson LLP

JON W. DAVIDSON
JENNIFER C. PIZER
TARA BORELLI
Lambda Legal Defense and
Education Fund, Inc.

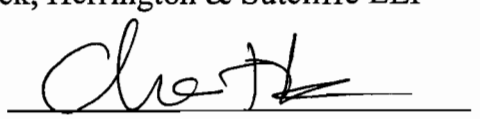
ALAN L. SCHLOSSER
JAMES D. ESSEKS
ELIZABETH O. GILL
ACLU Foundation of Northern California

MARK ROSENBAUM
CLARE PASTORE
LORI RIFKIN
ACLU Foundation of Southern California

DAVID BLAIR-LOY
ACLU Foundation of San Diego and
Imperial Counties

DAVID C. CODELL
Law Office of David C. Codell

STEPHEN V. BOMSE
Orrick, Herrington & Sutcliffe LLP

By: 
CHRISTOPHER F. STOLL

Attorneys for Petitioners Karen L. Strauss, Ruth Borenstein, Brad Jacklin, Dustin Hergert, Eileen Ma, Suyapa Portillo, Gerardo Marin, Jay Thomas, Sierra North, Celia Carter, Desmund Wu, James Tolen and Equality California

DECLARATION OF ERIN BERNSTEIN

I, ERIN BERNSTEIN declare under penalty of perjury that I have firsthand knowledge of the facts set forth below, and if called upon to testify, I could and would testify as follows:

1. I am an attorney licensed to practice before this Court. I am an attorney of record for Petitioner City and County of San Francisco, *et al.*, in the above-captioned action.

2. Attached hereto as Exhibit A is a true and correct copy of the Opening Brief of Plaintiff/Appellant Clifton Hill in *Hill v. Miller* (S7657), one of several cases including *Mulkey v. Reitman* (1966) 64 Cal.2d 529, affd. *sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369, that challenged Proposition 14 and that appear to have been consolidated before this Court. This brief was found at the law library of the University of California, Hastings, which maintains a repository for such briefs. The brief was copied for the San Francisco City Attorney's Office by library staff on or about December 5, 2008.

3. Attached hereto as Exhibit B is a true and correct copy of the First Reply Brief of Respondent Crawford Miller in *Hill v. Miller*. This brief was found at the law library of the University of California, Hastings, which maintains a repository for such briefs. The brief was copied for the San Francisco City Attorney's Office by library staff on or about December 5, 2008.

4. Attached hereto as Exhibit C is a true and correct copy of the Reply Brief of Appellant Clifton Hill in *Hill v. Miller*. This brief was found at the law library of the University of California, Hastings, which maintains a repository for such briefs. The brief was copied for the San Francisco City Attorney's Office by library staff on or about December 5, 2008.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 4th day of June, 2009, at San Francisco, California.

Erin Bernstein

Sac. No.
7657

APR 11 1966

See L.C. Vols.
8519-D
8555-D

See L.A. 28360
" 28422
" 28449

L.A. 27019
" 27017
" 27070

In the Supreme Court

OF THE

State of California

CLIFTON HILL,
Plaintiff and Appellant,

vs.

CRAWFORD MILLER,
Defendant and Respondent.

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court of the State of California, in and for the County of Sacramento

Honorable William H. Gallagher, Judge

COLLEY AND MCGHEE,
NATHANIEL S. COLLEY,
MILTON L. MCGHEE,
1617 - 10th Street,
Sacramento 14, California.

STANLEY MALONE,
2824 South W. Avenue,
Los Angeles, California,

CLARENCE B. CANSON,
2404 - 21st Street,
Sacramento, California,

Attorneys for Plaintiff and Appellant.

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Subject Index

Table of Authorities Cited

Codes

Constitutions

Texts

Miscellaneous

Sac. No. 7657

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STATEMENT OF ISSUES

I. Does The Complaint State Sufficient Facts, Or Is It Capable Of Amendment So As To Make It State Sufficient Facts, To Plead A Class Action?

II. Does The Complaint State Sufficient Facts, Or Is It Capable Of Amendment So As To Make It State Sufficient Facts, To Warrant Grant Of Injunctive Relief?

III. Does Article I, Section 26, California Constitution Violate The 14th Amendment To The United States Constitution?

A. Preliminary Statement.

B. Does The Initiative Constitutional Amendment Violate The Equal Protection Clause Of The 14th Amendment To The United States Constitution?

1. The Case of *Abstract Investment Company v. Hutchison* is controlling.

2. The Amendment invites and encourages racial discrimination.

3. The rule of *Smith v. Allwright* applies.

4. The State cannot allow its laws to be used to aid in a plan of discrimination.

5. A law, though valid on its face, is void if discriminatorily administered.

6. Article I, Section 26, California Constitution, was conceived as a device of racial discrimination and hence is nothing but a stratagem to facilitate denial of equal protection.

7. Article I, Section 26, cannot apply to most aliens, and hence citizens as a class are denied equal protection.

8. To the extent Article I, Section 26 prohibits the State Courts and Administrative Agencies from enforcing the Fair Housing Laws of the State, it constitutes a denial of equal protection of the laws.

9. The Privileges and Immunities Clause of the United States Constitution prohibits the application of Article I, Section 26 to persons who

are citizens of the United States but not citizens of California, and hence it denies equal protection of the laws to all citizens of California.

C. Does Article I, Section 26, Violate The Privileges And Immunities Clause Of The 14th Amendment?

D. Is The Right To Acquire Property In And Of Itself A Property Right The Abolition Of Which Is Prohibited By Substantive Due Process Of Law?

IV. Is The Legal Right To Acquire Real Property A Concept Inherent In A Republican Form Of Government?

V. Is The Initiative Measure In Conflict With 42 U.S.C. 1982?

VI. Does Article I, Section 26, California Constitution Contain An Implied Covenant Against Racial Discrimination?

VII. Does Article I, Section 26, California Constitution Unlawfully Cover More Than One Subject?

1. Does it cover the subject of Urban Redevelopment?

2. Does it cover the subject of Real Property Contracts?

3. Does it cover the subject of Probate Law?

4. Does it cover the subject of Auctions?

5. Does it cover the subject of Restraints on Alienation?

6. Does it cover the subject of Corporation Law?

7. Does it cover the subject of Restrictive Covenants?

VIII. Does Article I, Section 26, California Constitution Unlawfully Revise, Rather Than Amend, The State Constitution?

1. Does Article I, Section 26, abolish the previously constitutionally guaranteed right to acquire real property?

2. Does it abolish the requirement that all laws be uniform in application?

3. Does it abolish the principle of separation of powers?

4. Does it abolish Article I, Section 21, California Constitution which prohibits Class Legislation?

IX. Conclusion.

PROCEEDINGS IN THE COURT BELOW

Plaintiff-Appellant commenced this action in the Court below for an injunction prohibiting Defendant-Respondent from using the California unlawful detainer statutes to effect his summary eviction from a residential housing unit. He alleged that he was the lessee and that Defendant-Respondent was the lessor of the house in question. He claimed that he was about to be evicted, solely because of his race or color, pursuant to a notice to quit served upon him. It was alleged that the owner intended to follow said notice with an unlawful detainer action, and to have the

Marshal of the Municipal Court, armed with a Writ of Restitution, carry out such eviction.

The complaint specifically alleged that the sole reason for giving said notice was the race or color of Plaintiff-Appellant, and that the same was given pursuant to a plan, scheme or design of Defendant-Respondent to follow a policy of excluding Negroes from the rental of residential real property owned by him. Plaintiff-Appellant asserted a right under the 14th Amendment to the United States Constitution to be free from racial discrimination against him by private persons, such as Defendant-Respondent, acting under color of or pursuant to state laws which tend to aid, perpetuate or encourage such discrimination. Since Article I, Section 26, California Constitution, purported to give an owner of real property an absolute right to practice racial discrimination in its sale or rental if he wishes, Plaintiff-Appellant alleged it to be unconstitutional and void. Defendant-Respondent filed a general demurrer to the complaint, alleging that it did not state facts sufficient to constitute a cause of action. In addition, he filed an answer in which he denied that Plaintiff-Appellant has a constitutionally protected right to be free from racial discrimination in the use and enjoyment of real property. The answer admitted that the proposed eviction was based upon race or color alone.

The demurrer was submitted for decision after oral argument. The case was then tried on the motion for a preliminary injunction. Each party agreed that if the demurrer was overruled the case could be deemed

tried on the merits and a final judgment would ensue. The demurrer was sustained without leave to amend. This appeal is from the judgment of dismissal which followed.

ARGUMENT

I. THE COMPLAINT STATES SUFFICIENT FACTS, OR IS CAPABLE OF AMENDMENT TO STATE SUFFICIENT FACTS TO PLEAD A CLASS ACTION.

In order to constitute a class action the subject matter of the case must be of common or general interest to many persons, or the parties in interest must be so numerous that it is impractical to bring them all before the Court individually. Section 382, California Code of Civil Procedure. In explanation of the statutory provision it has been said that (1) "there must exist a well defined community of interest in questions of law and fact between those bringing the suit and those claimed to be represented, and (2) the suing and non-suing groups must constitute a definite ascertainable class." *Barber v. California Emp. Stab. Comm.,* 130 Cal. App. 2d 7, 14.

The well defined community of interest in a question of law and fact between Plaintiff-Appellant and the class he claims to represent is certainly present, as is the existence of a definite ascertainable class. The question of law is the right of persons to be free from state imposed, encouraged, perpetuated, or enforced racial discrimination in the acquisition or use of real property. It is a question of fact of great interest to all whether Defendant-Respondent seeks to use a state constitutional amendment in conjunction

with a special summary statutory unlawful detainer system to effectuate his own plan of racial discrimination. No member of the class seeks monetary damages, and by its very nature, the relief sought by plaintiff would give full protection to all persons having the requisite interest in the subject matter of the action. If an injunction is granted the Court should exercise its full powers and restrain Defendant-Respondent from discriminating against any person for reasons of race or color alone, and not just enjoin him from so acting with reference to plaintiff only. If the narrow course is followed each person subsequently claiming to be discriminated against for such reasons would have to sue for himself. Even Defendant-Respondent should not want this result, because, obviously, he too would have to bear the burden of multiple suits.

This case is distinguishable from *Weaver v. Pasadena Tournament of Roses Association,* 32 Cal. 2d 833. There, the right of each member of the alleged class to the relief turned upon facts peculiar to him. That was an action under Section 53, California Civil Code, and by command of the statute, only those could recover who could show they were over the age of twenty-one years, had demanded admittance, had tendered the price of the ticket, and as an individual, was a person entitled to admission. In the case at bar, the complaint alleged that solely for reason of race or color, a thing he has in common with all members of the class, he was threatened with unconstitutional discrimination at the hands of Defendant-Respondent. Questions of other factors such as ability to pay rent,

commission of waste or unlawful conduct, which by their nature would be individual to each tenant or prospective tenant, were in no way involved.

The complaint alleged that Plaintiff is a member of an ethnic group of persons commonly known and referred to as Negroes. Since on the demurrer we are testing only the sufficiency of the pleadings it is of significance to note that the allegations in the Court below were almost identical to those approved in *Banks v. Housing Authority of San Francisco,* 120 Cal. App. 2d 1. The trial court here, however, without citation of authority or exposition of its reasoning, concluded that the allegations of the complaint were "clearly insufficient under California law to sustain the right of plaintiff to represent all other Negroes as a class in the State of California." It is thus clear that the unsound legal premise upon which that Court's view was based is that in order for Plaintiff-Appellant to sufficiently plead facts which will constitute a class action he must demonstrate that he represents all Negroes in California. Quite obviously Plaintiff-Appellant does not represent all Negroes in this State any more than Mattie Banks represented all of them in *Banks v. Housing Authority of San Francisco,* supra. The class brought within the ambit of the complaint is not all Negroes of the State, but is rather limited to those Negroes similarly situated as is Plaintiff-Appellant with respect to certain practices of Defendant-Respondent. The overwhelming majority of Negroes in California will never wish to rent an $86.00 per month house from Defendant-Respondent,

but such of them as do clearly constitute a legal class within the meaning of the *Banks* case. We are unaware of any "all or none at all" theory applicable to representative suits brought by Negroes.

Even assuming, for purposes of argument only, that the complaint does not now state facts sufficient to show that this is a class action, it should not have been dismissed. In the first place, Plaintiff-Appellant should have been given leave to amend after having had the Court point out to him the particulars in which it was deemed insufficient. Unless it appears that the complaint may not be amended so as to state a cause of action it is an abuse of discretion to deny leave to amend. *Plaza v. San Mateo,* 123 Cal. App. 2d 103; *Kauffman v. Bobo & Wood,* 99 Cal. App. 2d 322.

The second reason that the complaint should not have been dismissed for this reason is that even again assuming, for purposes of argument only, that a class action was not properly pleaded this would certainly not defeat the individual right of Plaintiff-Appellant. In the leading case of *Weaver v. Pasadena Tournament of Roses Association,* supra, which held that a class action was not stated the case was not dismissed, but rather was transferred to the Justice Court which had jurisdiction of the subject matter. In the case at bar, if in fact a class action was not properly pleaded the action should have proceeded as if brought by Plaintiff-Appellant alone. He certainly did not extinguish his own right by attempting to assume the role of vindicator of the rights of all those he claimed were similarly situated.

II. THE COMPLAINT STATED SUFFICIENT FACTS, OR COULD HAVE BEEN AMENDED SO AS TO STATE SUFFICIENT FACTS, TO WARRANT GRANT OF INJUNCTIVE RELIEF.

The complaint alleged that Plaintiff-Appellant had been sent a notice terminating his tenancy, and that the notice itself specified that the sole reason for it was that Defendant-Respondent, pursuant to a right conferred upon him by Article I, Section 26, California Constitution, has elected to hereafter rent his property solely to members of the Caucasian race. It was specifically alleged that the threatened eviction by way of an unlawful detainer action was a part of a plan, scheme or design of Defendant-Respondent to follow a policy of excluding Negroes from the rental of residential real property owned by him. It was also alleged that Defendant-Respondent threatened to invoke the aid of the Municipal Court, and the Marshal thereof, in carrying out his plan of racial discrimination. The injunctive relief sought was to prevent Defendant-Respondent from proceeding with any action to evict Plaintiff-Appellant from the premises solely on the basis of race or color.

The Court below, in its Memorandum of Opinion, at page 4 thereof, stated that an action may not be brought in the Superior Court to enjoin a threatened eviction in the Municipal Court, and cited the case of *Johnson v. Sun Realty Co.*, 138 Cal. App. 296, as authority for that proposition. A careful reading of that case, however, discloses not a single reference to an eviction suit. The case dealt with the right of a party to seek reformation of a contract in a Superior Court action while a suit for rent under the same con-

tract was still pending in the Municipal Court. An effort was made to enjoin the prosecution of the action for rent pending a decision on the question of reformation. The Court held that an injunction would not lie because appellant had elected to do so he could have sought reformation in the Municipal Court by way of equitable defense.

In the case at bar, however, the action sought to be halted was an unlawful detainer action, and while even in that type of case assertion of equitable defenses is permissible *(Abstract Investment Co. v. Hutchinson,* 204 Cal. App. 2d 242), the fact remains that injunctive relief is by it very nature offensive and hence may only be had by way of complaint or cross-complaint. It is well settled that an unlawful detainer action is summary in nature and cross-complaints and counterclaims are not permitted. *Schubert v. Lowe,* 193 Cal. 291; *Smith v. Whyers,* 64 Cal. App. 193; *Cheney v. Trauzettel,* 9 Cal. 2d 158.

It is also well settled that a Superior Court may, in a proper case, enjoin the prosecution of an action in the Municipal Court. 27 Cal. Jur. 2d 139. In fact, it has been specifically held that a Municipal Court may be enjoined from proceeding with an unlawful detainer action. *Curl v. Pacific Home,* 108 Cal. App. 2d 655. In that case plaintiff sought a declaration of her rights under a contract which gave her the right to occupy a portion of the premises of defendant, and while her rights were being adjudicated, an injunction was sought to prevent her eviction. The case at bar could well be treated as a request by Plaintiff-Appel-

lant for a declaration of his rights under his oral lease agreement. He claimed the right to be free from racial discrimination and his landlord claimed the right to use the unlawful detainer statutes to evict him solely because of race or color. In each case the moving party sought to restrain an eviction, and in either case, as said in *Curl v. Pacific Home,* supra, it would be idle to claim that "damages would be adequate or capable of compensating respondent for being driven from her home and deprived of the benefits thereof . . ."

The Court below insisted that this is an unlawful detainer action, and since the monthly rent was only $86.00, no Court had jurisdiction to hear the case except the Municipal Court. Plaintiff-Appellant, however, denominated his action a "Complaint for Injunction," and has at all times considered it to be such. Whatever it was, one of the things it could not have been is an action for unlawful detainer, because that is an action always brought by a *landlord* to recover possession of his premises. California Code of Civil Procedure, Sec. 1161. The gist of the complaint in an unlawful detainer action is the continued occupancy of the premises by the tenant after the landlord becomes entitled to possession. *Bell v. Haun,* 9 Cal. App. 41. Simply stated, it is an action for recovery of possession of real property. *Johnson v. Smith,* 128 Cal. App. 2d 859. In the case at bar plaintiff alleged that he was in possession of the premises, and what he sought was a decree to prevent that possession from being disturbed by the unlawful detainer

process, except on conditions applicable alike to persons of every race or color.

Unlawful detainer is purely a creature of statute. *Hinman v. Wagnor,* 172 Cal. App. 2d 24. It is a special, summary method provided by law for recovery of possession of real property, and exists separate from, and in addition to, the common law remedies of ejectment and a proceeding to quiet title. *Hanes v. Coffee,* 212 Cal. 777.

The statutes dealing with unlawful detainer are found in Chapter 4, Title 3, Sections 1159-1178, California Code of Civil Procedure. Not a single one of those sections gives a tenant in possession any right whatsoever to enjoin a threatened wrongful eviction. For such relief the tenant must look to Section 526, CCP, the general statutory grant of injunctive powers. Thus, the action by Plaintiff-Appellant was clearly for injunctive relief to prevent violation of a constitutional right, and the Superior Court had jurisdiction to hear it. Section 526 CCP; *Orloff v. Los Angeles Turf Club,* 30 Cal. 2d 110; *Orleans Parish School Bd. v. Bush,* 242 Fed. 2d 156; *Slaughter House Cases,* 16 (Wall.) U.S. 36; *Truax v. Raich,* 239 U.S. 33.

It is the contention of Plaintiff-Appellant that his civil rights are about to be violated, and with reference to the proper remedy when such claim is made this Court recently observed as follows:

> ". . . a person whose civil rights are invaded as a result of discrimination against a group on the basis of race or ancestry may bring an action for injunctive relief on behalf of all members of

the group similarly situated." *Burks v. Poppy Const. Co.,* 57 Cal. 2d 463, 470.

This would seem to settle the question of the propriety of a class action in this case as well as whether injunctive relief is proper.

We have never claimed that constitutional issues could not be raised in the Municipal Court as a defense to the eviction suit. That question was properly settled in *Abstract Inv. Co. v. Hutchinson,* supra. Our contention is that even though Plaintiff-Appellant could have waited and raised that issue in the Municipal Court there is no law requiring him to do so. In *Johnson v. Sun Realty Co.,* 138 Cal. App. 296, 302, the rule is properly stated to be that although an equitable defense may be asserted in the Municipal Court it does not have to be, and a party who does not do so is nevertheless entitled to proceed with his equitable action in the Superior Court. This is but a recitation of a rule established in this state in 1856. *Lorraine v. Long,* 6 Cal. 452.

The denial of injunctive relief in *Johnson v. Sun Realty Co.,* supra, was in no way based upon the theory that the Superior Court may not enjoin the prosecution of an unlawful detainer action in the Municipal Court, but rather was posited solely upon the ground that the equitable remedy of reformation sought there increased rather than prevented multiplicity of suits. In addition, in that case the Municipal Court action was filed first, while here, at the time of the ruling on the demurrer no action was pending

except the one from which this appeal is taken. The rule is that where two Courts have jurisdiction over both the subject matter and the parties, the one in which the action is first commenced and whose process is first served will retain jurisdiction and decide the whole case. *Gorman v. Superior Court,* 23 Cal. App. 2d 172; *Green v. Superior Court,* 37 Cal. 2d 307.

In addition to these considerations we think it clear that Plaintiff-Appellant could not get adequate relief in the Municipal Court, even if we assume, for purposes of argument only, that there is some unspecified law which requires that he must wait and defend, rather than aggressively assert, his Constitutional rights. Once the unlawful detainer action is brought, Plaintiff-Appellant faces the possibility of having treble damages assessed against him if he loses. CCP 1174. Thus, in order to assert and test his constitutional right in the Municipal Court he must run the risk of suffering a potentially heavy financial burden. It is our view that a citizen should at least be able to find out from the Courts in the first instance whether he has a right, without being subjected to the economic jeopardy of treble damages.

This Court must never lose sight of the fact that what Plaintiff-Appellant seeks is continued possession of the premises, except that it be terminated by methods and for reasons applicable alike to all persons, without regard to race or color. His eviction may be effected at the time of the filing of a Municipal Court complaint by the landlord if he follows the simple expedient of filing a bond and making the

allegations specified in CCP 1166a. Once that happened, the tenant would be outside looking in, and even his restoration to possession by the Municipal Court could not undo the irreparable harm already done.

There is a final consideration which weighs heavily in favor of this action being brought in the Superior Court in the first instance. From its judgment, there is direct appeal to this Court, while any appeal from the judgment of the Municipal Court would have to go first to the Appellate Department of the Superior Court, and thence upon certification, to the District Court of Appeal. California Const., Art. VI, Sec. 4.

This action involves the constitutionality of Article I, Sec. 26, California Constitution, and in one way or another it touches the life and well being of practically every California resident. It is common knowledge that the challenged addition to our Constitution has brought the vast urban renewal programs in California to a virtual standstill. In addition to the hundreds of millions of dollars in Federal funds being withheld pending the outcome of this or similar litigation, the stagnation of redevelopment plans have worked great hardship upon cities and individual property owners as well. No one wishes to improve and make outlays to preserve real property earmarked for early destruction. Yet, the longer a final solution to the constitutional questions here raised is delayed, the longer this economic paralysis will continue to inflict inevitable decay and ruin upon the plans of our cities and properties of our people.

In addition, this Court may take judicial notice of the fact that the State Fair Employment Practices Commission has taken the view that Article I, Section 26, prohibits it from fully processing complaints of racial discrimination in housing. If the challenged amendment is void, this vital agency may at once get back to the pressing task of implementing the state and national policies against racial discrimination.

The above are some of the reasons that the validity of Art. I, Sec. 26, should be decided at the earliest possible time by this Court. Successive appeals with the delay inherent in them are not in the public interest.

Since the entry of judgment herein Defendant-Respondent has brought his unlawful detainer action. The Municipal Court in which it was brought has quite properly stayed that proceeding until there is a ruling on this Appeal.

III. ARTICLE I, SECTION 26, CALIFORNIA CONSTITUTION, VIOLATES THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Preliminary Statement.

We believe that any consideration of the validity of Art. I, Sec. 26, California Constitution must take into account our claim that its meaning cannot be ascertained by a mere casual reading of its innocuous language. When viewed in proper perspective we believe that all will see that it is but another part of a continuing tragedy which has been playing on the

American social and political stage for a century. Discrimination against Negroes in the sale and rental of residential real property is of long standing and is deeply rooted in our history. It is a part of the heritage of slavery which for a hundred years this nation has been unable to fully overcome. No other factor has played an equally important role in the growth of slums and ghettoes in our cities, both great and small. The accelerated migration of Negroes to the cities during the two world wars tended to aggravate the problem.[1]

There can be no denial of the scope and extent of residential segregation by race in California and the nation as a whole. The subject has been fully investigated and documented.[2]

This Court has recently had occasion to face and recognize the deleterious effects of racial ghettoes upon public education, and because of that effect, to give judicial sanction to the concept that de facto racial segregation in public schools is unlawful. *Jackson v. Pasadena Unified School District,* 59 Cal. 2d 876. Earlier, the generally adverse effect of racial seg-

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[1]Weaver, Robert, *The Negro Ghetto*, New York, Harper & Bros., 1948;
Abrams, Charles, Forbidden Neighbors, New York, Harper & Bros., 1955.

[2]McEntire, David, *Residence & Race*, Berkeley, University of California Press;
United States Commission on Civil Rights Housing Report, 1961;
Kaplin, Discrimination in California Housing: The Need for Additional Legislation, 50 Cal. L. Rev., 635 (1962);
Robison, Housing, The Northern Civil Rights Frontier, 13 W. Res. L. Rev. 101 (1961).

regation in housing was discussed. *Burks v. Poppy Const. Co.*, 57 Cal. 2d 463.

Negroes are not the only ones who have been the victims of the various schemes of those who would use race or color to determine place of residence. First, it was the Chinese against whom the people of California in 1879 authorized cities, by Article XIX, Section 4 of the State Constitution, to practice wholesale racial exclusion. San Francisco tried it, but was rebuffed when it was held that to arbitrarily exclude a whole ethnic group of persons from a city contravened the equal protection clause of the 14th Amendment. *In re Sing*, 43 Fed. 359 (1890).

If the newly adopted Article I, Section 26, California Constitution is valid, under it a city not presently having Negro residents (Glendale, Lodi, Burbank) may forever exclude them by the simple expedient of each present property owner exercising his right to decline to sell or rent to such persons in his absolute discretion. Thus, pursuant to State law, Negroes, Chinese, or any ethnic group whatsoever, could either be totally excluded from cities, or their numbers regulated by quotas agreed upon in advance by present owners of property. Such an enabling law is tantamount to segregation and discrimination by the State itself. The essential command of the 14th Amendment is that no state shall make or enforce any law which creates or perpetuates segregation by race. This command compels the conclusion that the initiative amendment conferring upon present owners of real property

the right to decline to sell or rent it in their absolute discretion is void.

California has lived through the period of its irrational fear of the so-called "Yellow Peril," but before it did we had not only attempts at Chinese exclusion, but also Alien Land Laws designed primarily to prevent ownership of land by persons of Japanese ancestry. These laws too, fortunately, have been struck down as casualties in the futile battle against the equalitarian command of the 14th Amendment. *Sei Fujii v. Calif.*, 38 Cal. 2d 718.

In some Southern cities segregation in housing has been sought to be maintained by racial zoning ordinances. Under these, an effort was made to enforce the separation of the races by providing that if a majority of the persons in a certain block was white, no additional Negroes could move into it, and if a majority was Negro, no additional white people could move there. This scheme limited the right of one to buy property as he chose and was held unconstitutional. *Buchanan v. Worley*, 245 U.S. 60; *City of Birmingham v. Monk*, 185 Fed. 2d 859.

The invalidation of racial zoning ordinances perhaps encouraged the rapid growth of racially restrictive covenants. A leader in their development and use was the California Real Estate Association, the principal sponsor of Article I, Section 26. Such covenants received rather uniform judicial enforcement until they too were interdicted by the equalitarian command of the 14th Amendment in 1948 in the now

famous case of *Shelley v. Kraemer,* 334 U.S. 1. Thereafter, individuals agreed among themselves that they would not sell their property to anyone except members of the Caucasian race, and when one of the signers sold to a Negro in contravention of the agreement, others sought damages against him in court. In *Barrows v. Jackson,* 346 U.S. 249, it was held that state Courts may not entertain such a damage suit, because to do so would amount to lending the aid of the state in the enforcement of a scheme of racial residential segregation. In the case at bar those who seek to discriminate against the Negro invoke the aid of the State Constitution by using it as a device to prohibit the state Courts and other agencies from limiting or abridging their absolute discretion in the use of property. Here, as has been the case historically, the aid of the state is sought to effect the evil purposes against which the 14th Amendment was erected as a shield of protection almost a hundred years ago. This the law does not permit.

Let us suppose that immediately after the Civil War every state in the nation had enacted an amendment similar to the one considered here. Since at that time most Negroes were ex-slaves and had no property, they never could have acquired any except at the sufferance of white people. Congress foresaw this possibility and enacted 42 USC 1982, which provides that the citizens in every state and territory shall have the same right to buy and rent real property as is enjoyed by white persons. Even now, a hundred years later, that same right cannot be left to the absolute discretion of others, nor may it be left without means of vindication by the

state. A state is duty bound to provide a forum in which that "same right" may be enforced, and a state constitutional provision which purports to prohibit any and every state agency from doing so is void. The duty of state Courts to pause and hear every claim of racial discrimination is discussed later in this brief. The whole concept that state action is necessary before the prohibitions of the 14th Amendment may be invoked is based upon an assumption that the states themselves will not destroy civil rights but will protect them. Where, as here, the state deliberately destroys the right to resort to its Courts and agencies to vindicate the right to be free from racial discrimination in housing, this in itself becomes state action nullifying the legal foundation upon which the Civil Rights Cases, 109 U.S. 3 were based. Those cases, as well as *U.S. v. Harris,* 106 U.S. 629; *U.S. v. Cruikshank,* 92 U.S. 542, and others decided during that era all assumed that the right to be free from racial discrimination would be protected by the states. Not one of them was based upon an assumption that any state would ally itself with the bigots and use its Courts to assist in their discriminatory schemes and withhold all state power when their victims cry out in anguish for relief from oppression based upon race or color.

The earlier decisions seem to have conformed to the modern view that all legal relationships between private persons are either compelled, prohibited or permitted by the state. See *Horowitz,* Fourteenth Amendment Aspects of Racial Discrimination in Private Housing, 52 Cal. L. Rev. 1, (March 1964). Where, as

in *Buchanan v. Worley,* 245 U.S. 60 and *Shelley v. Kraemer,* 334 U.S. 1, the action of the state is to compel refusal to sell, the 14th Amendment is, without question, brought into play. Laws prohibiting discrimination because of race or color do not exceed constitutional limitations. *Burks v. Poppy Const. Co.,* 57 Cal. 2d 463. The problem arises when we consider the legal consequences of the State permitting discrimination as between private persons. In this situation one person usually asserts the "right" to discriminate, while another claims a "right" not to be treated differently solely because of race or color. One theory, adopted by the Court below, is that in this situation the State may constitutionally elect to be neutral. We say that neutrality by the State in such a case is an impossibility, and even if it could be achieved, it would inevitably lead to anarchy. Here, incompatible rights are in mortal conflict, and if for no other reason than to preserve the peace, the State must choose between them. This calls for a weighing or balancing of the equities involved. Thus, the possible evil involved in determining that the legitimate interest of an owner who desires to sell or rent his property is impersonal and economic, must be weighed against the asserted right of a person to buy or rent a home for the personal use of himself and the family for which he bears moral and legal responsibility. When this is done we say the latter looms large and the former fades into insignificance. Whenever the state permits a refusal to rent or sell, or assists in an eviction, solely on the basis of race, it has at that moment ceased to

be neutral and has aligned itself on the side of that course which has neither legal nor moral justification.

The Court below, at page 15 of its Memorandum Opinion, observed that many states do not have fair housing laws, and concluded that by adoption of the Amendment in question, California simply placed in its Constitution the laws of those states. If His Honor meant that we simply adopted the law of Mississippi he does that state a grave injustice, because neither it nor its sister state of Alabama has a statute or constitutional provision comparable to ours. The state courts and agencies of Mississippi and Alabama, whatever else their shortcomings may be, are not prohibited by the constitutions of those states, from vindicating the right of Negroes to be free from discrimination, solely on the basis of race or color, in the use and enjoyment of real property. We suspect that the real reason for this is not that Mississippi and Alabama honestly enjoy being more advanced in the protection of the right to housing than is California, but their apparently more enlightened position is simply because the people there know that, despite its innocuous language, such a law passed by them would be quickly seen for what it is. We submit that it is equally transparent in California, and constitutional rights may not be nullified, directly or indirectly, by evasive schemes and subterfuges for producing or perpetuating racial segregation. *Jackson v. Pasadena School Dist.*, 59 Cal. 2d 876, 880.

In its Memorandum Opinion the Court below took the view that the only effect of the amendment was

to nullify fair housing laws (Health and Safety Code Sections 35, 700 et seq.—Rumford Act, and Civil Code Sections 51-52—Unruh Act), and make the State neutral in these matters. Even without consideration of either of those Acts, however, our state courts, on the basis of the 14th Amendment alone, could prevent a racially discriminatory eviction by the unlawful detainer process. *Abstract Inv. Co. v. Hutchinson,* 204 Cal. App. 2d 242. Rather than accept the direct holding in this more recent case, decided by the District Court of Appeal and written by the Honorable Justice Burke, however, the trial Court chose to follow the pure dictum in *Housing Authority v. Cordova,* 130 Cal. App. 2d Supp. 883, decided by the Appellate Department of the Los Angeles County Superior Court. In the latter case the issue was whether an admittedly public housing authority could be arbitrary in the selection of tenants. On the basis of *Banks v. Housing Authority,* 120 Cal. App. 2d 1, it was held that it could not, and as dictum the Court observed that a private person could discriminate in the selection of tenants. No authority was cited for that proposition, nor was any reasoning given to show why such a rule should flow from any of our fundamental constitutional principles.

Perhaps the constitutional case against the initiative under the 14th Amendment may be summarized and simplified in this manner. It purports to give to owners of real property, by virtue of state law, a right to discriminate in its sale or rental upon the basis of race or color, and denies to the person aggrieved any

official forum in which he may be heard to complain. The right to acquire housing without racial discrimination is protected by Federal law, and no state may prohibit its courts from enforcing the laws of the nation. To hold otherwise would make a shambles of the supremacy clause of the U. S. Constitution. In addition, the right to acquire property is one of those fundamental rights which every citizen under a republican form of government enjoys.

Any consideration of this initiative amendment must be in context. Its primary sponsor, the California Real Estate Association,[3] has had a historical interest in maintaining residential racial segregation.[4] In addition, the propaganda during the campaign for its enactment dealt almost wholly with the so-called "forced housing" allegedly inherent in the Rumford

[3]The request for a title for the initiative Constitutional Amendment which ultimately became Article I, Section 26, California Constitution, was made by the California Real Estate Association and two other groups interested in the sale and rental of residential housing.

[4]The official organ of the California Real Estate Association is the California Real Estate Magazine, a monthly publication. According to the research and court testimony of Paul F. C. Mueller, Ph.D., Sacramento, California, between 1920 and 1964, a substantial portion of the contents of that magazine dealt directly or indirectly, with the question of residential segregation on the basis of race or ancestry. In the October, 1920 issue a "yes" vote was urged on the alien Land Laws. It cautioned that "The ownership of our land must not pass to an alien race." The July, 1931 issue, at page 28, explained the alien Land Law and pointed out its limitations as a device for "stabilizing and or maintaining the character of a residential area with respect to the racial alienage (sic) of its inhabitants." In the same issue racial zoning ordinances and racially restrictive covenants were suggested as "two well known methods in use in restricting the character of a neighborhood." In the September, 1943 issue the CREA Board of Directors lauded "the fine work done by General DeWitt in removing the Japs from California cities," and the fond hope was

Fair Housing Act. More importantly, however, the initiative is without purpose if its objective was not to permit owners to decline to sell or rent real property for racial or religious reasons, because even without its enactment every such owner already had a right to decline to sell or rent for any other reason. In other words, by nullifying all fair housing laws and prohibiting the courts from enforcing federal laws on the subject, the initiative purports to add the right to practice racial discrimination to those already held by the owners of property. Thus, it is clear that the right to practice racial discrimination finds sanction in state law. This the 14th Amendment prohibits. We contend that when the purpose of Article I, Section 26 is laid bare it is null and void on its face and there are no factual issues to resolve which may not

expressed that they never be allowed to return. In the December, 1940 issue it is reported that the Southwest Branch, Los Angeles Realty Board won an achievement award from the CREA for, among other things, instructing property owners how to go about securing petitions and filing papers to renew restrictive covenants. At page 33 the award winning board reported with pride as follows: "Our Board spent two years inaugurating a program to establish perpetual race restrictions on all parcels of property in Glendale." Members signing a pledge that during the war emergency they would not sell real property to non-Caucasians. Even as late as the June 1952 issue, the Glendale Board advertised that "Glendale 100% Caucasian Race Community." The September, 1948 issue carried in detail a proposal for an amendment to the United States Constitution which would have nullified *Shelley v. Kraemer*. The attorney for CREA opined in the March, 1958 issue that a broker should "respect the wishes of a neighborhood." CREA opposed every fair housing bill which came before the California Legislature. The May, 1961 and February, 1962 issues boasted of a temporary success, but forewarned the advent of Proposition 14. The May 1963 issue applauded the defeat of the Berkeley Fair Housing Ordinance and expressed the view that fair housing laws continued to threaten the fundamental right of a property owner to practice discrimination in the selection of his tenants.

be settled by a consideration of the record on the hearing on the motion for a preliminary and permanent injunction.

Petitioner has demonstrated that he has a right which is either immediately threatened or is in the process of being actually decimated. The spirit of the law demands that a remedy be fashioned for the protection of this right. For every wrong there must be a remedy. CCP 3523. A delayed remedy is often a contradiction in terms because justice delayed is often justice denied.

In an earlier case this year *(Lewis v. Jordan,* unreported) this Court expressed grave doubts as to the constitutionality of the initiative now adopted as Article I, Section 26, but stated that the right of the people to vote on the measure should not be abridged. The question of constitutionality could, it was said, be passed upon after its passage. It has now been adopted and the time to pass on the grave constitutional question is at hand.

B. The Initiative Constitutional Amendment Violates the Equal Protection Clause of the 14th Amendment to the United States Constitution.

1. The Case of Abstract Investment Company v. Hutchinson Is Controlling.

Article I, Section 26 of the *California Constitution* provides in part as follows:

> "Neither the state nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly the right of any person, who

is willing or desirous to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such persons as he, in his absolute discretion, chooses."

Since the state courts and the Fair Employment Practices Commission are agencies of the State, under the above amendment neither may hereafter interfere, directly or indirectly, with the right of an owner to decline to sell his property solely on the basis of race or color. This means that if a landlord chooses, solely because of race or color, to decline to continue a tenant in possession, he may call upon state courts and law enforcement officers to evict him pursuant to law, and the tenant may not defend on the ground that state assistance in his summary eviction under these circumstances would be unlawful state action. The Court below stated that the State is now neutral in these matters, but we submit, most respectfully, that it is indeed a novel brand of neutrality which allows the landlord to call upon state officers and agencies to assist him in carrying out his admittedly discriminatory scheme, but nevertheless forces those same agencies and officers to turn a deaf ear when the tenant who seeks relief from oppressive racial discrimination calls for help. The victim may well ask "neutral on whose side"? In the case of *Abstract Investment Company v. Hutchinson,* 204 Cal. App. 2d 242, however, it was expressly held that it was error for a trial Court to refuse to entertain the defense of racial discrimination asserted in an unlawful detainer action by a tenant who claimed that the sole basis of his eviction

was his race or color. On this point the Court observed:

> "We hold that defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination, which if proven would bar the court from ordering his eviction because of both federal and state constitutions." 255.

It can hardly be seriously claimed that the Constitutional provision now under consideration permits the courts to entertain the defense of racial discrimination in housing litigation, because to do so would limit or abridge the absolute discretion of an owner to decline to sell or rent to anyone he chooses. On the one hand, Article I, Section 26 enjoins the Court and other state agencies from acting, while on the other hand the equal protection clause of the 14th Amendment to the United States Constitution commands exactly that which the State Constitution prohibits. In that situation, the Courts of the state, by virtue of the supremacy clause of the United States Constitution, must accede to federal mandates and declare the state law null and void. *Thomas v. Collins,* 323 U.S. 156; *Smith v. Ames,* 169 U.S. 466.

As was said in *Sterling v. Constantin,* 287 U.S. 389, "There is no avenue of escape from the paramount authority of the Federal Constitution." The uniform rule is that the supremacy clause of the U.S. Constitution prohibits a state Court from refusing to enforce a federally protected right. *Cooper v. Aaron,* 358 U.S. 1; *Public Utilities Commission v. U.S.,* 355

U.S. 534; *Testa v. Katt,* 330 U.S. 386. The right to be free from racial discrimination in the purchase and use of real property is embraced in a specific federal statute. 42 *U.S.C.* 1982.

2. The Amendment Invites and Encourages Racial Discrimination.

The amendment purports to confer upon the owner of real property the right to sell or rent it or decline to sell or rent it at his absolute discretion. Under law existing prior to the adoption of Article I, Section 26 an "absolute" owner of property had an "absolute" right to use, lease, sell or decline to lease or sell, subject only to general laws. California Civil Code Section 679. One such general law abridging that absolute right was the Rumford Fair Housing Act. Another was the Unruh Civil Rights Act. The amendment now under attack purports to remove the existing restriction requiring that the use be subject to general laws. Thus, it is clear that by Article I, Section 26 of its constitution the State of California purportedly conferred upon private persons an absolute right to discriminate against others because of race or color in the use of real property. In a legal sense, it is quite elementary that the thrust of the prohibition contained in the equal protection clause of the 14th Amendment was aimed at just such state approved schemes of racial discrimination. In *Nebbia v. New York,* 291 U.S. 502, it was said that "neither property rights nor contract rights are absolute; for government cannot exist if the citizen may at will use his property to the detriment of his fellows, or exercise his freedom to contract to work them harm."

If the State itself, in all its majestic sovereignty, cannot discriminate, is it not a crass exhibition of "absolute" simplemindedness for anyone to claim that it may nevertheless erect a constitutionally sheltered arena in which private persons may so discriminate in their "absolute" discretion. Both common sense and uniform case law suggest a negative answer. *Williams v. Howard Johnson, et al,* 268 Fed. 845; *Lombard v. Louisiana,* 10 L. ed. 2d 338. See also: *Nixon v. Condon,* 286 U.S. 73; *Smith v. Allwright,* 321 U.S. 649; *Terry v. Adams,* 345 U.S. 461.

In order to invalidate the amendment, however, we do not have to reach the case where a private person, unaided or encouraged by state law or custom, practices racial discrimination. That is a different case. Here the State says to its citizens in effect—"come on in, the waters of racial discrimination are warm and enjoyable." It is an invitation to dance to the tune of bigotry.

3. The Rule of Smith v. Allwright Applies.

In one of the so-called Texas White Primary Cases that State conferred upon political parties the right to select their own members. Put another way, this meant that the party was given the right to exclude Negroes from participation in the primaries. Theoretically at least, any group was still free to form a political party and exclude other groups from membership. The so-called White Primary was ruled unconstitutional in *Nixon v. Condon,* 286 U.S. 73. Thereafter, the Texas Democratic Party pursuant to law,

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declared itself to be a completely private group, and as such, asserted the right to exclude Negroes from membership. This too was ruled unconstitutional, primarily because the Democrats were able to exclude Negroes by virtue of state law, even though the candidates elected governed everyone. *Smith v. Allwright,* 321 U.S. 649. There, the State did not command Negro exclusion, but only permitted it. Here, the State does not compel racial discrimination in housing, but expressly permits it. In the case at bar, like in the Texas primary cases, private persons are given a right by virtue of state law, to practice racial discrimination. Here like there, the purported grant of power is null and void. In the Primary Cases, the statute was unconstitutional because it permitted private persons to effectively bar Negroes from the free exercise of a federally protected right — the right to vote. Here Article I, Section 26 must be struck down because it purports to confer upon private owners of real property an absolute right to limit, restrict or extinguish the right of Negroes to acquire and use real property, another federally protected right. 42 U.S.C. 1982; *U.S. v. Wheeler,* 254 U.S. 281; *Slaughter House Cases,* 16 Wall (U.S.) 36.

4. The State Cannot Allow Its Laws to Be Used to Aid in a Plan of Discrimination.

As was said in *Railway Mail Association v. Corsi,* 326 U.S. 88, the purpose of the 14th Amendment was to prevent the states from doing anything which would "perpetuate discrimination on the basis of race or color." 93-94. The law in question would do exactly

that by excluding Negroes from the housing market except at the sufferance of white people. It is the kind of unfriendly legislation said to be prohibited in *Stauder v. W. Va.*, 101 U.S. 303.

It is often said that such a proposal as is here considered is saved from unconstitutionality because under it Negroes may discriminate against white people, and the law merely gives members of each group an equal right to discriminate. This argument fails to comprehend the nature of constitutional rights under our system of government, or the realities of life in the United States. Rights belong to the individual, and they are never vindicated by merely showing that others of a group to which he belongs have not been harmed, or that he or his group may also discriminate. *Buchanan v. Worley*, 245 U.S. 60; *Goss v. Board of Education*, 10 L. ed. 636. No group has any constitutionally protected right to equal protection of the laws, but every individual does. Further, as a practical matter, white people need no more protection in 1965 from racial discrimination in this country than Germany needed protection from invasion by Czechoslovakia in 1939.

It must be kept in mind that the eviction here is pursuant to a scheme established by the State for the summary removal of tenants at the will of the landlord. The rule is well established that in California an unlawful detainer action is purely statutory in nature. *Hinman v. Wagnon*, 172 Cal. App. 2d 24. In the case at bar the landlord attempts to use the aid of the state in carrying out his plan of racial discrimination.

We think it clear that the State, in a constitutional sense, cannot permit its constitution or laws to be used as a device to effectuate plans of private individuals designed to discriminate against persons because of race or color.

5. A Law, Though Valid on Its Face, Is Void If Discriminatorily Administered.

When measured against the equal protection clause of the 14th Amendment, a statute may become void because it is administered in an unconstitutional manner. This rule is stated in 16 Am. Jur. 2d 929, Section 540 as follows:

> "A law, though fair on its face and impartial in appearance, which is of such a nature that it may be applied and administered with an evil eye and unequal hand so as to make unjust and illegal discrimination is, when so applied and administered, within the prohibition of the Federal Constitution."

To the same effect are the following cases:

Gomillion v. Lightfoot, 364 U.S. 339, 347, 348;
Norris v. Alabama, 294 U.S. 587;
Bailey v. Alabama, 219 U.S. 219;
Yick Wo v. Hopkins, 118 U.S. 356.

In *Yick Wo v. Hopkins*, supra, an ordinance of the City of San Francisco was invalidated as a denial of equal protection of the laws, even though on its face it purported to apply equally to all persons who desired to engage in the laundry business. The purpose and effect of the ordinance was a controlling factor. Here, even though Code of Civil Procedure Sections

1159 et seq. are valid on their face as providing a summary method for eviction of tenants, these statutes would become invalid if pursuant to authority granted by Article I, Section 26 of the State Constitution they were used to effect summary discrimination against Negroes. This is especially true when the harsh, penal nature of the statutes is considered. *Woods-Drury Inc. v. Sup. Court,* 18 Cal. App. 2d 340. When we look to the purpose of those statutes and to the purpose of the new constitutional provision, it is clear that the former was not intended to permit racial discrimination, and the latter was conceived and enacted solely for the purpose of granting license to owners of residential real property to decline to sell or lease to persons of certain minority ethnic groups. Unless this interpretation is accepted, Article I, Section 26 added absolutely nothing to existing law because, as pointed out heretofore, prior to its adoption an owner of residential real property already had an absolute right, pursuant to Civil Code Section 679, to decline to lease or sell, subject only to general laws. Thus, the only meaningful interpretation which may be given to the new amendment renders it null and void as an attempt by the State to confer upon private individuals a right to do that which even the State itself may not do. It must be concluded, therefore, that Article I, Section 26 is invalid because it would deny Plaintiff-Appellant that equal protection of the laws required by the 14th Amendment.

6. Article I, Section 26, California Constitution, Was Conceived as a Device of Racial Discrimination and Hence Is Nothing But a Stratagem to Facilitate Denial of Equal Protection.

The principal sponsor of Article I, Section 26, was the California Real Estate Association, and this Court should not ignore the historic interest of that organization in racial segregation and discrimination in housing. Excerpts from the California Real Estate Magazine, the official organ of that body, have been alluded to at some length in footnote No. 4. Since as early as 1927 CREA has devoted much of its time and resources to perfecting and encouraging racially restrictive covenants. In 1948 when the United States Supreme Court declared these restrictive covenants unconstitutional, it was the CREA which talked of launching a nationwide campaign to amend the federal constitution so as to permit racial discrimination in housing. Until about 1952 the code of ethics of CREA required every member to agree not to be instrumental in introducing into any neighborhood any race or nationality which would be detrimental to property values.[5]

Even though history is enlightening and interesting we need not look far into the past to see the present motivations of the sponsors of this amendment. The whole campaign for its enactment was based upon an appeal to race hatred. "Freedom to rent or sell to whom you choose," their ads screamed. "Abolish the

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[5]For a further discussion see Cain, Leonard, Absolute Discretion, Sacramento Committee For Fair Housing, Research Bulletin No. 7, 1964.

Rumford Forced Housing Act," they urged. To these people the Rumford Fair Housing Act was always the Rumford "Forced" Housing Act. In an editorial in the December 1963 issue of its official magazine the CREA openly admitted that the purpose of the amendment was to restore the right to property owners to practice racial discrimination.[6] They called upon tenants of apartment houses to protect their right not to have others forced upon them as neighbors.[7] Theirs was an open call to the people to give constitutional sanction to their desire to practice racial discrimination. Through the instrumentality of a cunningly drawn constitutional amendment they sought to mask the odor of their bigoted scheme.

Since an owner of real property already enjoyed the right to decline to sell it to any person except to the extent that the right was abridged by fair housing statutes, it is clear that the sole purpose of the initiative was to confer upon such owners the right to decline to sell or rent (a nice way of saying right to discriminate) on account of race, color, religion or

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[6]The editorial reads in part as follows:

"If voted in at the next general election, the amendment will restore the right of choice to the property owner in this state. That right has been partially taken away through a series of laws passed by the California legislature during the past few years. The latest, effective September 20, of this year, forbids refusal to sell, lease or rent private property for reasons of race, creed, color, religion or national origin." See footnote No. 13.

[7]Their appeal took the form of "An Open letter to Apartment house tenants" published in every major newspaper in California. In it a mythical landlady expressed her concern for the physical safety of tenants unless she could discriminate in their selection.

national origin alone.[8] In light of all the circumstances the initiative is void because it was conceived as a device for denial of equal protection and does just that. For further proof of this we need only look to the official ballot argument in favor of the proposal.[9] See *Fujii v. California,* supra.

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[8]The March 1963 issue of the California Real Estate Magazine contained a call for a crusade. CREA President L. H. Wilson said:

"It is time to launch a new crusade . . . for freedom. . . . Militant minorities have organized and vocalized for equal rights until 'equal rights' have almost become 'special privilege'."

Predicting some drastic measure to eliminate the "threat" posed by fair housing laws, Mr. Wilson is reported in the July 1963 issue as saying:

"Politicians in California are playing for Negro votes by supporting coercive laws . . ."

"We hope soon in California to find a clear answer . . . and the method, to terminate erosion of our American way of life and stop continually recurring legislative proposals that nibble away freedom. This is the way to equality."

The October 1963 issue reported that the Board of Directors made a decision to initiate an amendment to the State Constitution which would nullify the Rumford Act and similar legislation. They stated that such a plan would provide "a permanent settlement for the forced housing law."

[9]The official ballot argument, submitted by L. H. Wilson and others read in part as follows:

"Your 'Yes' vote on this constitutional amendment will guarantee the right of all home and apartment owners to choose buyers and renters of their property as they wish, without interference by State or local government.

Most owners of such property in California lost this right through the Rumford Act of 1963. It says they may not refuse to sell or rent their property to anyone for reasons of race, color, religion, national origin, or ancestry."

. . . . . .

"Under the Rumford Act, any person refused by a property owner may charge discrimination. The owner must defend himself, not because he refused, but for his reason for refusing. He must defend himself for alleged unlawful thoughts."

. . . . . .

"If such legislation is proper, what is to prevent the legislature from passing laws prohibiting property owners from

The Court below chose not to look beyond "the lifeless words" of the Amendment, and refused to consider the "history of the times when it was passed". The result was that the modern view of statutory interpretation announced in *Great Northern Ry. Co. v. U.S.*, 315 U.S. 262, 273, was not followed. It has been wisely and succinctly said that when it comes to statutory interpretation, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349. It is impossible to divorce a statute or constitutional provision from the circumstances existing at the time it was adopted, or from the wrong sought to be eliminated or the benefit intended to be conferred. *U.S. v. Champlain Ref. Co.*, 341 U.S. 290.

When dealing with a statute it is easy enough to resort to debates in the legislature and reports of the various committees. With an initiative measure like Article I, Section 26, however, there are no official debates or committee reports. Where, then, do we look for the history of such a proposal? We are not without guidelines in our search for an answer to that question.

The laws of this State require that every initiative amendment have proponents or sponsors. The process

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declining to rent or sell for reasons of sex, age, marital status, or lack of financial responsibility?"

. . . . . .

"Opponents of this amendment show a complete lack of confidence in the fairness of Californians in dealing with members of minority groups. They believe, therefore, the people must not be allowed to make their own decisions.

"Your 'Yes' vote will end such interference. It will be a vote for freedom."

is commenced by the proponents submitting a request to the Attorney General of the State for a title for the measure.[10] California Elections Code, Section 3501. The Attorney General is required by Article IV, Section 1, California Constitution to prepare and deliver a title and summary of the measure to the proponents

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[10]November 6, 1963

The Honorable Stanley Mosk
Attorney General of the
State of California
600 State Building
Los Angeles, California

Dear Sir:

Pursuant to Article IV, Section 1, of the Constitution of the State of California and Sections 3500 to 3507, inclusive, of the Elections Code of the State of California, we submit to you herewith the enclosed draft of Initiative Petition. We request that you prepare a title and summary of the chief purposes and points of the measure and take such other steps as required by law. A check for the prescribed fee is attached.

Please address all communications and inquiries with respect to this matter to Laurance H. Wilson, President, California Real Estate Association, Room 1100, 117 West Ninth Street, Los Angeles 15, California.

Very truly yours,

CALIFORNIA REAL ESTATE
ASSOCIATION
By Laurance H. Wilson
Laurance H. Wilson, President
Room 1100,
117 West Ninth Street
Los Angeles 15, California

Laurance H. Wilson
Laurance H. Wilson,
Individually
2348 Ventura Street
Fresno 21, California

CALIFORNIA APARTMENT
OWNERS ASSOCIATION
By Robert L. Snell
Robert L. Snell, State President
320 - 17th Street
Oakland, California

Robert L. Snell
Robert L. Snell, Individually
320 - 17th Street
Oakland, California

Robert A. Olin
Robert A. Olin, Individually
777 Foothill Boulevard
Claremont, California

William A. Walters, Sr.
William A. Walters, Sr.,
Individually
3923 West Sixth Street
Los Angeles 5, California

Reg F. Dupuy
Reg F. Dupuy, Individually
3999, Atlantic Avenue
Long Beach, California

and to the Secretary of State of California. T
purpose in having the Attorney General prepare t
summary is to assure impartiality in the official e
planation which is attached to the petition whi
prospective voters are asked to sign in order to quali
the measure for a place on the ballot. *Boyd v. Jorda*
1 Cal. 2d 468.

In the case of the initiative in question the title an
summary prepared and submitted by the Attorne
General made no reference whatever to the real chie
purpose of the Amendment.[11] It was as stiff, cold an

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[11]State of California
Office of the Attorney General
DEPARTMENT OF JUSTICE
Library and Courts Building, Sacramento 14
November 7, 1963

Laurance H. Wilson, President
Room 1100, 117 West Ninth Street
Los Angeles 15, California
Robert L. Snell, State President
320 - 17th Street
Oakland, California
Robert A. Olin, Individually
777 Foothill Boulevard
Claremont, California
Reg F. Dupuy, Individually
3999 Atlantic Avenue
Long Beach, California

Laurance H. Wilson
Individually
2348 Ventura Street
Fresno 21, California
Robert L. Snell, Individually
320 - 17th Street
Oakland, California
William A. Walters, Sr.,
Individually
3923 West Sixth Street
Los Angeles 5, California

Re: SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. INITIATIVE CONSTITUTIONAL AMENDMENT.

Dear Sirs:

Pursuant to your request delivered to this office on Wednesday, November 6, 1963, we have prepared and submit to you as the proponents the following title and summary of the chief purposes and points for your proposed initiative measure:

SALES AND RENTALS OF RESIDENTIAL REAL PROPERTY. INITIATIVE CONSTITUTIONAL AMENDMENT. Prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease, or rent residential real property to any person as he chooses. Prohibition not applicable to property owned

legalistic as the first edition of Blackstone's Commentaries. That officer, however, was not solely to be blamed for this lapse in meaningful, communicative language, because the proponents did not tell him what their real purpose was. It is little wonder then that his title and summary matched the original request as a masterpiece of unenlightening legalistic jargon.

As soon as the formalities of legal ritual were completed, however, the proponents supplied each solicitor of qualifying signatures with a "statement of purpose" of their own.[12] No doubt they knew that few would read or comprehend the official statement. They openly referred to a restoration of the right to sell or rent to persons of the owner's choosing, and alluded to the fact that recent laws had taken the right away. This was another way of saying that recent laws had taken away the right to discriminate, and that by signing the petition and voting for the measure that right could be restored. This view is spelled out in

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by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, motels, and similar public places.

Very truly yours,
STANLEY MOSK, Attorney General
By
E. G. BENARD, Assistant Attorney General

EGB:jn

[12]STATEMENT OF PURPOSES

The proposed Constitutional Amendment, appearing on the face of the petition would restore the right of property owners to sell, lease or rent their real property to persons of their own choosing.

This constitutionally guaranteed right has been partially taken away from them by recently enacted laws in the State.

Your signature on this petition will assist in our efforts to give the people of this State the opportunity to vote to restore these rights.

detail in an editorial in the December 1963 issue of the California Real Estate Magazine.[13]

The proponents of an initiative measure are as much a part of the legislative process as are legislators with reference to statutes. Just as we ascertain legislative meaning from committee reports and formal debates in both houses, we must look for the meaning of an initiative measure by examining what the proponents said they intended to achieve, their historical interest in and actions with reference to the subject matter, and the official ballot arguments placed before the people during the election campaign. There

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legalistic words and phr
which gives them some
realities of life.

When given this ove
Article I, Section 26
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the right of every Ne
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for a century, have der
him only such rights

[13]California Real Estate Magazine
Official Publication California Real Estate Association
Vol. XLIV No. 2 Dec., 1963
Editorial
THE FORCED HOUSING ISSUE

Representatives of CREA, the California Apartment House Owners Association and the Home Builders Association have filed an initiative for an amendment to the State Constitution.

The initiative reads: "Neither the state nor any subdivision thereof shall deny, limit or abridge, directly or indirectly, the right of any person who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion chooses.

"'Person' includes individuals, partnerships, corporations and other legal entities and their agents or representatives but does not include the State or any subdivision thereof with respect to the sale, lease or rental of property owned by it.

"'Real property' consists of any interest in real property of any kind or quality, present or future, irrespective of how obtained or financed, which is used, designed, constructed, zoned or otherwise devoted to or limited for residential purposes whether as a single family dwelling or as a dwelling for two or more persons or families living together or independently of each other.

"This Article shall not apply to the obtaining of property by eminent domain pursuant to Article I, Sections 14 and 14½ of this Constitution, nor to the renting or providing of any accommodations for lodging purposes by a hotel, motel or other similar

public place engaged in fu
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thereof to any person or
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provision to other persons
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Your help is needed
this initiative. The peop
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is often no other means by which cold, dry, innocuous, legalistic words and phrases may be seen in a context which gives them some reasonable relationship to the realities of life.

When given this over-view, it becomes clear that Article I, Section 26 represents that type of unfriendly legislation the 14th Amendment was enacted to prohibit. It would have a natural tendency to make the right of every Negro to acquire property turn upon the absolute discretion of people, many of whom, for a century, have demonstrated that they will afford him only such rights as the law commands. This is

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public place engaged in furnishing lodging to transient guests.

"If any part or provision of this Article, or the application thereof to any person or circumstance, is held invalid, the remainder of the Article, including the application of such part or provision to other persons or circumstances, shall not be affected thereby and shall continue in full force and effect. To this end the provisions of this Article are severable."

If voted in at the next general election, the amendment will restore the right of choice to the property owner in this state. That right has been partially taken away through a series of laws passed by the California Legislature during the past few years. The latest, effective September 20 of this year, forbids refusal to sell, lease or rent private property for reasons of race, creed, color, religion or national origin.

It is a dangerous precedent when one group is conceded rights over others because of an accident of birth or belief. What possible authority could anyone have to knock on a property owner's door and demand that he be selected as the one with whom to deal, simply because he desires that particular property? To say that he has such a right, and back him with law, amounts to confiscation by the state.

These laws may have been passed with the best of intentions. They are, nevertheless, eroding the most fundamental right Americans enjoy—the right to own property, to use it as they see fit, and to dispose of it without governmental interference.

Your help is needed to get signatures on petitions to qualify this initiative. The people must have the opportunity to cast their votes on this vitally important issue.

especially true where the right to housing is nationally concerned, [14] and California is no exception.[15]

7. Article I, Section 26, Cannot Apply to Most Aliens, and Hence Citizens as a Class Are Denied Equal Protection.

All persons within the jurisdiction of the United States are entitled to equal protection of the laws. Up to this point, this has been a shield insulating Negroes and other minorities against discrimination solely because of their status. Heretofore, however, it has never occurred to most people that the day would so soon come that the majority of the citizens would have to invoke that clause for their own protection. Yet, this is now the situation, because under treaty provisions with all of the most favored nations and many of the others, the United States has guaranteed aliens from the treaty nations an equal right to acquire residen-

[14] The matter was well put by Albert Cole, then administrator of the Federal Housing and Home Finance Agency, in 1954 when he said:

> The Negro is still not a free man in his own home. Too often he must live where he is compelled to live. He lives in tightly contained, less desirable parts of our cities. He is denied the opportunity . . . of freely bargaining for and acquiring a home suited to his needs. . . . It would be the grossest self deception for us to think that we have given the Negro his freedom so long as he is not free to acquire one of the free man's most cherished possessions—his own home.

[15] The Oakland Tribune of April 27, 1964, page DA 11 described a solid barrier of suburban prejudice, "nourished by convictions—fancied or real—that Negroes and declining property values go hand in hand."

> "In Southern Alameda County, less than one percent of the population is nonwhite, according to the Oakland unit of the Urban League of the Eastbay. The same picture, says its director, Cal Davis, is true in interior Contra Costa County, where the percentage is even lower. 'There is a definite suburban freeze-out against the Negroes,' he says, 'and statistical studies easily prove it.'"

tial property in this country. In effect, to say the least, this means that our national government has undertaken to guarantee to these aliens that they will not be discriminated against in the access to residential housing solely on the basis of alien status. In other words, we have contracted with these countries that we will not make a classification based solely upon alien status so far as the citizens of the treaty countries are concerned. Since the treaty is the supreme law of the land by mandate of Article VI, U.S. Constitution, it follows that the states are without power to make such classification. While it is true that a treaty does not ipso facto invalidate a state law unless the treaty is self-executing *(Sei Fujii v. California,* 38 Cal. 2d 718), the treaties of which we speak are usually in great detail and have been uniformly held to be self-executing. *Bacardi Corp. v. Domenech,* 311 U.S. 150; *Sei Fujii v. Calif.,* supra. A typical example of such treaties is the one executed with Japan.[16]

In Article I, Section 26, then, we have a classification based upon citizenship. Under it a citizen can be discriminated against by an owner solely because of

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[16]"Treaty of Friendship, Commerce and Navigation Between the United States of America and Japan, executed at Tokyo, Japan, April 2, 1953 . . .

ARTICLE IX

Nationals and companies of either Party shall be accorded within the territories of the other Party: (a) national treatment with respect to leasing land, buildings and other immovable property appropriate to the conduct of activities in which they are permitted to engage pursuant to Articles VII and VIII and for residential purposes, and with respect to occupying and using such property; and (b) other rights in immovable property permitted by applicable laws of the other Party."

citizenship, but most aliens cannot be discriminated against solely because of lack of citizenship. Though the proponents of this scheme of racial segregation are the ones most often likely to drape themselves in the flag, to them it is a cloak to disguise selfishness and bigotry, and not the symbol of an intellectual commitment to the ideals of democracy. It certainly never occurred to them that they would engulf within the ambit of their cunningly designed scheme all citizens, of every race or color, and exempt most aliens. Since reasonableness is the test of constitutional validity so far as equal protection is concerned, we doubt that even the proponents of Proposition 14 will now come forward and claim that it is proper to classify persons, for purposes of denial of rights, on the basis of citizenship and prefer the alien over the citizen.

8. To the Extent Article I, Section 26, Prohibits the State Courts and Administrative Agencies From Enforcing the Fair Housing Laws of the State, It Constitutes a Denial of Equal Protection of the Laws.

It must be remembered that no fair housing law was expressly repealed by Article I, Section 26. Ordinarily, a statute enacted by the legislature may be repealed by that body, and an initiative measure enacted by the people may be repealed only by a subsequent initiative. Article IV, Section 1, California Constitution. An enactment by the legislature may also be repealed by the referendum process, provided the action is legally commenced within ninety days after the date of the adjournment of the legislature. Article IV, Section 1, California Constitution. None of the fair housing laws was subjected to repeal by

referendum. If they were repealed at all, it was by implication gathered from inconsistent provisions of Article I, Section 26. A reading of that constitutional provision, however, reveals that it in no way makes reference to these laws. There is even no provision stating that all laws inconsistent with the amendment are deemed repealed. Under our law, there is a strong rule against repeal by implication. *Penziner v. West. Am. Fin. Co.,* 10 Cal. 2d 160, 176.

We contend that the fair housing laws conferred certain rights to be free from discrimination in the use and enjoyment of real property on account of race, color or creed, and that all Article I, Section 26 does is to prohibit the state courts and administrative agencies from vindicating those rights. The statutes are still there, but they cannot be enforced because of the prohibitions contained in the amendment. The rights created by the statutes were in keeping with the national policy against racial discrimination, and tended to implement the purposes of the 14th Amendment. *Burks v. Poppy Const. Co.,* 57 Cal. 2d 463, 471. These rights are substantial, because "Discrimination in housing leads to lack of adequate housing for minority groups, and inadequate housing conditions contribute to disease, crime and immorality." *Burks v. Poppy Const. Co.,* supra at page 471. Thus, when Plaintiff-Appellant asks for relief from housing discrimination imposed solely because of race or color he is asking that he and the class he represents be protected from conditions which lead to disease, crime and immorality. Everyone would concede that it is wrong for him to be subjected to these evils, solely

because of his race, but if Article I, Section 26 is valid, hereafter he has no remedy. Yet, the code section providing that for every wrong there must be a remedy is still applicable to every class of wrongs except this one. Thus, the people have created a class of persons who can now lawfully be subjected to a wrong so monstrous that they are threatened with disease, crime and immorality, while other classes, when wrongs are shown to exist, must be afforded a remedy. This is a denial of equal protection in a crude, raw form.

It seems reasonable to assume that the pursuit of life, liberty and happiness, guaranteed by our foundation documents of democracy, cannot be realistically engaged in by those in society whose right to be free from conditions which lead to crime, disease and immorality will not be protected by the state, but instead will be left to the absolute discretion of those who have exhibited an historical inability to be good neighbors to all, without regard to race, creed or color. Equal protection presupposes an equal right to pursue happiness as well as to purchase property.

9. The Privileges and Immunities Clauses of the United States Constitution Prohibits the Application of Article I, Section 26, to Persons Who Are Citizens of the United States But Not Citizens of California, and Hence It Denies Equal Protection of the Laws to All Citizens of California.

Article IV, Section 2, of the Constitution of the United States reads as follows:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The term "privileges and immunities" has been defined many times. The uniformly accepted definition was expressed by this Court in 1872 as follows:

> "The words 'privileges and immunities' had at that time acquired a distinctive meaning and a well known signification. They comprehended the enjoyment of life and liberty, and the right to acquire and possess property, and to demand and receive the protection of the Government in aid of these." *Van Valkenburg v. Brown,* 43 Cal. 43, 48.

One of the things protected by Article IV, Section 1 of the Constitution of the United States is the right of the citizens of the several States to "acquire and hold real property in any of the States." *Campbell v. Morris,* 3 Harr. & McH., 554 (Maryland Reports); *Van Valkenburg v. Brown,* supra. The purpose of the provision was to facilitate the welding of the several states into one motion. *Blake v. McClung,* 172 U.S. 239. The idea was that the several States of the Union should not be merely a cluster of separate motions with no common citizenship and fundamental rights.

It would seem to follow, then, that had Plaintiff-Appellant been a citizen of Nevada temporarily residing in California, he could not be evicted from or refused rental or sale of residential real property solely because he is a citizen of Nevada, because to do so would abridge his privileges and immunities solely on the basis of his lack of California citizenship. Since that provision does not prohibit this State from permitting discrimination against its own citizens

because of the fact of their citizenship, and since Article I, Section 26 of our Constitution clearly would permit an owner in his absolute discretion, to refuse to sell or rent to a citizen solely because of state citizenship, the conclusion is inescapable that we have now unreasonably classified citizens so they may receive less protection from the State than noncitizens. Thus, all citizens, of every race or color, are denied the equal protection of the laws mandated by the 14th Amendment.

C. Article I, Section 26, Violates the Privileges and Immunities Clause of the 14th Amendment.

One of the purposes of the 14th Amendment clause "is to place the privileges and immunities of citizens of the United States beyond the operation of state legislation, even with respect to a state's own citizens." 11 Cal. Jur. 2d 631. This being so, in any given case all we need do is identify the privileges and immunities of national citizenship, and it follows as a matter of law that no state may abridge them. It is well settled that the right to acquire property is a privilege conferred by the fact of United States Citizenship. *Slaughter House Cases,* 16 Wall. (U.S.) 36; *Van Valkenburg v. Brown,* 43 Cal. 43. This means that the State law, Article I, Section 26, may not be used to deny Plaintiff-Appellant his federally granted right to acquire real property. The right to acquire and possess real property is one of the privileges removed from operation of State law.

D. The Right to Acquire Property Is in and of Itself a Property Right and Substantive Due Process of Law Prohibits Its Abolition.

Under our system of constitutional government, every citizen is endowed with certain fundamental, inalienable rights, among which is the right to acquire property. 16 Am. Jur. 2d 692. It has been said that the right of acquiring, possessing and protecting property is as old as Magna Carta, and lies at the foundation of constitutional government. It has been held to be necessary to the existence of civil liberty and free institutions. *Miller v. McKenna,* 23 Cal. 2d 774.

The right to acquire property is itself a specie of property, and a law which purports to confer upon owners an absolute right to decline to sell or rent certainly deprives non-owners of their right to acquire. We contend that neither the right to acquire nor the right to decline to sell or rent is absolute under each and every possible circumstance, and to arbitrarily give either right that characteristic nullifies the other, and constitutes a denial of due process of law.

Even though the right to acquire property is recognized in Article I, Section 1 of the California Constitution and is said to be inalienable, the right does not spring from that document alone. The Magna Carta, Declaration of Independence, Articles of Confederation, and the U.S. Constitution, all recognize the right. The fact that it is inalienable makes it immune to erosion by state laws or customs, and even a 2 to 1 majority vote of the people of California cannot

abolish or dilute it. *Colorado Anti-Discrimination Commission v. Case,* 380 Pac. 2d 34.

The 5th Amendment of the Bill of Rights guarantees every citizen against federal action which results in a deprivation of property without due process of law. The 14th Amendment imposes a like restriction upon the states. The primary purpose of and necessity for a Bill of Rights is the protection of minorities from unfair and unreasonable action by majorities. 16 Am. Jur. 637, Section 329. The Bill of Rights immunizes the rights therein secured against abrogation by what Chief Justice Marshall called "Those sudden and strong passions to which men are exposed." *Fletcher v. Peck,* 6 Cranch (U.S.) 87.

As indicated heretofore, Article I, Section 1 of the California State Constitution refers to the right to acquire property as inalienable. It does not say inalienable except by a vote of the people, but simply inalienable. This means that when the people adopted the Constitution, in order to secure a favorable vote, they agreed that this right would never be taken away at the whim or passion of a majority.

The 14th Amendment places an absolute prohibition upon the states so far as deprivation of property without due process of law is concerned. This, in fact, is the language of that Amendment. The more difficult question is always indicated by our search for what constitutes due process and what does not. Substantive due process of law, to say the least, requires that no person be deprived of property by arbitrary state action of any kind. The phrase as used in the

14th Amendment is in legal effect the same as when used in the 5th. It is thus a part of the bundle of rights guaranteed by the Bill of Rights found in the United States Constitution. These rights are fundamental, and are protected even against those sudden and strong passions to which majorities are exposed. Due process interposes its mandate against arbitrary action upon the law making process as well as upon the other facets of the exercise of governmental power. *Ex Parte Dickey,* 144 Cal.App. 234.

The right of acquiring property is in and of itself a property right. *Billings v. Hall,* 7 Cal. 1, 6; *Slaughter House Cases,* 16 Wall. (U.S.) 36; *Miller v. McKenna,* 23 Cal. 2d 774; 16 Am. Jur. 2d 692. It is vested in every citizen because of his American citizenship. This principle was recently stated by the Supreme Court of Colorado as follows:

> "We hold that as an unenumerated inalienable right a man has the right to acquire one of the necessities of life, a home for himself, unfettered by discrimination against him on account of his race, creed or color."
>
> *Colorado Anti-Discrimination Commission v. Case,* 380 Pac. 2d 34, 41.

The right of every person in California who owns no property to ever acquire any has been purportedly abolished except, as and to the extent that present owners, in their absolute discretion, decide to sell or rent to them. If an owner has an absolute right to decline to sell to any individual person, it follows that he has an absolute right to sell to any class of per-

sons. The class may be Negroes today, but tomorrow it could be judges, lawyers, doctors, teachers, blonds or brunettes. In each instance, the state could not exercise its powers to prevent private persons from using their property to the detriment of others, and the victims would certainly suffer loss of their rights to acquire property.

IV. THE RIGHT TO ACQUIRE PROPERTY IS A NECESSARY CONCEPT IN A REPUBLICAN FORM OF GOVERNMENT.

It has been held that the duty to protect the rights of property is a characteristic of the republican form of government required by Article IV, Section 4 of the U.S. Constitution. *Chicago, B&Q R. Co. v. Chicago,* 166 U.S. 226. This being true, the State of California may not issue an official declaration of absolute neutrality in the struggle of a disadvantaged people to acquire equality of opportunity in housing. The 5th and 14th Amendments to the U.S. Constitution recognize the right of a citizen not to be deprived of his property without due process of law. They prohibit such a deprivation by governmental action in every form. Assuming, as we must, that the right to acquire property is itself a property right, the only rational conclusion to be reached is that the new amendment (Article I, Section 26) does in fact deprive persons of that right without due process of law. By a vote of the people, the right to invoke the aid of the State in vindicating the right to acquire property was abolished. Not only is the state barred by due process

and equal protection requirements from doing this, but it is also under a positive duty imposed upon it by fundamental concepts dating back to Magna Carta to protect the right. When the state abdicates its duty to protect the rights of a citizen to acquire property it at the same moment abandons any pretense of having the constitutionally required republican form of government. In a constitutional sense, the people of California may not establish a form of government which does not protect property rights, including the right to acquire property. This being the case, it must now abandon the initiative measure as merely an abortive attempt in that direction.

The State of California requires allegiance to its laws from all its citizens. Under a republican form of government, every citizen has a right to demand of that government, which is supposed to represent all the people, that those laws be fair and just, and that they protect the rights of all without regard to race or color. While a State has a right to demand allegiance, it has a concomitant duty to offer protection in return for it. "Allegiance and protection are reciprocal obligations." *Minor v. Happerstett,* 21 Wall. (U.S.) 162, 165-166. This is a part of the bargain extracted from King John at Runnymeade on June 15, 1215.

By the adoption of Article I, Section 26, the people of the State of California in effect took away the mutuality in the rights secured by the Magna Carta as far as the Negro is concerned. The State still demands his allegiance to its laws, but has disavowed

any duty to protect him when he seeks an equal right with others to seek such an elemental necessity as a home for himself and his family. California will probably still get its commanded allegiance, but all should realize that it is much more difficult to give it freely, from the heart, as a natural response, from a rat-infested slum, shack, or from under a bridge, or in the streets, than it is when one has been able to choose and secure his place of abode without consideration of the absolute discretion of those whom in the past he has found to be so often inflicted with blind, unyielding hate, made more formidable by an ignorance which is beyond reach because it is so firmly encased in a closed mind.

It was never contemplated by the founding fathers that the Divine Right of Kings should be succeeded by an absolute discretion of majorities. Whenever this happens, their dream is frustrated and our government is no longer republican in form or democratic in substance.

V. THE INITIATIVE AMENDMENT IS IN CONFLICT WITH 42 U.S.C. 1982.

It is ironic, but true, that almost a hundred years ago, in an effort to assure equal access of all citizens, without regard to race or color, to the housing market Congress enacted a statute as follows:

> "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, pur-

chase, lease, sell, hold and convey real and personal property." 42 U.S.C. 1982.

The above statute was first enacted in 1866, but there was evidently some doubt concerning the authority of Congress to enact it as an anti-slavery measure, and after the adoption of the 14th Amendment it was re-enacted as a measure spelling out one of the rights inherent in federal citizenship. It has been held that it prohibits state action in aid of discrimination in the ownership or rental of real property. *Corrigan v. Buckly,* 299 F. 899; *Hurd v. Hodge,* 334 U.S. 1187.

It is utterly impossible to reconcile the Federal statute with Article I, Section 26 of the California Constitution. The Federal law says that all citizens in every state and territory must enjoy the same right to own and rent real property as is enjoyed by white people, while the new amendment says that every owner shall have an absolute right to decline to sell or rent real property, and this necessarily means the right to decline for reasons of race alone. What it says is that the state courts and commissions may not vindicate a right expressly given by Federal law.

Where, as is the case with 42 U.S.C. 1982, there is an affirmative declaration of national public policy by specific legislation, it must be presumed that the right conferred was intended to be enforceable in legal proceedings, and no state law may defeat its purpose by prohibiting state courts from recognizing the right so conferred. *Texas & N.O.R.R. Co. v. Brotherhood of*

Ry. & S.S. Clerks, 281 U.S. 548; *Elsis v. Evans,* 157 Cal. App. 2d 399, 409.

The state and all its subdivisions and agencies, and this certainly includes its courts and commissions, must protect the right to own and possess real property conferred upon all citizens by the above statute. Under it, the measure of equality is the right a white citizen enjoys. All others must be accorded that same right. Thus, if when a Negro asserts that he is not receiving the same right, he is saying in another way that he is being discriminated against because of race or color. 42 U.S.C. 1982 commands the state to hear and determine his plea. The initiative amendment (Article I, Section 26, California Constitution) here considered enjoins the state court from listening. When such conflict arises the state law is null and void.

VI. THE INITIATIVE AMENDMENT CONTAINS NO COVENANT AGAINST RACIAL DISCRIMINATION, AND IS HENCE VOID.

Every state statute and constitutional provision must be presumed to have been enacted with view toward the equalitarian and due process commands of the 14th Amendment to the U.S. Constitution, and hence each, even though silent on the subject, may be said to contain an implied covenant against racial discrimination. Likewise, as held in *Ming v. Horgan,* Sacramento Superior Court No. 97,130, every federal statute is said is contain an implied covenant against racial discrimination because the due process clause of

the 5th Amendment would permit no other type of statute to stand. Thus, when the National Housing Act of 1934, as amended, provided that it was the purpose of Congress to help provide a decent home for every American family, it was presumed that in a constitutional sense Congress could not have intended that Negroes would be excluded from the benefits of the program, even though the law itself made no mention of race. In that case Judge James Oakley, observed that the answer to the claim that had Congress intended non-discrimination in Federal programs it would have said so is that in a constitutional sense, Congress could not have ordained otherwise. Similarly, federal labor laws have been held to require non-discrimination by unions receiving the benefits conferred by Congress, even though no mention is made of race or color in the statutes. *Railway Trainmen v. Howard,* 343 U.S. 768.

The constitutional provision now found in Article I, Section 26, however, does not contain such a covenant against racial discrimination, but in fact, by its express terms, gives an arbitrary right to every property owner to discriminate if he chooses. If the provision had read that every owner of real property has an absolute right to decline to sell to Negroes its unconstitutionality would be clear and manifest. We submit, however, that the effect of it is exactly that, and when fundamental rights are at stake the niceties of artful language should be brushed aside. Instead of the expressed or implied covenant against racial discrimination, here we have a covenant in the law itself

purporting to confer the right to discriminate on the basis of race or for any other reason. By its constitution the State of California says that it will not object if individuals deny Negroes the right to acquire or use real property, and in fact gives license for such discrimination. The effect and purpose of Art. I, Sec. 26 are not only to permit racial discrimination, but also to encourage it.

In its Memorandum Opinion the Court below stated that Defendant-Respondent would be denied due process of law unless he could call upon the State to assist him in carrying out the eviction. We know of no constitutional requirement whatsoever that the State must provide a landlord with an unlawful detainer statute, but we do know that if it does such law must be administered in such a way that under it persons are not discriminated against because of race or color. *Yick Wo v. Hopkins,* supra.

The answer to the contention of the Court is that here we are not dealing with the "home or club" of a property owner referred to by the various U.S. Supreme Court justices in *Bell v. Maryland,* 84 S. Ct. 1814. Here, the landlord is not taking roomers into his home, or even renting out the other half of a duplex owned by him. He has declared to the world that his house in question is for rent at a certain price. Could it be claimed that $86.00 per month rent from a Negro tenant would deprive him of his property, while a like sum from a white one would not? The renting of a house by a landlord certainly does not involve the personal associational interests referred to in *Bell v.*

Maryland, supra. The fact that we are dealing with a single residence is irrelevant since there is no public accommodation exemption in Article I, Section 26 except as it relates to transient housing. See *Colorado Anti-Discrimination Com. v. Case,* supra.

There can be no doubt on the question as to whether one purpose of the 13th and 14th Amendments and the federal statutes enacted pursuant thereto, was to enable Negroes to own and possess real property on a basis of equality with white persons, just as there can be no doubt that it was the purpose of the 15th Amendment to secure to Negroes the right to vote. In 1910 the State of Oklahoma attempted to abridge the right of Negroes to vote by subjecting them to a literacy test from which persons whose ancestors could vote in 1866 were exempted. The United States Supreme Court struck down the offensive provision of the constitution of the state on the ground that a necessary result of its operation would be the same disfranchisement of Negroes which the 15th Amendment sought to destroy. *Gruen v. U.S.,* 238 U.S. 347. An analogous situation exists here. The amendment to the California Constitution would inevitably recreate the conditions of restricted or limited property ownership by Negroes the 13th and 14th Amendments were designed to destroy. The purposes of these amendments may not be so easily circumvented.

We conclude that every California law which we have examined except this one is capable of an interpretation which can save it. It is meaningless and pure surplusage unless it is construed to mean that an

owner is given a right by it to practice racial discrimination, and such a construction will make it void. No covenant against discrimination is implied in it, nor may one be inferred from it. The reason for this is that its sole purpose is to permit racial discrimination in the sale and rental of real property. Even though a statute may be valid on its face, it will be invalidated if its purpose or effect is discriminatory on the basis of race or color. *Sei Fujii v. Calif.*, 38 Cal. 2d 718.

VII. ARTICLE I, SECTION 26, CALIFORNIA CONSTITUTION UNLAWFULLY COVERS MORE THAN ONE SUBJECT.

Article IV, Section 1c of the California Constitution provides that an initiative measure shall not contain more than one subject. The one in question certainly seems to include a multitude of subjects. For example:

(1) It covers the subject of Urban Redevelopment, in that it prohibits any redevelopment agency from complying with the federal requirements for supervision and enforcement of non-discrimination provisions in redevelopment contracts.

(2) It covers the subject of contracts as they relate to real property in the following particulars:

(a) A real estate broker may no longer sue to collect his commission on a residential real property sale if the owner, in his absolute

discretion, decides to decline to sell to a purchaser secured by the broker.

(b) Specific performance of real property contracts will be impossible because every owner now has an absolute discretion to decline to sell, and we submit that it can be exercised at any time.

(3) It covers the subject of probate law in that under it executors and administrators are owners of property of the estate, and they may hereafter decline to sell to the highest and best bidder. Such a fiduciary could decline to sell to all Negro bidders.

(4) It covers the law of auction as embraced in Section 2362, Civil Code, and the auctioneer need not any longer sell to the highest bidder. The owner of residential real property could instruct the auctioneer to sell only to the highest and best white bid.

(5) The subject of restraints on alienation is also covered. Section 711, Civil Code, makes restraints on alienation void. Under the new amendment to the California Constitution all of the property owners of California, acting either individually or in concert, could execute an agreement to decline to sell their property to Negroes. Under the doctrine of *Title Ins. v. Garrott,* 42 Cal. App. 152, this would be a restraint on alienation, but under the amendment it would be legal.

(6) It covers the subject of corporation law. Corporate officers may now decline to sell corpo-

rate residential real property to everyone except themselves or their friends or relatives. If the state attempts to interfere with this self-serving policy the corporation could always contend that the state is interfering with or abridging its right to decline to sell its property to any person including the right to decline to sell to every person of a particular race.

(7) The new amendment would have the effect of legalizing racially restrictive covenants, since if an owner may now decline to sell he may by deed restrain his successors in interest from selling to members of ethnic groups desired to be excluded from ownership and use of the property in question.

It may be suggested that it was not the purpose of the amendment to cover any of the foregoing subjects. If this is true, is not this an admission that it added nothing to existing law but the right to practice racial discrimination?

VIII. THE PROPOSAL REPRESENTS AN UNLAWFUL ATTEMPT TO REVISE RATHER THAN AMEND THE STATE CONSTITUTION.

1. Article I, Section 26, Revises the Constitution by Abolishing the Previous Constitutionally Guaranteed Right to Acquire Property.

The only methods provided for amending the California Constitution are set out in Article XVIII, Section 2 thereof. The procedure followed in the adoption of Article I, Section 26, is not one of them. *Livermore*

v. Waite, 102 Cal. 113, 117-119; *McFadden v. Jordan,* 32 Cal. 2d 330, 332. In the *Livermore* case, it is said:

> "An 'amendment' is such a change or addition within the lines of the original instrument as will effect an improvement or better carry out the purpose for which it was framed."

Article I, Section 26 was adopted as an initiative measure pursuant to Article IV, Section 1 of the Constitution. That provision authorizes enactment of laws and amendments to the constitution, but not alteration or revision thereof.

The original document here altered is the California Constitution, Article I, Section 1, which previously guaranteed all persons the right to *acquire* and possess real property. The Constitution prior to adoption of Article I, Section 26 guaranteed every person equal protection of the laws and recognized the right to acquire property as one of that bundle of rights guaranteed from abrogation by anyone. The right to acquire property now turns upon the absolute discretion of owners, and a right so circumscribed is no right at all in a legal sense, because by definition, a right is something one can call upon the state to vindicate.

Thus, the proposal did not "amend" the existing constitution, but rather "revised" it by changing its whole philosophy from the equalitarian view of the rights of man to the fascist view that might makes right, and he who has many keep, in his absolute discretion, without regard to the effect of such policy upon others or the community as a whole.

Our state constitution commences as follows:

> "All men are by nature free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing and obtaining safety and happiness."

This Court has held that the cited article means that:

> "The right of 'acquiring, possessing and protecting property is anchored in the first section of the first article of our Constitution. It lies at the foundation of our constitutional government, and is 'necessary to the existence of civil liberties and free institutions'."
>
> (*Billings v. Hall,* 7 Cal. 1, 6; *Miller v. McKenna,* 23 Cal. 2d 774, 763).

Thus, it is plain that Article I, Section 1 already completely safeguarded the right of free alienation and enjoyment of property. Article I, Section 26 seeks more. It purportedly confers constitutional sanction upon the claimed right to discriminate on racial or religious grounds in the rental or sale of residential real property.

In effect, it revises Article I, Section 1, to make it read:

> "All men are by nature free and independent and have certain inalienable rights among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting, provided however that the right of any person willing or desirous to sell, to decline to sell, rent or lease his real property to another for racial or religious

reason shall remain forever inviolate; and pursuing safety and happiness."

Article I, Section 26 shrinks from taking that simple route to its real objective for the obvious reason that its proponents knew that had it done so it would have invoked constitutional sanctions. Therefore, the design is cloaked in a welter of words in a transparent effort to clothe bigotry in respectable constitutional garb. We do not think that racial or religious discrimination can be made constitutionally acceptable by the simple expedient of resort to an exercise in semantics.

At this posture of the matter, it seems plain that Article I, Section 26 not only embraces nullification of most of the Rumford Act and related statutes, but it also constitutes a vital revision of Article I, Section 1 of the State Constitution. Nor did it stop there.

2. It Abolishes the Requirement That Laws Be Uniform in Application.

Perhaps without intention the initiative amendment also effects widespread revision of Article I, Section 11 of the California Constitution which now reads:

> "All laws of a general nature shall have a uniform operation." California Constitution, Article I, Section 11.

Section 11 is in essence an equal protection provision, and the inquiry in almost every case is whether a classification, by statute or by Constitutional Amendment, imposes a disability or confers a special benefit by reason of the classificatory scheme. Of course, there is no state constitutional prohibition against a con-

stitutional amendment which makes a presently prohibited classification, but in that case the initiative would have to "relate to" that "one subject."

Any examination of the classification attempted by Article I, Section 26 most be severalfold in outlook. First, inquiry must be made to determine whether or not it is of such a character as to evidence a determination to revise Section 11 itself, and thus impinge on the constitutional rule announced in Article IV, Section 1c, against multiplicity of subject matter in an initiative measure. Finally, we inquire in order to determine whether the new classification, even if found valid and unobjectionable per se, works such changes in statutory law that the initiative, by virtue of those changes, *embraces* and *relates* to more than one subject matter.

The test of classificatory validity, it has been said in a thousand different ways, is reasonableness and a substantial relation to a legitimate end to be accomplished. *Katzev v. Los Angeles,* 52 Cal. 2d 360.

All owners of residential property, except governmental agencies, are purportedly included in that class of persons who may exercise an "absolute discretion" to "decline to sell, rent, or lease" real property. The classification is aborted at the outset by the fact that Presidential Executive Order 11603, issued November 20, 1962, by the late President John F. Kennedy, forbids racial or religious discrimination in the sale or rental of federally assisted housing. As relevant here, this includes all housing constructed under the mortgage insurance system of the Federal Housing

Administration or the guarantee system of the Veterans Administration, and all housing constructed under urban renewal or urban redevelopment plans under commitments obtained in either case since November 20, 1962. The Order's injunction against exercise of such discrimination is, of course, a direct interdiction against an exercise of that "absolute discretion" sought to be vested by the initiative. Thus, there are two groups of Californians, identical in all respects, except that one group has availed itself of the benefits of the National Housing Act and the other has not. The reward for non-involvement with Federal programs is the right to discriminate. We realize that in *Burks v. Poppy Const. Co.*, supra, it was held that it was not unreasonable to classify those who receive public assistance in acquiring housing in a manner so as to prohibit discrimination, but it does not follow from this that it is likewise reasonable to specifically classify and give a right of discrimination to those not receiving such assistance. Non-discrimination is a part of the national policy. *James v. Marinship Corp.*, 25 Cal. 2d 721. Thus, a classification designed to permit or encourage racial discrimination is against national policy and is as a matter of law unreasonable.

The initiative singles out beneficiaries of the Act from November 20, 1962 forward as a class upon whom they will visit what they obviously regard as a hardship. (We do not suppose that even they claim that initiative would supersede the Excutive Order). The harsh realities of the segregated housing market bear out of the prognosis that there will be an inundation of Negroes in FHA and VA tracts open to Negro

occupancy under terms of the Presidential Order if other areas are closed to Negroes through enactment of the initiative. In that sense, the implicit classification sought to be imposed on FHA, VA and urban renewal and redevelopment owners, builders and developers by Article I, Section 26 is grossly unfair and unreasonable.

The purpose of the National Housing Act, as expressed in its preamble, is to provide "a decent home and suitable living environment for every American family." California has a paramount interest in encouraging its citizens to avail themselves of the benefits of the Act where their doing so will further those ends. That law does not express the dream of a decent home for every white American family, but by necessary implication, for every American family without regard to race, color or creed.

In addition, as pointed out in our discussion of equal protection of the laws, Article I, Section 26 could not possibly have application to nationals of foreign nations protected by treaty in their right to acquire residential property in California. This is another example which shows that this provision may not have uniform application, and it is hardly reasonable to make a classification of citizens of the United States which removes a right to acquire property, and at the same time, by mandate of the supreme law of the land, reserves it to certain aliens.

We concede at the outset that the State imposed requirement for uniform laws provided the pitfalls of denial of equal protection are avoided, may be re-

moved by the people if they so decide. What we are saying is that a nullification of the requirement constitutes a fundamental revision of the State Constitution within the meaning of *Livermore v. Waite* and *McFadden v. Jordan,* supra. If we are correct in this view, it becomes clear that the adoption of Article I, Section 26 did not follow the revision process set out in Article XVII, Section 2, California Constitution, and is hence void.

3. Article I, Section 26, Revises the Constitution by Abolishing the Principle Separation of Powers.

The powers of the State are exercised either through the executive, legislative or judicial branch of government. The doctrine of separation of powers prohibits one branch from encroaching upon the powers of the other. The question of interpreting the laws and adjudicating the rights of parties is reserved exclusively to the judiciary. *Frasher v. Rader,* 124 Cal. 132. The legislative branch, whether exercised in the form of statutes by the legislature or initiatives by the people, under our constitutional system existing prior to the adoption of Article I, Section 26, was without power to say to the judiciary that it cannot perform its function of deciding questions, legal in nature, arising from private disputes. Article VI, Section 1, Calif. Const. The rule is stated in 11 Cal. Jur. 2d 473 as follows:

> "The Constitution shows a marked solicitude to secure the independence of the judiciary. Where, therefore, certain powers are vested in the judiciary by the constitution, the courts cannot be deprived of them by legislative act."

Now, however, by virtue of Article I, Section
all of this is no more, because the people, exerci
their reserved legislative powers, have prohibited
state Courts and all state administrative agencies fr
exercising their powers in any way, directly or in
rectly, which would limit or abridge the right of
owner of real property to decline to rent or sell it
any person in his absolute discretion. Since the Ru
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what the people have said to the Courts and admin
strative agencies is that though the laws in questio
are not repealed, and the rights conferred by the
therefore still exist, the administrative and judicia
branches of government may no longer enforce o
administer them. Thus, the judiciary, by legislative
change made by the people themselves, is no longer
equal and independent, but now may be told which
laws may be enforced and which must be ignored,
and whose rights may be protected, and whose may be
subjected to the absolute discretion of others.

This seems to be a clear case of an attempted constitutional revision by the initiative process. This our constitution itself does not allow. Art. XVIII, Sec. 2, Calif. Const.

4. Article I, Section 26, Revises the State Constitution by Modifying Article I, Section 21 Thereof, Which Prohibited Class Legislation.

Article I, Section 21, California Constitution, reads as follows:

> "No special privileges or immunities shall ever be granted which may not be altered, revoked, or

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not be altered, revoked, or

repealed by the legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

We concede, as we must, that the word "legislature" as here used includes the people acting through their reserved powers, and therefore, no contention is made that Article I, Section 26 modifies the first clause. It does, however, modify the second clause, because it specifically confers upon owners of residential real property to be free from state control of any kind in renting or declining to rent their such real property, but leaves owners of commercial or industrial real property subject to such State regulation. Two classes of property owners are created, and members of one may, in their absolute discretion, decline to sell to any person, without fear of State interference, while at any time the legislature may impose sanctions against such conduct by the other class. Even forgetting the equal protection questions this raises, to say the least, the State Constitution is thus revised so as to permit the grant of immunity to one class of real property owner to the exclusion of other classes.

We know of no legal or rational basis for the sweeping grant of absolute discretion exclusively to owners of residential real property. It may be suggested that the basis of the distinction sought to be made between the two newly created classes of property owners is that one involves personal associational relationships because a man's home is his castle. The fallacy of this position is readily seen. In this mod-

ern age, a substantial portion of all residential housing is constructed in giant subdivisions by owners who often never visit them, and would be horrified at the prospect of living in one. Such tracts are residential true enough, but they are also as commercial as any shopping center. This Court has held that such a tract is a business establishment within the meaning of that term as used in the Unruh Act (Sec. 51 C.C.). *Burks v. Poppy Const. Co.*, supra. See also *Mansfield v. Hyde*, 112 Cal. App. 2d 133.

We come then to the question of whether inherent in Article I, Section 26, there is a classification of real property owners which gives to all residential owners a privilege and immunity not granted upon the same terms to those persons who own commercial or industrial property. Here again serious equal protection questions arise under the 14th Amendment (*Morey v. Doud*, 354 U.S. 457) but laying them aside, we find that the amendment under attack literally abolishes an equal protection clause of the State Constitution, and thus revises that document in a most fundamental way. No higher law requires this State to maintain in its constitution an equal protection clause, but our own law prohibits its nullification except by the process specified for revising that document. *Livermore v. Waite*, supra.

CONCLUSION

We believe that we have demonstrated conclusively that Article I, Section 26 of the California Constitution enacted at the November 3, 1964 general election

is invalid when measured by the equal protection and due process clauses of the 14th Amendment. In addition, we believe that a state which prohibits its Courts and agencies from enforcing and protecting the right to acquire residential real property no longer has a republican form of government. Either of these contentions, standing alone, would invalidate the amendment, but there are other reasons for its invalidity. It covers more than one subject, and attempts to revise rather than amend the State Constitution.

This Court, by grace of a Divine Providence, may well exist for a thousand years, or for that matter, until eternity, but it will probably never have before it a more important issue than this one so long as we live in a multi-racial society beset by the frailties, weaknesses, and temptations inherent in mere human beings, especially when vested with absolute discretion.

In a real sense, this Court is dealing with the plea of Negroes and members of other ethnic minorities for commutation of the social death sentence imposed upon them and their children by residential housing patterns which consign them, in the absolute discretion of their humanly weak fellowmen, to slum dwellings, where the schools match their homes, and where crime, disease and immorality grow as the grass on a fertile plain.

This Court, and the whole white wonderful world, must take cognizance of an essential fact of the second half of the 20th Century which all but the politically and socially blind must now know. The fact is that the American Negro has rejected forever the

concept of state encouraged or enforced racial segregation. Not to recognize this fact of life is but to invite civil disobedience and social disorder, and perhaps even an eventual frustration of the American dream of being truly the land of the free and the home of men who are capable of rising above the petty devices which divide rather than unify a people.

Plaintiff here seeks no special favors. All he asks is that he and his family and other similarly situated be allowed to live as Americans rather than merely as American Negroes. The amendment here under attack would forever relegate them to the Negro district, or as some prefer to call it, the colored section. It represents an ignoble moment of retrogression in our political life and this Court should wipe the slate clean by declaring it null and void. Absolute discretion in a democratic multi-racial society is not law but license. It is not a tool of justice, but of oppression.

Dated, March 24, 1965.

Respectfully submitted,

COLLEY AND MCGHEE,
NATHANIEL S. COLLEY,
MILTON L. MCGHEE,
STANLEY MALONE,
CLARENCE B. CANSON,
Attorneys for Plaintiff and Appellant.

SAC. NO.
7657

In the Supreme Court
OF THE
State of California

CLIFTON HILL,
Plaintiff and Appellant,
vs.
CRAWFORD MILLER,
Defendant and Respondent.

RESPONDENT'S FIRST REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California, in and for the County of Sacramento

Honorable William H. Gallagher, Judge

HARRY A. ACKLEY,
812 Court Street,
Woodland, California,
ROBERT J. COOK,
7484 Kanai Avenue,
Citrus Heights, California,
JOHN M. BEEDE,
607 G Street,
Davis, California,
Attorneys for Respondent.

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Subject Index

Table of Authorities Cited

Codes

Constitutions

Texts

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Appeal from the Judgment of the Superior Court of the State of California, in and for the County of Sacramento

Honorable William H. Gallagher, Judge

FACTUAL SUMMATION

Plaintiff and appellant is a Negro. Defendant and respondent is a Caucasian. Respondent acquired residential real property consisting of a single family dwelling house situated upon a city lot generally known as 260 Olmstead Drive, North Sacramento, California. On the day that respondent acquired title he caused to be served upon appellant a thirty day Notice to Quit in accordance with Section 1946 of the *Civil Code*. At the end of respondent's Notice To Quit there appeared the following language:

> "The sole reason for this notice is that I have elected to exercise the right conferred upon me by Article I Section 26, California Constitution, to rent said premises to members of the Caucasian race."

Respondent owned no other real property other than the premises in question, except for respondent's own residence.

Both appellant and respondent are private individuals and were at all times acting in that capacity alone in the landlord and tenant relationship between them.

After service of said Notice to Quit and within the said thirty day period, appellant filed a Complaint for Injunction in the Sacramento County Superior Court under action No. 155789 in said Court against respondent. Appellant alleged irreparable injury without specificity and sought temporary and permanent injunctions to prevent the eviction solely on the basis of race or color, or for any reason whatsoever, except upon conditions applicable alike to all persons, a decree declaring Article I, Section 26, of the *California Constitution* null and void, costs of suit and other and further relief as seemed just and proper to the Court. No action in unlawful detainer had at that time been instituted by respondent.

Summons was issued on December 14, 1964, which was the date of the filing of the complaint, and appellant's Notice of Motion for Preliminary Injunction was served on respondent thereafter together with copies of the summons and complaint and ap-

pellant's points and authorities in support of his prayer for equitable relief.

On December 16, 1964, respondent filed his Demurrer to Complaint upon the ground that the complaint failed to state facts sufficient to constitute a cause of action based upon the theory that no governmental action at all was involved or alleged to be involved or capable of being alleged to be involved at the time appellant instituted his action thus setting forth no "state action" of any sort for a proper determination of the alleged deprivation of rights under the Fourteenth Amendment of the *United States Constitution.* On the same day respondent filed his Answer to Complaint for Injunction. On December 23, 1964, respondent's First Abstract of Points and Authorities in Support of Demurrer to Complaint and in Opposition to Complaint for Injunction was filed.

After being continued, the matter came on for hearing on January 18, 1965 at which time evidence was presented, amici curiae briefs were received, argument was had upon the demurrer and motion for preliminary injunction and also upon the merits of the constitutionality of Article I, Section 26 of the *California Constitution.* It was stipulated that the Court would rule first upon the validity of the demurrer attacking the sufficiency of the pleadings and that the evidence received and the argument heard upon the additional matters would come into play only if the demurrer was overruled. The receipt of evidence and argument thereon was simply to obviate the necessity of a second hearing in the event the demurrer was

found to be without merit. Thereafter the Court took the case under submission.

On February 2, 1965, the Court below, by Memorandum Opinion indicated, inter alia, that the demurrer without leave to amend would be sustained upon the grounds raised therein, i.e. that the complaint failed to state facts sufficient to constitute a cause of action. The Court also indicated in said opinion that it had no jurisdiction of the subject matter of the action. This latter ground was *not* raised by defendant in his demurrer to the complaint. The Opinion further indicated the Court's view that Article I, Section 26 of the *California Constitution* was constitutional under the *United States Constitution* and indicated that plaintiff's prayer for injunctive relief should be denied.

On February 9, 1965 the formal Order Sustaining Demurrer without Leave to Amend was endorsed-filed. (CT 29.) The Order was made "upon the ground that the complaint fails to state facts sufficient to constitute a cause of action." (CT 29.) On the same date the Court made and entered its Judgment of Dismissal adjudging that plaintiff "take nothing by his complaint", dismissing the same and awarding defendant his costs. Notice of Entry of Judgment was filed and served on February 15, 1965. Notice of Appeal was timely filed thereafter by appellant.

On March 15, 1965 respondent filed in unlawful detainer in the Municipal Court, Judicial District of the City of Sacramento under action No. 15487 in said Court seeking restitution of the premises. Appellant

filed his answer thereto on April 5, 1965 praying that plaintiff therein take nothing and that the action be abated pending the determination of the present appeal before this Court. The Municipal Court action in unlawful detainer still pends.

OBJECTION TO APPELLANT'S REFERENCES TO THE TESTIMONIAL RECORD BELOW AND MOTION TO STRIKE THE SAME

Appellant himself states, inter alia, in his summation of Proceedings in the Court below:

> "The demurrer was submitted for decision after oral argument. The case was then tried on the motion for a preliminary injunction. Each party agreed that if the demurrer was overruled the case could be deemed tried on the merits and a final judgment would ensue. The demurrer was sustained without leave to amend. This appeal is from the judgment of dismissal which followed." (pp. 5, 6.)

This is correct. The demurrer was sustained and judgment entered accordingly. The evidence adduced was received to prevent the necessity of a second hearing if the demurrer was held to be without merit. Since the demurrer tested only the sufficiency of the pleading which was found wanting, appellant's pleading alone was the basis of the Superior Court's decision. *Colm v. Francis* (1916) 30 CA 742, 752, 159 P 237. Counsel's argument from the record concerning the injunctive relief petitioned for but upon which the court below did not pass (which carefully omits the

neutralizing cross-examination) is objected to as improper and respondent moves to strike from appellant's brief the references thereto and those other references beyond the proper record (e.g. patently hearsay statements from one Albert Cole—Oakland Tribune, page 46) and including the following pages: 26, 27, 37, 38, 39, 40, 41, 42, 43, 44, 45 and 46.

STATEMENT OF THE ISSUE

Respondent contends that the sole issue before this Court is:

> Did the Complaint before the Court Below State Sufficient Facts to Constitute a Cause of Action, or Was It Capable of Amendment So As to Make It State Sufficient Facts to State a Cause of Action at that Time when the Sufficiency of the Pleading Was Challenged by General Demurrer?

Respondent contends that the Superior Court was correct in answering this question in the negative.

CONTENTS OF RESPONDENT'S BRIEF

Because appellant urges at length that the Judgment of Dismissal is in fact a finding that Article I, Section 26 of the *California Constitution* is not violative of the Fourteenth Amendment to the *United States Constitution* those contentions are answered herein. Respondent's position is however that the Superior Court's Order Sustaining Demurrer without Leave to Amend and the resultant Judgment of Dis-

missal is not such a holding but simply a determination that the complaint as passed upon at that time did not state facts sufficient to constitute a cause of action and was then incapable of being amended to add any then existing facts to so allege. Respondent urges that such judgment was manifestly correct.

ARGUMENT

I. APPELLANT IS BOUND BY RES JUDICATA AND COLLATERAL ESTOPPEL

The cases of *Lewis v. Sacramento Committee for Home Protection, et al.* (Sacramento County Superior Court No. 147992) and *Lewis v. Jordan* (California Supreme Court Action No. Sac. 7549) decided the question of whether Section 26 Article I was an unlawful "revision" or an "amendment" to the Constitution of California.

Final judgments on this precise issue were rendered on its merits, by a Court having jurisdiction. Notwithstanding the identical parties are not the named parties in these cases the doctrines of Res Judicata and Collateral Estoppel apply to bar the plaintiff from relitigating this issue.

Mutuality of estoppel is no longer required as a condition to the imposition of the doctrine. *Bernhard v. Bank of America,* 19 Cal 2d 807. Thus if the party against whom the plea of res judicata is asserted was a party or in privity with a party or within a class of others similarly situated (*King v. International Union of Operating Engineers,* 114 CA 2d 159), the

prior adjudication is a bar, other conditions being met.

Section 382 *Code of Civil Procedure* in part provides: And when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the Court, one or more may sue or defend for the benefit of all.

In such cases a judgment rendered is binding and rests on considerations of necessity and paramount convenience.

Plaintiff being a member of this Class is therefore bound and the prior adjudication of this issue is a bar to its relitigation.

II. THE AMENDMENT IN QUESTION DOES NOT COVER MORE THAN ONE SUBJECT

Plaintiff contends that Article IV, Section 1 (c) was violated because Proposition 14 (Article I, Section 26 of the *California Constitution*) relates to more than one subject.

The Amendment has one object. That is to allow all persons the right to freely choose to whom he wants to sell or rent his property. It does nothing more. The contention of plaintiff that multitudinous subjects are embraced by the amendment is without merit.

Many, in fact most laws passed by our legislature have an indirect or incidental effect on others. The contention of plaintiff cannot stand examination. Plaintiff has no case law substantiating his position

although the California Supreme Court has stated in *Perry v. Jordan* (1949), 34 C 2d 87, that:

> "The problem of whether more than one subject is embraced within one legislative act is not new in this state. Although section 1c has been newly added extending the requirement to initiative constitutional amendments, the Constitution for many years has required that 'Every act shall embrace but one subject, which subject shall be expressed in its title.' (Cal. Const. Art. IV, Sec. 24.) The proper scope and application of that provision as to singleness of subject was elucidated, as the latest word on the subject, by this court in Evans v. Superior Court, 215 Cal. 58, 62 (8 P. 2d 467), upholding the adoption of the Probate Code in a single enactment: '. . . we are of the view that the provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation, all parts of which are reasonably germane. (Heron v. Riley, 209 Cal. 507, 510 (289 P. 160).) The provision was not enacted to provide means for the overthrow of legitimate legislation. (McClure v. Riley, 198 Cal. 23, ... P. 429).) . . .
>
> " 'Numerous provisions, having one general object, if fairly indicated in the title, may be united in one act. Provisions governing projects so related and interdependent as to constitute a single scheme may be properly included within a single act. (Barber v. Galloway, 195 Cal. 1, 3 (231 P. 34).) The legislature may insert in a single act all legislation germane to the general subject as expressed in its title and within the field of legislation suggested thereby. (Treat v. Los Angeles Gas Corp., 82 Cal. App. 610 (256 P. 447).) Pro-

visions which are logically germane to the title of the act, and are included within its scope, may be united. The general purpose of a statute being declared, the details provided for its accomplishment will be regarded as necessary incidents. (Estate of Wellings, 192 Cal. 506, 519 (221 P. 628); Buelke v. Levenstadt, 190 Cal. 684, 687 (214 P. 42); and cases cited.) The language of this court in Robinson v. Kerrigan, 151 Cal. 40, 51 (121 Am. St. Rep. 90, 12 Ann. Cas. 829, 90 P. 129), is especially applicable to this case at this point. A provision which conduces to the act, or which is auxiliary to and promotive of its main purpose, or has a necessary and natural connection with such purpose is germane within the rule. . . . Our conclusion, therefore, is that the newly enacted Probate Code does not embrace more than one subject. Its numerous provisions have one general object. The classification of these provisions, made by the code commission, and carried into the title of the act, is a reasonably intelligent reference to the subject to which the legislation of the act is to be addressed, 'which is all that is requisite.' (See, also, cases collected in 23 Cal. Jur., 646-650; 50 Am. Jur., Statutes, Secs. 196-199.) When the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction. (City of Long Beach v. Payne, 3 Cal. 2d 184 (44 P. 2d 305).) There is nothing in the argument to the voters when section 1c of article IV was adopted contrary to such construction or the purposes underlying the 'one subject' limitation. (Pp. 92-93.)

* * *

> "The measure presented is an initiative constitutional amendment. 'The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.' (McFadden v. Jordan, 32 Cal. 2d 330, 332 (196 P. 787).) To preserve the full spirit of the voters should not become bogged down by lengthy litigation in the courts, especially when there is a strong temptation to commence proceedings in the superior court by the opponents of a measure to delay its presentation to the electorate."
>
> *Perry v. Jordan* (1949), 34 C 2d 87, 90-91.

The subject or object of the amendment is single. It relates to one purpose. That is the freedom to choose to whom to sell or rent.

III. ARTICLE I, SECTION 26 IS NOT "AN ATTEMPTED INVALID REVISION"

It is agreed that Article I, Section 26, revises Article I, Section 11 requiring uniformity of application of laws. First it must be conceded that the amendment is a law. This concession made it is the contention of plaintiff that the amendment is not uniform because it does not apply to property subject to Federal regulation.

The apparent hiatus of this contention is the omission to consider the power reserved to the Federal Government vis-a-vis State Government. Whenever a subject is partially regulated or controlled by the Federal Government the State could not regulate that portion not so regulated or controlled in a different

manner if this contention of plaintiff was found to be correct.

In *McFadden v. Jordan* (1948), 32 Cal 2d 330, the invalid "revision" was one which would have resulted in fundamental changes in the present form of government together with many changes. Here, the amendment merely places us in our position prior to September 18, 1963 and makes one change.

Livermore v. Waite (1894), 102 Cal 113, was decided prior to the adoption of an amendment reserving the initiative power to the people. Nothing in *Livermore* lends merit to the plaintiff's contention.

The argument that the amendment is a revision is totally without merit. *Livermore* and *McFadden* do not support plaintiff's assertions. So held Judge Perluss in *Lewis v. Sacramento Committee for Home Protection,* supra.

IV. THE INITIATIVE AMENDMENT IS NOT IN CONFLICT WITH FEDERAL LAWS

Title 42, Sections 1982 and 1983 of the United States Code provide:

> "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. * * *"
>
> * * *
>
> "§ 1983. *Civil action for deprivation of rights*
>
> "Every person who, *under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory,* subjects, or causes to be sub-

> jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979." (Emphasis added.)

The italicized portion indicates clearly that these statutes are coextensive with the Fourteenth Amendment and are applicable only if there is established "state action" of the character that renders the State responsible for the conduct.

Moreover, inasmuch as Section 26, Article I leaves unregulated the decision to refuse to sell his property to any citizen regardless of color, it is difficult to see how the amendment would contravene the Federal statutes. Thus, the "State action" is absolutely even-handed as between the races. This being so, the fact that some individuals may choose to exercise this right in a manner which discriminates on the basis of race or creed is irrelevant. The amendment does not call upon the State to enforce private prejudice; it merely requires the State to remain neutral. In this respect, Section 1982 of the United States Code goes no further than the Fourteenth Amendment and the authorities cited herein under the Fourteenth Amendment are equally applicable here.

In *Agnew v. City of Compton* (9th Cir. 1957), 239 F 2d 226, the Court said:

> "The statutes next referred to are 42 U.S.C.A. §§ 1981 and 1982. These are the first two sections

> of the Civil Rights Act, as now codified. The plain purpose of these statutes is to provide for equality of rights as between persons of different races. The complaint under review does not allege that appellant was deprived of any right which, under similar circumstances, would have been accorded a person of a different race. It follows that no cause of action is stated under these sections." (p. 230.)

In *Hurd v. Hodge* (1948), 334 U. S. 224, 92 L. Ed. 1187, the Supreme Court said:

> "We may start with the proposition that the statute does not invalidate private restrictive agreements so long as the purposes of those agreements are achieved by the parties through voluntary adherence to the terms. The action toward which the provisions of the statute under consideration is directed is governmental action. Such was the holding of Corrigan v. Buckley, 55 App DC 30, 299 F 899, app dismd 271 US 323, 70 L ed 969, 46 S Ct 521, supra.
>
> "In considering whether judicial enforcement of restrictive covenants is the kind of governmental action which the first section of the Civil Rights Act of 1866 was intended to prohibit, reference must be made to the scope and purposes of the Fourteenth Amendment; * * * (p. 1193).

These cases clearly demonstrate that the argument based on an alleged inconsistency between Section 26 and Federal law cannot be sustained for two reasons. First, because there is nothing in the amendment which is contrary to the prohibition of the Federal law. Second, even if Section 26 could be read as the

argument suggests, the Federal law does not extend to private discrimination.

That Federal law does not extend to private discrimination in the sale or rental of residential property is further indicated by the recently enacted Federal Civil Rights Act of 1964. 74 Stat. 241 (1964). This most pervasive and comprehensive civil rights legislation ever adopted by the Congress imposes regulation on discriminatory conduct in numerous fields of activity such as voting, education, refusal of service in places of public accommodation, and with respect to various programs receiving federal financial assistance. Since the Congress was certainly aware that some nineteen states had so-called fair housing laws regulating discriminatory conduct in the sale or rental of some housing whereas the other thirty-one states had no such regulatory legislation, is it not perfectly evident that Congress did not intend to regulate discrimination in housing but determined that each State could make its own decision whether or not to regulate this area of private conduct?

Sei Fujii v. The State of California, 38 C 2d 718 cited by opposing counsel is not in point. There the Alien Land Law specifically prohibited the ownership of land by aliens ineligible for citizenship. The Court in *Sei Fujii* found that "The California Alien Land Law" was "obviously designed and administered as an instrument for effectuating racial discrimination" and properly held that there were "no circumstances justifying classification on that basis." (*Sei Fujii* at pp. 737 and 738.) Respondent agrees. The Alien Land

Law was an enacted statute. The purpose of the legislature in enacting the statute was properly found to be even as the statute provided, i.e. a prohibition based solely upon race against the ownership of land. At bench we are dealing not with legislation but with a Constitutional mandate overwhelmingly passed by the people of this State. Can it be said that the voters as they marked their ballots had in mind and in purpose an obvious design for effectuating racial discrimination? The plain language of the amendment and the plain meaning of that language simply returns to the people unfettered by legislative controls, the right to choose as to the use and disposition of their own property. A freedom has been returned to the populus by a vote that leaves no doubt as to the desire of the citizenry. A freedom of absolute choice, whether based on sex, religion, race, or a desire to sell, rent or give away real property only to people with no children, one dog, and of Oriental descent "because they are so clean and quiet" if you will. The enactment is not "a tool of oppression" but a guarantee returning absolute choice in private dealings of real property to the owners of that property when those owners deal in a solely private capacity as in the instant facts. That expressed freedom returned by the people to the people also finds protection as a property right under the same Fourteenth Amendment that appellant chooses to examine through but one side of the looking glass.

V. THE SUPERIOR COURT HAD JURISDICTION AND THE JUDGMENT RENDERED IS NOT TO THE CONTRARY

Respondent did not contend in the Court below and does not now contend that the Superior Court had no jurisdiction over the injunctive subject matter here involved. The order of the Superior Court sustaining the demurrer without leave to amend and the resultant judgment in no sense hold that the Superior Court had no jurisdiction to grant the injunction there sought by appellant. The lower Court rather holds precisely that the facts alleged in the complaint are insufficient to constitute a cause of action and the demurrer raised by appellant on that ground under subsection 6 of the section 430 of the *Code of Civil Procedure* was well taken. The Court further holds that the demurrer be sustained without leave to amend. There is no holding that the Court lacked jurisdiction. The "Memorandum Opinion" of the trial court is not such a holding. Mr. Witkin discusses the effect of the trial court's written opinion as it relates to the actual judgment at page 1873 of *California Procedure* as follows:

> "An oral or written opinion by a trial judge, discussing and purporting to decide the issues in the manner of an appellate court opinion, is merely an informal statement of his views. It may be helpful in framing the judgment, or on appeal in interpreting ambiguous or uncertain portions of the judgment. But it is not itself the decision of the court or a judgment, and it cannot be used to challenge otherwise sufficient findings and conclusions of the court. (See *DeCou v. Howell* (1923) 190 C. 741, 751, 214 P. 444; *Diaz v. Shultz* (1947)

81 C.A.2d 328, 183 P. 2d 717; *Lord v. Katz* (1942) 54 C.A.2d 363, 367, 128 P. 2d 907; 17 So. Cal. L. Rev. 107; *Appeal,* section 77.)"

It seems clear to respondent that since relief by injunction is proper to stay the threatened enforcement of an unconstitutional statute or ordinance by "State Action" actually commenced that, by parity of reasoning, injunctive relief may be petitioned for to stay the threatened enforcement of a state Constitutional provision which is factually in conflict with the Federal Constitution. *San Diego Tuberculosis Association v. East San Diego* 186 C 252.

The case at bench was jurisdictionally before the correct tribunal for an injunctive remedy since the relief sought was petitioned for by the tenant. This follows since no jurisdiction to grant injunctive relief when affirmatively sought by an allegedly wronged plaintiff by allegedly threatened enforcement of a right granted by the State Constitution which is alleged to be in fatal conflict with the due process and equal protection guarantees of the *United States Constitution* is vested in the municipal or justice courts. The jurisdiction of inferior trial courts is entirely statutory and the powers conferred upon them must be strictly pursued. *Gray v. Gieseke* 108 CA 271. No jurisdiction attaches to them unless specifically conferred. They are possessed with neither inherent nor implied jurisdiction. *Robertson v. Langford* 95 CA 414, *Storey v. Mueller* 21 CA 301.

This is not to say that a cause of action was factually pleaded in the instant case. Respondent contends

the trial court was demonstrably correct in its judgment that a cause of action was not stated in the complaint and that it could not be then amended to state a cause of action.

VI. THERE IS NO PROBLEM BEFORE THIS COURT AS TO WHETHER OR NOT A CLASS ACTION WAS PROPERLY BROUGHT BY PLAINTIFF IN THE SUPERIOR COURT

Appellant's brief dealing with his right to bring a class action misses the mark. Since an individual could invoke the Court's injunctive jurisdiction in a proper factual situation to prevent a threatened unconstitutional abridgement of rights by commenced state action "to some significant extent", the complaint could obviously have been amended to make this simply an individual action. Thus the trial court's decision is not defensible upon the ground of a class action erroneously brought.

For example, it was held in *San Diego Tuberculosis Association* (a corporation) *v. City of East San Diego* (a municipal corporation) 186 C 252 that an action would lie to enjoin the enforcement of an invalid municipal ordinance where such enforcement would cause substantial and irreparable injury to private property rights and there was no adequate remedy in the ordinary course of law. There, the city authorities "*commenced* a series of criminal prosecutions against the plaintiff, and threatened to arrest and prosecute its officers and employees and to keep on arresting and prosecuting them until the plaintiff

should be compelled to close the hospital." (*San Diego* at p. 253.) (Emphasis added.) This Court held that plaintiff was entitled to have the enforcement of the ordinance enjoined.

If the injunctive jurisdiction is available to an individual corporate entity as to a municipal ordinance which is found to be an "arbitrary and unreasonable" exercise of police power, it follows that such injunctive relief, in a proper case, would be available to an individual if in fact a state Constitutional provision was in conflict with federal guarantees under the Fourteenth Amendment.

The instant case is at once distinguishable since no state action of any sort was alleged in the complaint or capable of being alleged at the time defendant's demurrer was sustained without leave to amend and the judgment of dismissal was entered.

Even assuming arguendo that state action had been commenced by service of the Notice To Quit in this case by a state officer or further that an action in unlawful detainer had actually been commenced, it is respondent's position that such would not have been state action to the "significant extent" required to be violative of the Fourteenth Amendment due process and equal protection guarantees of the *United States Constitution* as the test is set forth by the United States Supreme Court in *Burton v. Wilmington Parking* 365 U.S. 715 (1961) for the reasons set forth hereinafter.

VII. WHAT THE CASE IS NOT

In determining whether or not there has been a proscription of the due process and equal protection rights guaranteed under the Fourteenth Amendment it is vital to decide, in the first instance, whether or not the facts bring the case within any of the decided cases where such invasion has been found by the United States Supreme Court. Respondent contends there is no such decided case by that Court. It is at least clear what this case is NOT.

(1) This is NOT a case involving racial discrimination by a private party *on state-owned land* as in *Burton v. Wilmington Parking Authority* 365 U.S. 715 (1961);

(2) This is NOT a case involving racial discrimination by recipients of federal construction grants pursuant to a state plan as in *Simkins v. Moses H. Cone Memorial Hospital* 323 F 2d 959 (4th Circuit 1963), certiorari denied;

(3) This is NOT a case involving racial discrimination in the eating and sleeping facilities provided by a common carrier as in *McCabe v. Atchison, Topeka & Santa Fe Railway* 235 U.S. 151 (1914) or in interstate or intrastate transportation as in *Bailey v. Patterson* 7 L. Ed. 2d 512;

(4) This is NOT a case involving racial discrimination by any private organization controlling an election as in *Terry v. Adams* 345 U.S. 461 (1953) and *Smith v. Allwright* 321 U.S. 649 (1944);

(5) This is NOT a case involving the denial to colored persons of eating facilities by private persons

under a lease from county authorities as in *Derrington v. Plummer* 240 F 2d 922 (5th Circuit 1956), certiorari denied, 353 U.S. 924 (1957);

(6) This is NOT a case where third parties to a restrictive covenant based upon race attempt to prevent a sale from a willing seller to a willing buyer as in *Shelley v. Kraemer* (1947) 334 U.S. 1, 92 L. Ed. 1116;

(7) This is NOT a case where third parties to a restrictive covenant based upon race seek damages for a violation thereof by a willing buyer to a willing seller as in *Barrows v. Jackson* 346 U.S. 249;

(8) This is NOT a case involving racial discrimination in places of *public facilities and accommodations* in which the state does not own the premises as in *Bell v. Maryland* 12 L. Ed. 2d 822.

Speaking more broadly, THIS IS *NOT* A CASE involving any of the factual areas in which the contact points between the State and the conduct complained of are so significant as to fall within the proscription of the equal protection clause of the Fourteenth Amendment. It is *not* the Federal Constitutional mandate that every racially discriminatory act *of the individual* involving the acquisition, enjoyment, ownership and disposition of property is enjoinable as a violation of equal protection of the laws. *Shelley v. Kraemer* on the narrow facts therein contained did *not* so hold. If the case does stand for such a broad proposition that there is a categorical rule THAT THERE IS STATE ACTION IN THE JUDICIAL SENSE WHEN THE COURTS ACT

BUT NO STATE ACTION IN THE JUDICIAL SENSE WHEN THE COURTS DECLINE TO ACT then *Shelley* should be reexamined in the light of the effect of such a dogmatic rubric. Defendant concedes that in the following factual areas the contact points are, under extant interpretation by the United States Supreme Court, sufficient to bring the so-called "shield" of the Amendment into play as against the forbidden State action:

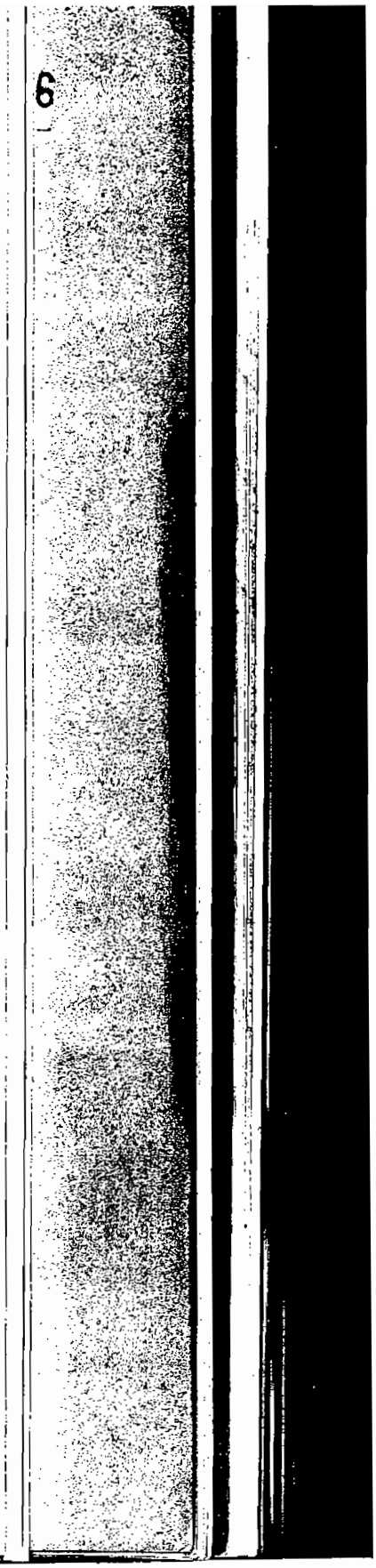
(1) Cases in which the individual or group acts in some manner as an agent of the State in a governmental or proprietary capacity and discriminates;

(2) Cases in which public accommodations are involved with discrimination by an individual or group;

(3) Certain cases in which governmental financial programming with its concomitant control is involved and the individual or group discriminates. No such forbidden State action has however yet been held to exist in the situation where a welfare recipient receives funds and determines only to buy at a Chinese market because she is prejudiced in favor of the Mongolian race.

(4) Cases in which state property or state controlled property is involved and the discrimination by the individual or group involves in some manner the use of that property.

The case at bench involves none of the above problem areas where the contact between the State and the individual actor is sufficient to invoke the prohibition required under the equal protection clause of the Fourteenth Amendment of the *United States Constitution.*



No single contact point between the State and the defendant in this case appears except that defendant will seek the aid of the courts of this State to evict a tenant under the specific authority of the *Civil Code* with the added reason of racial considerations as set forth in defendant's notice to the tenant. Defendant contends this is insufficient to bring him within the proscription of the Fourteenth Amendment equal protection clause as interpreted in *Shelley v. Kraemer* even at such time as the unlawful detainer action is before the courts, which it was not in the instant case.

VIII. THE CALIFORNIA CASE OF ABSTRACT INVESTMENT COMPANY v. HUTCHINSON 204 CA2d 242 WAS INCORRECTLY DECIDED AND DISTINGUISHABLE

The decision in *Abstract Investment* involved an unlawful detainer action *actually commenced.* The tenant sought to introduce the defense that the sole reason for turning him out of the premises was that of racial discrimination. The lower court denied the tenant the right to make such a showing by way of defense. This decision was reversed on appeal, the Second District Court of Appeal stating categorically:

> "We hold that defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination, which if proven would bar the court from ordering his eviction *because such 'state action' would be violative of both federal and state Constitutions."* (*Abstract* at p. 255.) (Emphasis added.)

As pointed out by Harold W. Horowitz in his analysis in 52 C.L.R. 1 "Fourteenth Amendment Aspects of Racial Discrimination in Private Housing" n footnote No. 102 at page 41:

> "The court's analysis appears to have stopped with the determination that there would be 'state action' if the court decided the case, on the assumption that all state action giving effect to private racial discrimination is unconstitutional. The constitutional issue in the case was, assuming that California law would permit a landlord to refuse to continue leasing premises to a tenant because of the tenant's race, whether that principle of state law was constitutional. A court effectively obscures that issue by confining its analysis as to whether the state 'acts' if the court gives effect to private discrimination."

As noted, the Court in *Abstract* finds its decision in the language "state action", i.e., the Court evidently reasons, *Shelley* did say the State acts when the courts act, thus if the Court were to decree eviction in a situation between two individuals where the decree would issue as of right save for the racial defense raised by the tenant, the state is acting and ipso facto the Fourteenth Amendment intervenes to preclude the decree sought in a situation concededly involving what otherwise would only be discriminatory private conduct.

IX. STATE ACTION ALONE, IRRESPECTIVE OF FACTUAL CONTEXT, IS NOT THE TEST AS TO WHETHER THE FOURTEENTH AMENDMENT PROTECTION INTERVENES TO PRECLUDE OTHERWISE PURELY PRIVATE DISCRIMINATION.

The Court in *Shelley* sets forth the law as follows at page 1180:

> "We conclude, therefore, that the restrictive agreements, standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. *Corrigan v. Buckley,* 271 US 323, 70 L ed 969, 46 S Ct 521 supra".

Thus, if there is voluntary adherence to the restrictive covenants complained of the discriminatee is powerless because the State is not acting. Does appellant contend in such a situation that a mandatory injunction should issue to force a breach of the voluntarily-complied-with restrictive covenant sanctioned under the express language of *Shelley?*

In refusing to issue the injunction to preclude the discrimination upon the theory that the Fourteenth Amendment protection is a shield and not a sword is not the State as surely acting by the refusal of a forum in a private matter of discrimination as it would be in the case at bar in enforcing the eviction here sought affirmatively, again in a wholly private matter? Reasoning can lead but to the conclusion that surely the State is acting in both instances and that State action as such is not the key that opens the

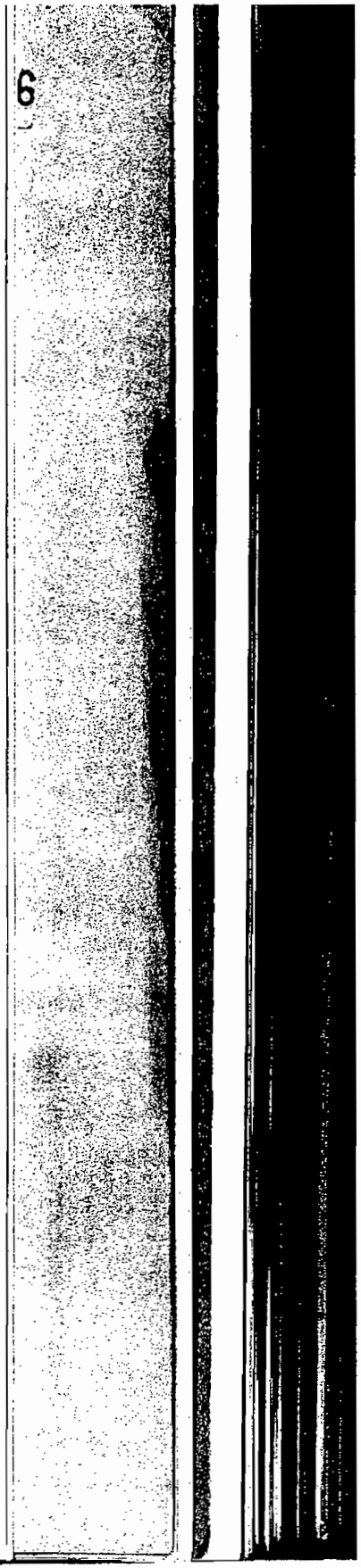
door to Constitutional intervention in each case of private discrimination without examination or reason.

It is unquestioned that the State is acting each time it speaks through its courts. As pointed out in *Shelley:*

> "That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment." (Citing *Virginia v. Rives,* 100 U.S. 313, 318, 26 L. Ed. 667, 669 (1880).)

The point is that it is not every State action as such which yields discrimination which falls within the proscription of the amendment. *Shelley v. Kraemer* did NOT involve private discrimination between the vendor and purchaser of real property (analogous here to the landlord and tenant) but rather discrimination sought by third parties to the covenants there sought to be enforced. Thus *Shelley* DID INVOLVE a *willing seller* and a *willing buyer* who wished to consummate the purchase and sale of realty but were precluded from so doing by the acts of third parties who sought in the courts to interfere with a private person's *intended sale* to a person of his choice. (Such were the facts in both the Missouri and Michigan cases in *Shelley.*) This very right is the essence of the California constitutional amendment Article I, Section 26 complained of by plaintiff below as unconstitutional.

Both *Shelley* and *Barrows v. Jackson* 346 U.S. 249 (1953) held on their facts that the State could not act through the courts to preclude the freedom of



choice between private parties to deal with whom they saw fit irrespective of racially restrictive covenants that appeared to bind them otherwise. Article I, Section 26 of the *California Constitution* also enforces this right.

Shelley is not authority for the proposition that an UNWILLING private owner acting for himself alone cannot evict through judicial process a Negro tenant on the grounds of race alone from the owner's premises after the giving of adequate statutory notice. Such would be state action through the courts it is true but such would not be unconstitutional state action condemed by the Fourteenth Amendment.

X. THAT THE TRUE TEST OF VIOLATION OF THE PROSCRIPTION OF THE FOURTEENTH AMENDMENT IS INVOLVEMENT ON THE PART OF THE STATE "TO SOME SIGNIFICANT EXTENT" AND NOT SIMPLY THE SHALLOW INQUIRY OF WHETHER THE STATE IS ACTING IN ANY SENSE AT ALL IS APPARENT FROM THE ILLUSTRATIONS THAT FOLLOW

Example 1:

Put the theoretical case of our District Attorney's counterpart in the State of Mississippi as a direct representative of the State declining to prosecute on valid evidence when a Negro is wantonly murdered by a Caucasian. In such instance would opposing counsel truly urge that there is no action by the State of Mississippi because the State is not affirmatively acting through the courts to deprive the Negro community of equal protection of the laws and that the

imagined conduct of the Mississippi County Prosecuter is not reachable by the guarantees of the Fourteenth Amendment because there is no overt action in the Mississippi courts so that the magic formula of "state action" comes into play. We think not. Obviously in this hypothetical situation there is affirmative State action by dereliction of duty which should be reachable by mandatory injunction to compel this failure to act to forthwith cease. Constitutional protections cannot turn upon the antiquated niceties of positive and negative injunctions.

Example 2:

Put the theoretical case of my attempted enforcement in the courts of the local real property trespass statutes. A Negro with whom I am acquainted wishes to enjoy with me my real property by visiting with me in my home but I exclude him *solely* because he is a Negro. He persists and I bring an action in trespass. Do opposing counsel contend that I am powerless in the courts to force the ejectment because the state is acting to assist me in preserving my own home from an unwanted guest solely on racial grounds? Again we think not.

Example 3:

Suppose *only one* of the admixture of reasons in my refusal to continue a month to month tenancy to a given person is what I suppose (perhaps erroneously) to be a "racial" characteristic such as heavy lips or swarthy skin. Is the mere scintilla of even such an imagined factor on my part sufficient to preclude a

concededly otherwise lawful eviction by resort to the courts for assistance? Would court action in granting my prayer in unlawful detainer transgress upon the Fourteenth Amendment guarantees in a private action solely between myself and the discriminatee when such discrimination is admittedly *a minor factor?*

Example 4:

Suppose I decide to privately sell my residential real property to a third party of my own selection, without public offering, for $10,000.00 which is its fair market value. Do counsel contend that by mandate I must sell to a Negro who wants to pay a higher price if my sole reason for turning down a higher offering is because the new offeror is a Negro? Surely the refusal of the issuance of a writ in such instance upon the ground that the matter is private is truly as much state action as the affirmative ruling on any unlawful detainer action on the facts at bench.

The mere incantation of "state action" as the test of abridgement under the Fourteenth Amendment as indicated in the *Abstract Investment* decision cannot withstand thoughtful scrutiny.

Under *Example 1,* Respondent urges the violation is palpable. The action of the District Attorney in choosing not to prosecute may be within the power of his office by statute or case law or even established by custom. Custom is sufficient to yield the required manifestation of State authority under the Civil Rights cases cited in *Shelley* under the following language at page 1181:

> "In the Civil Rights cases, 109 US 3, 11, 17, 27 L Ed 835, 839, 841 (1883), this Court pointed out that the Amendment makes void 'State action of every kind' which is inconsistent with the guarantees therein contained, and extends to manifestations of 'State authority in the shape of laws, *customs,* or judicial or executive proceedings.' Language to like effect is employed no less than eighteen times during the course of that opinion." (Emphasis added.)

Thus the words "state action" as some sort of cabalistic formula to determine that if any discrimination results by the courts acting in any sense that the courts may not act by reason of the equal protection of the laws guarantee really misses the mark. The United States Supreme Court in *Burton* (infra) indicates the true test is involvement on the part of the State *"to some significant extent."* Each factual situation is unique. The relationships are multitudinous wherein it may be claimed that conduct falls within the protections of the Amendment from "State Action" but, in the words of the Court in *Burton,* such can be determined ". . . only in the framework of the peculiar facts or circumstances present". (6 L Ed 2d at p. 52.)

On the narrow facts of this case there is a purely private relationship and nothing more. Private motive is immaterial unless the State's contact points with that private conduct are so strong as to require invocation of the protection afforded by the Fourteenth Amendment. On the facts of this case there is not such significant involvement on the face of the plead-

ings themselves and the order and judgment below were correct and should be affirmed.

XI. WHAT THIS CASE IS

Unlike *Shelley v. Kraemer* and *Barrows v. Jackson* the instant facts involve an *unwilling* landlord in a purely private transaction who seeks to evict a Negro tenant on racial grounds. Private conduct on privately owned real property alone is involved. All relationships between Mr. Miller and Mr. Hill at the time of the Superior Court's Order and Judgment were private in every sense. The state had acted in no single capacity. Defendant's Notice To Quit was served through Plaintiff's counsel of record herein. No arm of the state was involved. State action was unborn.

In *Griffin v. Maryland,* ..... US ....., 12 L Ed 2d 754, 84 S Ct ....., the United States Supreme Court found the necessary state action and further found that it transgressed the equal protection clause of the Fourteenth Amendment where:

> "An employee of a privately owned and operated amusement park, acting pursuant to his contractual obligations to the owner and *under color of his authority as a deputy sheriff,* ordered five Negroes picketing the park in protest of its policy of racial segregation to leave the park, arrested them, and instituted prosecutions against them." (12 L Ed 754.) (Emphasis added.)

Chief Justice Warren speaking for six members of the Court emphasized that the alleged criminal tres-

passes by Negroes in a private amusement park took place in the presence of Francis J. Collins "a special deputy sheriff of Montgomery County (who was also the agent of the park operator)". (12 L Ed 2d at p. 757.) The Court found that Collins, who ordered the Negroes to leave the park, arrested them, and instituted the criminal prosecutions against them did so purporting "to exercise the authority of a deputy sheriff". (12 L Ed 2d at p. 757.) He so identified himself consistently. He wore the badge of that office. His sworn application for the arrest warrant initially so identified him. Thus in *Griffin* the state action was found, the Court holding at pages 757, 758:

> "If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law. Thus, it is clear that Collins' action was state action. See Williams v. United States, 341 US 97, 95 L Ed 774, 71 S Ct 576; see also Labor Board v. Jones & Laughlin Steel Corp., 331 US 416, 429, 91 L Ed 1575, 1583, 67 S Ct 1274."

After finding the required state action the majority then poses the remaining question of whether or not the state action violated the equal protection of the laws guarantee of the Fourteenth Amendment. The latter question was answered in the affirmative and the convictions reversed.

In *Griffin* there was state action. In the case at bar there was none. The demurrer below was properly

sustained on the ground that state action must be alleged as a fact before a cause of action is stated based upon an alleged infringement of rights guaranteed under the Fourteenth Amendment of the *United States Constitution*.

On the pleadings below, the constitutional question which plaintiff-appellant there sought and here seeks to adjudicate was not reached. The Superior Court's formal Order and Judgment is to that precise effect and was and is correct.

XII. EVEN ASSUMING THAT RESPONDENT HAD SOUGHT THE AID OF THE COURTS IN UNLAWFUL DETAINER AND OBTAINED RESTITUTION, THE ACTION OF THE COURT IN GRANTING THE RELIEF WOULD NOT AMOUNT TO SUCH "STATE ACTION" AS IS FORBIDDEN BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

It is significant that Appellant's Opening Brief, though highly discursive, is barren of any reference to the United States Supreme Court case which sets forth the test as to whether or not particular state action is within the proscription of the Fourteenth Amendment. *Burton v. Wilmington Parking Authority,* 365 US 715, at p. 722, 6 L Ed 2d 45 at p. 50, a public accommodations case, involving a lease from a state created agency which this case does not, speaks to this point as follows through Mr. Justice Clark for the Court:

> "It is clear, as it always has been since the Civil Rights cases (US) supra, that 'Individual invasion of individual rights is not the subject-

matter of the amendment.' at p. 11, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless *to some significant extent* the State in any of its manifestations has been found to have become involved in it."

If the instant case involves purely private discriminatory conduct it is not reached by the interdiction of the Fourteenth Amendment for:

"The Civil Rights cases, 109 US 3, 27 L Ed 835, 3 S Ct 18 (1883), 'embedded in our constitutional law' the principle 'that the action inhibited by the first section (Equal Protection Clause) of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' Chief Justice Vinson in Shelley v. Kraemer, 334 US 1, 13, 92 L Ed 1161, 1180, 68 S Ct 836, 3 ALR 2d 441 (1948)." (*Burton* at 365 US p. 720, 6 L Ed p. 50.)

If the instant case involves state action to the "significant extent" impinging on the Fourteenth Amendment simply by the intended use of the courts by respondent Miller to enforce his right in unlawful detainer, then concededly his complaint seeking that relief should not succeed.

Because the problem turns on state action to a "significant extent" and not merely state action the reasoning in *Abstract* (supra) is erroneous for there the appellate court simply concluded that state action existed, by use of the courts to evict on a racial basis,

that was the end of the matter. That determination is an over-simplification. As pointed out by Mr. Justice Harlan in his concurring opinion in *Peterson v. Greenville,* 373 US 244, 10 L Ed 2d 323 at p. 327 (emphasis supplied):

> "Judicial enforcement is of course state action, *but this is not the end of the inquiry.* The ultimate substantive question is whether there has been 'State action of a particular character' (Civil Rights cases, supra (109 US at 11)—whether the character of the State's involvement in an arbitrary discrimination *is such that it should be held responsible* for the discrimination."
>
> "This limitation on the scope of the prohibitions of the Fourteenth Amendment serves several vital functions in our system. Underlying the cases involving an alleged denial of equal protection by ostensibly private action is a clash of competing constitutional claims of a high order: liberty and equality. Freedom of the individual to choose his associates or his neighbors, *to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference.* This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority." (Pp. 327-328.)

In *Griffin v. Maryland* (supra), the Court did *not* old nor indicate that the trespass convictions would ave been reversed simply because there was state ction through the machinery of the courts if the omplainant, Francis J. Collins, had acted solely as an gent for the owner of the amusement park rather ıan as a deputy sheriff. It was Collins as "an indiidual . . . possessed of state authority and" who urported "to act under that authority" (*Griffin* at 2 L Ed 757) that yielded the state action to the significant extent" required. Indeed, Chief Justice Warren there states:

> "It is irrelevant that *he might have taken the same action had he acted in a purely private capacity* or that the particular action which he took was not authorized by state law. See e.g., *Screws v. United States,* 325 US 91, 89 L Ed 1495, 65 S Ct 1031, 162 ALR 1330." (Emphasis added.)

Indeed *Griffin* factually approaches, if it is not in ıct, a public accommodations case, since the so-called private" amusement park was open to all members f the community except the Negro.

At bar is a private landlord who contends he has private right to discriminate in the private renting f private property owned by him as to another rivate individual because of that individual's race or, ı theory, for any other private reason that he may ave. If this Court holds that the courts of Cali- ɔrnia in upholding Mr. Miller's right to so discrimiate are so significantly involved thereby that the

prohibition of the Fourteenth Amendment is applicable these results obtain:

(1) Any vestige of discrimination because of race proven by a month to month tenant would give that tenant more than he was entitled to in the beginning by his contract and under the law, that is, a month to month tenancy and nothing more.

(2) Motive for non-renewal of a lease expired by its own terms becomes in issue if that motive is predicated on racial grounds.

Thus if tenant Hill prevails in the litigation between the parties, he will have succeeded by action of the courts of this state in enlarging his contract for a month to month tenancy made with landlord Miller's predecessor in title to a tenancy in perpetuity so long as Mr. Hill can show to the satisfaction of a trier of the fact that Mr. Miller seeks to evict him for racial reasons.

XIII. THE LANGUAGE IN BELL v. MARYLAND ..... US ....., 12 L Ed 2d 822, 84 S CT ..... IS COGENT

The *Bell* decision involved Negro students convicted in a Maryland state court of criminal trespass because of a "sit-in" demonstration in a public eating place. On certiorari, the judgment of affirmance by the Maryland Court of Appeals was vacated and the case remanded to that Court inasmuch as supervening public accommodations laws had been enacted by both the State of Maryland and the City of Baltimore making

it unlawful to deny service on account of race. Justice Brennan, speaking for five members of the Court, felt that in view of the recently enacted local public accommodations law the state court should be given an opportunity to decide whether the indictments should not be dismissed. The Chief Justice along with Justice Goldberg concurred but expressed the further view that the Federal Constitution guarantees equality between members of the community where *public accommodations* are involved as they were in the *Bell* factual situation. Justice Douglas concurred in this view but felt a dismissal of the indictments should have been ordered.

The dissent by Justice Black, joined in by Justices Harlan and White reasoned that even though public accommodations were involved, private discrimination therein was not prohibited by the Fourteenth Amendment and the Maryland trespass law was applicable.

Respondent again reiterates that *no public accommodations* are here involved but urges that the language in the opinions of the members of the Court in *Bell* are indicative of the likely reasoning of the Court in a private-private relationship with which this Court is confronted.

The opinion of Mr. Justice Goldberg, with the Chief Justice concurring and Mr. Justice Douglas concurring in part emphasizes the "public places" concept of the Fourteenth Amendment's background.

> "A review of the relevant congressional debates reveals that the concept of civil rights which lay at the heart of both of the contemporary legisla-

tive proposals and of the Fourteenth Amendment encompassed the right to equal treatment *in public places*—a right explicitly recognized to be a 'civil' rather than a 'social' right. It was repeatedly emphasized 'that colored persons shall enjoy the same civil rights as white persons,' that the colored man should have the right 'to go where he pleases,' that he should have 'practical freedom,' and that he should share 'the rights and guarantees of the good old common law.' " (With footnoting references.) (Emphasis added.) (12 L ed 2d p. 837.)

" 'Among those customs which we call the common law, that have come down to us from the remote past, are rules which have a special application to those who sustain *a quasi public relation* to the community. The wayfarer and the traveler had a right to demand food and lodging from the innkeeper; the common carrier was bound to accept all passengers and goods offered for transportation, according to his means. So, too, all who applied for admission to the public shows and amusements, were entitled to admission, and in each instance, for a refusal, an action on the case lay, unless sufficient reason were shown. The statute deals with subjects which have always been under legal control.' (*Donnell v. State,* 48 Miss. 661, 680-681." (Emphasis added.) (12 L Ed 2d p. 840.)

" ' The negro is now, by the Constitution of the United States, given full citizenship with the white man, and all the rights and privileges of citizenship attend him wherever he goes. Whatever right a white man has in a public place, the black man has also, because of such citizenship.' (Id., at 364.)" (12 L Ed 2d p. 841.)

The Court then emphasized that in light of this Constitutional principle the same result would follow whether the claim rested on a statute or on the common law:

> " 'The common law as it existed in this State before the passage of this statute, and before the colored man became a citizen under our Constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen *in all public places.* It must be considered that, when this suit was planted, the colored man, under the common law of this State, was entitled to the same rights and privileges in public places as the white man, and he must be treated the same there; and that his right of action for any injury arising from an unjust discrimination against him is just as perfect and sacred in the courts as that of any other citizen. This statute is only declaratory of the common law, as I understand it now to exist in this State.' (Quoting from *Ferguson v. Gies,* 82 Mich. 358, decided in 1890.)" (Emphasis added.) (12 L Ed 2d pp. 841, 842.)

Respondent concurs with all of the above excerpts rom *Bell* as well as the other authority therein for pplication of the Fourteenth Amendment to public ccommodations situations. Respondent also concurs vith the following portions of the decision indicating he rule is otherwise insofar as a private right to disriminate is concerned:

1) *The Opinion of Mr. Justice Goldberg:*

> "It should be recognized that the claim asserted by the Negro petitioners concerns such public es-

tablishments and does not infringe upon the rights of property owners or personal associational interests.

Petitioners frankly state that the 'extension of constitutional guarantees to the authentically private choices of man is wholly unacceptable, and any constitutional theory leading to that result would have reduced itself to absurdity.' Indeed, the constitutional protection extended to privacy and private association assures against the imposition of social equality. As noted before, the Congress that enacted the Fourteenth Amendment was particularly conscious that the 'civil' rights of man should be distinguished from his 'social' rights. Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race. These and other rights pertaining to privacy and private association are themselves constitutionally protected liberties.

We deal here, however, with a claim of equal access to public accommodations. This is not a claim which significantly impinges upon personal associational interests; *nor is it a claim infringing upon the control of private property not dedicated to public use.* A judicial ruling on this claim inevitably involves the liberties and freedoms both of the restaurant proprietor and of the Negro citizen. The dissent would hold in effect that the restaurant proprietor's interest in choosing customers on the basis of race is to be preferred to the Negro's right to equal treatment by *a business serving the public.*" (12 L Ed 2d pp. 847, 848.)

The Opinion of Mr. Justice Black:

"The Amendment does not forbid a State to prosecute for crimes committed against a person or his property, however prejudiced or narrow the victim's views may be. Nor can whatever prejudice and bigotry the victim of a crime may have be automatically attributed to the State that prosecutes." (12 L Ed 2d p. 856.)

or can "whatever prejudice and bigotry" of a ·ate plaintiff in an unlawful detainer action "be)matically attributed to the State" that affords him forum to evict an unwanted tenant for racial or :r cause when that tenant's lawful term has ex-)d.

"It seems pretty clear that the reason judicial enforcement of the restrictive covenants in Shelley was deemed state action was, not merely the fact that a state court had acted, but rather that it had acted 'to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises *which petitioners are willing and financially able to acquire and which the grantors are willing to sell.*' 334 US at 19, 92 L Ed at 1183, 3 ALR 2d 441. In other words, this Court held that state enforcement of the covenants had the effect of denying to the parties their federally guaranteed right to own, occupy, enjoy and use their property without regard to race or color. Thus, the line of cases from Buchanan through Shelley establishes these propositions: (1) When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866, which gives all persons the same right to 'inherit, lease, sell, hold,

convey' property, *prohibits* a State, whether through its legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties. Shelley v. Kraemer, supra, 334 US at 19, 92 L ed at 1183, 3 ALR 2d 441. (2) Once a person has become a property owner, then he acquires all the rights that go with ownership: 'the free use, enjoyment, and disposal of a person's acquisitions without control or diminution save by the law of the land.' Buchanan v. Warley, supra, 245 US at 74, 62 L ed at 161, LRA 1918 C 1201. (This means that the property owner may, in the absence of a valid statute forbidding it, will his property to whom he pleases and admit to that property whom he will; so long as both parties are willing parties, then the principles stated in Buchanan and Shelley protect this right. *But equally,* when one party is unwilling, as when the property owner chooses *not* to sell to a particular person or *not* to admit that person, then, as this Court emphasized in Buchanan, he is entitled to rely on the guarantee of due process of law, that is, 'law of the land,' to protect his free use and enjoyment of property and to know that only by valid legislation, passed pursuant to some constitutional grant of power, can anyone disturb this free use." (12 L Ed 2d p. 858.)

(3) *The Opinion of Mr. Justice Douglas:*

"The property involved is not, however, a man's home or his yard or even his fields. Private property is involved, but it is property that is serving the public. As my Brother Goldberg says, it is a 'civil' right, not a 'social' right, with which we deal. Here it is restaurant refusing service to a

Negro. But so far as principle and law are concerned it might just as well be a hospital refusing admission to a sick or injured Negro (cf. Simkins v. Moses H. Cone Memorial Hospital, 323 F 2d 959), or a drug store refusing antibiotics to a Negro, or a bus denying transportation to a Negro, or a telephone company refusing to install a telephone in a Negro's home.

The problem with which we deal has no relation to opening or closing the door of one's home. The home of course is the essence of privacy, in no way dedicated to public use, in no way extending an invitation to the public. Some businesses, like the classical country store where the owner lives overhead or in the rear, make the store an extension, so to speak, of the home. But such is not this case. The facts of these sit-in cases have little resemblance to any institution of property which we customarily associate with privacy." (12 L Ed 2d p. 873.)

"We deal here, we are told, with personal rights —the rights pertaining to property. One need not share his home with one he dislikes. One need not allow another to put his foot upon his private domain for any reason he desires—whether bigoted or enlightened. In the simple agricultural economy that Jefferson extolled, the conflicts posed were highly personal. But how is a 'personal' right infringed when a corporate chain store, for example, is forced to open its lunch counters to people of all races? How can that so-called right be elevated to a constitutional level? How is that corporate right more 'personal' than the right against self-incrimination?" (12 L Ed 2d p. 879.)

> "Corporate motives have no tinge of an individual's choice to associate only with one class of customers, '*to keep members of one race from his property,*' to erect a wall of privacy around a business in the manner that one is erected around the home." (12 L Ed 2d pp. 880, 881.)

The Courts in protecting Constitutional rights must speak as well for the private rights of the racially bigoted to be racially bigoted in private matters of private property. At some point the courts must say, simply and clearly, that although men of good will abhor discrimination that the reasons and motives of men may not be ordered changed by judicial fiat in lawful private transactions between private persons simply because they do not conform with the popular current of the day. This is such a time. This is such a case.

The judgment should be affirmed.

Dated, Woodland, California,
April 26, 1965.

Respectfully submitted,
HARRY A. ACKLEY,
ROBERT J. COOK,
JOHN M. BEEDE,
Attorneys for Respondent.

Sac. No.
7657

In the Supreme Court
OF THE
State of California

CLIFTON HILL,
Plaintiff and Appellant,
vs.
CRAWFORD MILLER,
Defendant and Respondent.

FILED
MAY 26 1965
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BY ..... S. F. DEPUTY

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California, in and for the County of Sacramento

Honorable William H. Gallagher, Judge

COLLEY AND MCGHEE,
NATHANIEL S. COLLEY,
MILTON L. MCGHEE,
1617 - 10th Street,
Sacramento, California,
STANLEY MALONE,
2824 South W. Avenue,
Los Angeles, California,
CLARENCE B. CANSON,
2404 - 21st Street,
Sacramento, California,
Attorneys for Plaintiff and Appellant.

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Subject Index

Table of Authorities Cited

Constitutions

Statutes

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APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court of the State of California, in and for the County of Sacramento

Honorable William H. Gallagher, Judge

I. APPELLANT IS NOT BOUND BY RES JUDICATA AND COLLATERAL ESTOPPEL.

1. *Lewis v. Sacramento Committee For Home Protection,* et al., Sacramento County Superior Court No. 147992, was a class action brought by Howard G. Lewis against the proponents of Proposition 14, and the Sacramento County Clerk, C. C. LaRue, seeking the following relief:

> "1. That defendants, except C. C. LaRue, be enjoined, temporarily and permanently from pre-

senting signatures of voters to defendant C. C. LaRue, or any other County Clerk in California, for the purpose of qualifying said proposal for a place on the next general election ballot.

2. That defendant, C. C. LaRue, be enjoined and restrained from receiving, verifying said signatures, and from certifying the same to qualify said initiative constitutional amendment for a place on the ballot at the next general election or any election; that defendants be ordered to show cause, at some convenient time and place, why they should not be so restrained pending the hearing of this cause on the merits, or why a preliminary injunction should not issue."

While it is true that the complaint raised both the revision vs. amendment issue and the "more than one subject argument", the trial Court did not rule on either of them. The only issue conclusively litigated in that case was the one involving the sufficiency of the title and summary prepared by the Attorney General. Plaintiff had claimed that the legal requirement that such title and summary show the "chief purpose" of the proposal had not been met. The trial Court ruled that the function of the Attorney General in such a case is ministerial, and he need not look beyond the language of the sponsors when he seeks to identify the chief purpose of a proposal. We have set out the Memorandum Opinion of the trial Court as Appendix A.

The other matter decided by the trial Court was that it should not rule on the merits of our claim that the measure itself was invalid, because to do so would

constitute an interference with the right of the people to vote on the issue. Adhering to what it understood to be the rule of *Wind v. Hite,* 58 Cal. 2d 415, the Court declined to decide on the constitutionality of the proposal. This was left for decision after the adoption of the measure by the electorate.

2. The case of *Howard G. Lewis v. Jordan,* Sac. No. 7549, was an original proceeding in this Court seeking a Writ of Mandate directing the Secretary of State not to place Proposition 14 on the ballot at the next general election. The attack upon the proposal there included the claim that it covered more than one subject, and that it would revise rather than merely amend the Constitution of California. In denying the petition the only thing this Court did was to decline to exercise its original jurisdiction. None of the issues raised was decided.

3. Res judicata and collateral estoppel are affirmative defenses. And unless raised in the trial Court are deemed to be waived.

The rule is well settled that in the absence of pleading or proof of a former judgment, the defense of res judicata is deemed waived.

Landau Estate, 158 Cal. App. 2d 176.

The answer filed by respondent below did not raise these defenses. On the contrary, he argued that Article I, Section 26, California Constitution, did not cover more than one subject and did not revise the Constitution. In his prayer he asked that the Court declare the amendment to be constitutional in every respect.

If collateral estoppel ever existed in this case it was certainly waived by not being raised by respondent in the trial Court, and by participation by him in the arguments on the very issues he now claims we are estopped to raise.

4. Respondent is estopped to raise the defense of res judicata or collateral estoppel. The reason for this is that at every turn various defendants have claimed that the various complaints did not state a cause of action. In the two actions commenced in the Superior Court of Sacramento County they were successful. In this way they prevented the trial Court from ever reaching the other issues. In order to assert this defense respondent must claim that he stands in their shoes, and he may not now claim that issues they would not allow to be litigated previously were nevertheless settled in their favor.

Hall v. Coyle, 38 Cal. 2d 543;
Lunsford v. Kosanke, 140 Cal. App. 2d 623.

II. THE CASE OF ABSTRACT INVESTMENT COMPANY v. HUTCHINSON, 204 CAL. APP. 2d 242, WAS CORRECTLY DECIDED.

Respondent claims that the *Abstract* case was incorrectly decided. By asserting this claim he obviously concedes that this case is controlled by that decision, and in order to prevail on appeal he must remove from our case law the *Abstract* doctrine.

In a narrow sense, all that *Abstract v. Hutchinson* held was that in an unlawful detainer action the trial

Court is mandated by the 14th Amendment to the United States Constitution to entertain and make findings upon an asserted claim that the sole reason for the eviction is the race or color of the tenant. If the trial Court finds as a matter of fact that this was the sole basis of the attempted eviction, the Writ of Restitution may not issue. Its issuance by the Court would be the type of state action the 14th Amendment was designed to prevent.

The *Abstract* doctrine is sound as pointed out in our opening brief. Unlawful detainer is a special, summary, statutory method for removal of tenants from the possession of real property. This is a scheme set up by the legislature and administered by the Courts. The essential question is whether use of this method by a private property owner to effect his own discriminatory purposes offends the 14th Amendment. We think it does. It is involvement of the state, rather than whose purpose is being effectuated, which brings into play the prohibitions of the 14th Amendment to the United States Constitution. Ample authority for this proposition was cited in our opening brief. The only additional case we choose to cite here is *NAACP v. Alabama,* 357 U.S. 449. That case involved compulsory disclosure of membership lists of the NAACP by the State of Alabama. The association claimed that such disclosure would subject its members to intimidation and repression by private citizens in Alabama. The State contended that since such repression would be by private persons it was not reached by the 14th Amendment. The Court held that

a violation of due process may result from the interplay of private and governmental action, especially where exertion of state action is necessary in order to effectuate the private conduct. In the case at bar the so-called private action of respondent does not become effective until he takes advantage of the state statute for summary eviction of tenants, and is not completed until he arms a sheriff with a writ of restitution from a state Court. Certainly there is that interplay of governmental and private action referred to in *NAACP v. Alabama,* supra.

It is true that here respondent gave his eviction notice pursuant to a right purportedly conferred upon him by the State Constitution, but this gives no justification to his action for the reason that the people of a state in adopting a constitution are also bound by the limitations of due process and equal protection. *State ex rel. Wausau Street F. Co. v. Bancroft,* 148 Wis. 124, 134 N.W. 330.

III. NEITHER BURTON v. WILMINGTON PARKING AUTHORITY, 365 U.S. 715, NOR BELL v. MARYLAND, 84 S. CT. 1814, SUPPORTS THE POSITION OF RESPONDENT.

We did not discuss *Burton v. Wilmington Parking Authority,* supra, in our opening brief because it did not appear to us then, nor does it appear to us now, that such discussion was necessary. After holding that the lessee of a state agency could not lawfully exclude persons from the premises solely on the basis of race or color, the Supreme Court of the United States

simply repeated the age old requirement of state action before the 14th Amendment is brought into play. While we do not agree that the framers of that amendment intended that such an inflexible rule should ever be applied, we recognize that if the requirement of state action is to be abolished it should be done by that Court and not this one. It is our view that in the case before us the state is involved in the act of discrimination from beginning to end, and without such governmental involvement the eviction could not ensue.

It was for like reasons that we did not discuss at length the case of *Bell v. Maryland,* 84 S. Ct. 1814. The holding of the majority in that case was that the judgments of conviction of certain sit-in demonstrators should be vacated and remanded to the state Court for decision on the question of whether, in light of newly adopted local civil rights laws, the charges should be dismissed.

The zeal with which respondent has embraced dicta from concurring and dissenting opinions, often taken out of context, rather than strengthening his argument, reveals its basic weakness. When able counsel is forced, by the lack of authority or reason, to rely almost exclusively upon opinions which could not carry the day in the forum in which they were originally uttered, we may reach our own conclusions.

The rather lengthy quotation from the concurring opinion of Justice Douglas refutes, rather than supports, the position of respondent. Respondent was not

evicting appellant from his home. This was a house which respondent had chosen to rent to a member of the public willing to pay the rent demanded. No "personal associational interests" or relationships are involved here.

Without realizing it, respondent admits that in many instances Article I, Section 26, California Constitution is invalid under the doctrine of the dicta in *Burton v. Wilmington Parking Authority,* and *Bell v. Maryland,* supra. On page 41 of his brief he admits that he concurs in the excerpts from the opinions in those cases which apply the 14th Amendment to public accommodation situations. What answer would he give a Negro applicant who sought to purchase a house in a tract found to be a place of public accommodation? (*Burks v. Poppy Construction Co.,* 57 Cal. 2d 463). Or, would he admit that a landlord owning a twenty unit apartment house could not invoke Article I, Section 26 as a defense to a plan of racially inspired evictions? That certainly would be a place of public accommodation, and no "personal associational interests" would be involved.

Under the test adopted by respondent Article I, Section 26, becomes merely a homeowners' right to privacy law. This means that it added nothing to existing statutes, because even now appellant does not question the right of a private owner of a home to exclude those whom he dislikes. Other houses owned by him, however, and held out for rental to the public, are a different matter. The ancient maxim, against which

appellant makes no assault, is that a man's home is his castle. Home is where a man lives. His rental houses are merely a part of his commercial enterprise and nothing more.

IV. TITLE 42 USC, SECTION 1982, COMPELS EVERY STATE TO ENFORCE THE RIGHT TO ACQUIRE PROPERTY WITHOUT RACIAL DISCRIMINATION.

The language of the above section is mandatory. It commands every state and territory to assure every citizen the same right to acquire property as is enjoyed by white persons. If a Negro is discriminated against in the sale or rental of property solely because of his race or color, clearly he is not being given the same right which white persons enjoy.

The word "right" connotes a legally enforceable claim. *Estate of Gogabashvelle,* 195 Cal. App. 2d 503. In our society, every citizen has certain rights which exist for their own sake, and do not depend upon a grant from the state. Our positive laws do not create these rights, but only define them. They are defined in the due process and equal protection clauses of the 14th Amendment, but this is not their source. The state must protect them from encroachment by any and all comers, both private and public. As was said in *Estate of Gogabashvelle,* supra, "One of the indispensible qualities of a legal right is the certainty that the state will recognize its existence and *assist in its enforcement.*" It is clear that the right to *acquire*

property is one of those rights which every man has in our society as a natural, inalienable right, not subject to abridgement or abolition in the absolute discretion of others. *Colorado Anti-Discrimination Commission v. Case,* 380 Pac. 2d 34; *In re Krachler's Estate,* 199 Ore. 448; *Estate of Gogabashvelle,* supra.

The conflict between Title 42, U.S.C., Section 1982, and Article I, Section 26, California Constitution is obvious. The former says that citizens in every state and territory shall have the same *right to acquire and possess real property* as is enjoyed by white citizens thereof. This could only mean that the laws of the states and territories may not be so *made* or *enforced* that pursuant to them a non-white citizen may be discriminated against, solely because of race or color, in the acquisition or possession of real property. In Article I, Section 26, California Constitution, we have a law which says in effect that the state will neither abridge nor limit, directly or indirectly, the right of an owner *to decline to sell or rent his real property* to persons for reasons of race or color, or for any other reason. The federal statute says the "right" which the state must protect and assist in enforcing is the "right" *to acquire and possess property.* The state constitution now says that the "right" which the state must protect and enforce is the "right" to decline to sell or rent, in the absolute discretion of the owner. In this conflict of "rights" the one of federal origin must prevail. This is the meaning and import of the supremacy clause of the United States Constitution. *Cooper v. Aaron,* 358 U.S. 1.

In this case respondent does not deny that he would have continued a white tenant in possession of the premises in question. Thus, it is manifestly clear and plainly obvious that appellant was not enjoying the same right to rent property as white persons have. Respondent in effect admit this, but say so what? This is merely a case of one private person discriminating against another, he says, and since the source of Title 42, USC 1982 is the 14th Amendment, nothing can be done about it because essential state involvement has not been shown. We would first point out that this federal statute was originally enacted pursuant to the 13th Amendment as an anti-slavery measure, and then reenacted after the adoption of the 14th Amendment. More fundamentally, however, our answer is that the state law conferred the "right" to discriminate because of race or color. Prior to the last general election every California statute since 1871 proscribed racial discrimination, and our Court decisions quite uniformly have held that racial discrimination was contrary to the public policy of this state. *James v. Marinship Corp.*, 25 Cal. 2d 721; *Burks v. Poppy Const. Co.*, 57 Cal. 2d 463; *Jackson v. Pasadena Unified School District*, 59 Cal. 2d 876. So far as the rental and purchase of residential real property is concerned, Article I, Section 26 purports to change all this. The one new ingredient in the legal and social milieu which permits racial discrimination in an area in which it was formerly prohibited is Article I, Section 26. It is this state law which is under attack, and where such is the case, talk about absence of "state action" becomes a bit ridiculous.

CONCLUSION

In adopting Article I, Section 26, the people of the State of California issued a declaration of neutrality in the struggle of the American Negro to acquire shelter for himself and his family. A higher law, the United States Constitution, however, commands this state to join battle on the side of those fighting for equality of rights, without regard to race or creed. Where white people outnumber Negroes more than ten to one, where nearly all political, economic and legal machinery are in the hands of white people, a declaration of neutrality by the state is in effect not that at all, but rather is an alliance of the government on the side of those who would dispense rights to Negroes in their absolute discretion. The challenged provision should be invalidated, and California returned to the paths of constitutional respectability.

Dated, May 26, 1965.

COLLEY AND MCGHEE,
NATHANIEL S. COLLEY,
MILTON L. MCGHEE,
STANLEY MALONE,
CLARENCE B. CANSON,
By NATHANIEL S. COLLEY,
Attorneys for Plaintiff and Appellant.

(Appendix A Follows)

Appendix.

Appendix A

In The Superior Court of The State of Califor
In And For The County of Sacramento

No. 147992

Howard G. Lewis,
Plaintiff,

vs.

Sacramento Committee For Home Protection; California Real Estate Association; California Apartment Owners Association; Robert A. Olin, William A. Walters, Lawrence H. Wilson, Robert L. Snell, Reg F. Depuy, Tom Dovi, J. Chamberlain, Ken Stewart, C. C. LaRue,
Defendants.

MEMORANDUM OPINION

I

The Court is not concerned in this proceeding the moral, sociological or political aspects of the posed initiative here involved. Rather, the Cou concerned only with certain legal aspects of the posed initiative.

First, it must be ascertained whether the title ; the measure by the Attorney General is legally

cient under the provisions of section 1 of Article IV of the California Constitution which provides that the "chief purpose" of a proposed initiative must be set forth in its title. If the title is in compliance with the law, the Court must then decide whether it is proper to enjoin this exercise of the legislative process assuming *arguendo* the unconstitutionality of the proposed initiative. Finally, if it appears that this is an appropriate case for injunction, the Court will be required to determine whether the proposed initiative, if qualified and approved, would be unconstitutional as violative of either federal statutes or the Fourteenth Amendment to the Constitution of the United States.

II

The plaintiff insists that the Attorney General has mistitled the proposed initiative in that the title does not set forth the "chief purpose" as required by law.[1] He maintains that while the measure on its face speaks against discrimination, in fact it has been artfully drawn to perpetuate discrimination against Negroes. Thus, he argues, the proposed initiative if qualified and approved will operate to supersede the Rumford Act (section 35700 *et seq.*, Health and Safety

[1]The title prepared by the Attorney General is as follows: "Sales and Rentals of Residential Real Property. Initiative Constitutional Amendment prohibits State, subdivision, or agency thereof from denying, limiting, or abridging right of any person to decline to sell, lease or rent residential real property to any person as he chooses. Prohibition not applicable to property owned by State or its subdivisions; property acquired by eminent domain; or transient lodging accommodations by hotels, motels, and similar public places."

Code)[2] and will partially render ineffective the Unruh Civil Rights Act (sections 51 and 52, Civil Code). Indeed, it is contended, that many long established provisions of our law in such diverse fields as real property, probate and contracts will be altered should the proposed initiative be adopted.

The essential question first presented, accordingly, is whether the Attorney General is required to go behind the language of a proposed initiative in preparing a title. The Supreme Court has told us that the Attorney General in preparing a title is performing a ministerial function (*Warner v. Kenny* (1946) 27 Cal. 2d 627, 631), and that the title need not be a catalogue or index of the proposed measure (*Perry v. Jordan* (1949) 34 Cal. 2d 87, 94). Even more important, the Legislature has established that there is a difference between the "chief purpose" of a proposed initiative and its "legal effect" by providing in section 3566 of the Elections Code:[3]

> "Whenever any measure qualifies for a place on the ballot the Secretary of State shall transmit a copy of the measure to the Legislative Counsel. *The Legislative Counsel shall prepare an impartial analysis of the measure showing the effect of the measure on the existing law and the operation of the measure.* The analysis shall be printed in

[2]That the proponents of the proposed initiative are in fact seeking to nullify the Rumford Act is stipulated by counsel for defendants.

[3]The construction given a constitutional provision by the Legislature is of "very persuasive significance". *County of Madera v. Gendron* (1963) 59 Cal. 2d 798.

> the ballot pamphlet between the ballot title and the arguments for and against the measure . . ." (Emphasis supplied.)

Thus, it is concluded that in ascertaining the "chief purpose" of a proposed initiative in the preparation of a title, the Attorney General is required to look only to the language of the measure itself. The Attorney General's function has been performed properly here.

III

We next turn to the question as to whether this is an appropriate case for the Court to enjoin the exercise of the legislative process by the people.

The courts have acted where there has been an unauthorized submission of a matter to the electorate (*Harnett v. County of Sacramento* (1925) 195 Cal. 676, 682-683; *McFadden v. Jordan* (1948) 32 Cal. 2d 330, 334). There also have been indications that in unusual circumstances the courts may act to restrain public officials from expending funds on an election when the measure to be voted upon if enacted would be invalid (*Harnett v. County of Sacramento* (1925) 195 Cal. 676, 683), or if the individual who is seeking election will be ineligible for the public office sought (*Samuels v. Hite* (1950) 35 Cal. 2d 115).

Nevertheless, it is fundamental that in our democratic society the rights the people have reserved to themselves must always be jealously guarded. This basic ideal also must be coupled with the reality that the time limitations for the circulation and qualifica-

tion of a proposed initiative are fixed. It is obvious, accordingly, that the issuance of an injunction by this Court would mean that one judge of one Superior Court might be sending the proposed initiative to its doom, for clearly there would not be sufficient time for qualification after going through the procedures required for appellate court review.[4] It is not a sufficient answer to assert that this Court may stay the operation of the injunction pending the issuance of a writ of supersedeas by the Supreme Court. The Court believes that its responsibility may not be so shirked or transferred. The Supreme Court has given us a clear guide by declining to arrogate the responsibility to itself of removing matters from the electorate. In the recent case of *Wind v. Hite* (September 18, 1962) 58 Cal. 2d 415, it was sought to enjoin the holding of an election as to whether draw poker should be prohibited in Los Angeles County on the ground that the enabling statute providing for such local option was unconstitutional. The Court there said (58 Cal. 2d 415, 416-417):

> "The ballot must be printed by September 27, 1962. The record on appeal has not been filed and the parties are entitled to specified periods of time for the submission of briefs after the record has been filed. (Cal. Rules of Court, rule 16(a)). It is obviously impractical to dispose of the issues raised by the appeal within the time available.
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[4]The Court is informed that the filing deadline for the first or original petitions in the County Clerk's office is February 5, 1964.