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Constitutional Law - Discrimination - State Judiciary Precluded from Enforcing a Criminal Trespass Pursuant to a Restaurateur's Discriminatory Refusal to Serve and the Patron's Refusal to Leave

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CONSTITUTIONAL LAW—DISCRIMINATION—STATE JUDICIARY PRECLUDED FROM ENFORCING A CRIMINAL TRESPASS PURSUANT TO A RESTAURATEUR'S DISCRIMINATORY REFUSAL TO SERVE AND THE PATRON'S REFUSAL TO LEAVE.

State v. Brown (Del. 1963)

Defendant, a Negro, entered a privately owned establishment with separate hotel and restaurant facilities and requested the service of food. The proprietor, relying on a Delaware statute,[1] asked the defendant to leave after denying him service solely because of his race. Upon his refusal to leave, the proprietor obtained a warrant for his arrest for violating the criminal trespass statute.[2] Defendant was arrested by the police, but the charge was dismissed by a municipal court.[3] Upon petition of the parties, the superior court certified to the Delaware Supreme Court the question of whether the proprietor of a place of public accommodation violates the Fourteenth Amendment by refusing to serve a patron because of race pursuant to state statute. The court *held* that the proprietor of a private place of public accommodation has the right to refuse service to a Negro on a racial basis, but that he cannot have the Negro convicted for the trespass. *State v. Brown*, ... Del. ....., 195 A.2d 379 (1963).

It is well settled that a private act of discrimination is not forbidden by the Fourteenth Amendment.[4] This amendment has been held to apply only to state action and in no way impedes the rights of individuals to act as they choose. Private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the state, in any of its manifestations, is involved. The line of prohibited state conduct may be crossed by executive,[5] legislative,[6] administrative,[7] or judicial action.[8] With these principles in mind the Delaware Supreme Court had to decide whether there was prohibited state action in the statute recognizing the right to discriminate, in the act of the proprietor in discriminating, or in the possible conviction under these circumstances.

The right of a private entrepreneur to select the persons he will serve and to make such selection by any criterion he chooses, including color,

1. DEL. CODE ANN. tit. 24, § 1501 (1953):
No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers 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.

2. DEL. CODE ANN. tit. 11, § 871 (1953).

3. State v. Brown, Wilmington, Del., Munic. Ct., No. 483, May Term, 1963.

4. Civil Rights Cases, 109 U.S. 3, 3 S.Ct. 18 (1883).

5. Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122 (1963); Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961); Screws v. U.S., 325 U.S. 91, 65 S.Ct. 1031 (1945); see also 9 VILL. L. REV. 129 (1963).

6. Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119 (1963); Brown v. Board of Educ., 347 U.S. 483, 74 S.Ct. 686 (1954); Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16 (1917).

7. Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856 (1961).

8. Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836 (1948); Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031 (1953).

has been repeatedly recognized by the courts of this nation.[9] The heavy weight of judicial opinion is that the proprietor of a restaurant did not have a duty to serve everyone who presented himself for service.[10] A restaurateur had the right to select his patrons even by a discriminatory standard. In the instant case, however, the proprietor was acting pursuant to an express statute. Herein lies an argument for unlawful state legislative action.

The same statute was subject to the scrutiny of the Supreme Court of the United States in *Burton v. Wilmington Parking Authority*[11] and was held valid in spite of the equal protection clause. It may be implied from the decision that, if there were a valid preexisting common law rule allowing restaurant owners to refuse service to anyone, the mere fact that this rule has been restated in a statute does not introduce state action into the discrimination. Though there was some dispute about how the Delaware court had interpreted the statute, it may be inferred that if this statute were a codification of valid common law, it could not be the basis of state action as required by the Fourteenth Amendment.[12] In the instant decision, the Delaware court clearly indicated that the statute does not denote a public policy favoring a discriminatory classification, but merely codifies the common law. The court therefore held that the statute was not violative of the equal protection clause. This appears in line with the *Burton* decision.

Justice Wolcott, in his concurring opinion charges the prohibited legislative action. His assertion was based on the facts that the legislature has acted and that relying on this act, the proprietor discriminated upon racial grounds. However, this position seems untenable since the statute is non-discriminatory on its face. A reading of the statute readily discloses that it makes no reference to any class, race or group, nor does it confer any more rights on Caucasians than are conferred on Negroes. This is not a law that seeks to undercut the rights of any racial group. To the contrary, this is a law that is merely a legislative recognition of the common law rights accorded to the owners of property which find widespread acceptance throughout the United States.[13] The mere fact that a party used the statute to discriminate does not make the statute unconstitutional if the statute in itself is non-discriminatory.

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9. Fletcher v. Coney Island, 100 Ohio App. 259, 136 N.E.2d 344 (1955); Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824 (Tex. Civ. App. 1944); De La Ysla v. Publix Theatres Corp., 82 Utah 598, 26 P.2d 818 (1933).

10. Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959); Slack v. Atlantic White Tower Sys., Inc., 181 F. Supp. 124 (D. Md. 1960); Alpaugh v. Wolverton, 184 Va. 943, 36 S.E.2d 906 (1946).

11. 365 U.S. 715, 81 S.Ct. 856 (1961).

12. *Id.* at 727–28, 81 S.Ct. 862–64 (see Mr. Justice Stewart's concurring opinion and Justices Harlan, Whittaker and Frankfurter's dissents). Although this particular issue was not discussed by the majority, it can be inferred from Mr. Justice Frankfurter's dissent that the court would not have found state action from the mere codification of the common law. *Id.* at 863–64, 81 S.Ct. at 728.

13. See cases cited in notes 9 & 10 *supra*.

Defendant next attempted to link the state with the restaurateur by the fact that the state issued a license to the restaurant. The issue of whether discrimination by a licensee of the state is state action has been before the federal courts in the past.[14] The theory has been uniformly rejected on the ground that the licensing requirement is merely to insure minimum health standards in restaurants for the protection of the community, and is not an attempt to control the management of the business or to dictate its policies. This distinction appears to be valid, for to hold that all licensees are state instrumentalities subject to the Fourteenth Amendment would almost completely erode any distinction between private and public action and undermines the teachings of the *Civil Rights Cases*.[15]

With the dismissal of this issue, the court was faced with deciding perhaps the most difficult issue of the case: whether at the request of a private owner of a public accommodation, the state may convict as a trespasser one who refuses to leave after being denied service because of his race. This particular question has never been answered by the Supreme Court of the United States, although the enforcement by the judiciary of a private discrimination had been held void in *Shelley v. Kraemer*.[16] The court in that landmark case held that the action of state courts in enforcing restrictive agreements which exclude persons of designated race or color from the occupancy of real property is unconstitutional. The restrictive agreements standing alone did not violate any rights guaranteed by the Fourteenth Amendment since they were private discriminations, however it was held that in enforcing the restrictive covenant the state had denied a Negro the equal protection of the law. Drawing an analogy from this to the instant case, the refusal to serve would not be unconstitutional, but the judicial enforcement of the trespass would be. This analogy appears logical, but raises the problem of whether the doctrine of *Shelley v. Kraemer* is broad enough to cover the instant situation.

The Delaware court based its holding on *Shelley*, justifying the extension of that doctrine on *Turner v. City of Memphis*.[17] The court felt that, just as in the latter case where it was held that the state could not enact a statute which supported racial discrimination, the present court could not apply a statute which results in fostering racial discrimination. The court then stated that the *Turner* decision contravenes the previous decisions that have upheld trespass convictions.[18] However, using *Turner*

14. Williams v. Howard Johnson's Restaurant, 268 F.2d 845 (4th Cir. 1959); Slack v. Atlantic White Tower Sys., Inc., 181 F. Supp. 124 (D. Md. 1960). See also Madden v. Queens County Jockey Club, Inc., 296 N.Y. 249, 72 N.E.2d 697 (1947); *cert. denied*, 332 U.S. 761, 68 S.Ct. 63 (1947).

15. 109 U.S. 3, 3 S.Ct. 18 (1883). These cases held that private discrimination is not unlawful under the Fourteenth Amendment. *But see* Harlan, J., dissenting in the *Civil Rights Cases*, *id.* at 27, 3 S.Ct. at 33 and Douglas, J., concurring in Lombard v. Louisiana, 373 U.S. 267, 274, 83 S.Ct. 1122, 1125.

16. 334 U.S. 1, 68 S.Ct. 836 (1948).

17. 369 U.S. 350, 82 S.Ct. 805 (1962).

18. Griffin v. State, 225 Md. 422, 171 A.2d 717 (1961); State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958); Randolph v. Commonwealth, 202 Va. 661, 119 S.E.2d 817 (1961). See also Griffin v. Collins, 187 F. Supp. 149 (D. Md. 1960).

as the basis of an extention of *Shelley* is unsound. *Turner* dealt with an injunction against a party operating eating and rest room facilities at a municipal airport on a racially segregated basis and did not involve judicial enforcement of a private discrimination. Whether the instant result is justified based on *Shelley* alone is the question that must be answered.

It could be argued under *Shelley* that whenever there is a private discrimination, and the state makes it efficacious through the judicial machinery, the state is a partner in the discrimination. Following this premise, it would seem that if there were a discriminatory disposition under a will which the state judiciary enforces, there would be unlawful state action. Apparently, however, *Shelley* does not extend this far. In the case of *In re Girard College Trusteeship*,[19] where certiorari to the Supreme Court was denied, a private testamentary discrimination was enforced by a state court. Though denial of certiorari lends no greater weight to any case, the case suggests that different types of discrimination will be accorded different treatment by the courts. On this set of facts and in the absence of a liberalizing interpretation of *Shelley* by the Supreme Court, the Pennsylvania court was unwilling to extend *Shelley*.

Other courts have been faced with this exact problem and have not satisfactorily resolved the issue. These courts either fail to discuss the issue,[20] or state positively that there is not state action,[21] or ignore the *Shelley* ramifications.[22] Unfortunately these courts fail to give substantial reasons for their failure to apply or extend the *Shelley* rule. It should be noted, however, that this failure is not entirely the fault of these courts because the extent of *Shelley* is more or less speculative at the present.

It has been suggested that under the *Shelley* principle judicial state action exists only if ". . . the state assists a private person in seeing to it that others behave in a fashion which the state cannot itself have ordained."[23] Using this theory, court help would be state action if the courts are to coerce an unwilling party into discrimination, but it would not be unlawful if a private individual engages the courts to protect his own conduct. In the *Shelley* case, since the seller was willing to sell his property, discrimination was not effected until the courts enforced the restrictive covenant. The seller did not want to discriminate, and in the absence of court enforcement there would have been no discrimination. In effect, the court would be forcing one to discriminate when he was unwilling to do so. Using this analysis for the instant case where there was no unwilling discrimination, the court could enforce the trespass, because there would be no judicial compulsion of discrimination. The court would merely be recognizing the individual's right to discriminate and protecting the right

19. 391 Pa. 434, 138 A.2d 844 (1958), *cert. denied sub nom.*, Pennsylvania v. Board of Directors of City Trusts, 357 U.S. 570, 78 S.Ct. 1383 (1958).
20. State v. Clyburn, 247 N.C. 455, 101 S.E.2d 295 (1958).
21. Drews v. State, 224 Md. 186, 167 A.2d 341 (1961).
22. Griffin v. Collins, 187 F. Supp. 149 (D. Md. 1960).
23. Pollak, *Racial Discrimination and Judicial Integrity*, 108 U. PA. L. REV. 1, 13 (1959).

to use his property as he sees fit.[24] This analysis is plausible, although nowhere in the *Shelley* decision does the Court indicate this limited view.

Another view of interpreting the extent of *Shelley* and *Girard* is that the state should not be restrained from using judicial enforcement where it cannot prevent a particular private action or discrimination because to do so would deprive the discriminator of due process of law.[25] In other words, if the state legislature could not constitutionally abolish the private right to discriminate, there should be no constitutional bar to enforcing the right. This theory assumes that under the *Shelley* facts the state could outlaw the discriminatory practice, while in *Girard* they could not. Applying this theory to the present case, if the legislature of Delaware could prohibit discrimination by a restaurateur, judicial enforcement of the proprietor's discrimination would be violative of *Shelley*, and the holding of the instant case would be justified.[26] However, it is submitted that a finding of state action by judicial enforcement should be based upon what the state does, not what it fails to do. Even if the state could prohibit private discrimination, it is not constitutionally compelled to do so. It can allow the entrepreneur to discriminate, and it would seem illogical to prevent the state courts from enforcing the individual's right. If the reverse were true, any discrimination within the power of the state to prevent would be state action and violative of the Fourteenth Amendment.

This precise issue has been repeatedly avoided by the Supreme Court.[27] The rule of *Shelley v. Kraemer* has never been extended by that Court to cover the situation involved in the instant case. But in view of the persistent efforts of so many to circumvent the policy of the Court to eliminate discrimination, it could not be said with certainty that the Court would not extend the rule if this case reached it. In the present state of the law, however, it does not appear that the Delaware Supreme Court was required to reach this decision. It is, of course, free to interpret the United States Constitution in any way it sees fit as long as its interpretation does not violate any person's constitutional rights. Certainly the decision in the instant case violates no one's rights, and it may be, if the efforts to per-

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24. See United States Nat'l Bank v. Snodgrass, 202 Ore. 530, 531, 275 P.2d 860, 863 (1954), where it was stated that "while one may personally and loudly condemn a species of 'intolerance' as socially outrageous, a court on the other hand must guard against being judicially intolerant of such an 'intolerance,' unless the court can say the act of intolerance is in a form not sanctioned by the law."

25. Henkin, *Shelley v. Kraemer: Notes For a Revised Opinion*, 110 U. PA. L. REV. 473, 491 (1962).

26. See Marsh v. Alabama, 326 U.S. 501, 506, 66 S.Ct. 276, 278 (1946). "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the . . . constitutional rights of those who use it." (dictum).

27. See Boynton v. Virginia, 364 U.S. 454, 81 S.Ct. 182 (1960) (decided under the commerce clause); Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248 (1961) (dismissed for lack of sufficient evidence against petitioners); Peterson v. City of Greenville, 373 U.S. 244, 83 S.Ct. 1119 (1963) (found state action created by a compulsory segregation statute); Lombard v. Louisiana, 373 U.S. 267, 83 S.Ct. 1122 (1963) (police speeches commanding segregation in restaurant was unlawful state action); 9 VILL. L. REV. 129 (1963).