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Open Housing: Title VIII of the 1968 Civil Rights Act.

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OPEN HOUSING: TITLE VIII OF THE 1968 CIVIL RIGHTS ACT

Title VIII of the 1968 Civil Rights Act[1] is intended to prevent discrimination in the sale or rental of housing. Title VIII is a detailed statute, defining with particularity the types of housing involved, the forms of action which are discriminatory and the remedies which are available. The purpose of this comment is to examine the operation and implications of the statute. To that end, it will discuss the four areas of the statute: types of housing covered, prohibited activity, enforcement and administration, and the remedies provided.

I. Types of Housing Covered by the Act

The types of housing within the purview of Title VIII consist of three classes, each class being accorded a different date upon which the proscription against discrimination is to commence. The first category covers any housing the financing or acquisition of which was provided through the federal government.[2] This housing includes dwellings owned by the federal government, dwellings provided through loans or grants secured by the credit of the federal government, and dwellings made available through state or local agencies receiving aid for urban renewal.[3] However, this class does not include dwellings subject to mortgages held by a Federal Deposit Insurance Corporation or by a Federal Savings and Loan Insurance Corporation institution merely on the basis of this connection.[4] The prohibition of discrimination in the sale or rental of this class of dwellings commenced with the enactment of the statute.[5]

The second category of housing consists of all other housing, with the exception of single family dwellings where the owner does not own or have an interest in more than three such dwellings at any one time.[6] Further, if the owner was not the last occupant prior to the transaction in question and if he has sold a similar residence within the preceding twenty-four months, the transaction does not fall within the exception described.[7] The effective date for application of the statutory proscription of discrimination in this class of dwellings is December 31, 1968.

The third category, which comes within the purview of the statutory proscription after December 31, 1969, consists of dwellings in the sale or rental of which the owner makes use of the services of a broker, an agent or

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[1] 42 U.S.C.A. §§ 3601-19 (Supp. 1968).

[2] Id. § 3603(a)(1)(B).

[3] Id. §§ 3603(a)(1)(A), (C), (D).

[4] Id. § 3603(a)(1)(C).

[5] The statute was approved April 11, 1968.

[6] 42 U.S.C.A. §§ 3603(a)(2), (b)(1) (Supp. 1968). The statute forbids such abuses as placing title to residences in other people's names in order to keep ownership under the stipulated maximum of three homes; it provides that the seller may not have reserved to himself, pursuant to any private agreement, any right or title to three or more such dwellings.

[7] Id. § 3603(b)(1).

an employee of a broker or agent in the business of selling or renting dwellings.[8]

The statute allows two specific exceptions from the coverage of the three categories described: first, that a religious group may limit the sale or rental of dwellings which it owns to members of the same religion; second, that private clubs may limit to their members rental of any dwellings maintained as an incident to their primary purpose.[9] The first exemption is narrowly drawn with the provision that membership in the particular sect cannot be limited by considerations of race or national origin.[10] In this way, possible abuses such as setting up a pseudo-religious organization in order to exclude potential purchasers or tenants on racial grounds will be minimized. This type of ruse would not be entirely effective, since a member of a racial minority, by joining the sect, would become eligible to rent or purchase the dwellings owned by the organization. This attempt to prevent abuse is not, however, foolproof. A major problem exists in the fact that the exception is tied to religion. Members of the minorities whom this section is designed to protect may not, because of personal religious conviction, desire to join the sect in question, merely to avoid the effect of discrimination. Therefore, the exception may prove to be a useful tool for the segregationist despite the inclusion of the open membership condition.

The second exemption, concerning rental of dwellings by private clubs, may also prove, for the segregationist, to be an escape from the operation of the statute. It is foreseeable that owners of apartment complexes might attempt to set up these complexes as private clubs in order to avoid the ambit of the statute. The statute recognizes this possibility by requiring that the rental of dwellings be merely incidental to the operation of the club, and that the dwellings be held for other than commercial purposes.[11] This condition will effectively prevent circumvention by owners of large apartment complexes where the necessary bookkeeping and rental procedures would serve as ample evidence of the primarily commercial purposes for which the apartments are held. However, the smaller the number of units involved, the easier it would be to disguise the commercial purposes of the arrangement, and to use the exemption as a basis for discrimination. Such a ploy might be attempted with cooperative apartments, where the tenants as a group own the building and provide services in common. It would be easy, through a concerted effort by the tenants, to operate the enterprise in such a way as to give it the appearance of a private club. This effort might be made through the formulation of by laws for the operation of the complex as a club and resort may even be had to incorporation of the complex as a

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[8] Id. A person in the business of selling or renting is one who is the principal in the sale of three or more dwellings within a period of twelve months, the agent in the sale of two or more dwellings other than his own within twelve months, or one who owns a dwelling which may be occupied by five or more families. Id. § 3603(c). Under § 3602, a "family" may be merely a single person.

[9] Id. § 3607.

[10] Id.

[11] Id.

private club. This loophole easily could have been tightened, without serious impairment of the purpose for which the exception was granted, by inclusion of a condition that any private club seeking to qualify for the exception must be a non-profit organization. This provision would be an added check upon persons who attempt to qualify their apartment holdings as private clubs when they are in fact profit-making commercial ventures. Concededly, this provision may exclude legitimate private clubs which are profit-making ventures from enjoyment of the exceptions; but, in view of the reduction in the number of potential abuses of the exception, the stipulation regarding profit-making institutions appears justified.

A more fundamental question inheres in the consideration of the statutory exemptions: why are any exemptions included? One answer is suggested by the statement of the statutory purpose, "to provide, *within constitutional limitations*, for fair housing throughout the United States." (Emphasis added.)[12] The draftsmen may have been concerned with whether the statute, without these exceptions, would be constitutional, since at the time of its drafting, proscriptions of discrimination had been limited under the fourteenth amendment to cases where some form of "state action" was involved.[13]

The question of the constitutionality of a proscription against discrimination in the sale of a private dwelling has, however, been decided in the affirmative by the United States Supreme Court in the case of *Jones v. Alfred H. Mayer Co.*[14] In that case, reviewing the application of the 1866 Civil Rights Act[15] as a prohibition of discrimination in the sale of dwellings by private owners, the Supreme Court found that the thirteenth amendment empowered Congress to prohibit purely private acts of discrimination.[16] The power of Congress to prohibit constitutionally the type of activity which is the subject of these exceptions is, therefore, assured.

Alternatively, the exemptions may have been included as a compromise within the legislative process to assure passage of the bill. If so, the inclusion of the exceptions is ironic, since the Supreme Court announced the *Jones* decision only two months after congressional approval of the bill in its present form. And *Jones* approved a cause of action upon the type of activity which is the subject of these exceptions, rendering them useless as shelters for discriminatory activity.[17] In any event, the inclusion of these exceptions impairs achievement of the stated purpose of Title VIII.

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[12] Id. § 3601.

[13] See, e.g., Hurd v. Hodge, 334 U.S. 24 (1948); Shelley v. Kraemer, 334 U.S. 1 (1948).

[14] 392 U.S. 409 (1968).

[15] 42 U.S.C. § 1982 (1964).

[16] 392 U.S. at 437-39.

[17] In *Jones*, the Supreme Court stated that "§ 1982 appears to prohibit *all* discrimination against Negroes in the sale or rental of property—discrimination by private owners as well as discrimination by public authorities." 392 U.S. at 421 (emphasis in original). It therefore appears that a Negro may bring an action under § 1982 for the type of actions which are excepted under the 1968 Act, such as discrimination by private clubs or discrimination by a private person owning less than three dwellings. It should be noted that the cause of action under § 1982 is limited to racial discrimination

II. Prohibited Activity

The statute describes specific actions as discriminatory and hence unlawful. These include denial of sale or rental of a dwelling or discrimination in the terms of a sale or rental because of race, color, religion or national origin; advertisement concerning the sale or rental of a dwelling which gives evidence of an intent to discriminate on these grounds; statements that a dwelling is not for sale when in fact it is; or participation in blockbusting activities.[18] The last three types of activity involve objectively identifiable acts and therefore would be relatively easy to police. On the other hand, the first two practices, the denial of sale or rental, or discrimination in the terms of sale or rental because of race, color, creed or national origin, are more nebulous since they depend largely upon a determination of the subjective intent of the person allegedly discriminating.

Because of the problem of subjective intent, proof of violations of these two provisions will often be difficult. A typical situation would occur where a person places an ad for the sale of a home but lists no purchase price. When a member of a minority seeks to purchase the dwelling, the owner purposely quotes a price higher than he intended to ask in order to discourage the potential purchaser. Clearly, this behavior would be a violation of the provision against discrimination in the terms of sale, but the only method of effective exposure of the violation would be the use of a "tester." Even then the violator may claim that the change in terms was made in good faith and not because of considerations of a discriminatory nature. The only method to assure proof of a discriminatory practice would be the dispatch of a series of testers, alternating members of the minority with people acceptable to the seller, and thus revealing a fluctuation in the prices quoted to the various testers. Since this process can be both expensive and time consuming, potential purchasers may simply seek other dwellings.

One further problem arises in the application of the provision concerning denial of sale or rental of housing. For example, a developer may make a good faith effort to create an integrated community through the use of a plan calling for percentage occupation by minorities. If he refuses to sell or rent a dwelling to a member of a minority after that minority's quota is filled, he violates the provision of the statute making it illegal to deny sale or rental to a person because of race, creed or color.[19] Even though he did not intend to discriminate, the type of selection necessary to carry out the plan would, by statutory definition, be discriminatory. Thus, the statute prevents this method of community integration. The result can be defended, however, on the ground that assignment of occupation quotas to minorities is merely another form of discriminatory practice. To be free from discrimination, minorities must be able to settle wherever and in whatever numbers they may desire.

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and therefore does not reach discrimination prompted by considerations of religion or national origin, which the 1968 Act does cover. Therefore, any action based upon discrimination because of religion or national origin must be brought under the 1968 Act.

[18] 42 U.S.C.A. § 3604 (Supp. 1968).

[19] Id. § 3604(a).

Another class of conduct proscribed by the statute is discrimination on the basis of race, color, creed or national origin in the provision of financial assistance for the purchase or renovation of a dwelling. This stricture is necessary since outright purchase of a home is rare in today's real estate market. Indeed, it has been estimated that in 1960, over 60 percent of all owner-occupied dwellings were then subject to some form of financing.[20] The section adequately prevents flagrant discrimination in financing—the situation where financing is denied to a member of a racial or religious minority, yet granted to another person with substantially the same financial credentials. (Here, the violation is obvious and easily established by proof of the similarity between the two persons and the absence of any other reason for the refusal of the loan.) Where racial or religious discrimination is the motive for refusal, the court need only look to the reasonableness of refusal. Guidelines for the determination of reasonableness are readily available in the standards of the general banking community, or in the standards of the institution itself with regard to non-minority borrowers.

The section on prohibited activity presents another problem. Banks and lending institutions presumably still retain the right to refuse to grant a loan on the basis of the financial position of an applicant. Financial institutions should not be forced to grant a loan not likely to be repaid. The question then arises whether a lending institution might be able to discriminate in violation of the statute, using an excuse of poor credit risk as a covering motive. Many members of minority groups, whom Title VIII is designed to protect, are financially vulnerable to loan refusal ordinarily reasonable under normal banking standards.[21] The statute therefore offers them little assistance in obtaining loans, without which they will be unable to purchase a residence. The Act itself, then, does not guarantee to minorities the purchasing power to obtain housing. However, within the context of a larger effort by the federal government to give economic assistance through such agencies for obtaining housing, as the Federal Housing Administration and the Veterans Administration programs, the Act serves effectively as a guarantee of an equal opportunity to obtain housing.

Finally, a larger question remains in the statutory treatment of discrimination in financing. That question is whether the provision is intended to reach solely discrimination arising from the personal prejudices of the lenders, or whether it is also intended to prevent denial resulting from the economic effects of community prejudice. In other words, may a bank refuse to grant a loan because the entry of a minority into the neighborhood in question will reduce the property values which will in turn impair the value of the bank's investment? The United States Commission on Civil Rights has pointed to fear of falling property values as a frequent reason for the

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[20] In addition, mortgages for the purchase of many other dwellings had probably been discharged by that time. See United States Commission on Civil Rights, Report 4, at 28 (1961).

[21] Cf. Hearings on S. 1358, S. 2114 and S. 2280 Before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 246 (1967).

denial of home financing to minorities.[22] While in many cases the denial may be economically sound, socially it is simply another factor in a continuing circle of discrimination. This circle must be broken at some point. Property values will not cease to decline until residents have an opportunity to confront the baselessness of the fear of minority entrance into a neighborhood.[23] And this opportunity can only occur when minorities move into these neighborhoods. However, minorities can move into these neighborhoods only when lending institutions begin to supply the necessary loans. The obvious starting point for any attempt to interrupt this cycle is the prevention of denial of loans on the basis of an anticipated decline in property values occasioned by the applicant's arrival in the neighborhood. Although the statute does not deal with this point specifically, this type of denial might easily be labeled discrimination in financial assistance and hence unlawful[24] since it is visited only upon minority groups because they are minorities.

III. Administration and Enforcement

The powers and duties of administration of Title VIII are vested in the Secretary of Housing and Urban Development.[25] Any person seeking relief under the statute for alleged discriminatory practices is required to file a written complaint with the Secretary, who must forward a copy of this complaint to the alleged offender.[26] Within 30 days, and after examination of the complaint, the Secretary must notify the party filing the complaint whether the department will take action in the matter.[27] If a state or local ordinance controls discriminatory housing practices in the locality of the alleged offense, and if this ordinance supplies rights substantially similar to those supplied under the federal statute, the Secretary must notify the appropriate enforcement official under the state or local ordinance.[28] In this situation, the Secretary will take no further action on the complaint unless he determines that no action has been taken by the local official or that the action taken by him is dilatory.[29] If the Secretary determines that further action on his part is necessary, he must certify that in his opinion such action is necessary to preserve the rights of the parties.[30] Practically, the Secretary will probably have little opportunity to follow the progress of individual cases once they have been referred to the state agencies, so parties who feel that the complaint is being managed improperly will probably have to take it upon themselves to notify the Secretary of any deficiencies in the disposition of the case by the local officials.

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22 See United States Commission on Civil Rights, Report 4, at 3 (1961).

23 Id.

24 42 U.S.C.A. § 3605 (Supp. 1968).

25 Id. § 3608(a). The Secretary may delegate any powers or functions devolving upon him under the statute to employees of the Department of Housing and Urban Development either singly or in boards, and he has the power to create rights of appeal within the Department for the decisions of departmental examiners. Id. § 3608(b).

26 Id. § 3610(a).

27 Id.

28 Id. § 3610(c).

29 Id.

30 Id.

A. *Investigations*

In order to probe into the allegations of these complaints, the Secretary has a full complement of investigatory powers, including the right to subpoena witnesses and to issue interrogatories.[31] A respondent is given the right to have a reasonable number of subpoenas issued in the Secretary's name.[32] Any witness whom the Secretary may subpoena may within five days petition the Secretary to modify or revoke the subpoena because it is unreasonable, or requires the production of irrelevant evidence, or is not of sufficient particularity.[33] These investigatory powers are backed by fines up to 1000 dollars or prison terms of not more than one year for non-compliance with an order of the Secretary, or for intentionally giving false or misleading testimony or evidence.[34]

B. *Informal Hearings*

If, subsequent to investigation of the allegations of the complaint, the Secretary decides to take action, the first step must be an attempt to resolve the conflict through informal means.[35] The statute attempts to assure the efficacy of these informal hearings by providing an atmosphere conducive to free exchange: nothing said by the parties at the hearings may be used as evidence against them at a subsequent formal proceeding.[36]

This procedure of informal hearings serves a number of useful purposes. First, it provides for a quick determination of the merits of a claim. Immediate review would help to weed out unfounded or nuisance complaints; it also supplies the alleged offender with an opportunity to explain his actions before having to contend with the rigors and expense of formal litigation. Second, it will in many cases reduce the costs to the disputants. Speedy and informal hearings will lessen the need for protracted employment of attorneys and will eliminate lengthy formal pleadings. Another potential economy is that the hearings are to take place as near as possible to the location of the alleged infraction.[37] A third advantage of the informal hearing process is that it will lighten the load of litigation upon the courts. Also, it is to be expected that the hearing examiners working under the Secretary will quickly develop expertise in coping with the problems in the area. Finally, it will act as a deterrent to acts of discrimination since, as a result of the speed and economy of the system, any party injured by the proscribed conduct will be able quickly to marshal assistance. The offender can no longer be secure in the thought that the expense and inherent sluggishness of the legal system will discourage enforcement by minorities of their rights.

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[31] Id. § 3611(b). Witnesses summoned by the Secretary are entitled to the same mileage and witness fees as are witnesses in proceedings in the United States District Courts. Id. § 3611(c).

[32] Id. § 3611(b).

[33] Id. § 3611(d).

[34] Id. § 3611(f).

[35] Id. § 3610(a).

[36] Id.

[37] Id. § 3608(b).

C. *Judicial Proceedings*

The person claiming injury may bring an action in the United States District Court to enforce his rights under the statute.[38] The action may be brought without regard to the amount in controversy, but it must be commenced within 180 days of the alleged discriminatory act and, again, the plaintiff must have no possibility of redress under a state or local ordinance supplying rights substantially similar to those supplied by the federal statute.[39] The statute also suggests that the plaintiff must file a complaint with the Secretary before bringing an action in the district court.[40] A question arises whether the district court, before deciding the case on the merits, must wait the 30 days allowed by the statute for the Secretary to take action on the complaint, or until it is notified that the Secretary does not intend to take any action. The relevant language in the statute states that "the court shall continue such civil case . . . from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of. . . ."[41] Under the language cited, the court has the right to decide whether it will hear the case in light of any conciliatory efforts being made by the Secretary. The court may decide that no efforts by the Secretary would resolve the complaint, and then deal with the claim on its merits. Thus the injured party might obtain relief from the court without having to await action by the Secretary.

D. *Remedies*

In civil actions brought in the United States District Court, relief may consist of injunctions, either temporary or permanent, temporary restraining orders, actual damages and punitive damages up to 1000 dollars where appropriate.[42] Where the dwelling has not been sold or rented, specific relief may be granted in the form of an injunction ordering the owner either to sell or rent the dwelling to the plaintiff. A question arises whether such an order is appropriate where the owner maintains that he has decided to retain the dwelling himself. The statute implies that such an order would be proper

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[38] Id. §§ 3610(d), 3612(a).

[39] Id. § 3610(d). But see Note, Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968, 82 Harv. L. Rev. 834, 855-58 (1969).

[40] 42 U.S.C.A. § 3610(d) (Supp. 1968). The language in section 3612(a) also suggests the same result: "[T]he court shall continue such civil case . . . from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of *in the complaint made to the Secretary or to the local or State agency* and which practice forms the basis for the action in court." Id. § 3612(a) (emphasis added). But see Note, Discrimination in Employment and in Housing: Private Enforcement Provisions of the Civil Rights Acts of 1964 and 1968, 82 Harv. L. Rev. 834 (1969), in which it is suggested that § 3612(a) provides direct access to the courts without the need to await the results of the conciliatory efforts of the Secretary.

[41] 42 U.S.C.A. § 3612(a) (Supp. 1968).

[42] Id. § 3612(c).

in language making it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer. . . ."[43]

Where the dwelling in question has been sold in the interim, the problem remains of calculating the actual damages to the plaintiff, since at common law every piece of property is presumed to be unique.[44] One possible method for determining relief, which is used in the treatment of damages for breach of a purchase and sale agreement, is the use of a "cover" theory. The plaintiff would acquire another dwelling suitable to his tastes and the measure of damages would be the difference between the cost of the house acquired and the value of the residence which was sold plus any expenses incidental to acquisition of the second dwelling.

In the event that the house has been sold, no action by the district court may affect the right of a bona fide purchaser, encumbrancer, or tenant of the dwelling subject to the action.[45] This stipulation can cause serious problems in cases where the court has decided to continue the case, pending results of conciliatory efforts by the Secretary. When a complaint is filed with the Secretary, he has 30 days to conduct conciliatory hearings. Meanwhile, the probability is high that in an active real estate market the dwelling will have been sold or rented to a bona fide purchaser or tenant and that the court will be left to calculate adequate compensatory damages. The question arises whether the defendant, upon discovery that the action was pending, sold the dwelling as quickly as possible. This conduct could, of course, be dealt with under the punitive damages provision. But how is the defendant to avoid the possibility of this problem? Must he take the dwelling off the market upon learning of the controversy? This course of action would be an economically harsh requirement, especially since there has been no finding of discrimination. In the case of a real estate agent, it would be harmful business policy, since he would probably lose his client. Alternatively, perhaps the defendant need only be prepared to prove that no special effort was made to sell or rent the dwelling.

In any event the problem will be a difficult one for the real estate dealers until the courts have articulated guidelines in the area. In drawing these guidelines, the courts must consider the problems of the brokers and agents as well as those of the party claiming relief. The necessary accommodation of interests will inevitably produce some dissatisfaction. In the meantime, the best course of action for the party seeking relief is probably to seek, immediately after filing the complaint with the Secretary, a temporary injunction against the sale or rental of the dwelling until the dispute is settled.

This problem would be greatly alleviated if the court were to take immediate action upon the complaint without awaiting the results of the conciliatory efforts of the Secretary. In addition, the statute stipulates that the courts must expedite cases by scheduling hearings at the earliest possible date. Even if the court decides to await the results of conciliation, this

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[43] Id. § 3604(a).

[44] See, e.g., Gartrell v. Stafford, 12 Neb. 545, 11 N.W. 732 (1882).

[45] 42 U.S.C.A. § 3612(a) (Supp. 1968).

action does not preclude the possibility of granting a temporary injunction against the sale of the house. Therefore, by temporarily enjoining sale, the court could allow the informal hearings, with their attendant advantages, to continue.

E. *Enforcement by the Attorney General*

The final enforcement provision gives the United States Attorney General the power to institute a civil action for an injunction against conduct which he finds to constitute a pattern of discrimination in violation of the statute.[46] He may obtain permanent or temporary injunctions as well as restraining orders to prevent such conduct and to guarantee "the full enjoyment of the rights granted by this title."[47]

Conclusion

Title VIII attempts to provide fair housing through specific proscriptions of types of discriminatory action, with provision for relief where these proscriptions are violated. Conceptually, the relief granted is adequate to carry out the purposes of the Act. The effectiveness of the statute, however, is limited by the exceptions which the statute specifically allows. Fortunately, the Supreme Court in the *Jones* decision has provided an alternative basis for a cause of action for discriminatory practices in the sale or rental of housing. This alternative, which is not subject to these statutory limitations,[48] will in many cases supply a remedy for the shortcomings of Title VIII. It will not be surprising, therefore, to find many cases abandoning the cause of action granted by Title VIII in favor of obtaining relief under the *Jones* application of the thirteenth amendment and the Civil Rights Act of 1866.[49]

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[46] Id. § 3613.

[47] Id.

[48] See note 17 supra.

[49] See, e.g., Harris v. Jones, — F. Supp. — (D. Mass. 1969), in which the court granted an injunction specifically requiring the defendant to rent an apartment in a two-family dwelling to the plaintiff.