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Constitutional Law--State Action--Real Estate Discrimination

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If a subcontractor cannot recover as a third party beneficiary under a contractor's bond because it contains no provision for his benefit, a fortiori, he cannot recover under such a contract without bond for the same reason. The general rule is that where a contract for public work has been let without obtaining from the contractor the statutory bond, there is no liability to the subcontractor.[16] Since the contract between the state and the prime contractor contained no express provision for the benefit of the subcontractor, the court in the principal case correctly decided that the subcontractor was not a third party beneficiary. For this reason, the subcontractor's action fails, and not, as suggested in the Arkansas case, because of the absence of an existing obligation to him at the time the prime contract was executed.

Tommy W. Chandler

CONSTITUTIONAL LAW—STATE ACTION—REAL ESTATE DISCRIMINATION. —Real estate brokers in Detroit brought action to enjoin the enforcement of a rule of the Michigan Corporation and Securities Commission,[1] which prohibited discrimination by real estate brokers, salesmen, and agents because of race, color, religion, ethnic origin or ancestry.[2] The commission is authorized by the legislature to revoke a real estate broker's license for dishonest and unfair dealing,[3] and to enumerate additional grounds of such conduct and "make rules in harmony with the subject matter legislated upon."[4]

The basis of the action is that the commission had exceeded its rule-making power. The Commission and amici curiae[5] contended that, because of the vital importance to the state of the functions performed by the licensed real estate brokers, discrimination on the basis of race, color, creed or ancestry constitutes discriminatory state action in violation of the fourteenth amendment by not affirmatively prohibiting such practice. The circuit court decreed the injunction sought and the

[16] Annot., 64 A.L.R. 678 (1929).

[1] For a discussion of the rule which is the subject of this litigation, see Kinsey, Rule *Nine—A Novel Approach?*, 39 U. Det. L.J. 108 (1961).

[2] The commission is vested with responsibility for enforcing provisions of the Michigan statute which regulates licensed real estate agents and brokers. Mich. Stat. Ann. § 19.794 (1959).

[3] Mich. Stat. Ann. § 19.794 (1959).

[4] Ranke v. Corporation and Securities Commission, 317 Mich. 304, 26 N.W.2d 898 (1947).

[5] American Jewish Congress, American Civil Liberties Union of Michigan, National Association for the Advancement of Colored People, American Jewish Committee, and the Anti-Defamation League of the B'nai B'rith.

commission appealed. *Held*: Affirmed. "Unfair dealing" is not normally conceived to include discrimination, but rather is intended to mean no more than good reputation for honesty and fair dealing. The delegation of power to make such a rule would be an unconstitutional delegation of legislative power to an executive agency. The failure of the state to affirmatively prohibit discriminatory practices does not constitute state action as prohibited by the fourteenth amendment. *McKibbon v. Michigan Corporation and Securities Commission*, 119 N.W.2d 557 (Mich. 1963).

In reaching its decision, the court dealt primarily with the delegation of rule-making power to the defendant commission. By utilizing the term "unfair dealing" as the foundation for making Rule 9, the commission had gone beyond what the court felt was the legislative intent of the statute delegating its rule-making power. "Unfair dealing" was held to mean no more than "good reputation for honesty and fair dealing" and was not so broad as to include the subject matter of the rule in question.[6] Even if the term "unfair dealing" were construed as to cover the behavior forbidden by the rule, it would amount to an unconstitutional delegation of legislative powers in violation of article 4 of the Michigan constitution.[7]

The right of the commission to revoke or suspend the license of a real estate agent for failure to submit to his customer *all* offers received is not involved in this decision. The court accepted as contrary to the laws of agency a unilateral assumption of right on the part of a real estate agent to determine suitability of a prospective purchaser.[8] Rule 9, however, was construed as covering discrimination, whether or not such was directed by the client.[9] This would be, in effect, denying a private seller the services of a real estate agent if he should wish to discriminate in entertaining offers.

It was the contention of the amici curiae that a eral estate agent should not be part of a discriminatory transaction, and that the state is guilty of discriminatory state action in violation of the fourteenth amendment if it fails to forbid his participation. The amici rely heavily on the recent case of *Burton v. Wilmington Parking Authority*[10] and the concurring opinion of Justice Douglas in *Garner v. Louisiana*.[11]

The *Burton* case was concerned with the question of whether the failure of a governmental body to expressly prohibit discrimination in

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[6] 119 N.W.2d 557, 561 (1963).
[7] *Id.* at 563.
[8] *Id.* at 558.
[9] *Ibid.*
[10] 365 U.S. 715 (1961).
[11] 368 U.S. 157 (1961).

a lease of space to a restaurant in a publicly owned building constituted state action. The Supreme Court, in reversing the decision of the Delaware Supreme Court, supported the opinion with the proposition that, since a large percentage of the income in the parking authority enterprise was derived from leases of space to private concerns within the building, the state was placed in a position of economic interdependence with the private restaurant. Discrimination by the restaurant in refusing to serve Negroes was, therefore, state action as prohibited by the fourteenth amendment. *Garner v. Louisiana* was a case in which Garner had been convicted of breach of the peace as a result of a nonviolent lunch counter sit-in. The majority opinion, in reversing, held that Garner had been denied due process of law. Mr. Justice Douglas concurred with the result on other grounds. Though private enterprises, reasoned Mr. Douglas, restaurants are public facilities in which the states may not enforce a state policy and custom of segregation. Restaurants have "public consequence" and affect the community at large.[12] The Michigan court distinguished *Garner* on the grounds that, while the state was enforcing a Louisiana policy of segregation, Michigan has no such policy or custom. Michigan has, in fact, a manifested legislative policy against discrimination.[13]

The amici curiae contended that failure of the state to forbid its licensed real estate agents from engaging in transactions involving discriminatory conduct would amount to discrimination by the state and, therefore, violate the fourteenth amendment. The equal protection clause of the fourteenth amendment is directed to the states and not to private individuals.[14] The amici argued that not only can the state not actively discriminate, but that it must affirmatively take action to prevent discrimination by real estate agents and deny their services to private sellers who practice discrimination.

The states are told by the fourteenth amendment what they must not do, not what they must do.[15] Mr. Justice Bradley, in the *Civil Rights Cases*,[16] stated:

> The wrongful act of an individual unsupported by any such authority [by the state] is simply a private wrong, or a crime of that individual, an invasion of the rights of the injured party, it is true whether they

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[12] *Id.* at 183.

[13] *E.g.*, Mich. State Fair Employment Practices Act, Mich. Stat. Ann. § 17.458 (1960); Equal Accomodations Act, Mich. Stat. Ann. § 28.343 (1962).

[14] U.S. Const. amend. XIV, § 1.

[15] Henkin, *Shelley v. Kraemer: Notes For A Revised Opinion*, 110 U. Pa. L. Rev. 473, 479 (1962).

[16] 109 U.S. 3 (1883).

> affect his person, property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force. . . .[17]

This traditional concept of state action, however, has been expanding. In 1948, the Court, in the case of *Shelley v. Kraemer,*[18] held that enforcement by state courts of contracts restricting the sale of property to certain races was state action. The Supreme Court, in *Barrows v. Jackson,*[19] in 1953, held that the awarding of damages for breach of such contracts similarly constituted state action. Administrative action of a city board of trustees carrying out the provisions of a will which established a school, to be operated by the city, for "poor white orphans" was held to be state action.[20]

In the area of inaction amounting to state action, the concept was further broadened by the decision of the Supreme Court in the *Burton* case. The failure of the state to forbid discrimination by its lessee was a violation of the fourteenth amendment. The earlier cases in this area had been generally limited to situations involving a public official's refusal or culpable failure to perform his duties.[21] Usually, the cases holding inaction by the state as amounting to forbidden state action have been restricted to this type of situation. The interdependence of enterprises in the *Burton* case weighed heavily in the Supreme Court's decision. It was felt by the court in Michigan, in distinguishing *Burton,* that the Supreme Court has been expanding the concept of state action, but not to the extent of the facts of the *McKibbon* case nor "has even intimated it could do so."[22]

In considering a problem such as is presented in the *McKibbon* case, the court must look beyond a technical mold and carefully consider the delicate balance of interests involved. The freedom to make private contracts and the freedom to use and enjoy property are precious rights, as is the right to be free from discrimination.[23] It has been said that the notion of state action is useful in dividing the responsibilities of the state and federal governments.[24] In this age, however, of ever expanding state and federal influence, the question

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[17] *Id.* at 17.
[18] 334 U.S. 1 (1948).
[19] 356 U.S. 249 (1953).
[20] Pennsylvania v. Board of Directors of the City Trusts of the City of Philadelphia, 350 U.S. 230 (1957).
[21] Lynch v. U.S., 189 F.2d 476 (1951); Picking v. Pennsylvania R.R. Co., 151 F.2d 240 (1945); Catlette v. U.S., 132 F.2d 902 (1943).
[22] McKibbon v. Michigan Corporation and Securities Commission, *supra* note 6 at 566.
[23] In O'Meara v. Washington State Board Against Discrimination, 365 P.2d 1 (Wash. 1961), it was held that an anti-discrimination statute violated the rights of the property seller.
[24] Lewis, *The Meaning of State Action,* 60 Colum. L. Rev. 1083, 1121 (1960).

of whether state action is involved becomes a very close and crucial delineation. Federal Housing Administration home loans, urban renewal, the licensing of real estate agents by the state, building codes, and zoning ordinances are but a few facets of public dominion in the field of housing alone. The using of state action as the ultimate test is becoming, at the least, somewhat tenuous, since it is possible to find state action in a case such as this by seizing on the licensing aspect only. By balancing the interests involved, the court determines whether there is or is not state action to the extent thus far determined by the Supreme Court as being in violation of the fourteenth amendment and reaches a desired result.

Donald S. Muir

CRIMINAL PROCEDURE — EVIDENCE — WIRETAPPING — ADMISSIBILITY IN STATE COURTS.—Defendant's conversation with the prosecuting witness was recorded by an officer who attached a tape recorder microphone to the witness' telephone receiver. The recording was made with the aid and consent of the prosecuting witness, but without the knowledge of the defendant. In a criminal action for obtaining money under false pretenses, the trial court refused to allow the introduction of this recording as evidence. The Commonwealth appealed to the court of appeals, seeking a certification of law on the issue of admissibility. *Held*: The recording is admissible. The recording of the conversation is not a violation of the federal statutory prohibition of wiretapping, and the federal rule excluding evidence obtained in violation of a federal statute does not apply to the states. *Commonwealth v. Brinkley*, 362 S.W.2d 494 (Ky. 1962).

As early as 1914, the United States Supreme Court held, in *Weeks v. United States*,[1] that evidence obtained by an unreasonable search and seizure was not admissible in a federal court. The court reasoned that to hold otherwise would defeat the fourth amendment's protection against such searches and seizures. But in the case of *Olmstead v. United States*,[2] the Supreme court refused to apply this doctrine to a victim of wiretapping, holding that wiretapping is not an illegal search and seizure within the meaning of the fourth amendment. In response to this case, Congress enacted the Federal Communications Act, which provides that no person shall intercept and divulge any communication without the consent of the sender.[3] Since the enact-

[1] 232 U.S. 383 (1914).
[2] 277 U.S. 438 (1928).
[3] 47 U.S.C. § 605 (1934).