UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 37 | Number 1 Article 11

12-1-1958

Constitutional Law -- Fourteenth Amendment -- Trespass Prosecution Not Discrimination by State

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NOTES AND COMMENTS

Constitutional Law—Fourteenth Amendment—Trespass Prosecution Not Discrimination by State

Defendant Negroes entered the portion of an ice cream parlor reserved for whites. The building was separated by a partition, and had separate doors marked "White" and "Colored." They requested service; the owner refused to give them service and asked them to leave. The Negroes declined to leave, saying they could not do so "without doing damage to the Constitution."

Defendants were arrested and convicted of criminal trespass.[1] They claimed that separation by color for service was a violation of their rights guaranteed by the fourteenth amendment to the Constitution of the United States.

The North Carolina Supreme Court, speaking through Justice Rodman, concluded[2] that: (1) the appellants had been correctly convicted because the discriminatory action involved was merely private conduct, and not state action of the character forbidden by the fourteenth amendment; (2) the occupier of land may accept or reject anyone on his premises for whatever whim suits his fancy; (3) the right of a private enterprise operator to select the clientele he will serve and to make the selection based on race if he so desires has been repeatedly recognized by the courts of the nation; and (4) the fact that the proprietor paid a license tax, the license containing no restrictions on whom could be served, cannot be construed to justify a trespass.

The court had ample authority for concluding that the fourteenth amendment precludes discriminative state action but not purely private action[3] in the field of private enterprise, although inroads are being made on private discrimination.[4] But was the court correct in con-

[1] N.C. GEN. STAT. § 14-134 (1953).

[2] State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).

[3] "Since the decision of this court in the Civil Rights Cases, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section 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." Shelley v. Kraemer, 334 U.S. 1, 13 (1948); Civil Rights Cases, 109 U.S. 3 (1883).

[4] A rail carrier may not transfer a Negro from a Pullman to a second-class car, even though an Arkansas statute required it, because the Interstate Commerce Act forbids it and Congress has pre-empted the field. Mitchell v. United States, 313 U.S. 80 (1941). Following several cases holding that state statutes regulating party primaries were state action, and therefore Negroes might vote therein, South Carolina repealed all of its primary election laws and the defendant contended that the political party was a private organization and not subject to the prohibitions of the

cluding that this was private discrimination rather than state action?[5]

Even if one might conclude, or assume arguendo, that this was state action, it does not necessarily follow that it was of a character precluded by the fourteenth amendment. What is necessary is state action *plus* a violation of one of the clauses set out in section one of the amendment.[6]

Shelley v. Kraemer[7] declares that judicial enforcement of privately drawn racially restrictive covenants is state action violating the fourteenth amendment. The Negroes in that case contended that all three clauses of the amendment were violated. The decision rested on a violation of equal protection of the laws, the Court finding "it unnecessary to consider whether petitioners have also been deprived of property

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Constitution against state action. The court held that party officials were subject to the limitations of the fourteenth and fifteenth amendments. "Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise." Rice v. Elmore, 165 F.2d 387, 391 (4th Cir. 1947). *Cf.* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 87 N.E.2d 541, *cert. denied*, 339 U.S. 981 (1949), where the court held that a private housing corporation could discriminate on the basis of color in selecting its tenants, even though the city and state aided the corporation by condemning the land for the project and giving it tax advantages, because the aid extended and the control exercised were insufficient to constitute state action.

After the *Dorsey* case, the New York legislature passed an act, N.Y. CIVIL RIGHTS LAW § 18-a, to provide against racial discrimination in the selection of tenants for privately owned, but publicly-assisted, housing accommodations. This law was held constitutional in New York State Comm'n v. Pelham Hall Apartments, Inc., 170 N.Y.S.2d 750 (1958), on the grounds that private property rights are subject to be regulated by the exercise of police power legislation, and that the state had the right either to leave abstention from racial discrimination in housing accommodations to the conscience of the individual, or to forbid racial discrimination in housing.

[5] "But the present cases . . . do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined." Shelley v. Kraemer, 334 U.S. 1, 12 (1948).

"That the actions of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court." *Id.* at 14.

"[J]udical action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common law policy. Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement." *Id.* at 20.

[6] U.S. CONST. amend. XIV, § 1. "That Amendment prohibits the respective states from making laws abridging the privileges or immunities of citizens of the United States or denying to any person within the jurisdiction of a state the equal protection of the laws." Collins v. Hardyman, 341 U.S. 651, 664 (1951). "It is State action of a particular character that is prohibited. . . . It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws." Civil Rights Cases, 109 U.S. 3, 11 (1883).

[7] 334 U.S. 1 (1948).

without due process of law or denied privileges and immunities of citizens of the United States."[8] However, the Court noted that "among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property,"[9] citing congressional civil rights legislation[10] as a source of the rights. Thus, although the Court does not say so, it would seem that the privileges and immunities clause was also violated, because the privilege or right to own property was specifically negated by the state action. Was the due process clause also violated in *Shelley v. Kraemer?* That question admits of more doubt, but the Negroes were being ordered by the state courts to move away from the restricted property they had already purchased, and that could easily be held a deprivation of property without due process. Was there also deprivation of liberty without due process? Normally when the word "liberty" is preceded by the word "life," as in the fifth and fourteenth amendments, one thinks in terms of gallows and prison. Yet, in *Bolling v. Sharpe,*[11] a District of Columbia case in which the fourteenth amendment was not applicable, the Court took the attitude that school segregation was a deprivation of liberty under the fifth amendment. So, perhaps in the *Kraemer* case there was also a deprivation of liberty.

Assuming that arresting and convicting defendants constituted state action in the principal case, it is still necessary to determine if any of the three clauses of the fourteenth amendment were violated by such state action.

It would seem that the privileges and immunities clause was not violated, because unlike the right to own property, which is defined by statute,[12] there is no specific right or privilege to enter the premises of another and remain after being asked to depart.[13] In fact, the civil and

[8] *Id.* at 23. [9] *Ibid.*

[10] "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." 14 STAT. 27 (1866), 42 U.S.C. § 1982 (1952).

[11] 347 U.S. 497 (1954).

"Although the Court has not assumed to define 'liberty' with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective . . . . [T]hus it [segregation] imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause." *Id.* at 499-500.

[12] 14 STAT. 27 (1866), 42 U.S.C. § 1982 (1952).

[13] "At common law, a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased." Madden v. Queens County Jockey Club, 296 N.Y. 249, 253, 72 N.E.2d 697, 698 (1947).

criminal laws of trespass and real property laws put the privilege of peaceful possession in the owner.

Was this deprivation of liberty or property without due process of law? Again it seems that this question must be answered in terms of rights. The defendants were deprived of property by fines, but the fines were imposed for violating a non-discriminatory statute applicable to everyone. Was there substantive due process? If there was a right in the defendants to be on the premises, the deprivation was without due process; if there was no right, then the deprivation was with due process.

Was there equal protection of the laws? In the *Kraemer* case it was contended that since the laws applied to everyone alike, there was no denial of equal protection. The Court said that this contention would not bear scrutiny. The reason is that the fourteenth amendment guarantees personal rights to the individual, and to deny another class of persons these same rights is not equal protection, but indiscriminate imposition of inequalities. Therein lies the key difference in the principal case and *Kraemer;* in the former there existed no right in the defendants to occupy the premises after being asked to depart, and in the latter there exists a right to own property which may not be negated by state action. The contrary argument is that, in substance, the proprietor has elected segregation; that by arresting the defendants, the state has made the action of the individual its own action, adopting[14] his motives and rules; and that this is a type of state action precluded by the fourteenth amendment. The North Carolina court answers this argument by saying in effect that it does not look to the motive or reasoning of the possessor, but only to the wrongful disturbance of his possession.

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"A franchise is a special privilege, conferred by the State on an individual, which does not belong to the individual as a matter of common right. It creates a privilege where none existed before." *Id.* at 255, 72 N.E.2d at 699.

"A license, on the other hand, is no more than a permission to exercise a pre-existing right or privilege which has been subjected to regulation in the interest of public welfare. The grant of the license to promote the public good, in and of itself, however, makes neither the purpose a public one nor the license a franchise, neither renders the enterprise public nor places the licensee under obligation to the public." *Ibid.*

The licensee is not an administrative agency of the state simply because he pays a tax or fee for his license. Madden v. Queens County Jockey Club, *supra.*

Plaintiff Negro was refused service at a restaurant in Washington solely because of color. She failed to state a cause of action under the fourteenth amendment, because it applies only to state action and not to one who acts as a private individual. However, a cause was stated under the Civil Rights Act of the State of Washington. Powell v. Utz, 87 F. Supp. 811 (E.D. Wash. 1949).

[14] See Smith v. Allwright, 321 U.S. 649 (1944).