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issues, but instead is a determination whether there are issues to be tried. Certainly, the remedy is not available to adjudicate cases by a short-cut method, and it cannot be employed unless the court perceives clearly and has no doubt that a trial in the familiar sense of the word would be unavailing, and that a directed verdict for the movant would result if a trial were had. Yet, when there is nothing in fact to be adjudicated the applicable procedure to be employed by counsel *and accepted by the court* is a motion for summary judgment.

Racial Discrimination in the Creation of Charitable Trust

One of the most important and current issues concerning the law of trusts is racial discrimination in the creation of a charitable trust. The problem is more acute if the court upholds the validity of a trust which is created for the purpose of racial discrimination.

On May 20, 1968, one case involving this problem finally came to an end, when the United States Supreme Court opened the doors of Girard College, located in the city of Philadelphia, Commonwealth of Pennsylvania, to qualified orphan boys of all races. By denying certiorari to the United States Court of Appeals, Third Circuit, the United States Supreme Court has ended a fourteen year battle in the federal courts involving racial discrimination in the admittance of Negroes to Girard College.[1]

This problem, to be understood thoroughly, must be studied through its various stages. It first came to light in 1844 in the case of *Vidal v. Girard's Ex'rs.*[2] The facts are stated below:

Stephen Girard created a trust for the establishment of Girard College, in the city of Philadelphia, Commonwealth of Pennsylvania. The trust stated that the money should be used by the City of Philadelphia for the purpose of erecting and operating a school for poor, white male orphans. The next of kin objected to the trust for two reasons: First, because of the exclusion of all ecclesiatics, missionaries, and ministers of any sect, from holding or exercising any station or duty in the college. Second, because it limits the instruction to be given the scholars thereby excluding, by implication, all instruction in the Christian religion.[3] The

[1] Brown v. Commonwealth of Pennsylvania, 392 F.2d 120 (1968).
[2] Vidal *et al.* v. Girard's Executors, 12 Howard 126 (1844).
[3] *Id.*, p. 128.

Circuit Court of Pennsylvania held for the executors of Girard's Estate and dismissed the bill, stating, in effect, there was nothing in the devise establishing the college or in the regulations and restrictions contained therein which were inconsistent with the Christian religion, or opposed to any known policy of the State of Pennsylvania.[4]

The rule which is stated above stood firm until the Civil Rights Cases,[5] when the United States Supreme Court decided that the Fourteenth Amendment applied only to discrimination by the states and not to discrimination by individuals. The Civil Rights Cases determined the test whether "state action" is involved. The Girard College Case emerges again on the appellate level in 1957. Petitioners were denied admission to the school on the basis of race, pursuant to Stephen Girard's will. The will named the City of Philadelphia as trustee; subsequently, a Board of Directors of the City Trusts was established to administer the trust and the college. The United States Supreme Court held that the City of Philadelphia could not discriminate against Negroes. A different view comes into existence when the lower court (Orphan's Court) in the City of Philadelphia removed the city as trustee and replaced it with a private trustee.[6] By allowing this action to stand and denying certiorari the court has allowed racial discrimination to remain undisturbed in the Girard Trust.

Evans v. Newton

The next important case which comes to light concerning racial discrimination in a charitable trust is *Evans v. Newton* which involves the desegregation of a park.[7] The facts are as follows:

In 1911 a tract of land was willed in trust to the Mayor and City Council of Macon, Georgia, as a park for white people, to be controlled by a white Board of Managers. When the city desegregated the park the managers brought suit in the state court against the city and the trustees of residuary beneficiaries. In the bill of complaint they asked the city to remove the trustee and replace him with private trustees to enforce the racial limitations which were imposed by the trust. The city stated that it could no longer enforce segregation and asked to resign as trustee after intervention of a Negro citizen who claimed that the racial limita-

[4] *Ibid.*
[5] Civil Rights Cases, 109 U.S. 3 (1883).
[6] Pennsylvania *et al.* v. Board of Directors of Philadelphia, 353 U.S. 230 (1956).
[7] Evans v. Newton, 382 U.S. 296 (1966).

tions violated federal law.[8] Another argument was that the charitable devise was no longer capable of being executed in the manner provided by the testator, and therefore the court should effectuate his general charitable intent to establish a public park by refusing to appoint new trustees.[9] One of the heirs of the testator intervened stating that the property should revert to him if new trustees were not appointed. The Georgia Court accepted the resignation of the trustees and appointed new ones. The United States Supreme Court granted certiorari and reversed the decision of the Georgia Supreme Court.[10]

Mr. Justice Douglas, in stating the opinion of the court, brought out the fact that the park, even with private trustees, was still within the public sector, and discrimination based on race was therefore prohibited by the Fourteenth Amendment of the Constitution of the United States.[11] He continued, asserting that this decision was based on two things:

> "First, that due to continuous care of the park by the City over the years, it had acquired status as a public facility which would not be dispelled by the mere change of trustees;
>
> secondly, that the service rendered by even a private park of this character was municipal in nature."[12]

State Action

In the above case the Cy Pres Doctrine could have been applied. This has been done in several charitable trusts in the State of Georgia. The definition of this doctrine is:

> Where a settlor with a general charitable intent gives property in trust for a specific purpose and it becomes impossible or impracticable or illegal to carry out the particular purpose, the trust will not fail, but the court will direct the disposition of the property to some related charitable purpose, in order to carry out as nearly as possible the general charitable intent of the settlor.[13]

The problem involving racially discriminatory charitable trusts might be solved in each state's trust laws. A charitable trust will be enforced when it benefits a large or indefinite group of people. But a restriction

[8] *Id.*, p. 297.
[9] *Ibid.*
[10] *Ibid.*
[11] *Id.*, p. 298.
[12] *Id.*, p. 299.
[13] Bogert, Trusts, Cy Pres Doctrine, § 147 (3rd ed. Hornbook, 1952).

which is created in a charitable trust could be declared void and the trust itself could be still declared valid.[14] It is most important that each state take steps to avoid racial restriction in charitable trusts. If the clause in the trust cannot be held void, there is a possibility that the whole charitable trust might be declared invalid.

In expanding this concept of state action, it has become more and more apparent that the state courts would not tolerate racially restrictive covenants on the sale of houses as incorporated by some city officials.[15] The applicable test is explained below:

> This test nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the law.[16]

The only time this test was applied was in the *Wilmington Parking Authority*.[17] In this case a restaurant located in a publicly owned off-street parking building in Wilmington, Delaware, refused to serve appellant food or drink solely because he was a Negro. The parking building was owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and it was built with public funds for a public purpose. The appellant claimed that by refusing to serve him, the Parking Authority abridged his rights under the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.[18] The Supreme Court of Delaware held that the appellant was not entitled to relief because the restaurant's action was not state action within the meaning of the Fourteenth Amendment. The United States Supreme Court granted certiorari. Mr. Justice Clark in reversing the decision of the court of Delaware stated:

> By its inaction the Authority and through it the state, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination.[19]

[14] Williams, "The Twilight of State Action," 41 TEXAS LAW REVIEW 347 (1963).

[15] Large, "Racial Discrimination: Trust and Estates: Racially Discriminatory Charitable Trust and "State Action" under the Fourteenth Amendment: *Evans v. Newton*, 382 U.S. 296 (1966); 51 CORNELL LAW QUARTERLY 862 (1965).

[16] *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

Mr. Justice Clark implied that the state itself violated the Fourteenth Amendment because there was no state enforcement against the discrimination of the appellant. The state court had refused declaratory and injunctive relief to the victim of discrimination in an action against the state authority as seen in the facts. If there had been state enforcement, there might have been a remedy available at common law.

In summary, this article contains the landmark United States Supreme Court's decisions to date involving charitable trusts created for the purpose of racial discrimination. The confusion and discrimination surrounding the Girard Case has been further clouded by the 1958 decision of the United States Supreme Court in which the court denied certiorari and allowed the lower court to change trustees of Girard College from public to private.

In March 1968 the trustees of Girard College once again appeared in court to keep the school segregated. It had been ten years since the college had appealed to the courts to uphold the validity of the trust.

The appeal to the United States Court of Appeals, Third Circuit, set the stage for a constitutional showdown on two major issues. First, are wills such as Girard's will ironclad? Second, are schools in the gray area between the public and private spheres subject to the equal protection guarantee by the Constitution?[20]

The Court of Appeals, Third Circuit, in its opinion delivered by Mr. Justice McLaughlin held that in granting judicial enforcement of the restrictive agreements in the cases connected with Girard, the state has denied petitioners the equal protection of the laws. Thus, the action of Philadelphia's Orphans' Court in its substitution of Girard trustees was adjudged unconstitutional state action.[21]

In May 1968, the United States Supreme Court affirmed the decision of the United States Court of Appeals and denied certiorari to the trustees of Girard College.[22]

The questions and issues concerning discrimination in charitable trusts have been before the courts more than 125 years. It is now hoped that these points have finally been laid to rest.

[20] Brown v. Commonwealth of Pennsylvania, 392 F.2d 120 (1968).
[21] *Ibid.*
[22] 391 U.S. 921 (1968).