

1970

The End of Private Racial Discrimination in Housing through Revival of the Civil Rights Act of 1866 (42 U.S.C. 1982)

Del Menge

George Ramey

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Recommended Citation

Del Menge, & George Ramey, *The End of Private Racial Discrimination in Housing through Revival of the Civil Rights Act of 1866 (42 U.S.C. 1982)*, 6 Tulsa L. J. 146 (1970).

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CONSTITUTIONAL LAW: THE END OF PRIVATE
RACIAL DISCRIMINATION IN HOUSING THROUGH
REVIVAL OF THE CIVIL RIGHTS ACT OF 1866
(42 U.S.C. § 1982)

1. LEGISLATIVE PURPOSE OF THE CIVIL RIGHTS ACT
OF 1866

A. SOCIAL HISTORY

After the Civil War, Negroes tested their newly obtained freedoms and found they were not prepared to cope with many of the problems encountered. Although they had gained their freedom, "slavery [had] left the Negroes illiterate and untrained for the responsibilities of freedom"; and they were characterized as loving "idleness," having "no keen conception of right and wrong," liking "'ease and comfort'" and concerned more with their present than future environment.¹ However, the fact remains that Negroes wanted to own their own land.² They wandered around looking for their "forty acres" and had a longing "for the feel of their own plows tilling their own soil."³

While there was plenty of cheap land available, it was said that sales to Negroes were not consummated because they wanted to buy "a choice spot in the midst of the plantation" or they had made "some other unreasonable demand" for which a sale to a "white man" would also have been denied;⁴ thus implying that the refusal to sell was not based solely on racial discrimination. Although there were some persons in the North and South who felt a Negro should not "become the outright owner of land anywhere," the majority of whites felt favorable toward "Negro ownership of land if they got it in

¹ 8 COULTER, *THE SOUTH DURING RECONSTRUCTION 1865-1877*, at 49 (1947) [hereinafter cited as COULTER].

² *Id.* at 59, 107.

³ *Id.* at 109.

⁴ *Id.* at 111.

a legal way.”⁵ This alleged feeling of the white man as to Negroes’ rights to acquire property is questionable when viewed in light of then existing legislation.

When the new state governments in the South had become fully organized and functional there developed the so-called “Black Codes”; which, especially the more elaborate ones, dictated what the Negro could and could not do with his newly gained freedom.⁶

The Negro as a slave had been property; he had no rights, civil or political. The mere act of setting him free still left him without these rights; he was still not a citizen. It was a problem of first importance to nurse him into the responsibilities of a free citizenship among a population which had always been free. He must be protected against the whites and himself no less than the whites against him.⁷

Many of the people in the North were aware of these “Black Codes” and saw them as an attempt to return the Negro to slavery.⁸ These Codes, in many cases, had the effect of placing the Negro under the same property right restrictions that had faced him as a slave.⁹ In this position the Negro was generally denied the right to freely enter some types of contracts, carry a firearm, sit on juries, sue and be sued, and buy and sell property.¹⁰

Also during this time the country was undergoing a period of reconstruction and unification under the guidance of Presi-

⁵ *Id.*

⁶ *Id.* at 39-40.

⁷ *Id.* at 38.

⁸ Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and The Right to Buy Property*, 40 S. CAL. L. REV. 274, 292 (1967) [hereinafter cited as Avins]; COULTER 39; J. TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 163 (1954) [hereinafter cited as TENBROEK].

⁹ Avins 292; COULTER 39.

¹⁰ See, e.g., COULTER 39-40; See generally, Avins 280-87 (review of cases and materials on the property rights of slaves).

dent Andrew Johnson, a Southerner who had retained his basic understanding of the South and its Negro problem even though he had been exposed to the North and had undergone four years of extreme Unionism.¹¹ When President Johnson formulated his reconstruction policies, he did not want to bother with calling a special session of Congress; consequently, that body did not assemble until the regular session, some eight months later.¹² In light of this fact and the reconstruction programs which had been instituted, a number of congressmen formed a rising opposition to the President's dealings with the South, even before Congress convened on December 5, 1865.¹³

These were some of the conditions which made up the atmosphere in which the 39th Congress would conduct its business, a part of which included the enactment of the Civil Rights Act of 1866.

B. LEGISLATIVE HISTORY

Congress, since 1838, had been involved in intermittent discussions on what power they had to enact legislation to abolish slavery. The majority of the abolitionists felt that Congress did not have the constitutional power to abolish slavery by direct legislation; the minority felt that the national power vested in Congress, in light of our federal system, was sufficient to allow legislation for the abolition of slavery throughout the country.¹⁴ Then, on December 14, 1863, the House received a proposal for a constitutional amendment that would effectively abolish slavery throughout the nation.¹⁵ After the congressional debates in the spring of 1864 and January, 1865, the proposed amendment was sent to the states for ratification.

¹¹ COULTER 34.

¹² *Id.* at 32.

¹³ *Id.* at 41.

¹⁴ TENBROEK 68-70.

¹⁵ *Id.* at 138.

It was ratified and became law on December 18, 1865, as the thirteenth amendment.¹⁶

For those abolitionists who had felt Congress had the power to abolish slavery by direct legislation, this new amendment was merely declaratory; but for the majority of the abolitionists, it was felt to be amendatory. The majority's view was that it took the power over slavery from the states, abolished slavery throughout the Nation, and made freedom a national right with Congress having the power of enforcement. However, regardless of the label placed on it, the feeling of all abolitionists was that Congress now had power to protect persons from bondage and in addition to provide a wide range of natural and constitutional rights.¹⁷

Shortly before and after the adoption of the thirteenth amendment, three bills were sponsored in the Senate aimed at declaring null and void the antebellum slave codes and discriminatory laws which were in existence; but all three were too narrow in scope.¹⁸ Before the first of these proposals was defeated, Senator Lyman Trumbull, Chairman of the Judiciary Committee, stated that if it was defeated, he would introduce a bill that would be more efficient in protecting the rights of the freedmen since, "It is idle to say that a man is free . . . who cannot buy and sell [property]" Trumbull felt that such legislation would have its authority in the second section of the thirteenth amendment.¹⁹ Then on January 5, 1866, Senator Trumbull introduced the civil rights bill which was later to become the Civil Rights Act of 1866.²⁰

¹⁶ 13 Stat. 774 (1865).

¹⁷ TENBROEK 152-55.

¹⁸ CONG. GLOBE, 39th Cong., 1st Sess. 39, 91 (1866), [hereinafter cited as CONG. GLOBE], cited in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 429 (1968); TENBROEK 158, 159.

¹⁹ CONG. GLOBE 43, cited in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 430 (1968); Avins 293; TENBROEK 159.

²⁰ CONG. GLOBE 129, cited in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 431 (1968); TENBROEK 160.

During the Senate debates that followed, much was said about the purpose, propriety and scope of this proposed legislation. As to the purpose, Senator Trumbull stated that it would effectively "destroy all the discriminations" which were created by the antebellum slave codes.²¹ He also said that this bill would give to all men "the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property."²² On the propriety of the bill, Senator Trumbull, in referring to section two of the thirteenth amendment, stated that:

The second clause of that amendment was inserted for . . . the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free.²³

²¹ CONG. GLOBE 322, *cited in* Avins 293. The full statement was: "When the constitutional amendment was adopted and slavery abolished, all these statutes became null and void, because they were all passed in aid of slavery, for the purpose of maintaining and supporting it. Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary states have passed laws relating to the freemen, . . . which deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill is to destroy all these discriminations, and to carry into effect the constitutional amendment." CONG. GLOBE 474, *cited in* Avins 293, 294.

²² CONG. GLOBE 474, *cited in* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 432 (1968); Avins 294.

²³ CONG. GLOBE 43, *cited in* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 455 (1968) (dissent).

The thirteenth amendment provides:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

When Senator Trumbull was questioned on the scope of the bill, he responded that section two, which imposed criminal sanctions for violation of the enumerated rights in section one, would "have no operation in any state where the laws are equal."²⁴ He also stated that section two of the civil rights bill was to punish "not state officers especially, but everybody

²⁴ CONG GLOBE 476, *cited in* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 459 (1968).

Original form of Civil Rights Act of 1866:

Section 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statutes, ordinance, regulation, or custom, to the contrary notwithstanding.

Section 2. That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.

Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27.

who violates the law. It is the intention to punish everybody who violates the law."²⁵

Following the Senate's passage of the Civil Rights Act, it was sponsored in the House by Representative James Wilson. During the first House debate, Wilson, in explaining the bill, made the following statement:

[I]t will be observed that the entire structure of this bill rests on the discrimination relative to civil rights and immunities made by the states on 'account of race, color or previous condition of slavery.'²⁶

He further stated:

[W]e may protect a citizen of the United States against a violation of his rights by the law of a single state; . . . this power permeates our whole system, is a part of it, without which the States can run riot over every fundamental right belonging to the citizens of the United States.²⁷

Representative Wilson expressed these same views throughout the House debates.

The bill was passed by the House on March 13, 1866.²⁸ President Johnson vetoed the Act. Congress overrode his veto and the Civil Rights Act of 1866 became law.²⁹

Although the cited excerpts of the congressional debates are not conclusive, it is believed that they are the best evidence of the legislative purpose of this Act since they were

²⁵ CONG GLOBE 500, cited in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 458 (1968).

²⁶ *Id.* at 1118, 392 U.S. at 465.

²⁷ *Id.* at 1119.

²⁸ *Id.* at 1367.

²⁹ Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27. The pertinent part of this Act which remains today is found in 42 U.S.C. § 1982 and provides: "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."

made by the two men (its originator and chief advocate in the Senate and its sponsor in the House) who were primarily responsible for explaining it to the other members of the Congress. From the debates and general background, it seems that the Act was intended to abolish the antebellum slave codes and other Acts of the State rather than to prohibit purely private racial discrimination.

II. CONSTITUTIONAL BASIS FOR GIVING EFFECT TO THE CIVIL RIGHTS ACT OF 1866

A. THIRTEENTH AMENDMENT

The congressional debates, in the spring of 1864 and in January, 1865, which led to the thirteenth amendment's ratification show that its advocates and opponents agreed that it would "evolutionize the federal system."³⁰ Another aid in determining the effect of the amendment was that the abolitionists were not sure whether it would have a declaratory or amendatory function. As previously mentioned, even though this ambiguity existed, there was little uncertainty among the abolitionists as to the power it conferred on Congress.³¹ The Senate debates indicate that there were a few who wanted to give a narrow construction to this amendment. Several Senators expressed the desire that section one cover only the master-Negro slave relationship and section two cover the right of the Negro to the privilege of habeas corpus.³² However, the prevailing view was that this amendment would be much broader in its scope than indicated by its simple language. The consensus of its drafters and sponsors was that it would not only remove the bonds of the physical person, but that it would also restore his "natural, inalienable, and civil rights"; which is another way

³⁰ TENBROEK 147, 148.

³¹ *Id.* at 152-55.

³² CONG. GLOBE 499 (Senator Cowan); *Id.* at 113, 476 (Senator Saulsbury); *Id.* at 317 (Senator Hendricks) [all cited in TENBROEK 165].

of saying that he would be given the privileges and immunities of a citizen of the United States.³³

In view of the previously mentioned statements of Senator Trumbull and Representative Wilson and in view of other statements made during the debates in both the Senate and the House as to the propriety of the civil rights bill, it seems reasonable to infer that the majority opinion was that the Civil Rights Act of 1866 could be given effect under the power granted to Congress by the thirteenth amendment.³⁴ If the purpose of the civil rights bill was to end all racial discrimination except that of a purely private nature and to effectively destroy the discriminatory acts which denied the same civil rights to all, including the right to buy, sell and own both real and personal property, then its application under this amendment would seem to be appropriate. However, it appears highly improbable that either Senator Trumbull or Representative Wilson would have viewed an individual's refusal to sell his realty to another because of his race as creating an act of slavery which would have violated this amendment.

B. FOURTEENTH AMENDMENT

From the time the fourteenth amendment was proposed until it was released for ratification, the debates in both the House and the Senate consisted, for the most part, of reference only to the political sections of the proposal. But what significant debates there were tended to show that Congress was still concerned with the national protection of natural or civil rights of persons or citizens.³⁵ While much has been written about the development of the fourteenth amendment, there is one point on which all historians agree: the fourteenth amendment "was designed to place the constitutionality of

³³ TENBROEK 179, 180.

³⁴ See, e.g., TENBROEK 156-80.

³⁵ *Id.* at 192.

³⁶ *Id.* at 183, 184.

the . . . civil rights bill [Civil Rights Act of 1866] . . . beyond doubt."³⁶

One historian, after making a close analysis of the legislative history, stated that Congress had growing doubts that the thirteenth amendment had the capacity to sustain the far-reaching legislative programs for protection of civil rights. However, they did feel that the fourteenth amendment would give Congress the power to declare that certain rights should be guaranteed to all citizens.³⁷

Another historian noted that during the House debates on the fourteenth amendment, a number of speakers stated that the purpose was to "make certain the constitutionality of the Civil Rights Act [of 1866]."³⁸ Also, the debates evidence a concern that this amendment would be required to "place the provisions of the Civil Rights Act beyond the power of shifting congressional majorities."³⁹

It would seem that, although the Civil Rights Act of 1866 was enacted under the authority of the thirteenth amendment and before the fourteenth amendment became law, the real constitutional basis for the Act is section five of the fourteenth amendment.⁴⁰ This observation is based on the idea that both the Act and the amendment were designed to prohibit discrimination by the states.

³⁷ FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* 45 (1908), cited in Robinson, *The Possibility of a Frontal Assault on the State Action Concept, with Special Reference to the Right to Purchase Real Property Guaranteed in* 42 U.S.C. § 1982, 41 NOTRE DAME L. REV. 455, 460, 461 (1966).

³⁸ TENBROEK 208.

³⁹ *Id.* at 209.

⁴⁰ U.S. CONST. amend. 14, §§ 1, 5 provide in pertinent parts:
Section 1. 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 law.
Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

III. CASES ON THE CONSTITUTIONAL BASIS OF THE CIVIL RIGHTS ACT OF 1866

This Act, from which 42 U.S.C. § 1982 is derived, has had a relatively quiet existence, but nonetheless, a very inconsistent one. In *United States v. Harris* there was a feeling that this section was enacted by virtue of and constitutionally grounded in the thirteenth amendment.⁴¹ Subsequently, a federal district court held that Section 1982 was a proper exercise of the powers granted by the thirteenth amendment since that amendment guaranteed the rights of citizenship and the right to buy or lease property.⁴²

Shortly after the *Harris* case, the *Civil Rights Cases*⁴³ were decided; and the Court, in dictum, said of the Civil Rights Act of 1866:

This law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified . . .⁴⁴

This statement suggests that Section 1982 would only be enforced under the state action doctrine of the fourteenth amendment. This view was, to all appearances, reinforced by *Hurd v. Hodges*.⁴⁵ In that case the Court pointed out that the original act was re-enacted after the passage of the fourteenth amendment because there were serious doubts that the thirteenth amendment would support it; and since the original act and the fourteenth amendment passed in the same Congress, they were closely related in the objective of being aimed at state action.⁴⁶ Nevertheless, this case held

⁴¹ 106 U.S. 629, 640 (1882).

⁴² *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903).

⁴³ 109 U.S. 3 (1883).

⁴⁴ *Id.* at 16.

⁴⁵ 334 U.S. 24 (1948).

⁴⁶ *Id.* at 32-33.

that judicial enforcement of a racially restrictive agreement would violate the predecessor of Section 1982.⁴⁷

These were the precedents for the construction of Section 1982 when the Supreme Court was faced with *Jones v. Alfred H. Mayer Co.*⁴⁸ The principal issue presented by *Jones* was:

[W]hether *purely* private discrimination, unaided by any action on the part of the government, would violate § 1982 if its effect were to deny a citizen the right to rent or buy property solely because of his race or color.⁴⁹

IV. CASE DEVELOPMENT PROHIBITING RACIAL DISCRIMINATION IN HOUSING

A. PRIOR TO *JONES V. ALFRED H. MAYER CO.*

Since the Civil War and the emancipation of all Negro slaves, the issue of whether Negroes are entitled to the full and equal enjoyment to buy, sell, convey and lease real property, as enjoyed by white citizens, has been shaded by the court invoked doctrine of "state action". This doctrine arose and developed in the case law since the *Civil Rights Cases*.⁵⁰

The Supreme Court, prior to *Jones* and in line with the *Civil Rights Cases*, concluded that the thirteenth amendment merely abolished slavery and its incidents; that the legislative power under section one of the thirteenth amendment extended only to the subject of slavery and its incidents;⁵¹ and that the denial by an individual of equal accommodations, public conveyances and places of public amusement imposed no badge of slavery which Congress had the power to prevent by appropriate legislation. In addition, the Court held that the fourteenth amendment prohibited "state action

⁴⁷ *Id.* at 32.

⁴⁸ 392 U.S. 409 (1968).

⁴⁹ *Id.* at 419.

⁵⁰ 109 U.S. 3 (1883).

⁵¹ *Id.* at 23.

of a particular character and that individual invasion of individual rights is not the subject matter of the amendment."⁵²

Since 1883 the concept of "state action," in regard to the issue of racial discrimination in private housing, has become firmly entrenched; the Supreme Court consistently holding that the requisite "state action" must be present before the Court could invoke the equal protection clause of the fourteenth amendment. But since the holding in the *Civil Rights Cases*, the Supreme Court has broadened and expanded the concept of "state action."

In *Buchanan v. Warley*⁵³ the Court held that a municipal ordinance which prohibited white as well as Negro ownership of property in close proximity with the other, so as to maintain the public peace, was "state action" prohibited by the fourteenth amendment. Also, the Court has found the requisite "state action," thus a violation of the fourteenth amendment, where a publicly owned and operated restaurant refused to serve food or drink to a Negro.⁵⁴

In *Boman v. Birmingham Transit Co.*⁵⁵ a city ordinance authorized the transit company to formulate rules for the seating of passengers. In light of the "statutory" power conferred on the transit company, the Fifth Circuit viewed the policy of racially segregated seating in buses as being "state action" and violative of the fourteenth amendment.

In *Ming v. Horgan*⁵⁶ a California court found state action in the licensing of a real estate broker who refused to sell real estate to persons solely on the basis of race.

⁵² *Id.* at 11.

⁵³ 245 U.S. 60 (1917).

⁵⁴ *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

⁵⁵ 280 F.2d 531 (5th Cir. 1960).

⁵⁶ 3 RACE REL. L. REP. 693 (Cal. Super. Ct. 1958).

This expansion by the courts of the concept of "state action" has, in the opinion of some writers, taken a new turn:

The issue must be whether the private organization has moved into an area of sufficient public concern, whether there is such 'interdependence' that the discrimination is no longer private and personal.⁵⁷

Also, the Supreme Court in *United States v. Guest*⁵⁸ stated that the involvement by the state need not be exclusive or direct.⁵⁹ We find further evidence of this view from the dissenting opinion of Judge Fuld:⁶⁰

Even the conduct of private individuals offends against the constitutional provision if it appears in an activity of public importance and if the state has accorded the transaction either the panoply of its authority or the weight of its power, interest and support.⁶¹

However, prior to *Jones*, the concept of "state action" was the only method used to attack racial discrimination in housing because the fourteenth amendment was only applicable where the requisite "state action" could be found. But see *United States v. Guest*⁶² and the following statement from the dissent of Justice Harlan in the *Civil Rights Cases*:

There are burdens and disabilities which constitute badges of slavery and servitude, and that the express

⁵⁷ Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347, 384 (1963).

⁵⁸ 383 U.S. 745 (1966).

⁵⁹ *Id.* at 755.

⁶⁰ *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. 2d 541 (1949).

⁶¹ *Id.* at 543, 87 N.E.2d at 555.

⁶² 383 U.S. 745, 762 (1966). Mr. Justice Clark, with whom Mr. Justice Black and Mr. Justice Fortas join, concurring, says that there can be no doubt that § 5, the enabling clause, empowers Congress to enact legislation to punish all conspiracies, with or without state action, that infringe upon fourteenth amendment rights.

power . . . to enforce, by appropriate legislation, the thirteenth amendment, may be exerted by legislation of a direct and primary character, for the eradication, not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the very foundation of the Civil Rights Act of 1866 [C]ongress, by the Act of 1866, passed in view of the thirteenth amendment, before the fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, . . . those fundamental rights which are the essence of civil freedom, namely the right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens⁶³

This view, prior to the *Jones* case, was also supported by a federal district court case;⁶⁴ the view being that the Civil Rights Act of 1866, now 42 U.S.C. § 1982, pursuant to the thirteenth amendment guaranteed a citizen the right to buy or lease property, and a violation of this right constituted a "badge of slavery" within the prohibitions of the thirteenth amendment.

B. *JONES V. ALFRED H. MAYER CO.*

The Supreme Court ended private discrimination in housing based solely upon race or color in *Jones v. Alfred H. Mayer Co.*⁶⁵

The facts of the case are that private individuals refused to sell Joseph Jones a house in the Paddock Woods community of St. Louis County, Missouri, for the sole reason that he was a Negro.

The basic issues of this case are: whether the Civil Rights

⁶³ 109 U.S. 3, 35 (1883).

⁶⁴ *United States v. Morris*, 125 F. 322 (E.D. Ark. 1903).

⁶⁵ 392 U.S. 409 (1968).

Act of 1866⁶⁶ purports to prohibit all racial discrimination, private or public, in the sale and rental of property; and also, whether Congress had the power to eradicate conditions that prevent Negroes from buying property because of their race or color under the thirteenth amendment.

The Court held that:

[Section] 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the thirteenth amendment.⁶⁷

The Supreme Court, in its interpretation of § 1982, gave it an all-encompassing application. It seems that the Court based its rationale on differences in wording between § 1 and § 2 of the Civil Rights Act of 1866.⁶⁸ It distinguished § 1 from § 2 by holding that § 1, stating the right to purchase and lease property, was to be enjoyed by Negroes as well as white citizens and that their right was secure from interference from the government or a private source. Further, the Court reasoned that § 2, which provided for criminal prosecution, only prohibited a deprivation of rights based upon race or color which was perpetrated "under color of law."⁶⁹ Thus, the Court concluded that if § 1 had intended to do no

⁶⁶ Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, which provides in pertinent parts:

That all persons born in the United States . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property . . . as is enjoyed by white citizens. . . .

⁶⁷ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

⁶⁸ Act of April 9, 1866, ch. 31, §§ 1-2, 14 Stat. 27.

⁶⁹ 392 U.S. at 426.

more than grant a relief from governmental interference then § 2 would have been immaterial and irrelevant.

The Court through this decision has put teeth into the thirteenth amendment, making it all encompassing as applied to any racial discrimination. It reasoned that Congress, under the thirteenth amendment, could determine what were badges and incidents of slavery and prohibit them by appropriate legislation; and thus:

[I]f Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man [then the Thirteenth Amendment is of no value]. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.⁷⁰

V. CONCLUSION

Shortly before the decision in the *Jones* case, the Civil Rights Act of 1968 had been enacted⁷¹ and was to become effective January 1, 1969. Title VIII of that Act⁷² provides for a very comprehensive "fair housing" policy. The Court in *Jones*, cognizant of the Civil Rights Act of 1968, pointed out that its opinion did not alleviate the need for such an Act since its decision was not "a comprehensive housing law" and since it did not deal with all facets of discrimination, as does the 1968 Act.⁷³

A careful reading of the Civil Rights Act of 1968 shows that the Court, in *Jones*, has "by its construction of § 1982

⁷⁰ *Id.* at 443.

⁷¹ Act of April 11, 1968, Pub. L. No. 90-284, 82 STAT. 73.

⁷² 42 U.S.C. § 3601-19 (Supp. IV 1968).

⁷³ 392 U.S. at 412-16.

. . . extended the coverage of federal 'fair housing' law far beyond that which Congress in its wisdom chose to provide in the Civil Rights Act of 1968".⁷⁴

Congress limited the application of the 1968 Act by excepting any single family house sold or rented by an owner.⁷⁵ Thus, we have in the *Jones* case and the Civil Rights Act of 1968 a contradiction as to the amount of discrimination which will be allowed. The *Jones* case bars all public and private racial discrimination in housing; and the Civil Rights Act of 1968 specifically exempts single family housing from its coverage of discriminatory acts. The Supreme Court will surely be called upon to resolve this conflict.

It would seem that the exemption provided by Congress in the 1968 Act is in line with the well-established principle in property law that a property owner has the absolute right of deciding to whom he wishes to convey his property. On the other hand, the Court in *Jones*, while talking about the right to buy and sell property, has seemingly established the principle that, if one is a Negro, he has a greater right to buy than to sell.

It is suggested that when the Court is faced with this conflict, it should bring its holding in line with the current legislative purpose. This could be done by reviewing its holding in the *Jones* case and then distinguishing it on a factual basis, or by finding that *Jones* was decided before the Civil Rights Act of 1968 was in effect.

Del Menge
George Ramey

⁷⁴ 392 U.S. at 478 (dissent).

⁷⁵ 42 U.S.C. § 3603 (b) (1) (Supp. IV 1968).