The Unruh Civil Rights Act as Applied to Real Estate Brokers

Joseph C. Rhine

Stanley A. Zimmerman

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol13/iss1/4

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
THE FULL AND EQUAL RIGHT of the California citizen to commercial service and accommodation has, in some degree, been protected by state legislation since 1872. In that year, the innkeeper and the common carrier were required to provide their services by the Penal Code which probably prohibited discrimination. In 1893 a statute was enacted to specifically prohibit discrimination by operators of places of "public amusement or entertainment." In 1897 "public accommodations" was added, and "inns, restaurants, and hotels" were included in the statute. "Public conveyances" was added to the section in 1919. By 1959 section 51 of the Civil Code included specific references to: "[I]nns, restaurants, hotels, eating-houses, places where ice cream or soft drinks of any kind are sold for consumption on the premises, barber shops, bath houses, theaters, skating rinks, public conveyances and all other places of accommodation or amusement."

In 1959 the legislature passed three statutes. Employers of more than five persons were prohibited from discriminating in the hiring of employees; persons selling or renting "publicly assisted" housing accommodations were required to act without discrimination; and operators of "all business establishments of every kind whatsoever" were made subject to civil actions if they denied their services because of the race, color, religion, ancestry or national origin of the citizen.

Historically, these statutes demonstrate that the legislature has broadened the scope of the right given to the citizen. Horowitz, in his article on the Unruh Civil Rights Act, points out that the earlier statutes were designed to prevent the public humiliation of the citizen who was discriminated against. The present sections, Horowitz continues, protect the citizen from a more subjective psychological injury whether or not he is in "public view."

---

1 Members, Third Year class.


It is also apparent that each successive statute passed by the legislature has resulted in subjecting a broader area of economic activity to a statutory duty. In 1959 particularly, the three statutes passed are directed at increased economic protection of the citizen who is subject to discrimination. In that year, the legislature undertook to insure equal economic opportunity for all citizens in the areas of employment, publicly assisted housing, and "all business establishments of every kind whatsoever."

Application of Sections 51 and 52 to Real Estate Brokers

Section 51 of the Civil Code states:

All citizens within the jurisdiction of this state are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

This section shall not be construed to confer any right or privilege on a citizen which is conditioned or limited by law or which is applicable alike to citizens of every color, race, religion, ancestry, or national origin.

Section 52 reads as follows:

Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in section 51 of this code.

Plain Meaning

The application of any statute is determined by the plain meaning of the words on its face. "When statutory language is clear, legislative intent must be ascertained therefrom, and there is no room from [sic] construction or interpretation."

This statute specifically refers to "all business establishments of every kind whatsoever." The real estate broker must be licensed as a business in California and maintain a definite place of business within the state. Section 10130 of the Business and Professions Code stipulates: "It is unlawful for any person to engage in the business, act in the capacity of, advertise or assume to act as a real estate broker or a real estate salesman within this state without first obtaining a real estate license from the division." (Emphasis added.) Section 10162 adds:

Every licensed real estate broker shall have and maintain a definite place of business in the State of California which shall serve as

---

his office for the transaction of business. This office shall be the place where his license is displayed and where personal consultations with clients are held.

No real estate license authorizes the licensee to do business except from the location stipulated in the real estate license.

Notice in writing shall be given the commissioner of change of business location of a real estate broker, whereupon the commissioner shall issue a new license for the unexpired period. (Emphasis added.)

Section 10163 also stipulates:

If the applicant for a real estate broker's license maintains more than one place of business within the state he shall apply for and procure an additional license for each branch office so maintained by him. Every such application shall state the name of the person and the location of the place or places of business for which such license is desired. The commissioner may determine whether or not a real estate broker is doing a real estate brokerage business at or from any particular location which requires him to have a branch office license. (Emphasis added.)

It is clear that these code sections provide for licensing a broker as a business establishment.

No business establishment is excepted by the plain meaning of the words of section 51. Indeed, the contrary is affirmatively stated in the phrase, “of every kind whatsoever.” Therefore, as the statutory language is not ambiguous and permits only one construction, it must be concluded that section 51 applies to the business establishment of the real estate broker. “The courts may not speculate that the legislature meant something other than what it said. Nor may they rewrite a statute to make it express an intention not expressed therein.”

This conclusion is supported by an opinion of the attorney general of the State of California: “The provisions of Civil Code section 51 apply to the advantages, facilities, privileges, and services supplied by real estate brokers and real estate salesmen in regard to the selling transferring, renting, leasing, or rental managing of real property.”

Legislative History of Section 51

The attorney general’s opinion is supported by the legislative history of the bill as it was molded into its final form. A basic principle of statutory construction is that “... a construction that will promote the legislative intention, purpose and policy will override a construction that would defeat it.” The history of this bill shows that the regulation of all business establishments of every kind whatsoever resulted in excluding regulation in areas other than business establishments.

---

6 Id. at § 128.
As originally introduced, A. B. 594 (later to become the present Civil Code 51, the Unruh Civil Rights Act) was an attempt to cover all types of activities:

All citizens within the jurisdiction of this state, no matter what their race, color, religion, ancestry, or national origin, are entitled to the full and equal admittance, accommodations, advantages, facilities, membership, and privileges in, or accorded by, all public or private groups, organizations, associations, business establishments, schools, and public facilities; to purchase real property; and to obtain the services of any professional person, group or association.

This version of the bill was similar to the section 51 in existence at that time, which also had a list of areas to be regulated. However, there had been great difficulty interpreting section 51 in the cases arising under it because of the restrictive nature of the specified areas of regulation, followed by the phrase “and all other places of public accommodation.” Similarly, as the classifications of A. B. 594 became more numerous and involved, the phrase “set out, but not limited by this section” was added to the bill.

The legislature again changed the bill before passage. From the activities regulated, the legislature removed public and private groups, organizations, associations, schools, public facilities, the purchasing of real property, and the obtaining of the services of any professional person, group or association. Of the rights granted, full and equal admittance and membership were removed, and full and equal “services” was added. Of all the activities originally listed, only “business establishments” remained. This one classification not only remained but was strengthened by the addition of “of every kind whatsoever.”

This particular classification was what the legislature intended to cover with section 51. The other areas were left for other laws, thus eliminating the problems of interpretation, of exclusion and inclusion, and the clause “set out, but not limited by this section.” The law was now clear. One definite criteria was established.

As earlier stated, real estate brokers are licensed as business establishments under the code. The removal of the phrase “to purchase real property,” or any of the other deleted phrases, would seem to be insignificant as far as the legislature’s intention to cover either the real estate brokerage business or any other business. One member of the legislature commented that he did not press for the passage of A. B. 444,
which was also aimed at regulating the real estate broker with an added provision for his delicensing when it became obvious that the Unruh Civil Rights Act would pass.\(^\text{10}\)

**Constitutionality of Section 51**

There appears to be no strong argument for holding the Unruh Civil Rights Act unconstitutional. The regulation of business in order to insure civil rights is a legitimate police power of the state. It has been stated that: "The police power of a state under our Constitutional system is adequate for the protection of the civil rights of its citizens against discrimination by reason of race or color . . . ".\(^\text{11}\)

When applied to real estate brokers, other state laws and city ordinances have not yet been declared unconstitutional,\(^\text{12}\) and many articles\(^\text{13}\) have come to the conclusion that the New York ordinance is clearly constitutional. Certainly the Supreme Court does not favor using the due process and equal protection clauses of the Fourteenth Amendment to find civil rights legislation unconstitutional.\(^\text{14}\) Justice Frankfurter, in a concurring opinion, states:\(^\text{15}\)

\[\ldots\text{I}t\text{ is urged that the Due Process Clause of the Fourteenth Amendment precludes the State of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a state may leave abstention from such discrimination to the conscience of individuals. On the other hand, a state may choose to put its authority behind one of the cherished aims of American feeling of forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such state power would be to stultify that Amendment. Certainly the insistence by individuals on their private prejudices as to race, color or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a state to extend the area of non-discrimination beyond that which the Constitution itself exacts.}\]

Therefore, the constitutionality of section 51 of the Civil Code would seem unquestionable.

\(^\text{10}\) Interview with Assemblyman Philip Burton, July 19, 1961.


\(^\text{12}\) Session Laws of Colorado ch. 148 (1959); N.Y.C. Admin. Code ch. 41, §X41-1.0 b (1).


\(^\text{15}\) Railway Mail Ass'n v. Corsi, supra note 14, at 98.
Summary

In amending sections 51 and 52 of the Civil Code, in 1959, by the Unruh Civil Rights Act, the legislature directly regulated real estate brokers. A contrary construction would defeat the legislative intention, purpose, and policy.

1. Real estate brokers are licensed as business establishments under the laws of California.
2. In clear and unambiguous language, Civil Code section 51 expressly regulates "business establishments of every kind whatsoever" and lists no exceptions.
3. Therefore, Civil Code sections 51 and 52 subject real estate brokers to liability if they deny full and equal services to a citizen on the basis of race, color, religion, ancestry, or national origin.

The Discriminatory Listing

The purpose of this section is to examine a general question which is best posed by these hypothetical events:

A private home owner, who is free to sell directly to whom he pleases, chooses to go to a broker and hires him to sell the house. The broker and the home owner enter into a listing contract which, among other things, authorizes the broker to sell the house to a buyer who meets the terms and conditions set forth in the contract. One of the conditions set by the home owner is that the house shall be sold to Caucasians exclusively. Thereby, the broker, as an agent, is not authorized to sell the house to a non-Caucasian.

A non-Caucasian citizen comes into the broker's office and asks to buy the house listed with the broker by the private home owner. The non-Caucasian meets all the terms and conditions set by the owner, except that of being a Caucasian. The broker refuses to sell the house to him.

Is the broker liable for denying the services of his business establishment to the non-Caucasian citizen on the basis of his race?

This general question may best be examined by posing a series of specific questions which lie within its scope.

Broker's Services to the Prospective Buyer

Is selling a house which is listed with him a business service which the broker offers to the prospective buyer?

It is clear that the primary motive of the broker in selling the house is to earn the commission which is due him under the contract with the owner. His contract duty is owed to the owner, and he cannot act as agent for more than one party in a transaction without the consent of all parties thereto. Consequently, the sale of the house is a service which the broker offers the owner, but this does not prevent
the sale of the house from also being a service which is offered to the
prospective buyer as well.

In California, the responsibility of the broker is not solely to the
person who hires him:16

The [real estate] commissioner may . . . [take action when] a
real estate licensee, in performing or attempting to perform any of
the acts within the scope of this chapter, has been guilty of any of
the following:

(a) Making any substantial misrepresentation.
(b) Making any false promises of a character likely to influence,
persuade or induce.

(i) Any other conduct, whether of the same or a different char-
acter than specified in this section, which constitutes fraud
or dishonest dealings.

The commissioner may suspend or revoke the license of any real
estate licensee . . . who has done any of the following:

(c) Knowingly authorized, directed, connived at or aided in the
publication, advertisement, distribution, or circulation of any
material false statement or representation concerning his
business or any land or subdivision . . . offered for sale.

A service is defined as “performance of labor for the benefit of
another, or at another’s command,”17 or as “any work performed for
the benefit of another; a benefit or advantage conferred.”18 The Cali-
ifornia code defines the real estate broker as follows: “A real estate
broker within the meaning of this part is a person who, for compensa-
tion or in expectation of a compensation, sells or offers for sale, buys
or offers to buy, lists or solicits for prospective purchasers, or negoti-
tiates the purchase or sale or exchange of real estate . . . ”19

It is common for the prospective buyer to seek out the broker
rather than each individual house owner who wishes to sell his house.
Ordinarily, the broker shows a number of houses to the prospective
buyer and makes known the conditions required by each owner. If
the prospective buyer can meet these conditions and wishes to buy,
the broker contracts to sell him the house, or takes the offer to the
prospective seller. These acts are a regular, ordinary part of the broker’s
business and are part of the services provided by the broker for the
prospective buyer.

**Services Excluded from Statute?**

Is any particular business service offered by the broker excluded
from the statute as a matter of legislative intent?

---

16 CAL. BUS. & PROF. CODE §§ 10176, 10177.
17 WEBSTER, NEW INTERNATIONAL DICTIONARY (2d ed. 1956).
18 FUNK & WAGNALL, NEW PRACTICAL STANDARD DICTIONARY (1948 ed.).
19 CAL. BUS. & PROF. CODE § 10131.
No reading of the statute suggests that any particular business service offered by the broker should be excluded from the scope of the statute. At no time when the bill was before the legislature was the word, “services,” modified, altered, or further particularized. Historically, the California civil rights statutes have never excluded a particular service which was offered by a place of public accommodation subject to the statute.

If the elimination in the statute of the phrase, “to purchase real property,” does not prevent the statute from applying to the broker’s business services as a whole, as previously shown, it is difficult to see how that change could prevent the application of the statute to any one of them. While some of the services provided by the broker to the private owner may be more helpful than others, the act does not make such a distinction, nor does it provide a guide by which the courts could make this relative determination.

It must be concluded that the legislature intended the statute to apply equally to all of the business services offered by the broker.

The Legal Relationship Between Citizen and Broker

What is the legal relationship between the citizen who is “entitled” to the services and the broker?

Right or Privilege

The statute provides that the citizen is “entitled” to the services. The word “entitled” by the very nature of the statute itself does not confer upon the citizen merely a legal privilege to qualify for or receive the services of the broker. As stated in Reed v. Hollywood Professional School: “The purpose, of course, is to compel a recognition of the equality of citizens in the right to the peculiar service afforded. . . .” (Emphasis added.) If the citizen is authorized to demand or “compel,” the citizen has been given a legal right. This legal right is emphasized by the legislature’s designation of this section as “the Unruh Civil Rights Act” and by the language in section 52 of the code: “suffered by any person denied the rights provided in section 51 of this code.”

Positive or Negative

Assuming that the citizens have been given a legal right, it must still be determined whether this right is positive or negative. With respect to this distinction, the following comment is made in Solmon on Jurisprudence:

In respect of their contents, rights are of two kinds, being either positive or negative. A positive right corresponds to a positive duty, and is a right that he on whom the duty lies shall do some positive
act on behalf of the person entitled. A negative right corresponds to a negative duty, and is a right that the person bound shall refrain from some act which would operate to the prejudice of the person entitled. The former is a right to be positively benefited; the latter is merely a right not to be harmed. The former is a right to receive something more than one already has, such as my right to the money in the pocket of my debtor; the latter is a right to retain what one already has, such as my right to the money in my pocket.

G. W. Keeton in his book, *Elementary Principles of Jurisprudence*, devotes the following passage to this difference:

A positive right corresponds to a positive duty, and a negative right to a negative duty. A positive duty is one in consequence of which the person bound by it is compelled to perform some positive act in favour of the person in whom the right resides. So, if the person bound infringes the right, it is by omission to do something, and it therefore follows that the infringement of a positive right, by the breach of a positive duty, is a negative wrong. . . . Ordinarily, the law is content to direct persons to refrain from performing wrongful acts, rather than to direct them to perform acts worthy of praise or reward. Accordingly, therefore, the majority of rights conferred, and duties imposed, by law are negative. . . .

The citizen, by the Unruh Act, has been given the right to the full and equal services of the business establishment, regardless of his race, color, religion, ancestry, or national origin. This is similar to Solmond’s illustration of his right to the money in the pocket of his debtor, not to his right to the money in his own pocket. It is a positive right. As Solmond remarks:

This distinction [between positive and negative rights] is one of practical importance. . . . Every man has a right against every man that the present position of things shall not be interfered with to his detriment; whilst it is only in particular cases and for special reasons that any man has a right against any man that the present position shall be altered for his advantage. I have a right against every one not to be pushed into the water; if I have a right at all to be pulled out, it is only on special grounds against determinate individuals.

**In Rem or In Personam**

Such a positive right, “on special grounds against determinate individuals,” is closely connected with a right in *personam*, according to Solmond: “A right in *rem*, then, is an interest protected against the world at large; a right in *personam* is an interest protected solely against determinate individuals.”

---

24 Solmond, *op cit. supra* note 22, at 283.
25 *Id.* at 284-85.
26 *Id.* at 285-86.
The distinction between rights in rem and in personam is closely connected with that between negative and positive rights. Almost all rights in rem are negative, and most rights in personam are positive, though in a few exceptional cases they are negative. [The product of some agreement.] . . . No person is in general given a legal right to the active assistance of all the world.

Keeton remarks on that distinction between rights in rem and in personam that it is to be found in "the number of persons subject to the duty of respecting them." He concludes: "In the final analysis, a right in rem is not a single right at all, but a collection of similar rights, available against each member of the community."27 Solmond stresses the difference in relationship:28

If the law confers upon me a right in rem, it is commonly because I stand in some special relation to the thing which is the object of the right. If, on the contrary, it confers on me a right in personam, it is commonly because I stand in some special relation to the person who is the subject of the correlative duty.

The right of the citizen under the Unruh Act is not a right in rem. It is not available against each member of the community, and it is conferred on the citizen because, and only when, he stands in a special relationship with the broker, who is the subject of the correlative duty. The right is, therefore, a right in personam.

**Source of the Right**

The most common right in personam is the right which has a contract relationship as its source. The right given to the citizen under the Act is different in this respect, because it does not depend on the broker's contract to enter into a business relationship with the citizen to whom the service is refused. If it did, the broker could prevent his liability for the refusal of one of his services by refusing all of them. Such a construction of the right given to the "citizens" by the legislature would render the bestowal of that right meaningless.

Nevertheless, the source of the right is found in the citizen-broker relationship. On the broker's side, it is imposed by law. The broker's conduct, in his brokerage business, can vary only within the limits imposed by the state which licenses him. So long as he is in the brokerage business, he must hold himself out as a real estate broker to the public as a whole.

On the other hand, the legal right given to each citizen does not arise simply because the broker goes into business. If it did, the broker would be required to seek out the individual citizen and urge him to take advantage of his real estate service. At this point, each citizen has the privilege of requesting the broker's services, but some further

---

27 Keeton, op. cit. supra note 23, at 142.
28 Solmond, op. cit. supra note 22, at 288.
act on his part is necessary to establish the relationship with the broker which gives him the legal right.

No statute or regulation prevents the broker from setting out conditions to his service, unless they conflict with the state-protected rights of others. The broker may require his customers to come to his office, or insist on proof that a customer has the financial ability to pay for the type of house he seeks. In these cases, no individual member of the community has a right to demand the services of the broker without meeting these conditions.

It is to be concluded that the broker-citizen relationship does not depend on a contract between them. It arises only when the broker has begun his licensed business and when the citizen has met the lawful conditions imposed by the broker for his services.

**Corresponding Duty**

The legislature, in providing that all citizens “are entitled to the full and equal . . . services . . .”, gave them a positive right in personam, which arises, not from a contract, but from their respective acts. As against that right there necessarily is a corresponding duty on the part of the broker. That duty, like the right of the citizen, is positive and in personam, and arises from the relationship between them.

**Similar Right-Duty Relationships**

Two of the oldest and most prominent situations in which such positive in personam duties arise are in the case of innkeepers and public carriers. Historically, “inns, restaurants, [and] hotels” were three of the first classifications included in the California Civil Rights Statute, and “public conveyances” was added in 1919. Both the innkeeper and the public carrier owe a positive duty in personam to the traveler, which does not arise out of a contract. The consequence of such a duty, as Keeton points out, is that, “the person bound by it is compelled to perform some positive act in favour of the person in whom the right resides.” In Solmond on Jurisprudence the duty of the innkeeper is developed: “An innkeeper is not under a present duty to admit all travellers; he is under a duty to admit only such as ask for admittance. When the request for admittance is made the innkeeper’s duty to admit is a duty in personam owed to the particular traveller who asks for admittance.”

In Orloff v. Hollywood Turf Club, the recovery of damages was denied to a plaintiff who sought to invoke the then existing civil rights statute, admittedly applicable to a race track, on the ground that the

---

32 Keeton, op. cit. supra note 23, at 141.
33 Solmond, op. cit. supra note 22, at 497.
assertion by the track authorities that the plaintiff would not be admitted in the future, constituted a continuing violation. In denying the contention, the court of appeals for the second district ruled:35

[There was no duty or obligation on the part of the defendant [turf club] to the plaintiff [invitee] arising out of a contractual obligation and none arising out of law, unless and until the plaintiff tendered to the defendant a ticket of admission issued by it or its price charged to all persons who alike sought admission to its track. . . . [The mere fact that defendant previously] told the plaintiff he would not in the future be admitted to the track, and if he was inadvertently admitted would be ejected, . . . [created] no status or legal relation of any kind or character between the parties which could give rise to a future right or duty on the part of one to the other.

Earlier, the court observed: "It is the privilege of an inn, a railroad or a race track to demand, in advance, pay for the accommodation, facility or the privilege to be rendered."36 It is to be concluded that the duty of the broker, in this respect, is comparable to the duty of the innkeeper or the common carrier. Like the invitee who seeks admission to the race track, the citizen who seeks the services of the broker must be prepared to meet the broker's lawful conditions. When he does so, the broker's positive duty then arises.

**Liability**

Admittedly, to come under a duty is not necessarily to become liable if that duty is violated. As Keeton points out, both the Statute of Frauds and the Statute of Limitations create such situations.37 Section 52 of the Civil Code sets out the liability of violators of the duty which arises under section 51:38

Whoever denies, or who aids, or incites such denial, or whoever makes any discrimination, distinction or restriction on account of color, race, religion, ancestry, or national origin, contrary to the provisions of section 51 of this code, is liable for each and every such offense for the actual damages, and two hundred fifty dollars ($250) in addition thereto, suffered by any person denied the rights provided in section 51 of this code.

It is unmistakably clear from the language of section 52 that "whoever makes any discrimination, distinction or restriction on account of race, color, religion, or national origin, contrary to the provisions of section 51 of this code is liable . . . ." Likewise, he who "denies" the right of the citizen to the equal services specified in section 51 because of his race, color, religion, ancestry, or national origin, becomes liable under section 52. It is immaterial whether the "denial" of the equal

---

35 Id. at 343, 242 P.2d at 662.
36 Id. at 342, 242 P.2d at 662.
37 KEETON, op. cit. supra note 23, at 133.
38 CAL. CIV. CODE § 52.
services for any of these specified reasons is occasioned by an affirma-
tive refusal, or by a failure to provide such equal service. In either
case the citizen is denied the positive right granted to him by the leg-
islature. Section 52, in implementing section 51, sets out the liability
of one who fails to perform the duty imposed on him by section 51 and
assesses the damages to “any person denied the rights provided in
section 51 of this code.”

Summary

Upon the citizen meeting the lawful conditions imposed by the
broker, a relationship exists between them. Thereafter:

1. The citizen has a positive right in personam, regardless of his
race, color, religion, ancestry, or national origin, to the full and equal
services of the broker in his business establishment.

2. The broker has a positive duty in personam to provide the full
and equal services of his business establishment to the citizen, regard-
less of his race, color, religion, ancestry, or national origin.

3. If the broker denies this right of the citizen to these services, or
fails to perform his duty to provide these services, the broker is liable.

The Agency Contract

How do the restrictive terms of the agency contract agreement
between the broker and the private home owner affect the broker’s
duty to the citizen?

The Contract

The private owner, who himself can ordinarily sell without regard
to the statute, conceivably could become liable if some additional
factor were present, such as his “aiding or inciting” the denial of the
broker. The broker, however, is in an entirely different position. By
entering into the contract agreement, the broker places himself in a
position where he may be called upon to perform two conflicting duties
—that is, his contractual duty to the private owner, and his statutory
duty to the citizen. This dilemma and the impending liability are both
of his own making. That liability then follows regardless of whether
he personally favors or opposes the restrictions.

The legislature could have exempted the broker from liability in
those instances where his contract with the private owner contained
the restrictions at the insistence of the owner. This the legislature
chose not to do. If the legislature had done so, the broker could avoid
liability under the shelter of that contract. In that event, the applica-
tion of the statute to the broker would be completely ineffective.

The Agency

As an agent, the broker lacks the power to sell to a non-Caucasian
because of the terms of his restrictive agreement with the owner. In
addition to his contractual duty, the broker owes a fiduciary duty to
the owner to carry out the terms of the agreement. The broker’s fiduciary duty, like his contractual duty, can not arise without his consent.\textsuperscript{39} The Restatement of Agency states the common rule: “Manifestations of Consent. An agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.”\textsuperscript{40}

As the agency relation requires the broker’s consent, he can prevent it from arising. Since he gave his consent, he has undertaken to provide the services of selling the house to a qualified Caucasian, knowing that he must deny this same service to a non-Caucasian otherwise qualified. If, by the terms of his agency and the statute, he is called upon to perform two conflicting duties, the dilemma is likewise of his own making.

The broker may not escape liability for a wrongful act on the ground that he acted under the directions of the home owner. The California Civil Code provides: “One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others: . . . 3. When his acts are wrongful in their nature.”\textsuperscript{41} And the California Supreme Court has stated: “The true rule is, of course, that the agent is liable for his own acts, regardless of whether the principal is liable or amenable to judicial action.”\textsuperscript{42}

Under the present civil rights statute the home owner is not obligated to give full and equal consideration to all citizens in making the private sale of his house. Can the argument be made that the broker is not obligated to provide his services to the non-Caucasian because the private owner is not so bound?

It is true that an agent may become privileged to do an act which he would not otherwise be privileged to do because of the privilege of the principal. “An agent is privileged to do what otherwise would constitute a tort if his principal is privileged to have an agent do it and has authorized the agent to do it.”\textsuperscript{43} However, this principle does not apply to the relationship between the broker and the owner. The contention that the broker is not bound, because the owner is not so bound, on analysis, is invalid.

First, the contention assumes that the owner’s freedom to sell his house is a privilege and not, under the present civil rights statute, an immunity. If it is an immunity it cannot be delegated to the agent. “An agent does not have the immunities of his principal although acting at the direction of the principal.”\textsuperscript{44}

\textsuperscript{39} Powell, Agency 238, 243 (1952).
\textsuperscript{40} Restatement (Second), Agency § 15 (1958).
\textsuperscript{41} Cal. Civ. Code § 2343.
\textsuperscript{43} Restatement (Second), Agency § 345 (1958).
\textsuperscript{44} Id. at § 347.
The Restatement of Agency distinguishes between these two freedoms in the following manner:45

a. Privileges. "Privilege" denotes the fact that conduct which under ordinary circumstances subjects the actor to liability, under particular circumstances does not subject him thereto. . . . It may be created by the law irrespective of consent for the protection of the rights of an individual or of the state.

b. Immunities. "Immunity" is a word which denotes the absence of civil liability for what would be a tortious act but for the relation between the parties or the status or position of the actor. (Emphasis added.)

Powell, although using different terminology, appears to make a similar distinction:46

(i) If the principal is immune from an action in tort, e.g., is a trade union, or a foreign ambassador, the agent cannot avail himself of that immunity unless he also is covered by its protection.
(ii) If the principal has a right to do the act in question without being liable in tort and can do the act through an agent, an agent who acts within his authority may rely on the right of the principal. Thus, if the principal has statutory authority to do an act, which would otherwise be a trespass, and may act through an agent, the agent also may rely on that statutory authority. (Emphasis added.)

Broadly speaking, "privilege" relates to the act or conduct of the individual while "immunity" relates to the status or position of the individual. Although the owner is free to discriminate in the private sale of his house, his freedom on the basis of an immunity may well depend on his continued status as a private owner. It is clear that a broker who bought houses and sold them as part of the services of his business establishment would not be free to ignore the rights given under the Act, which, by its own terms, applies to "every business establishment whatsoever." Likewise, the owner himself may forfeit his immunity by going into a similar business, whereas, if a privilege were involved, such an action on his part would not cause him to lose it. If the private owner's freedom to sell his house depends on his immunity from the statute, the broker cannot avail himself of that immunity.

Second, even if it be concluded—regardless of the freedom that the private owner would have in business—that the private owner has a privilege when he is not in business, the scope of that privilege must still be determined. Ordinarily, the scope of a privilege is determined by examining the purpose for which the privilege is created.

The Restatement of Agency provides:47

A privilege may, by its character or by the terms upon which it is granted, be capable of exercise in person only, or it may be capable

---

45 Id. at § 217, Comments a, b.
46 Powell, op. cit. supra note 39, at 227.
47 Restatement (Second), Agency § 345, Comment a (1958).
of exercise also through a servant or other agent. The privilege of the principal may have been created by common law or by statute, or it may be the result of a private grant. In any case, the *purpose for which the privilege exists* is considered in determining whether or not it can be exercised by an agent and, if created by statute or private grant, the *language used in creating it.* (Emphasis added.)

If it exists as a privilege at all, the privilege of the private owner is to refuse to sell his house to a citizen because of that citizen’s race, color, religion, ancestry or national origin. The owner’s privilege and the privilege of the broker to refuse his services on the same basis, both existed at common law. The Unruh Act did not create either privilege, but it does *limit* the privilege of the broker. The question is therefore: Does the Unruh Act require that the broker in his business establishment *not be* the agency through which the private owner exercises his privilege to refuse to sell his house on the basis which is prohibited to the broker?

The answer to this question depends on the expressed intention of the legislature as demonstrated principally, by the language used by it in creating the *limit* on the privilege of the broker. The express language of section 51 states that the statute shall apply to services “in all business establishments of every kind whatsoever.” It has been shown that the legislature intended the statute to apply to *all* of the services offered by the broker in his business establishment and that the legislature gave the citizen a positive right *in personam* to these services. There is no expressed intention to qualify this powerful right given to the citizen by leaving the broker free to act, because of his agency, in a way which would otherwise be clearly prohibited by the statute. Such an intention, *if found at all,* must be found outside the words of the statute as it was passed, and, *if found,* directly conflicts with the intention of the legislature as manifested in the statute.

The evidence of a contrary intention depends on words which were stricken from the Unruh Bill before it was passed into law. As has been pointed out, the bill, when it was originally introduced, sought to limit directly the owner’s privilege of selling his property in the same way that the final statute limits the broker’s privilege. The application of the words “to purchase real property” would have limited the *private* owner’s privilege by requiring that he not refuse to make a *private sale* of his house on the basis of the race, color, religion, ancestry or national origin of the buyer. This, the legislature refused to do. It does not follow from this that the legislature was unwilling to limit the privilege of the private owner *at all.* Significantly, it was at the time of this amendment that the phrase “of every kind whatsoever” was added to the phrase “in all business establishments,” re-asserting the intention of the legislature to apply the statute, *without* exception, in the broad area already designated.
It is apparent that there is no real basis for contending that the legislature intended to permit the broker to do an otherwise unlawful act because of the privilege of the principal.

In *Orloff v. Los Angeles Turf Club*, the California Supreme Court expressly rejected the argument of the defendant, under the then existing civil rights statutes, that the statutes should be strictly construed. The court ruled:

That rule does not prevail in this state, at least, as to the provisions of the four original codes. The statute in the instant case is in the Civil Code and it is provided therein: "The rule of common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice.

To construe the statute as giving the broker the freedom to refuse to provide his services because of the privilege of the owner would be to severely restrict the positive right given to the citizen and to subvert the clear meaning of the statute as passed by the legislature. Such a construction does not effect the objects of the statute, or promote justice.

It must therefore be concluded that the broker may not be the agency through which the private home owner refuses to sell his house on the basis of the race, color, religion, ancestry or national origin of the prospective buyer.

**Summary**

In consenting to the restrictive terms of the agency contract agreement, the broker takes his first affirmative step toward the violation of his statutory duty to the citizen:

1. The broker continues to be liable for the violation of his statutory duty despite the conflicting contractual duty which arises.
2. The broker continues to be liable for his wrongful acts although he acts as an agent for the private owner.
3. The owner's freedom to refuse to sell his house because of the race of the buyer does not give the broker the freedom to do this act in the name of the owner.

**Injunctive Relief**

 Does the citizen have an injunctive remedy against the broker who is liable for refusing to sell the house?

**Statutory Relief Not Exclusive**

It is clear under section 52 that damages may be recovered from those who violate section 51 of the code. Injunctive relief is also pos-

---

49 *Id.* at 113, 180 P.2d at 323.
sible in order to preserve the rights given to the citizen. The California Supreme Court, in 1947, made it clear that the statutory remedy in such cases was not exclusive.

In *Orloff v. Los Angeles Turf Club*, plaintiff was ejected from defendant’s race track and told that he would be refused admittance if he returned. Plaintiff alleged that his ejection was without just cause and in violation of the then existing civil rights statutes, sections 51, 52, 53 and 54 of the Civil Code. He sought injunctive relief.

The trial court sustained defendant’s demurrer with leave to plaintiff to amend to claim only damages.

The California Supreme Court did not consider whether there had been a violation of section 51, as the alleged facts clearly showed a violation of section 53. That section provided: “It is unlawful for any corporation... or the proprietor... of any... race course... to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, or who tenders the price thereof for such ticket, and who demands admission to such place...” Like the present section 52, section 54 prescribed damages for violation of the section which preceded it: “Any person who is refused admission to any place of amusement contrary to the provisions of the last preceding section, is entitled to recover from the proprietor... or from any such... corporation... his actual damages, and one hundred dollars in addition thereto.”

The defendant, in the *Orloff* case in making his demurrer, relied on the argument that section 53 created a right not known to the common law and that it must, therefore, be strictly construed to the end that the remedy in section 54 should be exclusive.

The supreme court rejected defendant’s argument, stressing that the Civil Code was “to be liberally construed with a view to effect its objects and to promote justice.” The court observed that the rule of strict construction did not apply where the remedy provided by the statute was inadequate, and ruled that:

A recovery of compensatory damages and 100 dollars is plainly inadequate relief in a case of this character. ... [citing law reviews]. Compensable damages would be extremely difficult if not impossible to measure and prove. The sum of 100 dollars is a relatively insignificant recovery when we consider that a positive and unequivocal right has been established and violated.

---

The court concluded “... that the statutes here involved do not purport to exclude all other remedies for the violation of the right conferred ... [and that the question] of the propriety of injunctive relief in the case at bar ... is a matter hinging upon the general principles circumscribing relief in equity.”54

No fairer statement can be made about the propriety of injunctive relief under the present section 51.

The Individual Case

The supreme court in the Orloff case went on to set out the applicable statutory provisions for the use of the injunction in the case which was before it.55

An injunction may be granted in the following cases: ... 2. When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great irreparable injury, to a party to the action; ... 4. When pecuniary compensation would not afford adequate relief; 5. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. (Emphasis added by the court.)

In reversing the judgment of the lower court, the supreme court held: “The positive declaration of the personal right and the importance of its preservation together with the inadequacy of the remedy by way of damages and the 100 dollar penalty furnish sufficient reason for injunctive relief.”56

The claim of the citizen for injunctive relief against the broker fully meets the standards set out in the Orloff case. First, a positive declaration of a personal right has been made by the legislature under the Unruh Civil Rights Act. Second, it is impossible to ascertain the amount of compensation which affords adequate relief to the citizen who has been denied the services of the broker, and third, the pecuniary compensation expressed in section 52 does not afford adequate relief for a continuing violation of the citizen’s personal right.

Thus, the citizen who has not received the broker’s services because of the owner’s restriction is able to establish his right to injunctive relief.

Terms of the Order

The purpose of the order for injunctive relief is to effectively secure the citizen’s statutory right to the service which the broker has denied.

It seems obvious that the court cannot order the broker to make the sale to the citizen, since the broker lacks the power to do so. Likewise the court cannot compel the private owner to remove the restriction to the broker. It is the broker who has violated the statute and the order must be directed to him on terms that he has the capacity to follow.

54 Id. at 115, 180 P.2d at 324.
55 Id. at 117-18, 180 P.2d at 325.
56 Id. at 118, 180 P.2d at 325.
The first affirmative act of the broker which starts him toward the violation of his statutory duty is his consent to accept the restricted listing. By accepting the restricted listing, the broker forfeits his power to prevent his liability to the citizen from arising. It is the continued acceptance of the restricted listing, once the broker has been found a violator of the statute, which is a constant threat to the violation of the citizen's right. It is the consent to accept similar listings in the future, by one who has violated the statute, which may permanently subvert the citizen's right under the statute by continually denying him the broker's service.

Once the broker has been decreed a violator, the order for injunctive relief must require him to terminate all restricted listings which limit his service to the citizen contrary to the provisions of section 51 of the code and to refuse to consent to accept any such restricted listings in the future. The terms of this order, the broker has the capacity to follow.

Such an order for injunctive relief will achieve a balance which accords with the object of section 51 and which promotes justice under the Civil Code. The order effectively secures the citizen's statutory right to the services of the broker but it does not create a right to the house which is sold. The conduct of the broker is regulated according to the duty which the legislature imposed, but he shares the burden of this duty with all other brokers who must now seek to guard against this same liability under the statute.

The owner is still free to sell his house directly to whom he chooses. If the owner chooses to sell his house through the broker, it is because he recognizes the economic advantages of his services. It is because of these economic advantages that the great majority of the sales of houses are made through brokers, and it is because of these economic advantages that it is incumbent on the order for injunctive relief to reach the statutory objective of assuring the broker's services fully and equally to all citizens.

Summary

The citizen has an injunctive remedy against the broker who is liable for refusing to sell the house:

1. The reasoning of the Orloff case makes it clear that the remedy of damages in section 52 is not exclusive.
2. The standard for injunctive relief which is set out in the Orloff case is met by the claim of the citizen against the broker.
3. The suggested order for injunctive relief directs the broker, who has been adjudged a violator, to terminate all restrictive listings which limit his service to the citizen contrary to the provisions of section 51 of the code and to refuse to consent to accept any such restricted listings in the future. This will effect the objects of the statute and promote justice under the Civil Code.
Conclusion

1. Real estate brokers are licensed as business establishments under the laws of California; and Civil Code section 51 expressly regulates "business establishments of every kind whatsoever."

2. Therefore, Civil Code sections 51 and 52 subject real estate brokers to liability if they deny full and equal services to a citizen on the basis of race, color, religion, ancestry, or national origin.

3. Upon meeting the lawful conditions imposed by the broker, the citizen has a positive right *in personam* to the full and equal services of the broker in his business establishment; and the broker has a positive duty to provide these services.

4. In consenting to the restrictive terms of an agency contract agreement with an owner, the broker takes his first affirmative step toward the violation of his statutory duty to the citizen, and he continues to be liable for the violation of this statutory duty despite his conflicting contractual duty or his wrongful acts done as an agent for an owner.

5. The citizen has an injunctive remedy when the broker is liable, and the order should direct the broker to terminate all restrictive listings which limit his service to the citizen contrary to the provisions of section 51 of the code and to refuse to consent to accept any such restricted listings in the future.