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Constitutional Law- State Action and the Equal Protection Clause - Status of Lessee of Public Property

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CONSTITUTIONAL LAW — STATE ACTION AND THE EQUAL PROTECTION CLAUSE — STATUS OF LESSEE OF PUBLIC PROPERTY — Defendant Wilmington Parking Authority was a tax-exempt state agency organized under the Delaware Parking Authority Act[1] to build and operate a public off-street parking facility. Financing of the project was accomplished primarily by the issuance of self-liquidating bonds, but fifteen percent of the necessary capital was advanced by the City of Wilmington from its public funds. The state agency had statutory authority to lease space in the facility for private commercial uses, but only to the extent that the rentals thereby obtained were needed to meet the state requirement that the facility be self-supporting.[2] In accordance with this authority space was leased to defendant lessee, a restaurant, which installed most of the restaurant furnishings at its own expense. Lessee covenanted to occupy and use the premises in accordance with all applicable laws, but no control over operation of the restaurant was reserved by the state agency. Lessee refused to serve plaintiff, a Negro, be-

1 DEL. CODE ANN. tit. 22, § 501 (1953).

2 DEL. CODE ANN. tit. 22, §§ 501, 504(a) (1953); Wilmington Parking Authority v. Ranken, 34 Del. Ch. 439, 461, 105 A.2d 614, 626 (1954).

cause of his race. Plaintiff joined lessee and the Parking Authority in a proceeding to enjoin lessee's[3] alleged discriminatory conduct. A state chancery court held that lessee's conduct was prohibited by the equal protection clause of the fourteenth amendment,[4] finding "state action" in the fact of state ownership of the leased property and the importance of the rental income to the continued existence of the parking facility.[5] On appeal, *held,* reversed. Since the Parking Authority did not locate the restaurant inside the public structure for the convenience of users of the parking facility, and did not directly or indirectly operate the restaurant or financially enable it to operate, lessee was acting in a purely private capacity and thus was not restrained by the fourteenth amendment. *Wilmington Parking Authority v. Burton,* 157 A.2d 894 (Del. 1960), *jurisdictional question postponed,* 364 U.S. 810 (1960).

The fourteenth amendment provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.[6] Soon after the amendment was adopted the United States Supreme Court held that it was not a limitation upon private action.[7] Although our courts still talk in terms of "state" and "private" action, judicial decision has been bringing within the prohibitions of the fourteenth amendment an increasing number of acts involving private participation.[8] This expansion of the state

[3] Lessee claimed protection under DEL. CODE ANN. tit. 24, § 1501 (1953): "No keeper of an inn, tavern, hotel, or restaurant . . . shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business."

[4] U.S. CONST. amend. XIV, § 1.

[5] Burton v. Wilmington Parking Authority, 150 A.2d 197 (Del. Ch. 1959).

[6] U.S. CONST. amend. XIV, § 1.

[7] Civil Rights Cases, 109 U.S. 3 (1883).

[8] *E.g.,* Shelley v. Kraemer, 334 U.S. 1 (1948), where racially restrictive covenants were held to be unenforceable, although Corrigan v. Buckley, 271 U.S. 323 (1926), had implied the validity of enforcing such covenants, presumably because they were private agreements; Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957), where a private trust fund could not constitutionally be administered in accordance with the settlor's racially-restrictive directions so long as a state agency administered the trust; Marsh v. Alabama, 326 U.S. 501 (1946), where a Jehovah's Witness was held to have a legal right to distribute religious literature on the streets of a town owned by a private company. In Ming v. Horgan, 3 RACE REL. L. REP. 693 (Cal. Super. Ct. 1958), the alleged deprivation of right by realtors and house builders was brought within the fifth and fourteenth amendments on the basis of state licensing of defendants, federal mortgage guarantees, building inspection and advertising. But other courts have found no state action under similar circumstances. See, *e.g.,* Johnson v. Levitt & Sons, 131 F. Supp. 114 (E.D. Pa. 1955). See generally Abernathy, *Expansion of the State Action Concept Under the Fourteenth Amendment,* 43 CORNELL L.Q. 375 (1958); *State Action: A Study of the Requirements Under the Fourteenth Amendment,* 1 RACE REL. L. REP. 613 (1956); Comment, 61 HARV. L. REV. 344 (1948). See also Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment,* 30 SO. CAL. L. REV. 208 (1957), where the writer suggests it would be better to focus on "denial of equal protection" rather than on "state action." The same expansive trend appears with respect to state action under the fifteenth amendment. See, *e.g.,* Smith v. Allwright, 321 U.S. 649 (1944), overruling Grovey v. Townsend, 295 U.S. 45 (1935), which had upheld the Texas Democratic Party's White Primary rule on the ground that the state was not sufficiently involved in the exclusion since the rule had been adopted at a Party convention and without express state sanction.

action concept is largely due to the anti-discrimination attitude which has dominated American constitutional jurisprudence during the past two decades, and increased government participation in areas of activity previously thought of as confined to private proprietorship.[9] Although "state action" is not susceptible of precise definition at present, it does not appear that its growth-potential has been eliminated.[10] The principal case was concerned with whether racially-discriminatory conduct of a lessee of state-owned property is state action.[11] In an early state court decision which seems to have been based on the "separate-but-equal" doctrine, racial discrimination by a short-term lessee of a municipal auditorium was not constitutionally prohibited so long as non-white groups had an equal opportunity to obtain such leases.[12] However, in several subsequent state and federal decisions the lessee's discriminatory conduct has been held to be within the scope of the state action concept.[13] At least one writer has asserted the general proposition that no lessee of state-owned property may racially discriminate.[14] This proposition, on examination of the cases, appears to be an over-generalization, for in each case one or more additional factors were present which indicated a state "connection" with lessee's discriminatory conduct beyond mere state property-ownership. Thus in some of the cases it appeared that the lease was made to accomplish indirectly the discrimination which would have been unconstitutional if done by the state directly;[15] under such circumstances it appears that the

9 GREENBERG, RACE RELATIONS AND AMERICAN LAW 47-48 (1959). In Kauper, *Trends in Constitutional Interpretation*, 24 F.R.D. 155, 179 (1959), the writer points out that anti-discrimination pressures also have led to Brown v. Board of Educ., 347 U.S. 483 (1954), which, as subsequently interpreted, completely rejects the "separate-but-equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), and makes it unlawful for a state to classify racially for the enjoyment of legal rights and privileges.

10 GREENBERG, *op. cit. supra* note 9, at 50. But in Boynton v. Virginia, 81 Sup. Ct. 182 (1960), involving discrimination by a restaurant lessee, the Court avoided the state action problem by holding that a bus terminal restaurant that operates as an "integral part" of a bus line's interstate passenger service is barred by the Interstate Commerce Act from segregating interstate bus passengers.

11 See generally Note, 42 VA. L. REV. 647 (1956).

12 Harris v. City of St. Louis, 233 Mo. App. 911, 111 S.W.2d 995 (1938).

13 Derrington v. Plummer, 240 F.2d 922 (5th Cir. 1956), *cert. denied*, 353 U.S. 924 (1957); Coke v. City of Atlanta, 184 F. Supp. 579 (N.D. Ga. 1960); Jones v. Marva Theatres, Inc., 180 F. Supp. 49 (D. Md. 1960); Simkins v. City of Greensboro, 149 F. Supp. 562 (M.D.N.C. 1957), *aff'd per curiam*, 246 F.2d 425 (4th Cir. 1957); Lawrence v. Hancock, 76 F. Supp. 1004 (S.D.W. Va. 1948); Culver v. City of Warren, 84 Ohio App. 373, 83 N.E.2d 82 (1948); Kern v. City Comm'rs, 151 Kan. 565, 100 P.2d 709 (1940). In Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954), *vacating and remanding per curiam* 202 F.2d 275 (6th Cir. 1953), the vacated judgment had upheld the racial discrimination of a short-term lessee of an amphitheatre in a public park. But the basis for the decision is not clear, and the case is of little help in analyzing the problem.

14 GREENBERG, *op. cit. supra* note 9, at 53, 112. Language found in some of the cases seems to lend support to the proposition. See, *e.g.*, Lawrence v. Hancock, *supra* note 13, at 1009: "It is not conceivable that a city can provide the ways and means for a private individual or corporation to discriminate against its own citizens."

15 *E.g.*, Simkins v. City of Greensboro, *supra* note 13; Lawrence v. Hancock, *supra* note 13; Culver v. City of Warren, *supra* note 13.

act of leasing would itself be unconstitutional state action.[16] In other cases there existed substantial governmental control over operation of the facility; although this factor can be construed merely as adding weight to the inference that the lease was made in order to achieve a discriminatory purpose,[17] it appears to be a factor which can itself establish a basis for state action.[18] Also, in some cases the leased facility was constructed and maintained with public funds; but only once has this factor occurred apart from the "indirect discrimination" and "state control" factors, and then it did not appear to be the basis on which state action was found.[19] In *all* of the cases it appeared that when the state acquired or constructed the leased facility it intended to provide a service which would be open to all or a substantial part of the general public. This "use by the public" appears to be most significant, for it enables a court to regard the lessee as an "instrumentality" of the state and thus to find state action despite the defenses of a good-faith lease and lack of state control.[20] The court in the principal case, in distinguishing those cases which held lessee's conduct to be state action, found the lease to be a bona fide arm's-length transaction, an absence of state control over operation of the restaurant, and insubstantial public financing. The court also found that the leased space had been acquired by the Parking Authority to provide income to help finance the parking facility rather than to provide parking facility users with a restaurant service.[21]

Although the court in the principal case recognized its obligation to follow federal decisions, it felt obligated to construe narrowly the cases finding state action because their application would erode local law.[22]

16 *Compare* Tate v. Department of Conservation & Dev., 133 F. Supp. 53 (E.D. Va. 1955), *aff'd per curiam*, 231 F.2d 615 (4th Cir. 1956), *cert. denied*, 352 U.S. 838 (1956), *with* Easterly v. Dempster, 112 F. Supp. 214 (E.D. Tenn. 1953), in which only the constitutionality of the lease was at issue.

17 See Simkins v. City of Greensboro, *supra* note 13.

18 See Derrington v. Plummer, *supra* note 13, at 924.

19 Kern v. City Comm'rs, *supra* note 13. See also Mitchell v. Boys' Club, 157 F. Supp. 101, 107-08 (D.D.C. 1957) (dictum), involving discriminatory conduct on privately-owned property, where the court states that governmental control rather than financial aid is the decisive factor. To see how the courts deal with discriminatory acts occurring on privately-owned property, see Abernathy, *supra* note 8, at 386-91.

20 This factor appears to be the basis of the decision in Kerr v. City Comm'rs, *supra* note 13. In Derrington v. Plummer, *supra* note 13, at 925-26, the court says, "[T]he express purpose of the lease was to furnish cafeteria service for the benefit of persons having occasion to be in the County Courthouse. If the County had rendered such a service directly, it could not be argued that discrimination on account of race would not be violative of the Fourteenth Amendment. The same result inevitably follows when the service is rendered through an instrumentality of a lessee; and in rendering such service the lessee stands in the place of the County." And see Anderson v. Moses, 185 F. Supp. 727 (S.D.N.Y. 1960), where the court lucidly discusses the factors of "use by the public," "state control," and "state financial aid" in relation to a restaurant concessionaire in a public park. See also Nash v. Air Terminal Services, Inc., 85 F. Supp. 545 (E.D. Va. 1949), also involving a restaurant concessionaire.

21 Principal case at 901.

22 Principal case at 902.

This may account for the absence of consideration by the court of a possible ramification of the "use by the public" factor which appears to have been suggested in *Derrington v. Plummer*,[23] and which would require finding state action in the principal case. In the absence of a state purpose to discriminate, or state control over the operation of the enterprise, the court in *Derrington* states that in order for the discriminatory conduct of a lessee of state-owned property not to be state action, the defendants must show that the leased space was surplus property neither used *nor needed for state purposes*. This suggested requirement that the leased space not be needed for state purposes might be regarded as just another statement of the previously-made inquiry into whether the state intended the leased facility itself to provide a service open to the public. However, the scope of "state purpose" need not be thus restricted. Rather, this suggested requirement in *Derrington* supports an analysis which would look beyond whether the leased facility itself was intended to be open to the public, and which would ascertain whether any *specific public purpose* underlay making the lease, in what manner the lease was to serve this specific public purpose, and whether or not the lease still served that purpose. Thus, in the principal case the purpose of the lease was specifically to provide income to aid in financing the parking facility, and neither the need for the parking service nor the need for the rents to finance the facility had terminated. So long as this rents paid-public service relationship exists, the state will be a party to any racial discrimination practiced by the lessee in his capacity as occupant of the leased premises.[24] Although the lessee would not be an "instrumentality" of the state in the sense that by operating the facility it is standing in the place of the state, it is reasonable to advance this extension of the "instrumentality" rationale in light of the increased proprietary activities in which one finds government participation. This increase, combined with contemporary anti-discrimination pressures, seems to warrant a further expansion of the state action concept.

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[23] *Supra* note 13, at 924-25.

[24] See Morse, *Policy and the Fourteenth Amendment: A New Semantics*, 27 FORDHAM L. REV. 187, 192-96 (1958), where the writer suggests that activities "affecting and effecting" a public purpose, when considered in the light of the expanding connotative meaning of "public purpose," could be analogized as the performance of a governmental function. Thus, when lessee performs the function of providing income to meet the facility's operating expenses, it is an "agent" of the state. For the development of the "public purpose" concept in the area of eminent domain powers, see Nichols, *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U.L. REV. 615 (1940).