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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 164.

WILLIAM H. BURTON,

Petitioner,

v.

THE WILMINGTON PARKING AUTHORITY, A BODY CORPORATE AND POLITIC OF THE STATE OF DELAWARE

AND

EAGLE COFFEE SHOPPE, INC., A CORPORATION OF THE STATE OF DELAWARE,

Respondents.

ON CERTIORARI FROM THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF OF RESPONDENT, EAGLE COFFEE SHOPPE, INC.

QUESTIONS OF LAW.

The only questions of law that should be considered, it is respectfully submitted, are the following:

1. Should this Court take jurisdiction of the appeal?

2. Has there been a violation of the equal protection clause of the Fourteenth Amendment when the facts are as follows: The Wilmington Parking Authority, a state agency, has acquired certain property by condemnation, pursuant to a statute which authorizes use of a portion of the property for public parking, and rental of the remaining portion to the highest bidders for the purpose of obtaining adequate funds with which to operate the parking facility. The right to rent the extra space for this purpose was approved by a decision of the Supreme Court of Delaware. The respondent, Eagle Coffee Shoppe, Inc., the successful bidder for one of the extra spaces, operates a restaurant therein. It has been the policy of the respondent to refuse restaurant service to Negroes. Specifically, respondent refused to serve the petitioner because he is a Negro.

It will be observed that the first question above is similar to the first question posed by petitioner in his brief. The second corresponds to petitioner's third except that respondent's version is more specific and that respondent omits reference to the matter of "assuming facts outside the record of the case." Although petitioner has inserted these quoted words in his third question, nowhere in his brief has he cited a single authority for the proposition that a court may not refer to relevant facts in a prior case decided by it. A court has wide discretion in seeking the truth, which privilege, of course, can not be abused. Petitioner has attacked the accuracy of the findings of facts outside the record, which he has a right to do, but in the absence of his

supporting with authorities the impropriety of the Court's going "out of the record", respondent is not called upon to make an extensive defense of that procedure.

Respondent has omitted entirely from its list of issues any question similar to petitioner's Question No. 2, which concerns the legality of a state statute. Respondent contends that this question should not be considered for reasons which will be given in answering the first question here propounded: Should this Court take jurisdiction of the appeal. Since an appeal must be confined to a consideration of the very statute referred to by petitioner in his Question No. 2, the answer of respondent to its first question of law, that this Court should not take jurisdiction of the appeal, gives the reasons why petitioner's second question should be held irrelevant to a solution of the problem to be resolved.

STATEMENT OF THE CASE.

Respondent relies upon the "Statement of the Case" made by his co-respondent, The Wilmington Parking Authority, upon the "facts" presented in petitioner's "Statement", and upon the findings of fact in the Opinion of the Supreme Court of Delaware (R. 42 et seq.).

SUMMARY OF ARGUMENT.

This case was brought by petitioner to this Court on appeal from the decision of the Supreme Court of Delaware. By rule of this Court, the only question that could have been considered on appeal was the legality of a statute which respondents had offered as a secondary defense to the complaint in the Delaware Court of Chancery. Petitioner having requested that the appeal be considered in the alternative as an application for certiorari, this Court made a ruling the effect of which was to accept jurisdiction of the certiorari application, and to postpone consideration of

jurisdiction of the appeal to the hearing on the merits in the certiorari proceedings.

Respondent requests the Court not to take jurisdiction of the appeal because interpretation of the statute can not possibly have any bearing on the final decision, which must depend on determination of the primary issue, whether a lessee of a state agency, leasing property which at the time of the creation of the agency was dedicated not for use in performing the function of the agency, parking service, but for the special purpose of obtaining the maximum amount of money from the highest bidder, who conducts its business in a racially discriminatory manner, violates the equal protection clause of the Fourteenth Amendment. Interpretation of the statute, furthermore, requires solution of a very difficult problem, whether the judicial enforcement doctrine of *Shelley v. Kraemer*[1] encompasses a court's acceptance of a pleading by way of defense.

The sole question, posed above, to be heard on the merits, should be decided in favor of respondents. The factual context of the present case makes it different from all those cited in petitioner's brief and brings it within the orbit of the surplus property cases, the "blighted area" cases and the other cases and hypothetical situations recited in respondent's brief. It is "in the public interest" that the Parking Authority be able to obtain the largest amount of money from the leasing of this extra space. That can be accomplished only if there is no federal interference with the operation of the business by the private enterprise in any manner it sees fit. Preservation of the constitutional guaranty of federal non-interference with private enterprise under the present circumstances, despite the momentary injustice of racial discrimination, will result in the long run in a greater measure of equal protection of the laws.

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1. 334 U. S. 1; 68 S. Ct. 836; 92 L. Ed. 1161 (1948).

ARGUMENT.

I. This Court Should Not Take Jurisdiction of the Appeal.

Petitioner brought this case here solely on appeal, and had the matter remained so, the only issue before this Court, under its rules, would have been the correctness of the Delaware Court's interpretation of Title 24, Delaware Code of 1953, Sec. 1501. After respondents requested this Court not to take jurisdiction of the appeal, petitioner countered with the contention that since an important constitutional question was involved and since the Delaware Court's decision was allegedly repugnant to prior decisions of this Court, it should, in the alternative, grant certiorari. On October 10, 1960, this Court entered an order which reads:

> "Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits."

Respondent assumes that the effect of the Order is twofold: first, that the Court has agreed to hear the merits of the case upon its facts under the certiorari application and second, that upon the hearing on the merits, the Court will also entertain arguments pertaining to the question whether it should take jurisdiction to consider on appeal the legality of the statute.

Since under its rules this Court may grant certiorari under certain circumstances even where the pleader did not request certiorari but merely appealed, respondent can see no ground available to it for disputing the Court's right to try the cause upon certiorari. As to the appeal, however, respondent is on better footing when it argues against review of the Delaware Court's interpretation of the statute on the following grounds:

After petitioner here, plaintiff in the action in the Court of Chancery, filed his complaint in Chancery, respondents

here, the defendants below, in their answers (R. 5, 7) referred to the statute by way of defense separate and apart from their main defense. The Court of Chancery deemed it unnecessary to interpret the statute, basing its final decision solely on the question whether racially discriminatory action under the auspices of a state agency under the instant facts violated the Fourteenth Amendment. In their brief in Chancery, respondents paid almost no attention to the effect of the statute. When appeal was taken to the Supreme Court of Delaware, respondents again devoted a very small portion of their brief to the statute. In the lengthy opinion of the Supreme Court of Delaware, only two or three sentences at the very end are devoted to a discussion of the statute. Why was so little study given to the statute? Because respondents as well as the two Delaware Courts realized that interpretation of the statute was a relatively unimportant matter, and need not even have been considered in determining the rights of the parties.

The defense based on the statute can not in fact control the outcome of the case. If it is held that the Eagle Restaurant's discriminatory conduct did violate the Fourteenth Amendment, it makes no difference what rights are granted to the restaurant under the statute or the common law, for the state law, under principles of sovereignty, must yield to the federal law. If it is, however, held that the respondents' first defense is valid, namely that there has been no violation of federal law and that respondent has a common law right to discriminate, it makes no difference whether the statute is constitutional or not, or whether the acts of the restaurant were justified under the statute. It is fundamental that when a defendant in a civil action pleads several defenses, and it is found that one of the defenses which is paramount to the others and is relied on as indispensable is a good defense and all the other collateral defenses are stricken out as invalid, judgment is rendered in favor of the defendant on the good defense.

It is true that the legality of the statute was made an issue when it was presented as a separate defense and was challenged. But since this is an issue the determination of which can not be decisive of the rights of either party, why should the Court undertake to decide it merely as an academic problem?

Furthermore, the problem of interpreting the availability of such defense under the statute is a much more difficult one than would appear from the treatment of the subject given in petitioner's brief. At page 12, petitioner's brief reads:

> "Even if one agrees with the court below that the statute is merely a restatement of common law (R-54) and we are not prepared so to agree, this Court has condemned state judicial enforcement of common law policy which nullifies constitutional freedoms. American Federation of Labor v. Swing, 312 U. S. 321 (1941); Bridges v. California, 314 U. S. 252 (1941)."

An examination of these two cases cited by petitioner discloses that each involved a conflict between the constitutional right to exercise free speech and a state common law right. In the first, the common law right was the right to freedom from a certain type of picketing. In the second, the local right was that of a state court not to be subjected to contempt in comment by a newspaper. In each case, the holding was that the right of free speech was paramount to these local rights. It is noteworthy that the right of free speech is a prerogative granted to all persons. In our case the privilege of freedom from racial discrimination is limited only to those operating within the orbit of state activity. Thus, before there can be found any conflict between the local law and the federal law in our case, it must first be held that "state action" is involved. These two cases do not concern *judicial enforcement* of a common law right in any sense which has any meaning here. They merely involve judicial determination as to which law takes

precedence, the local or the constitutional. Our case involves no such conflict. Respondents and the Supreme Court of Delaware have never maintained that local common law may supersede constitutional law. What is maintained is that there has been no violation of constitutional law.

Judicial enforcement of a state or local law, as defined in *Shelley v. Kraemer,*[1a] would have a bearing on the question of the legality of the Delaware statute if an appeal is allowed in this case. But the *Shelley v. Kraemer* doctrine, according to later decisions, has received certain judicial limitations. In *Rice v. Sioux City Memorial Park Cemetery,*[2] in a suit to enforce a contract of interment, it was pleaded *as a defense* to a civil suit that the contract contained a covenant against burial of non-Caucasians. The Supreme Court of Iowa held that the *judicial enforcement* doctrine of the *Shelley* case did not operate to bar a *defense* based on a restrictive covenant. When the matter was presented to this Court for decision,[3] the Court membership divided equally, with the result that the judgment below was affirmed. When it was discovered that the Iowa legislature had enacted a statute prohibiting cemetery companies from imposing such restrictions, a petition for a rehearing of the cause was filed and the Court vacated the affirmation of the holding resulting from the split decision.[4] In vacating the judgment, the Court made the following remark as to the attempted extension of the *Shelley v. Kraemer* doctrine: "This is a complicated problem which for long has divided opinion in this Court."

But in *Charlotte v. Barringer,*[5] in which a declaratory judgment action was instituted to determine the validity of a restrictive covenant against the use of a park by Negroes,

1a. See note 1, *supra.*

2. 245 Iowa R. 147, 60 N. W. 2d 110 (1953).

3. 347 U. S. 942, 74 S. Ct. 638, 98 L. Ed. 1091 (1954).

4. 349 U. S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1954).

5. 242 N. C. 311, 88 S. E. 2d 114 (1955).

with a reverter to the grantor if the covenant were violated, it was held that the Court in deciding in favor of the validity of this covenant was not engaged in *judicial enforcement* of a restrictive covenant. Certiorari was asked of this Court and denied.[6]

The facts here are similar to those in the *Rice* case and are not similar to those in the *Shelley* case, for here it is only by way of defense that the validity of the statutory authorization to discriminate comes into issue. Did the *Charlotte* case, *supra,* reinstate the holding in the original *Rice* case resulting from the split decision, or is the question still an open one whether a court in entertaining and giving legal effect to a defense is engaged in judicial enforcement of that defense?

In view of the comment made by the Court in vacating the effect of its split decision in the *Rice* case, will it now undertake to decide this difficult problem, resolution of which does not even affect the rights of the parties? In actuality, respondent rests its right to discriminate against Negroes not on the statute, nor on whether recognition of a defense based on the statute constitutes judicial enforcement of the statute, but on whether the common law right of every private business, including a restaurant, to operate as it sees fit should be held subject to the Fourteenth Amendment where the business has such ties with a public agency as exist here. The burden of the argument which follows will be that under the circumstances in the instant case, this Court, in view of its rulings in analogous cases, should hold that the equal protection clause is not applicable.

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6. 350 U. S. 983, 76 S. Ct. 469, 100 L. Ed. 851 in *Leeper v. Charlotte Park* (1956).

II. In Respect to Racially Discriminatory Acts by State Agencies, or by Parties in Some Way Associated With Such Agencies, This Court Has Made Variant Decisions Depending Upon the Facts, as to Whether There Has Been Any Violation of the Equal Protection Clause of the Fourteenth Amendment.

Petitioner's brief requests a ruling in his favor on the basis of a number of cases cited by him wherein this Court has ruled that racially discriminatory action by certain lessees of state agencies violates the equal protection clause of the Fourteenth Amendment of the Federal Constitution. In these and in other cases on the subject, the definition of "state action" is given in such broad terms that if the definitions were applied uniformly it would be impossible for any private business to escape classification as a state activity. Some of these definitions are collected by Judge Fuld in his dissenting opinion in *Dorsey v. Stuyvesant Corporation.*[7] Typical is that in *Shelley v. Kraemer,*[8] wherein it is said that state action refers to "the exertion of state power in all forms." Despite Judge Fuld's remonstrance that the facts in the *Dorsey* case clearly exhibited the exertion of state power, a majority of the state court refused to hold that the discrimination recorded there violated the Fourteenth Amendment. This Court denied certiorari in that case.[9]

In the *Dorsey* case, *supra,* a private redevelopment corporation had discriminated in its rental policies as to Negroes. The land on which the housing development was built had been taken in condemnation by the City of New York under a special statute, and then had been resold to the private company for this specific redevelopment project. It was sold subject to state control of the rental charges, of

7. 299 N. Y. 512, 87 N. E. 2d 541 (1949).

8. See Note 1, *supra.*

9. Cert. den. in 339 U. S. 981, 70 S. Ct. 1019; 94 L. Ed. 1385 (1950).

the profits of the company, of the methods of financing, and free from taxation. Yet these facts were held not to bring the Fourteenth Amendment into operation.

Even under the definition of state action later expounded in *Cooper v. Aaron,*[10] to the effect that state action refers to support by the state "through any arrangement, management funds or property," the activity of the private company in the *Dorsey* case would have to be classified as state activity. We can conclude only that there must be some factor so strong and important that it either creates an exception to the broad definitions of state action or makes these generalized definitions too broad to use as a test to determine what is or is not state activity.

A more fundamental problem implicit in the *Dorsey* case has been considered by this Court, namely the question whether state action in the form of condemnation of private property in a "blighted area" and resale of the condemned property to private interests constitutes in itself unequal protection of the laws. For it can not be denied that those persons of small means who are dispossessed by the condemnation, among whom there undoubtedly are many Negroes, will suffer as a result of this state action, whereas persons of affluence, usually the whites, who will be able to buy these properties for private use and profit will benefit. Yet the right of the state and of the private beneficiaries to engage in these practices has been sustained in *Berman v. Parker.*[11]

There was both the "exertion of state power" and state support by the contribution of funds under the facts in *Eaton v. Board of Managers,*[12] yet the federal court held that there was no "state action" within the meaning of the Fourteenth

10. 358 U. S. 1, 19; 78 S. Ct. 1401, 1410, 3 L. Ed. 2d 3 (1958).

11. 348 U. S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954). Also see *Murray v. LaGuardia,* 291 N. Y. 320; 52 N. E. 2d 884, cert. den., in 321 U. S. 771; 64 S. Ct. 530; 88 L. Ed. 1066 (1944) to same effect.

12. *Eaton v. Board of Managers,* 164 F. Supp. 191 (1958), 261 F. 2d 521; cert. denied in 359 U. S. 984, 79 S. Ct. 941, 3 L. Ed. 2d 934 (1959).

Amendment. In that case, three Negro doctors brought suit to obtain their admission to the staff of a private hospital from which they had been excluded because of their color. The hospital had been built on land one-half of which had been purchased from the state, the state had made contributions for the upkeep of the hospital, and there was provision for reverter to the state as to one-half of the hospital's land should the operation of the hospital cease.

An indication that even a lease agreement between a state agency and a private party does not necessarily subject the latter to the operation of the Fourteenth Amendment is found in *Derrington v. Plummer,*[13] which involved the leasing of the basement of a county court house to a private person for the operation of a cafeteria. The proprietor of the cafeteria had refused to sell food to Negroes. In holding that such discrimination offended the Fourteenth Amendment, the Federal Circuit Court, however, made these remarks:[14]

> "No doubt a county may in good faith lawfully sell and dispose of its surplus property, and its subsequent use by the grantee would not be state action. *Likewise, we think that, when there is no purpose of discrimination, no joinder in the enterprise, or reservation of control by the county, it may lease for private purposes property not used nor needed for county purposes, and the lessee's conduct in operating the leasehold would be merely that of a private person.*" (Italics supplied.)

And in the next paragraph after the above statement, that Court, upon an examination of the facts, concluded that "the basement of the court house can by no means be termed surplus property not used nor needed for county purposes."

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13. 148 F. Supp. 326; 240 F. 2d 922; cert. den. in 353 U. S. 924; 77 S. Ct. 680; 1 L. Ed. 2d 720 (1957) as *Casey v. Plummer.*

14. 240 F. 2d 922, 925 (1956).

The Circuit Court may have based this distinction between property needed for governmental purposes and property not needed for governmental purposes on the opinion of the United States Supreme Court in *Ashwander v. Tennessee Valley Authority.*[15] Ruling that the Tennessee Valley Authority could dispose of surplus power to private persons for strictly private uses, the Supreme Court quoted with approval these words:[16]

> "If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the government. The practice is not unusual in respect to similar public works constructed by state governments."

And in the *Ashwander* opinion, discussing whether the disposal of surplus property is limited to some public use, the Court declared that there was no such limitation upon the use of the property. Apparently, not only could the government lease or otherwise dispose of surplus public property to private interests, but the private persons could treat and use that surplus property in any manner they saw fit.

It has been held that no discriminatory state action was involved in the removal of the Board of City Trusts as trustee of a private trust, so as to permit a substituted private trustee to carry out the terms of a trust establishing a college for white males only.[17]

When the state grants a charter or a municipality a license to anyone to engage in any private business, there is definitely an exertion of state power. In three cases, it was decided that the grant of a license did not make the licensee

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15. 297 U. S. 288; 56 S. Ct. 466; 80 L. Ed. 688 (1936).

16. *Idem,* page 335 of 297 U. S., page 477 of 56 S. Ct.

17. *Re, Girard College Trusteeship,* 391 Pa. 434, 138 A. 2d 844, cert. den. in 357 U. S. 570, 78 S. Ct. 1383, 2 L. Ed. 2d 1546 (1958).

an agent, or representative of the state within the orbit of the term "state action." [18]

Inns, railroads, theaters, privately owned public utilities, quasi-public enterprises of all kinds, and all businesses so affected with a public interest as to be subject to public control are nevertheless immune from the provisions of the Fourteenth Amendment according to the *Civil Rights Cases,* from which there has been no deviation to this date.[19]

Public assistance in the form of providing water and sewerage facilities was held by the Maryland Federal District Court [20] not sufficient to convert a private real estate concern into a state agency.

If a state agency, such as the parking authority in our case, contracts with a private firm of auditors to have the parking authority's books audited, and much of the work is done on the premises of the parking authority, would the equal protection clause bar the auditing firm from discriminating in its employment policies or in any other aspect of its business against any racial group?

If a plumbing or electrical concern is engaged by the parking authority or by any other state agency to do work upon the agency's property, does the Fourteenth Amendment immediately come into effect so that the plumbing and electrical firms may not practice racial discrimination as to any work done on the premises?

Private banks in Delaware, and probably elsewhere, have discriminatory practices as to whom they select for their board of directors, or for their counsel, as to whom they employ in responsible positions, as to the race and color of those to whom they extend credit. We deplore and condemn these prejudices and these discriminatory policies.

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18. *Madden v. Queens County Jockey Club,* 296 N. Y. 249, 72 N. E. 2d 697, cert. den. in 332 U. S. 761, 68 S. Ct. 63, 82 L. Ed. 346 (1947); *Slack v. Atlantic White Tower,* 181 F. Supp. 124 (1960); *Williams v. Howard Johnson's Restaurant,* 268 F. 2d 845 (1959).

19. 109 U. S. 3; 3 S. Ct. 18; 27 L. Ed. 835 (1883).

20. *Hackley v. Art Builders, Inc.,* 179 F. Supp. 851 (1960).

This Court could help to end these injustices by deciding that such policies come within the ban of the Fourteenth Amendment because the state supports these institutions by borrowing money from them and by depositing savings with them. But then what of the principle announced in the *Civil Rights Cases* [21] that the Federal Government does not have the power to enforce the Fourteenth Amendment against private enterprises, a principle which has been consistently adhered to to this day. As stated by the Iowa Supreme Court in the *Rice* case,[22] *supra:*

> "But there is danger in attempting a remedy by such constitutional expansion. Invocation of the constitution then might depend upon a balance of two asserted values —the privilege of the private corporation v. the right of the plaintiff to equality of treatment which is another well known constitutional safeguard. It must be clear that a clash would result between such expansion of the 14th Amendment and the decisions of long standing in the Civil Rights Cases, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835. Both demand that the states protect the rights defined in the amendment against the wrongful actions of private individuals. This most states do by appropriate legislation and it is just and proper that state authorities furnish appropriate means of extending these moral rights into areas when they have not heretofore been asserted, rather than to try an extension of the coverage of the 14th amendment to fields that will abridge other individual rights, and violate other constitutional guarantees."

The foregoing cases and these hypothetical situations have been presented to demonstrate either that the general definitions of "state action" miss their mark, that there may be exceptions to the general rule as to discriminatory policies

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21. See note 19, *supra.*
22. See note 2, *supra.*

by state agencies under certain circumstances, or that there is some other reason why the rule does not apply. They show that there is no magic in any arrangement between a state agency and a private business which automatically, arbitrarily and without any consideration of the reason and purpose underlying the arrangement, converts the private business into an arm of the state within the meaning of the Fourteenth Amendment.

In a recent survey of racial problems,[23] very sympathetic to the Negroes, a comprehensive review of the many cases on the subject of discriminatory activities under state auspices[24] concludes that, "The development of the legal concept of state action has varied according to the factual situation in which the issue arises." And further, that "when both the state and private groups join together to achieve goals thought to be good in the community," . . . "the Courts must evaluate the degree of control held by the state, the amount of state financial assistance to the operation of the activity, and the relationship of the activity to public purposes."

In *Boynton v. Virginia,*[25] this Court found violation of interstate commerce by a restaurant lessee of a bus terminal serving an interstate carrier, despite the fact that there was no lease between the interstate carrier and the terminal operator. The Court considered all the facts and was not concerned with the absence of any lease, thereby demonstrating that the existence or non-existence of a lease is not the essential factor, that the decisive element is the relationship of the parties and the public interest. Respondent requests that the same technique of looking at the facts, at the substance and not at the format, at the content and not at the symbol, should be followed here.

In *Gomillion v. Lightfoot,* 81 S. Ct. 125, — U. S. — (1960) the Court stated:

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23. 34 Notre Dame Lawyer 607, at 737.

24. *Idem,* p. 731.

25. 81 S. Ct. 182, — U. S. — (1960).

"Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations which gave rise to them, must not be applied out of context in disregard of variant controlling facts."

III. Reconciliation of the Rulings in the Cases Cited by Respondent With the Decisions Set Forth in Petitioner's Brief.

There can be no reconciliation between the rulings in the cases cited by respondent and the cases in petitioner's brief if the reconciliation is attempted on the basis of these general definitions of "state action." There is a touch of the government's "thumb on the scales" [26] under the facts in the cases cited by respondent, yet the holdings there are just the opposite to those in the cases offered by petitioner. It may be urged that there is less "exertion of state power" when the state merely licenses or grants a charter to a business than when it grants a lease for the use of public property. But when the state sells property condemned by it to private interests who are permitted to use the property in a discriminatory fashion, this involves a more potent exertion of state power than does the mere leasing of the property to one who practices discrimination. The lease is sooner or later terminable whereas property divested by the owner is irretrievable. It follows that either the general definitions of state action are not apt in all factual contexts, or that there may be exceptions to the general rule as to the effect of the equal protection clause on state activities, or that some other factor exists which causes the contrary rulings.

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26. *American Communication v. Doud,* 339 U. S. 382, 401, 70 S. Ct. 674, 685, 94 L. Ed. 925 (1950), in which the Court said, "When authority derives in part from government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by government itself."

In the *Civil Rights Cases*,[27] Justice Harlan quoted the following precept of legal technique:

> "It is not the words of the law but the internal sense of it that makes the law. The letter of the law is the body, the sense and reason of the law is the soul."

With this precept in mind, we should investigate the meaning and purpose of the provision in the Fourteenth Amendment that no state "shall deny to any person within its jurisdiction the equal protection of the laws." It is noteworthy that there is contained in these words no inhibition against racial discrimination, which has since been read into the statute, whereas action by the state is more specifically pointed to. The phrase "equal protection of the laws" is a more general, a more flexible, a more inclusive expression than the reference to state action. It may well be that what constitutes equal protection of the laws may differ under different factual circumstances, and that that may be the clue solving our effort at reconciliation of the divergent rulings.

Historically speaking, we note that the Fourteenth Amendment was enacted for the purpose of implementing the Thirteenth, freeing the slaves, by affording the Negro some measure of rights equal to that of his white brother.[28] Why then was the grant limited to protection against state action and not against action by private persons? It must have been because the framers of the Amendment thought it more important to maintain a private enterprise system free from federal control than to eliminate discriminatory practices among private individuals. The legal minds who conceived this Amendment must have believed that the state, since it is founded on universal tax contributions and personal services rendered by every member of the public, has

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27. See note 19 and p. 26 of 109 U. S. and p. 33 of 3 S. Ct.

28. Report of the United States Commission on Civil Rights, 1959 p. 10.

a fiduciary relationship to all the public similar to that which a trustee of property bears to all the beneficiaries of the trust and which a personal guardian owes to all his wards. Neither the private nor the public trustee may treat any of the beneficiaries or any of the public unfairly by any method of discrimination. Nor can this duty not to discriminate be evaded by subterfuge or by delegation of duties. The cases cited in note 4 of page 15 of petitioner's brief,[29] are instances where the courts have not permitted the public trustee to circumvent the duty by leasing part of the public facilities to private interests to perform in a discriminatory manner the duty which the public trustee was itself obliged to perform.

In the complex interplay of public duty and private rights, however, there have arisen moments when this simple rule, like many another, has become difficult of application. The duties of the state and the rights of private enterprise have sometimes become so entangled and interrelated that to hamper, to impede, or to restrict in any way the function of the private enterprise will result in great harm to the beneficiaries of the public trust. The facts in the "blighted area" cases illustrate one instance. There, the government by seizing private property in order to eliminate slums, has a duty toward its public, as a public trustee, not to divert the property from public use, nor to permit the property to be used in violation of the public obligation against discrimination. Apparently the public body could not redevelop the property itself and had to sell the property to private interests to perform the public task. Why, then, was this private enterprise permitted to exercise racially discriminatory methods in the performance of a

29. The case of *Jones v. Marva Theatres, Inc.*, 180 F. Supp. 49 (1960), cited by petitioner in this note 4, page 15, is no exception. The operation of a theater in the Courthouse could be justified only on the ground that it was related to the duties of operating the Courthouse. Otherwise, operating of the theater would not be permissible even on a non-discriminatory basis. Note that the Court considered whether the space leased out was "surplus property."

public duty? The reason stated by the Court is that the elimination of the blighted areas was "in the public interest."

The gain to the Negro and to all other segments of the population from the elimination of the slums outweighs the loss in equal protection of the laws. Indeed from the long range point of view it may well result in a more substantial contribution to equal protection of the laws than a rigid adherence to a previously announced formula. Likewise, the leasing or sale by the government of surplus property without restriction is justified by the ultimate benefit to all members of the public from preventing complete dissipation of the property.

IV. "Special" or "Extra" Property Owned by a State Agency Under Such Circumstances as Exist Here Should Be Treated in the Same Way as State Owned Surplus Property, That Is With Immunity From the Provisions of the Fourteenth Amendment.

Respondent has applied the expression "special" or "extra" to the property leased to the Eagle Restaurant because the Supreme Court of Delaware in *Wilmington Parking Authority v. Ranken*,[30] considering the very same property involved here, described it in such a way as to merit these adjectives. The Delaware Court, in the declaratory judgment action based on undisputed facts, held that extra space could be added to the parking facilities for a special purpose, that is to raise by private leasing a substantial portion of the money needed to operate the parking facilities. The space was not needed for parking and could be used at the very outset in a manner unrelated to the function of parking (R. 51).

True, it may be that the function of parking would include such incidental uses as providing food for the benefit of parking customers. But it was distinctly assumed in the

30. 34 Del. Ch. 439, 105 A. 2d 614 (1954).

Ranken case that the "extra" space would not be dedicated for incidental uses related to parking, and would be available to the highest bidder for any use. It happened only by chance, and not by prior choice of the Parking Authority, that the lease in the instant case was granted to a restaurant (R. 52).

The ordinary leasing of governmental property, where such leasing is permissible as incidental to a public use, is not predicated on the idea of obtaining the greatest amount of money but on giving service to the public. Financial loss is not generally the criterion for discontinuing a public business, as witness the operation of the United States Post Office Department. It would, therefore, not be proper for a public authority to rent out its facilities merely because it is operating at a loss, or because it can profit more from an outside rental than from self-occupancy.

Where property, however, is not needed for any public service as when the property is surplus, "special" or "extra" as in our case, the best use of the property is to obtain the highest sum possible for it. True, the leasing of this property to private interests without any limitations as to use, may result in harm to those subjected to racial discrimination by the user. But the ultimate benefit to all the public including the members of the racially-discriminated group far outweighs the harm done. It is a fact that as white persons have moved out of the cities to restricted residential suburbs, more and more Negroes have been confined to the bounds of the city.[31] Regrettable as this is, it nevertheless follows that the Negroes in Wilmington will benefit comparatively more from public parking facilities in the city than will the whites.

Petitioner has argued that restrictions against racial discrimination by the lessee of the parking authority would not affect the number of applicants for the lease or the amount they would be willing to pay. Let us consider the

31. Report of the United States Commission for Civil Rights, 1959, pp. 366-367.

case of one of the lessees from the Wilmington Parking Authority, who operates a store for the sale of jewelry. If this store sells jewelry on credit, it undoubtedly discriminates against the Negro as a class. (We do not condone such discrimination by reciting its existence.) Banks and insurance companies practice one form or another of discrimination against the Negro.[32] White or Negro beauty parlors cater only to members of their own races. Various professions engage in racially discriminatory practices. Corporations of all sorts are very selective racially as to their choice for their boards and their management. None of these could without dissimulation seek to become lessees of the "extra" space of the Parking Authority if compelled thereby to deviate from their discriminatory practices.

Even with the adoption of the Fair Employment Practices Act, the sponsors of the act are not so naive as to believe that there will be an overnight metamorphosis in human nature. Though the act will do good in many respects, it will nevertheless drive some of the discriminatory employment practices underground.[32a] What is not done openly will be done secretly or under some pretext. But even if such discriminatory labor practices could be eliminated immediately, it would be unrealistic to assume that other forms of racially discriminatory business practices not prohibited by law will be discontinued in the near future. The Court is not sanctioning the continuance of these practices or encouraging their existence when it recognizes that they do exist and that it would be practically impossible for any public agency to do business with any private enterprise operated by members of the white race that is devoid of discriminatory practices toward the Negro in one form or another.

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32. *Idem,* pp. 510, 514, 526, 527, 531.

32a. "The Right to Equal Treatment: Administrative Enforcement of Antidiscrimination Legislation," 74 Harvard Law Review 526.

Petitioner says: [33]

"Moreover, it is difficult to understand that any of the funds shown by the affidavit of the Authority's chairman as coming to it (R. 12), whether cash donated by the City of Wilmington, proceeds from the sale of the Authority's revenue bonds, parking revenues or leasehold rental income, once in the treasury of this public governmental agency, are other than public funds."

For that reason, petitioner in effect contends that the Eagle Restaurant is in no better position to claim special privileges than any of the other contributors. The basic fallacy in this argument is the assumption that all the contributors to the public fund receive the same privileges. It will be found that each of the lessees in the cases cited in petitioner's brief [34] receive greater privileges than do any of the taxpayers, for the lessees receive in addition to the services available to all taxpayers the opportunity to make a profit at the expense of the other taxpayers. But since any service the ordinary lessee confers upon the public agency is a service related to the function of the agency, which presumably the agency could do for itself, it is only fair that the ordinary lessee be subjected to the same restrictions as the leasor. The special lessee, however, like the Eagle Restaurant is entitled to greater privileges than the ordinary lessee for he performs a service which presumably the public agency can not perform for itself. He furnishes the additional money which the public agency needs in order to exist. The "special" lessee is more like the lessee of surplus property, or like the development company in the "blighted area" cases, or like the bank which loans money to the state agency, or like the auditors who audit the books of the public agency, all rendering a special service for the doing of which they should be immunized from the restrictive effect of the Fourteenth

33. Petitioner's brief, p. 15.
34. Note 4, p. 15, petitioner's brief.

Amendment in order that the general public may receive the greatest cooperation of private enterprise. The ultimate good to the general public justifies tolerance for the comparatively insignificant injustice resulting from the discriminatory practices.

Petitioner's charge that the Court's findings of facts are erroneous is refuted by the fact that the Court made the same findings five years before in the *Ranken* case, *supra*.[35] Furthermore, it may not be amiss to point out that in recent years a climate of racial tolerance has existed in Wilmington. Petitioner's affidavit (R. 34) as to the large number of restaurants in Wilmington and environs that have opened their doors without restriction attests to that. Shortly after the decision in *Brown v. Board of Education*,[36] the Wilmington public schools were completely integrated.[37] In 1953, the Wilmington Housing Authority by resolution eliminated segregation in public housing.[38] This policy was adopted even before any federal court had rejected the *Plessy v. Ferguson*[39] doctrine as applied to public housing. Theatres, at one time barred to Negroes, have been opened to all.[40] It would be found too, upon a visit to Wilmington, that all public swimming pools have removed racial bars. The Y. M. and Y. W. C. A. accept Negro membership, even though a very fine Y. M. C. A. built especially for and used exclusively by Negroes has existed in Wilmington for some time. The largest hotel in Wilmington, the DuPont Hotel, rents its lodgings and furnishes eating facilities to all persons. The State of Delaware, on July 9, 1960, enacted a Fair Employment Practice Act.[41]

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35. See note 30, *supra*.

36. 347 U. S. 483, 74 S. Ct. 686.

37. Report of The United States Commission on Civil Rights, p. 179 et seq.

38. *Idem*, 411.

39. 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

40. *Idem*, 174.

41. Senate Bill No. 397.

CONCLUSION.

For the reasons stated above, the appeal should be dismissed and judgment should be rendered for respondents on the petition for certiorari.

Respectfully submitted,

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