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Constitutional Law--Civil Rights--State Action Under the Fourteenth Amendment

John Charles Lobert
West Virginia University College of Law

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State Action Under the Fourteenth Amendment

Ds, the Governor of Ohio and other officials, proposed to enter into construction contracts for a public educational facility. *Ps,* two Negroes who had made repeated unsuccessful attempts to gain membership in certain labor unions, brought a class action for declaratory and injunctive relief to enjoin *Ds,* alleging that qualified Negroes would be unable to get jobs because the contractors would use only union hiring sources and some union officials prevented Negroes from obtaining union membership. *Held,* injunction granted. *Ds'* proposed action would be a deprivation of *Ps'* privileges and immunities under color of state law. The state is not allowed to avoid responsibilities under the fourteenth amendment by ignoring or failing to perform them. *Ethridge v. Rhodes,* 268 F. Supp. 83 (S.D. Ohio 1967).

The pivotal issue in the principal case was whether *Ds'* conduct amounted to state action within the prohibitions of the fourteenth amendment.[1] Federal courts have long held that the fourteenth amendment applies only to state action and not to individual action.[2] In the *Ethridge* case individual actions (union discrimination practices) were primarily responsible for the harm complained of by plaintiffs. The court logically held, however, that the state's dealings with the union (through the construction firms) amounted to participation in the discrimination. This in itself was enough to constitute "state action."[3]

One of the first cases to define "state action" was *Ex parte Virginia.*[4] In this case the Supreme Court sustained an indictment against a state officer for excluding Negroes from a jury list. Holding that the action by the state officer was state action, the Court said:[5]

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[1] U.S. CONST. amend. XIV, § 1. The applicable part of this section reads:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[2] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961); North American Cold Storage Co. v. Chicago, 211 U.S. 306 (1908); Barbier v. Connolly, 113 U.S. 27 (1885); Civil Rights Cases, 109 U.S. 3 (1883); Neal v. Delaware, 103 U.S. 370 (1880); Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963); *But see* United States v. Guest, 383 U.S. 745 (1966). For a comment on the state action concept in the area of individual actions, see 66 W. Va. L. Rev. 325 (1964).

[3] Ethridge v. Rhodes, 268 F. Supp. 83, 87 (S.D. Ohio 1967).

[4] 100 U.S. 339 (1879).

[5] *Id.* at 347.

> Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the Constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.

Two other cases previous to *Ex parte Virginia* revolved around the same central theme. The Supreme Court struck down a West Virginia statute which denied Negroes the right to serve as jurors in *Strauder v. West Virginia.*[6] In *Virginia v. Rives*[7] the question of state action was raised where a judge overruled a motion to modify an all white jury to include one third Negroes in a murder trial of two Negroes.[8]

The principle established by these and other decisions is that the fourteenth amendment governs *all* action of a state whether through its executive or administrative officers, legislature, or courts.[9] The question of state action has arisen over the years in a number of cases,[10] the Court applying the above principle to the facts of each case.[11] It must be remembered, however, that not all the acts of state officers are acts of the state. They must act under state authority or "color of state authority,"[12] or under "color or pretense "[13] of law before such acts constitute state action.[14]

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[6] 100 U.S. 303 (1879).

[7] 100 U.S. 313 (1879).

[8] *Id.* The Court defined state action, but determined that there was none here.

[9] Rogers v. Alabama, 192 U.S. 226 (1904); Carter v. Texas, 177 U.S. 442 (1900); Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226 (1897).

[10] *See, e.g.*, Barrows v. Jackson, 346 U.S. 249 (1953) (court permitting damage judgments for breach of racially restrictive covenants); Hurd v. Hodge, 334 U.S. 24 (1948) (court enforcing racially restrictive covenants); Shelley v. Kraemer, 334 U.S. 1 (1948) (same); Lovell v. City of Griffin, 303 U.S. 444 (1938) (city manager requiring license to distribute literature); Mooney v. Holohan, 294 U.S. 103 (1935) (prosecuting attorney contriving to procure conviction and imprisonment of individual); Nixon v. Herndon, 273 U.S. 536 (1927) (statute prohibiting Negro participation in primary elections); Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913) (city ordinance establishing telephone rates).

[11] For discussions of the historical development of the state action concept, see Barnett, *What Is "State" Action Under the Fourteenth, Fifteenth, and Nineteenth Amendments of the Constitution?*, 24 ORE. L. REV. 227 (1945);Black, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960); Van Alstyne and Karst, *State Action*, 14 STANFORD L. REV. 3 (1961).

[12] Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239, 246 (1931).

[13] Civil Rights Cases, 109 U.S. 3, 17 (1883).

[14] "Color" would include those acts which are done under a semblance of authority, as opposed to those done under actual authority. BLACK'S LAW DICTIONARY 331 (4th ed. 1951).

A plaintiff injured as a result of state action may obtain relief through federal statutes such as those relied on in the principal case.[15] The court held that the plaintiffs correctly asserted jurisdiction under 42 U.S.C. § 1983 (1964),[16] which had been defined and applied previously in the landmark decision of *Monroe v. Pape*.[17] Under this section any public officer who violates the constitutional rights of a citizen may have an action or suit brought against him. Plaintiffs in *Ethridge* case, having established state action on the part of the defendants, were enabled to seek and obtain injunctive relief.

Even though plaintiffs had established jurisdiction in the federal courts, the more important issue arose as to whether intervention by the federal court was premature. Federal[18] and state[19] statutes distinctly spell out the procedure under which plaintiffs would have obtained redress in this situation, *i.e.*, racial discrimination. Under the federal statute monetary damages arising out of discriminatory work practices equal to the amount of back pay dating to the time of discrimination may be awarded. Plaintiffs were obligated to prove that the injury to them warranted the extraordinary relief of an injunction by a federal district court rather than just monetary damages.[20] The court here reasoned that injunctive relief was warranted since such discrimination tends to have an adverse psychological effect on the class discriminated against which cannot be remedied by the payment of money.[21] This identical argument was made by the Supreme Court in the now famous decision of *Brown v. Board of Education*.[22]

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[15] 28 U.S.C. §§ 1331, 1343 (3), 2201 (1964); 42 U.S.C. §§ 1981, 1983 (1964).

[16] 42 U.S.C. § 1983 (1964) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, 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. (Emphasis added.)

[17] 365 U.S. 167 (1961). *See also* Sigue v. Texas Gas Transmission Corp., 235 F. Supp. 155 (W.D. La. 1964); Tribune Review Pub. Co. v. Thomas, 153 F. Supp. 486 (W.D. Pa. 1957); Oppenheimer v. Stillwell, 132 F. Supp. 761 (S.D. Cal. 1955).

[18] 42 U.S.C. § 2000(e) (1964).

[19] OHIO REV. CODE, ch. 4112 (1964). For the applicable West Virginia statute see W. VA. CODE ch. 5, art. 11, §§ 1-15 (Michie Supp. 1967).

[20] Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio 1967); *accord*, Local 499, IBEW v. Iowa Power & Light Co., 224 F. Supp. 731 (S.D. Iowa 1964).

[21] Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio 1967).

[22] 347 U.S. 483 (1954).

At this point it is important to note that the same statute which would award back pay also admits the complaining party into the union which is guilty of discrimination thereby giving him *complete* relief. Plaintiffs in the principal case could have obtained relief through the state and federal administrative procedure. Federal courts have long held that they cannot interfere in such matters until all administrative procedures are exhausted.[23] Although this rule has been modified to some extent,[24] general speaking it is still the law.[25] However, it must be remembered that the principal case involves a *class* action instead of an *individual* action, and the rule would not necessarily be binding by analogy. Furthermore, the relief sought must be considered. Plaintiffs were seeking to enjoin defendants from participating with discriminatory unions and in no way asked for back pay or admission to a union. The above issues will be important if the decision is appealed, for it is upon these issues that the plaintiffs' right to federal court relief rests.

In the principal case Negroes as a class were successful in attacking union discrimination indirectly through state officers dealing with the union. The decision has a twofold effect: (1) It forces the state of Ohio to take notice of racial discrimination in labor unions, and (2) it forces the labor unions to reconsider past decisions concerning the continued practice of such discrimination. This case does raise the problem of federal intervention in state affairs: it limits those parties with which a state may contract, perhaps an undue restriction on the freedom of parties to contract with whomever they choose. However, the court balanced this freedom of contract against the rights of individuals as guaranteed by the Constitution and again upheld those rights. This decision may well be followed in the future as it represents a speedy and effective means by which Negroes and other groups as a class may secure recognition of their civil rights. It also represents one of the largest extensions of the state action concept since its inception. When any action interferes

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[23] Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938); Hegeman Farms Corp. v. Baldwin, 293 U.S. 163 (1934); United States v. Illinois Central R.R., 291 U.S. 457 (1934); Matthews v. Rodgers, 284 U.S. 521 (1932); Parham v. Dove, 271 F.2d 132 (8th Cir. 1959); Holt v. Raleigh City Bd. of Educ., 265 F.2d 95 (4th Cir. 1959); Carson v. Warlick, 238 F.2d 724 (4th Cir. 1956); Carson v. Bd. of Educ., 227 F.2d 789 (4th Cir. 1955).

[24] Perez v. Rhiddlehoover, 247 F. Supp. 65 (E.D. La. 1965).

[25] For a discussion on the problem of exhaustion of administrative remedies, see K. DAVIS, ADMINISTRATIVE LAW §§ 20.01-20.10 (1959).

with the guarantees of the fourteenth amendment, and especially action in some manner sanctioned or authorized by a state, other extensions may arguably be warranted.

John Charles Lobert

Damages—Vehicle—Recovery of More Than Actual Physical Damage When the Vehicle is Partially Destroyed

D negligently damaged the taxicab of *P*. The cost to repair the taxicab was $1,349 while the difference in market value before and after the collision was $415. *P* claims that under the special circumstances of a city ordinance he is not permitted to buy a used car and convert it to a taxicab. *P*, therefore, contends he must have the *cost of repair* to make him whole. The lower court held he was entitled only to the *difference in fair market values. Held,* affirmed. The general rule for damages to personal property partially destroyed is that the *difference in fair market values* before and after the accident is the proper element of recovery where such is less than the *cost of repair*. Here *P* failed to show the necessary special circumstances which would have made this general rule inapplicable, *i.e., P* failed to show that he could not buy a used taxicab which would satisfy the city ordinance. In the absence of such a showing he was completely compensated by recovering the difference in fair market values. *Norview Cars Incorporated v. Crews,* 156 S.E.2d 603 (Va. 1967).

The rule of damages in the principal case is a widely accepted one used in many jurisdictions.[1] It focuses on the actual physical damage inflicted. However, it is but one of several elements of recovery available to the injured party who might also be able to obtain recovery for loss of use or rental value, loss of profits, removal and storage, and interest.

The purpose of compensatory damages is to compensate the person wholly for the losses sustained concurrent with the least burden to the wrongdoer. In cases of personal property where there has been total destruction, this objective is achieved by awarding the fair market value, at the time of the accident, of the item destroyed less any salvage value. Where there has been partial destruction, the

[1] 22 AM. JUR. 2d *Damages* § 145 (1965).