10.19.2018

BURTON PLACE

DEDICATION

"In August 1958, Wilmington City Councilman and Civil Rights activist William "Dutch" Burton worked with the NAACP to expose the racially discriminatory practices of the Eagle Coffee Shoppe. The restaurant was located on this site in a complex owned and operated by the Wilmington Parking Authority. When Burton was denied service at the Eagle due to his race, attorney Louis L. Redding filed suit against the Authority. The case was appealed to the U.S. Supreme Court, which decided in favor of Burton in 1961. The Court ruled that private tenants of a public facility were bound by the 14th Amendment and could not discriminate on the basis of race"

- Delaware Public Archives 2018

BURTON PLACE
DEDICATION

I. Welcome and Remarks

Michael Hare, Executive Vice President of Development, The Buccini/Pollin Group

II. Mayor Michael S. Purzycki

III. Greetings from Wilmington City Council

Hon. Nnamdi O. Chukwuocha

Hon. Samuel L. Guy Esq.

IV. Robert Buccini, Co-Founder of The Buccini/Pollin Group

V. About Dutch Burton and Brief History

State Representative Stephanie T. Bolden

VI. Burton v. Wilmington Parking Authority

Ret. Superior Court Judge Charles H. Toliver IV

VII. About The Marker

Katei Hall, Delaware Public Archives

VIII. The Dedication

Music Provided by The Adult Choir of The Episcopal Church of St. Andrew & Matthew, David Christopher - Music Director

"It seems to me that so much is being said about the principles of democracy, that we ought to begin to do something about them, rather than sitting around and hoping that they just happen accidentally. As an American citizen, I will protest any infringement upon my constitutional rights and those of any other citizen at any and all times."

- William H. "Dutch" Burton

BPG 25 YEARS
The Buccini/Pollin Group

WPA
WILMINGTON
PARKING
AUTHORITY

COME BY HERE, MY LORD

Come by here, my Lord, come by here.
Come by here, my Lord, come by here.
Come by here, my Lord, come by here.
Oh, Lord, come by here.

Someone needs you, Lord, come by here ...

Someone's prayin' Lord, come by here ...

WALK TOGETHER CHILDREN

Walk together children, don't you get weary!
Walk together children, don't you get weary!
Walk together children, don't you get weary,
there's a great camp meeting in the promised land. REPEAT

We're gonna walk and never tire,
Walk and never tire,
Walk and never tire,
there's a great camp meeting in the promised land.

OH! WHAT A BEAUTIFUL CITY!

Oh! What a beautiful city,
Oh! What a beautiful city,
Oh! What a beautiful city,
Twelve gates a-to the city, a-Hallelujah! REPEAT

There's three gates in-a the East,
three gates in-a the West,
three gates in-a the North,
and three gates in-a the South,
makin' it twelve gates a-to the city, a-Hallelujah!
REFRAIN

http://blogs.lawlib.widener.edu/delaware/2012/02/08/local-legal-historic-sites-midtown-parking-center-and-eagle-coffee-shoppe/

http://www.oyez.org/cases/1960-1969/1960/1960_164

Burton v. Wilmington Parking Authority

From Wikipedia, the free encyclopedia

Jump to: navigation, search

Burton* v. *Wilmington Parking Authority	
Supreme Court of the United States	
Argued 21 February, 1961 **Decided 17 April, 1961**	
Full case name	*William H. BURTON, Appellant, v. WILMINGTON PARKING AUTHORITY, et al.*
Citations	365 U.S. 715 (*more*) 81 S. Ct. 856; 6 L. Ed. 2d 45; 1961 U.S. LEXIS 1297
Prior history	Delaware Supreme Court
Holding	
In view of all the circumstances of this case, including the facts that the restaurant was physically and financially an integral part of a public building, built and maintained with public funds, devoted to a public parking service, and owned and operated by an agency of the State for public	

purposes, the State was a joint participant in the operation of the restaurant, and its refusal to serve appellant violated the Equal Protection Clause of the Fourteenth Amendment.[1]
Court membership
Chief Justice Earl Warren **Associate Justices** Hugo Black · Felix Frankfurter William O. Douglas · Tom C. Clark John M. Harlan II · William J. Brennan, Jr. Charles E. Whittaker · Potter Stewart
Case opinions
Majority — Clark, joined by Douglas, Warren, Black, Brennan
Concurrence — Stewart
Dissent — Frankfurter
Dissent — Harlan, joined by Whittaker
Laws applied
Fourteenth Amendment, the Delaware Code

Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), was a United States Supreme Court case that considered the application of the Equal Protection Clause on a private business that operates in close relationship to a government to the point that it becomes a "state actor".[2]

Contents

[hide]

Background[edit]

The Wilmington Parking Authority (WPA) is a government agency established by the State of Delaware in 1951 to encourage parking access. Although a state agency, the WPA worked closely with the City of Wilmington who would issue the bonds for initial construction.[3] The first project of the new agency was to build the Midtown Parking Center, a garage on the downtown block in Wilmington between 8th, Orange, 9th and Shipley streets.[4] The city's economic analysis showed that the bonds could only be repaid if the parking income was augmented with rental income from a strip of storefronts built along 9th Street. The Eagle Coffee Shoppe, Inc., was one of the tenants and signed a 20-year lease in 1957.

Shortly after it opened, seven black local Chrysler workers were arrested for trespass when they staged a sit-in at the counter and refused to leave until they were served in an unsuccessful attempt to desegregate the restaurant. Louis L. Redding, a local civil rights attorney who helped litigate *Brown v. Board of Education*, became involved in the dispute.[5] Rather than appeal those arrests, he had City Councilman William H. Burton park at the garage and then go to the Eagle Coffee Shoppe where he was refused service explicitly because he was African American.[6]

Prior litigation[edit]

Suit was then filed in 1958 on Mr. Burton's behalf against the parking authority and the coffeehouse claiming the discrimination was state sanctioned by virtue of the landlord and the close relationship between the business and state agency. The lawsuit sought to either force the Eagle Coffee Shoppe to integrate their dining room or to terminate their lease.[7]

The Delaware Court of Chancery ruled that the government lease to a discriminating company was a violation of Burton's civil rights. However, the Delaware Supreme Court overruled that decision found that Eagle Coffee Shoppe's refusal to serve black clientele was legal due to a state law, 24 Del.C. § 1501, that allowed restaurants to refuse services if a person was disturbing other customers.[8]

> 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.
>
> — 24 Del.C. § 1501[9]

Redding then appealed to the federal courts on behalf of Burton.

Opinion of the Court[edit]

The majority opinion, written by Justice Tom Clark, looked closely at the specifics of the financing of the parking garage and the building plan's dependence on retail rental income to determine that the Eagle Coffee Shoppe was integral to the government purpose of building and financing a parking garage. Also, a close symbiosis was noted between retail businesses having nearby parking and a garage being close to shopping opportunities to the point where they were a "joint participant". Based on the close interplay between government and company, the court found that the exclusion of black customers was a violation even though no government agency was directly discriminating. "The exclusion of appellant under the circumstances shown to be present here was discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment."[6]

Justice Potter Stewart concurred with the verdict but felt that, since no evidence had been submitted that Burton had bothered other customers, the Delaware law allowing restaurants to exclude customers was a pretense to allow racial discrimination and was therefore itself unconstitutional. Justice John Harlan II, joined by Charles Whittaker, found the State court ruling so ambiguous that they preferred to return the case to the lower court for clarification. Justice Felix Frankfurter wrote a separate dissent that also called for returning the case to the state court."[6]

Legal consequences[edit]

The Burton case broadened the reach of the Equal Protection Clause to include not only direct government action, but also actions by private companies acting in close relationship to a government agency.[10] The impact of the ruling was later limited in *Moose Lodge v. Irvis* to situations where the government support of the business was substantial before private discrimination could be considered a "state action".[11]

See also[edit]

- List of United States Supreme Court cases, volume 365

References[edit]

1. **Jump up ^** Clark, Tom C. (17 April 1961). "Burton v. Wilmington Parking Authority - 365 U.S. 715 (1961)". *US Supreme Court Center*. Justia. Retrieved 2 October 2013.
2. **Jump up ^** Rabe, Johan (2001). *Equality, Affirmative Action and Justice*. Hamburg: Google Books. p. 69. ISBN 3831128324.
3. **Jump up ^** "About US". Wilmington Parking Authority. Retrieved 2 October 2013.
4. **Jump up ^** 39°44′42″N 75°32′59″W39.7450°N 75.5496°WCoordinates: 39°44′42″N 75°32′59″W39.7450°N 75.5496°W

5. **Jump up ^** Williams, Leonard L. (Summer 1998). "Louis L. Redding". *Delaware Lawyer* **16** (2). Retrieved 2 October 2013.
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8. **Jump up ^** Clark, Tom C. (17 April 1961). "BURTON v. WILMINGTON PARKING AUTHORITY". *Oyez Project*. Chicago–Kent College of Law. Retrieved 2 October 2013.
9. **Jump up ^** Clark, Tom C. (17 April 1961). "BURTON v. WILMINGTON PKG. AUTH., 365 U.S. 715 (1961)". *FindLaw*. Thomson Reuters. Retrieved 2 October 2013.
10. **Jump up ^** Bittker, Boris I (1989). *Collected Legal Essays*. Littleton, Colorado: Fred B. Rothman & Co., republished by Google Books. p. 202. ISBN 0837703581.
11. **Jump up ^** Rehnquist, William (12 June 1972). "Moose Lodge No. 107 v. Irvis (No. 70-75". *Legal Information Institute*. Cornell Law School. Retrieved 2 October 2013.

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Moose Lodge No. 107 v. Irvis

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Citation. 22 Ill.107 v. Irvis, 407 U.S. 163, 92 S. Ct. 1965, 32 L. Ed. 2d 627 (1972)

Brief Fact Summary. Appellee, an African-American, was the guest of a member of Appellant Moose Lodge No. 107 in Harrisburg, Pennsylvania to a function at Appellant's facility. While at the facility, Appellee was refused service by Appellant. Appellee sued on grounds that he was refused service because of his race, and claimed that the action of Appellant constitutes state action under the Fourteenth Amendment because of the regulatory regime instituted by the Pennsylvania Liquor Control Board.

Synopsis of Rule of Law. State licensing regulation over a particular private entity is not enough to rise to the level of the actions of the private entity to be considered state action for regulation under the Fourteenth Amendment of the United States Constitution.

Facts. Appellee, an African-American who was a guest of a Caucasian member of the Lodge, requested food and beverage service, and was refused service by Appellant because of his race. Appellant is a local chapter of a national fraternal organization having well defined requirements for membership, and allows guests only if invited by a member or by the house committee. Following this incident Appellee brought this action under 42 U.S.C. Section: 1983 for injunctive relief in the United States District Court for the Middle District of Pennsylvania. Appellee claims that because the Pennsylvania liquor board had issued Appellant a private club license that authorized the sale of alcoholic beverages on the premises of Appellant, that the state action requirement is satisfied. Appellee named both appellant and the Pennsylvania liquor board as Defendants seeking an injunction that would revoke Appellant's liquor license as long as it continues its discriminatory practices. The district court agre
ed with Appellee and revoked Appellant's liquor license as long as it follows a policy of racial discrimination

Issue. Does the Appellant's refusal to serve food and beverages to a guest by reason of the fact that he is an African-American violate the Fourteenth Amendment?

William H. "Dutch" Burton

A three-term Wilmington City Councilman, "Dutch" Burton was known as an aggressive and independent politician who organized numerous "sit-in" protests at segregated Wilmington establishments. His involvement in Civil Rights issues escalated in 1958 when he agreed to be part of a planned NAACP effort to expose the racially-discriminatory practices of the Eagle Restaurant, located in the Mid-town Parking Center at 9th and Shipley Streets, a facility owned and operated by the Wilmington Parking Authority. When Burton was refused service at the restaurant, he filed suit against it and the Authority for violation of the Equal Protection Clause of the Fourteenth Amendment. Shepherded by attorney Louis L. Redding, the case was decided in Burton's favor by the Court of Chancery, reversed by the Delaware Supreme Court on appeal, and reversed again by the U. S. Supreme Court in 1961. The influential case established that tenants of the publically-owned facility were bound by the U.S. Constitution's ban on racial discrimination. The court decision spurred Wilmington City Council to approve an ordinance (1962) amending the city licensing law to make it a misdemeanor to refuse service on racial or religious grounds. *The legacy of Councilman Burton is preserved in city code and constitutional case law.

[207]

*Following the verdict, the Eagle applied to change its name to the "Executive Club Restaurant" to improve its image and to give the impression that it served a limited clientele. The restaurant eventually closed, and the remnants of its kitchen could be seen for many years in the back room of the Ninth Street Bookshop, the successor business.

[264 words with this additional paragraph]

An expanded version would go into events that lead up to the suit, and additional detail on the cases and decisions.

Sources:

"Two Opinions," in the Virginia Commission on Constitutional Government, April 20, 1960.

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"Local Legal Historic Sites – Midtown Parking Center and Eagle Coffee Shoppe," Widener University, Delaware Campus Library blog, 2-8-2012.

"Parking Garage demolition Includes Delaware Civil Rights Landmark," Adam Taylor, News Journal, 12-26-13.

"Must Serve Negroes, Eagle Told," Sam A. Hanna, Morning News-Journal, 4-18-61.

"Eagle Restaurant Becomes Club, Still Open to Public," Evening Journal, 8-4-61.

Fair, Katelyn (DOS)

From: damobi42@comcast.net
Sent: Saturday, December 28, 2013 11:57 PM
To: ataylor@delawareonline.com; Fair, Katelyn (DOS); jim
Subject: Burton v. Wilmington Parking Authority
Attachments: Burton v. Wilmington Parking Authority.jpg; Burton v. Wilmington Parking Authority-page 2.jpg

Dear Mr. Adam Taylor,
News Journal Reporter

To review the situation: The Supreme Court Case of Burton v. Wilmington Parking Authority is a Landmark Civil Rights Supreme Court decision, argued February 21st,1961 by Louis Redding, Jr. This case involved the Equal Protection Clause as it related to the government working closely with a private business.
The Wilmington Parking Authority was established by the state government to provide parking areas located in the downtown sector of Wilmington. The Eagle Coffee Shoppe, Inc.was the private business concern in this situation. City Councilman William H. "Dutch" was ordering a cup of coffee at the Coffee Shoppe when he was asked to leave the building. The cashier said that "colored people were not allowed in the Coffee Shoppe because they bothered the other customers".

I'm 1961 after much litigation,The Delaware Supreme Court overruled the earlier decision that prevented Blacks from receiving service in the Coffee Shoppe. Some of the judges (Justice Tom C.Clark, Justice Charles Whitaker, Justice John Harlan II and Justice potter Stewart took a stand and said that Councilman Burton was not disruptive in any way towards the other customers. This accusation was just a racial ploy intended to keep Afro-Americans out of the establishment. As stated in the News Journal by reporter Adam Taylor in his December 26th article "the 1961 decision said that not serving Burton because he was Black violated the Equal Protection Clause of the 14th Amendment. It led to stronger public accommodations laws in Delaware."

In conclusion, the members of the Delaware Afro-American Historical and Genealogical Society (DEAAHGS), would like to place a state historical marker near or inside of the new building that will stand in the place of The Coffee Shoppe. We would like to do this in remembrance of the events that happened in this building in and concluded in the upholding of the Equal Protection Clause of the 14th amendment in 1961.

Darleen Amobi,
DEAAHGS
VP of History


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groundbreaking case will go with it

As Wilmington parking garage is leveled, coffee shop at center of groundbreaking case will go with it

Dec. 25, 2013 11:36 PM | 14 Comments

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The Mid-town Parking Center sits in a state of demolition, along with the stores that were once inside it, on Dec. 13. / KYLE GRANTHAM/THE NEWS JOURNAL

Written by
Adam Taylor
The News Journal

FILED UNDER

Local
Chancery Court

The Mid-Town Parking Garage and several vacant stores in a city block considered crucial to downtown Wilmington's revitalization are being demolished – and an important piece of Delaware's civil rights history is going down with them.

One of the stores on Ninth Street between Orange and Shipley streets was once the Eagle Coffee Shoppe, where City Councilman William H. "Dutch" Burton was refused service in 1958 because he was black.

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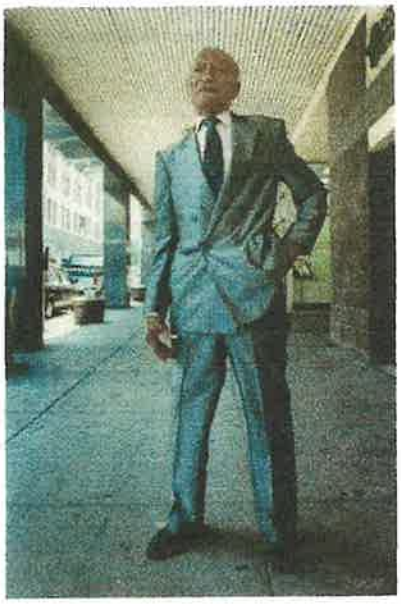
The coffee shop and the garage it was attached to were owned by the Wilmington Parking Authority at the time. Burton sued the authority and won in Chancery Court, but the decision was overturned by the Delaware Supreme Court, in part because of a state law that gave private businesses the right to not serve



William 'Dutch' Burton stands at the site of the Eagle Coffee Shoppe in 1993. Burton was refused service there in the 1950s. / FRED COMEGYS/THE NEWS JOURNAL

More

anyone who would be "offensive" to other customers.

The coffee shop was run by a private company, leased from the parking authority.

Attorney Louis L. Redding argued the case before the U.S. Supreme Court, which ruled in Burton's favor as it overturned the Delaware top court's decision.

"It's a famous case and a landmark decision," former Wilmington Mayor James M. Baker said. "It was really important, because it said that a public agency receiving tax dollars cannot discriminate against people because of their race."

The coffee shop eventually closed and the parking authority sold the stores and the garage to a private company. For 35 years, the building that houses the coffee shop was the site of the Ninth Street Book Shop before it moved a few blocks to Market Street last year.

The 1961 decision said that not serving Burton because he was black violated the equal protections clause of the 14th Amendment. It led to stronger public accommodations laws in Delaware.

Yet there has never been any marker or exhibit in the building noting the event.

City resident Kenyon Camper, 78, said he understands why there hasn't been anything to memorialize the event until now. But he thinks some sort of remembrance is appropriate in the building that replaces the one that housed the coffee shop.

LexisNexis

User Name: HariNarayan Grandy
Date and Time: Thursday, May 24, 2018 3:55:00 PM EDT
Job Number: 67299361

Document (1)

1. *FROM THE ARCHIVE: MY MEMORIES OF LAW PRACTICE IN WILMINGTON, DELAWARE (VOL. 16, NO. 2, SUMMER 1998), 20 Delaware Lawyer 20*

Client/Matter: -None-
20 Del. Law. 20:
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Secondary Materials	-None-

FROM THE ARCHIVE: MY MEMORIES OF LAW PRACTICE IN WILMINGTON, DELAWARE (VOL. 16, NO. 2, SUMMER 1998)

Spring, 2002

Reporter
20 Delaware Lawyer 20 *

Length: 2900 words

Author: Frank H. Hollis

Text

[*20] Backdrop

Wilmington, Delaware of the early 1950s appeared to the uninitiated as an idyllic city with well-defined separation of lifestyles. The landed gentry was dominated by E.I. duPont de Nemours, Atlas Powder Co., Hercules Powder Co., et al., and those who served their industrial and management needs. A second tier was represented by the two or three leather tanneries and those in their employ, the longshoremen who worked the Wilmington port, the postal workers, and those domestic workers who were employed by the rich and famous in Greenville, Delaware and such kindred environs. The black professional class was extremely limited in number with one lawyer, Louis F. Redding, Jr., five doctors, two dentists, one drug store owner (Melbourne) as its core membership. The badge of honor for the black working class was to have then been employed as an elevator operator or maintenance/stock worker for duPont, Atlas Powder, Hercules Powder combine, or to work for the U.S. Post Office or City Hall. The courts of Delaware were essential **[*21]** bastions of "whiteness," with every position from bailiffs to prosecutors and judges occupied by white male images.

Wilmington City Council represented an urban area where, with few exceptions, blacks resided in the east and west quadrants, while the northern and extreme southern quadrants housed the residences of its whites. The lone black representative was from the east side of town and he was employed as the janitor at the Delaware State House in Dover, Delaware. Similarly, the City's police department was tokenly reflective of its black population. Only one black detective and a handful of police officers were employed to patrol black residential neighborhoods and make arrests.

As stated above, the only black lawyer (Louis L. Redding, Jr.) had been admitted to the bar in the 1920s and he was destined to retain this dubious distinction until 1956.

On Coming to Delaware

My first encounter with Wilmington, Delaware was as a result of being stationed in the U.S. Army with "Mitch" Thomas, a graduate of the then Delaware State College, who had been a disc jockey while in school. Mitch and I formed a friendship which coalesced around our army experiences and our love for music (particularly jazz). Although born in Florida, his roots were now in Delaware where his intended bride, Odessa, lived. We would come up from the Tidewater, Virginia area, where we were stationed, whenever we could get a three-day pass. For me, as a Little Rock, Arkansas/Dallas, Texas native, these excursions were deeply anticipated and undertaken as a welcomed respite from army routine and fare.

My pre-army intentions had been to enroll at St. Louis University's Law School in St. Louis, Missouri. My desire for the practice of law has been whetted by my early experiences attending school in the southwest,--Dunbar High (Little Rock), Prairie View College (Texas) and Arkansas A.M.&N. College (Pine Bluff, Arkansas). I had observed the court proceedings as a student in junior high school involving Little Rock teachers, Sue Cowan Morris, et al., regarding the equalization of pay for black teachers with that of whites. My first encounter with Thurgood Marshall, then counsel for the **[*22]** National Association for the Advancement of Colored People (NAACP), was at this time. The pride I felt in watching him and a local attorney, J.R. Booker, during these proceedings remains a high point in my life. Other cases in Arkansas and Texas involved police brutality committed by white police against blacks and suits to compel the admission of blacks to the University of Arkansas and the University of Texas Law Schools.

A return to my pursuits at St. Louis University was not to be. Mitch and I were discharged from the army in late September 1952 (he a few days earlier than I). My final East Coast visit was planned as a swing through Delaware to spend a few days and then on to Arkansas/Texas. On this trip to Delaware I met my first wife to be, Janis Anderson.

The Anderson/Hamilton residence was at 204 E. Tenth Street, directly across the street from the Redding family home. Gwendolyn Redding, a teacher at Howard High School, lived with her mother and father, Louis Redding, Sr., a retired worker. Louis Redding, Jr. practiced law and lived away from the family home. J. Saunders Redding, Louis' brother, was a professor at Hampton University.

I returned to Arkansas and Texas and spent the next nine months preparing to enter Temple University Law School in September 1953. I returned to Wilmington, Delaware in June 1953 and took a job as a waiter at the Brandywine Country Club to earn money to tide me over and defray expenses until my G.I. Bill payments could be processed. I entered Temple Law School that fall.

I did well my first year at Temple and finished first in a class of 138. I was voted Vice President of my freshman class and worked in the Law Library and on the night shift at the U.S. Post Office to earn my keep. I ultimately graduated fourth in my class.

While I lived in Philadelphia, I would commute to Wilmington whenever I could to see my intended wife. My decision to attempt to establish practice in Delaware was made during my second year when I won the Corporation Law Award. My study group consisted of Joseph Kwiatkowski, Fred Knecht and Joseph Longobardi, among others. We would rotate the study locale between the several places we could centrally meet--most of the time at Joe's house. Thereafter, the study group stayed together to cram for the bar exam.

My eligibility to take the Delaware Bar was fraught with two obstacles--i.e., the need to identify a preceptor-ship with a Delaware attorney (a most difficult task since Louis Redding was the only attorney I knew and a preceptorship with him was not available), and the need to identify a means of having a second year of Latin proficiency certified to the Bar. I also learned that two other black candidates (Sidney Clark and Theophilus Nix) would be taking the Bar at the same time and that Leonard Williams would sit for the Bar the following year. It was a cause of some concern for me because since 1929 no blacks had been admitted to the Delaware Bar and now, within a span of two years, four black candidates would seek membership. In the late 1950s the question of black quotas for State Bars was a burning concern to black law graduates across the country--with several cases in the Southern States being brought to test so-called quota manipulation. It is to the credit of the Delaware Bar that all four black candidates passed.

The first of my problems (the preceptorship) was solved when then Chancellor Collins J. Seitz gave me a law clerkship with the Court of Chancery. As I was to appreciate later, this was the first law clerkship in that court and it was certainly the first one for a black in the court that heard causes affecting the 60% of the Nation's corporations that were headquartered (domiciled) in Delaware at that time. Such a law clerkship for a black is all the more remarkable since the Chancellor and Vice Chancellor were, in addition to the Court's normal share of causes, busy wrapping up those matters pertaining to the divestiture **[*23]** of duPont's control of General Motors stock and embarking on the protracted arguments, motions and exhibits which attended the decision in *Bata v. Hill, 139 A.2d 159.* The second problem (Latin) was solved by translating Caesar under the tutorage of a Catholic priest.

As a law clerk I cut my teeth on European civil law, including the law of "sales legacy," which determined the case in *Bata*. Thanks to my law school course in international law, I was also familiar with the principles of comity that were very much involved in the outcome of this case. The Chancellor, as busy as he was, used every opportunity to instruct me in the nuances of the law and the weighing of evidence leading toward decisions. There were more than 100 argument days and nearly 4,000 exhibits admitted into evidence in Bata.

Suffice it to say that Chancellor Seitz was one of the most brilliant jurists I have ever encountered. He was a paragon of fairness and humility. It is little wonder that his decision in the Delaware case involved in the landmark *Brown v. Board of Education* decision of the U.S. Supreme Court was the first to call into serious question the constitutional doctrine of separate-but-equal as it applied to the education of black children. No amount of praise can add to or detract from this pionecring accomplishment. He was truly my mentor (preceptor) and I still thank him.

At the Delaware Bar

I was sworn in by Supreme Court Chief Justice Sutherland in his chambers, which was then across the hall from the Court of Chancery in the County/State side of the Public Building (City Hall - Second Floor), and I immediately made plans to commence the practice of law.

My office was located at 1014 Walnut Street (now a parking lot) and my initial days in practice were spent locating a secretary, securing a working law library and handling the few cases my first few clients brought me. As I recall, my very first case was one of aggravated assault involving a cutting, for which I put together a complete trial brief in the City's Municipal Court. In addition, my feeble start was assisted by Ned Carpenter, Rodney Layton, William Bennethum and other members of the Bar who spread the word in the corporate sphere that there was a new kid on the block. Gradually, some corporate clients came to me. These kept body and soul together for me and my family. (I had married Janis Anderson at the end of my first year in law school and by now we had two children.)

One of the more interesting cases of a corporate nature occurred when I undertook the representation of Messrs. Garfield, Pasternak and Roen in the Chemoil (Bon Ami) case. These gentlemen had been sued by the stockholders of Chemoil Corporation for the handling of its business affairs, including the breach of their fiduciary duty in self-dealing with the corporation. They, in turn, had countersued for money due and owing for services they had rendered Chemoil. Motions, counter motions and depositions were regularly filed from all quarters. This case was an interesting study in an attempt to control corporate assets.

It is ironic to note that while Delaware today is reputed to serve as the domicile for over half of the Nation's large corporations, not a single black Delaware lawyer has a regular corporate practice before the Court of Chancery. This, I submit, is a tragic commentary on the rich legacy of a Collins Seitz and Delaware's admission of four blacks to its Bar within two years in the late 1950s. If Delaware is to be true to this legacy, this sorry state of affairs must be corrected.

My life at the Bar in Delaware was involved in other legal pursuits. The beginnings of the landmark case *Burton v. The Wilmington Parking Authority* were lodged in the efforts of seven workers at the Chrysler Newark Plant who sought to be served in a restaurant housed under lease in this government facility. When they were denied service, they were arrested and charged in the Wilmington Municipal Court with, inter alia, criminal trespass. As their legal representative, I conferred with Louis Redding, Jr., who was then counsel for the local branch of the NAACP. We decided to test the owner's no service to blacks policy by having City Councilman Burton seek service. He was arrested for trespassing and thanks to Louis Redding and Leonard Williams, the law is now established that a governmental entity cannot by inaction do what it could not do by action--enforce and countenance discrimination on the grounds of race in a publicly-owned facility.

The other notable Wilmington civil rights case involved the August Quarterly Celebration. Each year black participants from down-state Delaware and Wilmington would block off several blocks of French Street on either side of the Mother A.U.M.P. Church to celebrate the date the slaves of this state and its environs received word they had been freed. Because this was a bitter reminder to some citizens of an era best forgotten and/or because in many respects the celebration bore the earmarks of an evangelical revival, it was barely tolerated by the Wilmington

Police Department. The epitome of effrontery came on that evening in the late 1950s when the police, mounted on motorcycles and equipped with bull horns, sought to clear French Street and end the celebration. Several participants were struck by motorcycles and others were arrested, along with Rev. Brown, Pastor of the Church, on a charge of maintaining a nuisance. Clearly, this was a violation of the civil rights of those involved and ultimately the charges were dropped and the Chief of Police apologized.

My national contribution to the cause of civil rights occurred with the legal assistance I provided to the late Wiley A. Branton, Sr., Esquire, who was the lead counsel in the case of the "Little Rock Nine." Wiley and I had attended Arkansas A.M.&N. College together as classmates. He had matriculated as the second black graduate of the University of Arkansas Law School and his practice was established in Little Rock/Pine Bluff, Arkansas. We are all familiar with the attempts to integrate Little Rock High School in 1957, the recalcitrant resistance of then Governor Orval Faubus, and the attendant riots and use of U.S. troops to enforce the Federal Court's order. I am proud that in some small way I was able to assist my late friend and colleague during this ordeal.

Since Leaving Delaware

I left Delaware in 1961 to come to Washington, D.C. I accepted the position of Attorney-Advisor to the Solicitor, U.S. Department of Labor, Division of Opinions and Interpretations.

My job entailed: (1) legal oversight of the establishment of the President's Committee on Equal Employment Opportunity (the forerunner of the Commission); (2) the rendering of decisions on wage and hour determinations with respect to federal contracts; (3) the participation in drafting legal **[*27]** documents regarding litigation to outlaw discrimination in government contracting--culminating in the Norfolk Shipbuilding case; (4) decisions on the Federal Unemployment Trust Act and the Fair Labor Standards Act; and (5) the preparation of draft legislation and testimony on sundry matters under the jurisdiction of the U.S. Department of Labor.

One of my proudest achievements was participation in drafting the manpower legislative provisions of the Economic Opportunity Act of 1964. These provisions gave rise to such programs as the Neighborhood Youth Corp. (NYC) and Volunteers in Service to America (VISTA). These programs with their ancillary supports--e.g., Head Start (which grew out of the Act's day care provisions)--yet serve as models for people helping people.

I participated in the planning and coordination of the 1963 March on Washington where Dr. Martin Luther King delivered his "I Have a Dream" speech. In these years at the Labor Department I also aided, through NAACP affiliation, in arranging bail bonds and hearings for freedom fighters in Selma, Alabama, Sunflower County, Mississippi, and on the Eastern Shore of Maryland. I also participated in arranging bail bonds and the defense of the Lumbi Indians in Lumbarton, North Carolina in their struggles with the Ku Klux Klan.

As a result of my legal experience with the Economic Opportunity Act, I was invited to become a part of the United Planning Organization (the Community Action Agency for Washington, D.C. and Fairfax County, Northern Virginia). I first headed its Manpower Division and thereafter became its Deputy Director when my late friend, Wiley A. Branton, Sr., assumed its directorship. From 1965 until 1982 (when I left UPO as its Acting Director) this Agency grew from an annual budget of $ 6 million to a budget in excess of $ 36 million and some 8,000 direct and delegate agency employees.

I was divorced from my first wife in 1972 and I have the love and companionship of three beautiful daughters (all married and one a lawyer) and one son. I have five grandchildren and one great- grandchild. One of my daughters and her family reside in Newark, Delaware. I am remarried, since 1984, to Joyce W. Hollis.

I am currently serving as the Executive Assistant to the Deputy Director, Office of Labor Standards, D.C. Department of Employment Services. This Office has oversight responsibility for the Office of Safety and Health, the Disability (Public Sector) and Workers' (Private Sector) Compensation Programs and the Office of Wage and Hour for the District of Columbia Government.

Conclusion

My Delaware legal experiences have been a constant resource to draw upon in all my endeavors. I frequently visit Delaware to see my daughter and her family, my aunt, Lorraine Hamilton (now 94 years old), my friends--Dr. Hammond Knox and family, Jerry Berkowitz, Esquire, and the other black lawyers who pioneered with me. These days and the years since will long live in my memories. It remains my fervent hope that Delaware will resolve to carry on its rich legal legacy for all. Only then can it truly be called America's Diamond State--its First State.

Graphic

PHOTO, Frank H. Hollis, Esquire

Delaware Lawyer
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End of Document

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Historical Marker Application

1. Proposed Marker Information

Suggested Marker Topic: Burton vs. Wilmington Parking Authority

Location: County: New Castle City/Town: Wilmington

2. Applicant Contact Information

Contact Name: Michael Hare Daytime Telephone: 320-442-4121

Email Address: mhare@bpgroup.net

Applicant Organization (if applicable): Buccini/Pollin Group & The Wilmington Parking Authority

Street Address: 322 A Street, Suite 300

City: Wilmington State: DE Zip Code: 19801

3. Statement of Significance

On an attached sheet please explain in a thorough but concise typed statement why the proposed subject is important and why it should be commemorated with a marker. Refer to the guidelines and criteria when writing your statement.

4. Proposed Marker Location

Preferred Location (*Provide Exact Address, Directions, or GPS Coordinates*):
9th & Shipley Streets (Exhibit Marked)

Why was this location chosen:
Most visible on the site & proximate to the entrance of the former Eagle restaurant.

Is the location on: Public Property: _____ Private Property X

If on private property do you have permission from the owner? Yes X No____

5. Background Information

Please provide on a separate sheet of paper a typed list of relevant facts, notes, and/or information pertaining to the proposed marker subject. This information will be helpful in beginning the research process and writing the marker text. (Please note that the Delaware Public Archives Staff will write and has the final say on marker text and will edit and revise to conform to research and format standards, including space limitations.)

See attached

6. Funding

Historical markers are funded on an individual basis by local legislators. Financial support must be obtained from a local Senator or Representative only after the marker application has been approved by the Delaware Public Archives. Once support is gained the legislator will notify the archives staff and we will move forward with the production of a marker.

*Please complete all fields. Incomplete marker applications will not be reviewed or considered. If you have any questions please contact Katie Hall at (302) 744-5036 or via email at katie.hall@state.de.us.

Revised 03/27/2018

Historical Marker Application

Answers to questions #3 & #5

Burton vs. The Wilmington Parking Authority, 365 U.S 715 (1961). In 1958, The Eagle Coffee Shoppe, a private tenant in a government-owned parking garage and commercial facility, denied service to a group of black laborers because of their race, continuing the widespread practices of discrimination. Supported by the NAACP, a plan was made bring this violation of the Fourteenth Amendment to the US Constitution to light. Black City Councilman, William H. Burton, described as a fiery advocate for Civil Rights, later approached the same counter for service, and upon denial he and attorney Louis L. Redding embarked on a three-year legal battle, bringing suit against the owner of the facility who was allowing its tenant to discriminate. The case made its way through lower courts, and finally to the U.S. Supreme Court in 1961. It considered the application of the Equal Protection Clause of the Fourteenth Amendment when the actions of a private entity, in close association with a public facility, were in question. The U.S. Supreme Court decision in 1961 in favor of Burton also called into question a Delaware law, regarding nuisance behavior, which was being routinely misused for discriminatory purposes. The case was pivotal, and is often cited. Attorney Redding was following on his successes with the Delaware cases that became part of the Brown vs. Board of Topeka, Kansas decision. The Eagle Coffee Shoppe changed its name and became a private club, presumably to continue to continue its racially discriminatory practices. The location later was occupied by the Ninth Street Bookshop for decades, where the remains of the Eagle could be seen in the back rooms and basement.

Delaware Public Archives Marker Text version (3-1-18 draft)

[650 character and space limit]

Burton vs Wilmington Parking Authority

Wilmington City Councilman William "Dutch" Burton was known as an aggressive and independent politician who organized sit-in protests at segregated Wilmington establishments. His involvement in Civil Rights actions escalated in 1958 when he participated in an NAACP plan to expose the racially-discriminatory practices of the Eagle Coffee Shoppe, located at 9th and Shipley Streets in a facility owned and operated by the Wilmington Parking Authority. The resulting U.S. Supreme Court case, argued by Louis L. Redding in 1961, established that private tenants of a public facility were bound by the U.S. Constitution's ban on racial discrimination.

Longer Version – Interpretive panel material? We have pictures of Burton, Redding...

Burton vs. The Wilmington Parking Authority, 365 U.S 715 (1961). In 1958, The Eagle Coffee Shoppe, a private tenant in a government-owned parking garage and commercial facility, denied service to a group of black laborers because of their race, continuing the widespread practices of discrimination. Supported by the NAACP, a plan was made bring this violation of the Fourteenth Amendment to the US Constitution to light. Black City Councilman, William H. Burton, described as a fiery advocate for Civil Rights, later approached the same counter for service, and upon denial he and attorney Louis L. Redding embarked on a three-year legal battle, bringing suit against the owner of the facility who was allowing its tenant to discriminate. The case made its way though lower courts, and finally to the U.S. Supreme Court in 1961. It considered the application of the Equal Protection Clause of the Fourteenth Amendment when the actions of a private entity, in close association with a public facility, were in question. The U.S. Supreme Court decision in 1961 in favor of Burton also called into question a Delaware law, regarding nuisance behavior, which was being routinely misused for discriminatory purposes. The case was pivotal, and is often cited. Attorney Redding was following on his successes with the Delaware cases that became part of the Brown vs. Board of Topeka, Kansas decision. The Eagle Coffee Shoppe changed its name and became a private club, presumably to continue to continue its racially discriminatory practices. The location later was occupied by the Ninth Street Bookshop for decades, where the remains of the Eagle could be seen in the back rooms and basement. The Midtown Parking Garage complex was demolished in 2016.

Delaware Public Archives Marker Text version (3-1-18 draft)

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Burton vs Wilmington Parking Authority

Wilmington City Councilman William "Dutch" Burton was known as an aggressive and independent politician who organized sit-in protests at segregated Wilmington establishments. His involvement in Civil Rights actions escalated in 1958 when he participated in an NAACP plan to expose the racially-discriminatory practices of the Eagle Coffee Shoppe, located at 9th and Shipley Streets in a facility owned and operated by the Wilmington Parking Authority. The resulting U.S. Supreme Court case, argued by Louis L. Redding in 1961, established that private tenants of a public facility were bound by the U.S. Constitution's ban on racial discrimination.

Delaware Historical Marker Dedication Ceremony

Friday, October 19 at 1 pm

Good afternoon! Thank you for coming out to help us dedicate Delaware's newest historical marker. Unfortunately our state archivist couldn't join us here today. My name is Katie Hall, and I'm the Historical Markers Program Coordinator at the Delaware Public Archives.

We're here today in keeping with a long tradition in Delaware of recognizing historic buildings, locations, events, and notable Delawareans with historical markers. Our historical marker program began in 1931 and now, almost 90 years later we have nearly 670 markers throughout the state!

The program has changed over the years. But one thing that has stayed constant is that our historical markers are all proposed by individuals and communities who are passionate about preserving their local history. That means the markers tell the stories of Delaware that are important to our local communities—the stories that don't always make it into textbooks—even if they probably should be!

As Mayor Purzycki, Representative Bolden, Judge Toliver, and Mr. Pollin have described, we're standing on the site of one of Delaware's Civil Rights landmarks. Events here played out in countless other communities around Delaware and the country. Dedicating this historical marker today brings a painful era from our recent past to the forefront. It recognizes the work of William "Dutch" Burton and Louis L. Redding; it also serves to honor of those unnamed individuals who have worked for equality, like the workers from the Newark Chrysler Plant were denied service at the Eagle a few weeks before Burton. Erecting this marker gives us the opportunity to recognize a difficult time from our state's past so that we can learn from it and allow it to inform our future actions.

Our historical markers program only flourishes when people speak up and engage with the Archives and their local legislators. And so I want to thank the Buccini/Pollin group and especially Michael Pollin, Julia Mason, and Mandi Lemmons. I also want to thank Debbie Martin from the City of Wilmington, Wilmington City Council, and Mayor Purzycki. And finally I want to think Senator Henry and Representative Bolden for their enthusiastic support of our program and for their financial sponsorship of this marker.

Hall, Katie (DOS)

From: Julia Mason <jmason@bpgroup.net>
Sent: Thursday, October 18, 2018 5:15 PM
To: Julia Mason
Subject: Run of Show for Tomorrow Afternoon

Good afternoon, below is the run of show for tomorrow afternoon's ceremony. If you have a speaking role, or are a part of the ceremony, we ask that you arrive no later than 12:30 PM. Should you have any questions or concerns, feel free to email me or call my cell at 440.655.5381. We expect the ceremony to last around 45 minutes, since there are many participants, we kindly ask that remarks are kept brief.

Thank you so much and looking forward to tomorrow.

Run of Show: 10.19.2018 Burton Marker Unveiling and Dedication

(Choir Performance One Song)
I. Welcome and Remarks
Michael Hare, Executive Vice President of Development, The Buccini/Pollin Group
II. Mayor Michael S. Purzycki
III. Greetings from Wilmington City Council
Hon. Nnamdi O. Chukwuocha
Hon. Samuel L. Guy Esq.
IV. Robert Buccini, Co-Founder of The Buccini/Pollin Group
V. About Dutch Burton and Brief History
State Representative Stephanie T. Bolden
VI. Burton v. Wilmington Parking Authority
Ret. Superior Court Judge Charles H. Toliver IV
VII. About The Marker Stephen M. Marz, CA., Director of Delaware Public Archives
(Choir Performance One Song)
VIII. The Dedication

Music Provided by The Adult Choir of The Episcopal Church of St. Andrew & Matthew, David Christopher - Music Director

Kindest Regards,

BPG 25 YEARS
The Buccini/Pollin Group
MISSION VALUES COMMUNITY

Julia Mason
Marketing & Communications Manager
The Buccini/Pollin Group
322 A STREET, SUITE 300
WILMINGTON, DE 19801
O 302-691-2128
www.bpgroup.net

Wilmington's Latest Luxury Apartment Community, The Residences at Mid-town Park Celebrates Grand Opening

AUGUST 10, 2018 DEVELOPMENT

WILMINGTON, DE– The **Buccini/Pollin Group, Inc.** (BPG), BPGS Construction, and ResideBPG are pleased to announce the completion of The Residences at Mid-town Park, Wilmington's newest luxury apartment community steps away from the Market Street corridor at 116 W 9th Street. The grand opening celebration and ribbon cutting ceremony for this 200 unit state-of-the-art ResideBPG community took place on Thursday, August 9th at 3:00 PM.

Speakers included Governor John Carney, Mayor Michael S. Purzycki, City Council President Hanifa Shabazz, Robert Buccini, Co-President of The Buccini/Pollin Group and Michael Hare, Executive Vice President of The Buccini/Pollin Group.

Following the ribbon cutting ceremony, guests enjoyed an exclusive reception featuring tours of the impressive community, beer tastings provided by Ernest & Scott Taproom, champagne tastings provided by Frank's Wine, live jazz music provided by The Craig Satchell Jazz & Swing Ensemble, and fresh brews and hors d'oeuvres in the lavish outdoor courtyard from Stitch House Brewery.

The Residences at Mid-town Park is where the energy of the city and the conveniences of downtown accessibility collide, steps away from nightlife, restaurants and shops. Offering studios, one and two-bedroom apartments with stainless-steel appliances, quartz counter tops and high-end finish details throughout, The Residences at Mid-town Park features unparalleled amenities the Delaware market has not yet seen including a demonstration kitchen, a bike share program, and a dog washing station. The Residences at Mid-town Park also offers residents exclusive clubhouse amenities, a fitness center, screening room, and a private courtyard with a swimming pool, barbecue area, and outdoor fireplace. The Residences at Mid-town Park is not simply a community, it is an urban oasis.

The occasion signified the continued progress of the downtown revitalization movement as the Central Business District expands West of Market Street and attracts residents to be a part of the continued renaissance. In addition to The Residences at Mid-town Park, the $75 million development included the creation of Burton Place Passageway to connect Market Street to Orange Street, 511 spaces in the City's first subterranean parking garage at Mid-town Park Garage, and 12,751 square feet of retail space.

Burton Place Passageway commemorates an important ruling in civil rights history. The new road between the two Mid-town Park apartment buildings, which gives access to the parking garage, is named after former Wilmington City Councilman William H. "Dutch" Burton. Mr. Burton was denied service at the onsite Eagle Coffee Shop in 1958 and the case was taken all the way to the U.S. Supreme Court, which ruled in favor of Burton. An exclusive dedication event celebrating the historical significance of Burton Place will be held in the near future, complete with the permanent installation of a commemorative plaque.

For apartment tours and leasing information visit residencesatmidtownpark.com or call (833) 256-0011.

About ResideBPG

BPG Residential Services, LLC (ResideBPG) is the premier full service residential management and leasing company formed to compliment Buccini/Pollin's residential investment objectives. The company currently operates a portfolio of 3 residential brands comprised of 8 apartment communities, 1,000 unfurnished apartments and 85 corporate furnished apartments. From high rise luxury overlooking the Christina River, to urban walk-ups along Market Street,to LuxiaSuites, the premier corporate furnished community in Northern Delaware, ResideBPG has an extensive variety of communities and an unyielding commitment to quality.

The Buccini/Pollin has also completed 373 "for sale" properties along the riverfront in Wilmington, and currently has 4 additional residential development projects on the boards, totaling an additional 1,160 units. This includes both BPG and ResideBPG's debut into the Philadelphia residential market with the development of an apartment community at the site of the former The National restaurant supply company in the heart of Old City.

For more information, please visit residebpg.com.

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BPG Teams Up With Buckets of Love Bringing a Smile to 200 Children's Faces
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The Buccini/Pollin Group
CONTACT: Julia Mason
(302) 691-2128

City of Wilmington, DE
CONTACT: John Rago
(302) 420-7928

Wilmington Parking Authority CONTACT:
Stan Soja (302) 655-4442

MEDIA ADVISORY: THE FORMAL DEDICATION OF BURTON PLACE & UNVEILING OF A STATE HISTORICAL MARKER

WILMINGTON, DE- Wilmington-based developer, The **Buccini/Pollin Group, Inc.** along with **The City of Wilmington**, **Wilmington Parking Authority** and **The State of Delaware** are pleased to announce the formal dedication of Burton Place in honor of former Wilmington City Councilman and Civil Rights Activist William H. "Dutch" Burton and unveiling of a State Historical Marker in commemoration of the landmark decision in Burton v. Wilmington Parking Authority, a case that eventually led to the eradication of Delaware's accommodation laws. The ceremony will take place at 116 West 9th Street in front of The Residences at Mid-town Park at 1 PM.

The event will include live music from The Adult Choir of the Episcopal Church of St. Andrew and Matthew provided by David Christopher, Music Director as well as speakers Mayor Michael Purzycki, State Representative Stephanie T. Bolden, Ret. Superior Court Judge Charles H. Toliver IV, Stephen M. Marz, CA. and Executive Vice President of The Buccini/Pollin Group, Michael Hare.

Following the ceremony, a light reception will follow within The Residences at Mid-town Park.

The event is open to the public and all are welcome.

WHAT: The Formal Dedication of Burton Place and its impact, unveiling of a State Historical Marker in Commemoration of the Landmark decision in Burton v. Wilmington Parking Authority in Honor of William H."Dutch" Burton.

WHO: Mayor Michael S. Purzycki, State Representative Stephanie T. Bolden, Ret. Superior Court Judge Charles H. Toliver IV, Stan Soja, Executive Director of The Wilmington Parking Authority, Stephen M. Marz, CA.,Director of The Delaware Public Archives, Robert E. Buccini, Co-Founder of The Buccini/Pollin Group and Executive Vice President of The Buccini/Pollin Group, Michael Hare

WHEN: Friday, October 19, 2018 1 PM

WHERE: 116 West 9th Street Wilmington, DE 19801

CAMERAS AND FILM CREWS ARE WELCOME

The Buccini/Pollin Group
CONTACT: Julia Mason
(302) 691-2128

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WHEN: Friday, October 19, 2018 1 PM

WHERE: 116 West 9th Street Wilmington, DE 19801

CAMERAS AND FILM CREWS ARE WELCOME

Parking Authority

F. W. Miller


HUBER &
SPORTING GOODS · 216
UNIFORMS

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM H. BURTON, Plaintiff, vs. 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 Defendants.	*	CIVIL ACTION NO. 1029

PLAINTIFF'S REPLY BRIEF

LOUIS L. REDDING
Attorney for Plaintiff
923 Market Street
Wilmington, Delaware

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NATURE OF THE PROCEEDINGS

Plaintiff, a Negro, a citizen residing in Wilmington, Delaware, has sued Wilmington Parking Authority, which is an agency of the State of Delaware, and Eagle Coffee Shoppe, Inc., a Delaware corporation, for a declaratory judgment that he and other Negroes have a constitutional right to racially non-discriminatory service in a restaurant leased by Eagle in the public parking facility of The Authority. Plaintiff seeks to enjoin discriminatory refusal of service. Both defendants have filed answers which admit the lease, deny any control by lessor over lessee, and justify the refusal of service under a Delaware statute. On the grounds set forth in their answers, both defendants have moved for summary judgment.

STATEMENT OF THE FACTS

At this juncture in the case the pleadings show these facts as undisputed: The Authority is an agency of the State of Delaware. It was established by the City of Wilmington, in pursuance of Title 22, Delaware Code, Chapter 5, to erect and maintain a public structure for parking automobiles. (Complaint and Answers, paragraph 2) More than $1,800,000 of the cost of acquisition of land for the structure erected by The Authority was "donated" by the City of Wilmington. The cost of construction was financed by proceeds of the sale of bonds of The Authority. (Affidavit of Authority chairman) Solely to assist in the expense of maintaining this governmental facility, the statute confers on The Authority the power to lease commercially portions of the first floor of the structure. Title 22, Delaware

Code, Section 504(a). (Complaint and Answers, paragraph 4) The Authority determined it feasible to operate this public facility only if, in addition to parking fees, there was income from commercial leasing of space in the facility. (Complaint and Answers, paragraph 5; affidavit of Authority chairman) In April, 1957, The Authority leased to Eagle a portion of the facility to occupy as a restaurant and bar for a term of twenty years, with an option to renew for a further term of ten years. Eagle agreed to pay rent of more than $28,000. per year and to use the premises in accordance with all applicable laws, federal, state or municipal.

In August, 1958, plaintiff went to the restaurant and was refused service because of his race, color and ancestry. (Complaint, paragraph 7; amended answer of Eagle)

The motions for summary judgment of both defendants assert that Eagle operates the restaurant in the public facility as a private business. The Authority's motion asserts also that Eagle is independent of control by The Authority, is not its instrumentality or agent, and that the Fourteenth Amendment of the United States Constitution does not apply to this restaurant business.

Like The Authority's motion, Eagle's also states that Eagle has the right to refuse service to plaintiff under Title 24, Delaware Code, Section 1501, which is in the following language:

> "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.
>
> "As used in this section, "customers" includes all who have occasion for entertainment or refreshment."

QUESTIONS INVOLVED

I. IS A LESSEE, SUCH AS THE RESTAURANT HERE, OF SPACE IN A PUBLIC PARKING FACILITY, OWNED AND OPERATED BY A STATE AGENCY, AN INSTRUMENTALITY OF THE LESSOR AND, LIKE THE LESSOR, INHIBITED BY THE FOURTEENTH AMENDMENT FROM RACIAL DISCRIMINATION?

II. IS THE COMMON LAW DUTY OF AN INNKEEPER TO SERVE ALL PERSONS PEACEABLY REQUESTING SERVICE ABROGATED BY A STATUTE WHICH EITHER PURPORTS TO CONFER A RIGHT TO DISCRIMINATE ON THE GROUND OF RACE OR IS SO VAGUE AND INDEFINITE AS TO BE INCAPABLE OF APPLICATION?

ARGUMENT

I

THE LESSEE IS AN INSTRUMENTALITY OF PUBLIC GOVERNMENT AND AS SUCH IS RESTRICTED BY CONSTITUTIONAL PROHIBITIONS AGAINST RACIAL DISCRIMINATION, AS IS THE LESSOR

The restricted view set forth in defendants' briefs as to the scope of State action and the compass of the inhibition against racial discrimination imposed by the equal protection clause of the Fourteenth Amendment is not shared in this reply brief of the plaintiff. This lack of concurrence by plaintiff in defendants' view stems from an analysis of all the cases in this area. Among them are those which defendants cite in their brief which are adverse to defendants' position but which they seek to distinguish from the instant case. We refer to Derrington v. Plummer, 240 F. 2d 922, (5th Cir., 1956) cert. denied 77 Sup.Ct. 680 (1957) and Muir v. Louisville Park Theatrical Association, 347 U.S. 791, 74 S.Ct. 783 (1954), and shall return to them later in this brief.

That a State, in operating its facilities on a racially segregated basis, violates the constitutional guarantee of equal protection of the laws is now abundantly clear. Brown v. Board of Education of Topeka, 347 U.S. 483, 349 U.S. 294. The prohibition against racial discrimination applies to a political subdivision of a State, in either its governmental (Dawson v. Mayor and City Council, 220 F. 2d 386; aff'd. per curiam, 350 U.S. 877) 1/

1. Prohibits racial discrimination at public beaches and bath houses maintained by the City of Baltimore and the State of Maryland.

or proprietary capacity. St. Petersburg v. Alsup, 238 F. 2d 830; cert. denied, 77 S.Ct. 680 (1957).[2/] State action may not only be through agencies exercising executive, legislative or judicial authority, Mooney v. Holohan, 294 U.S. 103, 113, 55 S.Ct. 340, 342; Shelley v. Kraemer, 334 U.S. 1, but, as well, through all instrumentalities or individuals by which State purposes are accomplished. Raymond v. Chicago Union Traction Co., 207 U.S. 20, 35-36, 28 S.Ct. 7, 12.

A. Lessee an Instrumentality of the Public Lessor

That a lessee of a public lessor, in situations corresponding closely to the instant case, is the instrumentality of such lessor and engaged in state action, is the clear rationale of the decided cases. Nash v. Air Terminal Services, Inc., et al., 85 F. Supp. 545, U.S.D.Ct., E.D., Va. (1949) is expository of the view. There the plaintiff, a Negro, planning to depart by plane from Washington National Airport, geographically situate in the State of Virginia, had sought and, because of her color, was refused service in restaurants operated at the airport by the defendant, Air Terminal Services, Inc., a concessionaire of the airport owner, the United States Government. She sued the concessionaire and the airline for damages for the refusal. On a motion by the defendants to dismiss, the court held plaintiff had a cause of action for damages and declined to dismiss.

The contentions of the parties in the Nash case are identical with those here and these contentions, as well as the basis of the decision, will appear from excerpts from the opinion, here quoted:

2. A holding similar to case in Fn. 1, relates to municipal beach and swimming pool at St. Petersburg, Florida.

> ". . . the plaintiff avers. . . that Air Terminal Services, Inc., has failed to provide its colored patrons eating accommodations substantially equal or equivalent to those offered to white patrons,* and that, therefore, in refusing to service the plaintiff in the dining room or coffee shop, Air Terminal has deprived her solely because of her race or color, of the rights and privileges guaranteed her under the Fifth and Fourteenth Amendments. . . .
>
> "The contention of Air Terminal is that it was not obligated in law to serve anyone, white or colored, and that it could without cause refuse service. Consequently, it argues, that in declining to serve the plaintiff it has violated no obligation to her.
>
> "Undoubtedly the position of defendant is sound under the decisional law of Virginia in respect to restaurants operated by private citizens on private property. . . . But we do not believe the same principle of law is applicable to this defendant's restaurants at the Washington National Airport. They are operated on public property in a building constructed with public funds and under a concession from the public government. In effect, the concessionaire here is conducting the facility in the place and stead of the Federal Government**. . . . We do not hold that Air Terminal was an air carrier, or engaged in air transportation; we do hold its restaurants are too close, in origin and purpose, to the functions of the public government to allow them to refuse service without a good cause. Cf. Lawrence v. Hancock, D.C.S.C. W.Va., 76 F. Supp. 1004."

The court concluded that Air Terminal "did violate the plaintiff's constitutional rights."

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* The Nash case having been instituted in 1949, five years prior to the invalidation of the separate but equal doctrine by Brown v. Board of Education of Topeka, 347 U.S. 483, supra, plaintiff asserted that refusal of service infringed her constitutional right to equal, if separate, service. With "separate but equal" in the limbo of discarded doctrines, the contention of plaintiff in the instant case is that defendant's refusal of service violated his right under the equal protection clause, as now construed, to service undifferentiated because of color.

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The court identified the private concessionaire with the "public government" owning the property on which the concession was operated, and declared that the concessionaire was operating in the government's place and stead and was therefore inhibited by the same constitutional restrictions against racial discrimination that preclude the government from such discrimination.

The private restaurant concessionaire in Nash was "too close, in origin and purpose, to the functions of the public government" to be free of the inhibitions placed by the constitution on government. In the instant case also, there is a close identity between private lessee and the public governmental lessor. Paragraphs 4 and 5 of the complaint and the admissions in the corresponding paragraphs of the answers filed by both defendants reveal this closeness to be such that the governmental facility can function only by virtue of its lessees. The power to lease portions of the first floor of the parking facilities admittedly is permitted to The Authority only if The Authority determines such leasing is desirable to assist in defraying the expenses of The Authority. It is further admitted that the leasing here was determined by The Authority to be necessary to make economically feasible the operation of the "parking facility as a self-sustaining governmental unit." (See also the affidavit of The Authority's chairman.) The United States Supreme Court, it is pertinent to note, in one circumstance, regarded private ownership as a mere technicality, and held that constitutional liberties will be protected even on privately owned property, if that property is being operated as a municipality. See Marsh v. Alabama, 326 U.S. 501 (1946).

Defendants seek (Joint Brief, p. 7) to distinguish Derrington v. Plummer, 240 F. 2d 922, cert. denied 77 Sup.Ct. 680. Defendants say the primary reason for the lease in the instant case is not to afford service for patrons of the parking facility but to furnish rental income to construct and maintain the facility. First, let it be noted that in the Derrington case, while the court said the cafeteria was patronized principally by persons having business at the courthouse, it also observed: "It has always been open to the general public as an eating place." Moreover, there is nothing in the opinion to indicate whether the plaintiff whose right to racially nondiscriminatory service in this cafeteria was vindicated was a person having business in the courthouse or one casually there as a member of the general public solely to avail himself of service in the cafeteria. Clearly the opinion does not restrict the right to persons having official business at the courthouse.

In any event, it seems a tenuous and strained distinction the defendants essay, and one which begs the question. They admit that The Authority is a public body and an agency of the State of Delaware. See paragraph 2(a) of the complaint and corresponding paragraph in answer of each defendant. Do defendants contend that once rental income is paid into the treasury of this public governmental agency, the public funds can be used to maintain a structure in which racial discrimination can be enforced? Such a contention is contrary to the law generally and to all the cases we have referred to above. Even the implication of Commonwealth of Pennsylvania v. Board of Directors of City Trusts, 350 U.S. 230, 77 S.Ct. 1281 (1957), cited on p. 11 of defendants brief, is strongly to the contrary, al-

though the property involved came into being as a privately established trust. That case held that public trustees, whose official position made them agents of the State of Pennsylvania, could not administer in a racially discriminatory manner even a trust created by an individual out of his own private fortune. A fortiori, it would seem, funds originating as public funds——in this instance rent paid The Authority on this public structure——could not be administered in such a manner.

Since defendants' reference to this last-cited case (commonly known as the "Girard College Case") fails to disclose its full import, a summary, explaining the state action point decided, seems appropriate. By his will, Stephen Girard, in 1831, created a trust for the education of "white male orphans." The trust was administered by the Board of City Trusts, comprised of elected officials of the City of Philadelphia and appointees of the County Court of Common Pleas. The Supreme Court of Pennsylvania held the trust, so created, a private one and the action of the Board of City Trusts in administering it not "state action." That court therefore sustained a lower court which upheld the denial of admittance of Negro boys to the college established by this testamentary trust. Reversing the Pennsylvania Supreme Court, the United States Supreme Court decided that administration by the Board of City Trusts was state action and that it was unconstitutional discrimination by the State for the trustees to exclude Negroes from the benefits of the trust.

In their treatment of the Derrington case, defendants (at p. 7 of their Joint Brief) seek to derive some comfort from the fact that, as they say, "the Court concedes" that in certain circumstances the county could

make a lease with a private person unaffected by the Fourteenth Amendment. But this dictum the court limits to "surplus" property, not needed by the governmental entity. That is not the situation here where defendants concede that the leasing with the income derived therefrom is needed to enable the governmental agency to maintain this particular public facility.

Often courts have held, as in Nash and Derrington, that ownership by a lessor city or state sufficiently identifies the lessor with the lessee to require judicial restraint of racial discrimination on the leased property. Examples of such decisions are the cases cited below.

In Culver v. City of Warren, 84 Ohio App. 373, 387, 83 N.E. 2d 82, 88-89, the court quoted from the syllabus of another state court decision in Kern v. City Commissioners, 151 Kan. 565, 100 P. 2d 709:

> ". . . the fact that the city has leased the pool to one who is operating it does not relieve the city officials from the obligation to cause the pool to be operated so that there will be no discrimination against members of the colored race."

Lawrence v. Hancock, 76 F. Supp. 1004, 1009 (S.D. W.Va., 1948):

> "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. Having set up the swimming pool by the authority of the Legislature, the City, if the pool is operated, must operate it itself, or, if leased, must see that it is operated without any such discrimination."

We turn now to the defendants' effort to distinguish Muir v. Louisville Park Theatrical Association, 347 U.S. 971, 74 S.Ct. 783, (5-24-1954) which they cite but say sheds "little light here." Unfortunately, defendants' effort results only in the sort of obfuscation which can stem only from a failure to comprehend the case they cite.

That case began in the Federal courts as Sweeney et al. v. City of Louisville et al., 102 F. Supp. 525. It had, as appears from the report, a prior history in courts of the State of Kentucky. One plaintiff, Sweeney, complained of exclusion, because of color, from golf courses in public parks of the City of Louisville. Another, Carroll, complained of deprivation for the same reason from fishing. The third plaintiff, Muir, sought to restrain his exclusion, because of color, from admittance to the Amphitheatre owned and maintained by the City of Louisville in one of its public parks. The City had leased this structure to a corporation, Louisville Park Theatrical Association, for a term of five years for staging dramatic, operatic and athletic entertainment. The contract of lease gave the Association the right to charge reasonable admission fees and to sell food and refreshments.

The Federal District Court, as to golf and fishing, in its decision in 102 F. Supp. 525, held that "it was the duty" of the Director of Parks "to provide substantially equal facilities" for Negro golfers and fishers, and so ordered. That decision on 9-14-51 preceded Brown v. Board of Education of Topeka by nearly three years and, expectedly, the District Court decided it under the separate but equal doctrine. As to Muir, in the same decision, by some contortion of that doctrine, the District Court held that there had been no discrimination because it was not alleged or proven that the plaintiff Muir or any organization to which he belonged ever sought "to secure possession of the Amphitheatre for the purpose of providing entertainment." Muir appealed, and under the title Muir v. Louisville Park Theatrical Association, 202 F. 2d 275, the Court of Appeals for the Sixth Circuit decided the following:

> "That the Louisville Park Theatrical Association, a privately operated enterprise which leased from the City of Louisville an amphitheatre in Iroquois Park, where the city did not participate either directly or indirectly in the operation of the private enterprise, was guilty of no unlawful discrimination, in violation of the Fourteenth Amendment, in refusing admission to colored persons to its operatic performances during the summertime."

This opinion, of course, brings into sharp focus the analogy of the Muir case with the instant case. Muir petitioned the United States Supreme Court for a writ of certiorari. It was granted; and on May 24, 1954, exactly one week after the Supreme Court's decision in Brown v. Board of Education of Topeka, the Court rendered a brief per curiam opinion:

> "The judgments are vacated and the cases are remanded for consideration in the light of the Segregation Cases decided May 17, 1954, Brown V. Board of Education, ante, p. 483, and conditions that now prevail.

We suggest that the discussion here contained shows why the plaintiff, contrariwise to the view in defendants' joint brief, urges that the Muir case is apposite to the instant case and furnishes a guide for its decision.

B. The Public Lessor May Not Relinquish Control So As To Enable Lessee To Discriminate

The defendants in answers, motions and in both the joint and single briefs have referred to an alleged lack of control by the lessor over the lessee. Plaintiff's view as to control differs materially. We believe the cases indicate that an agency of public government, in a situation such as the instant one, may not relinquish control over the public facility to the

extent of being unable to prevent racial discrimination. We advert again to cases cited above, e.g., specifically, the excerpts of opinions quoted from Culver v. City of Warren, supra, p. 10, and Lawrence v. Hancock, supra, p. 10, holding that the governmental agency may not, in leasing the public facility, relieve itself of the obligation to cause the public property to be operated without discrimination.

In this connection, attention is invited to that section of the affidavit of Earl C. Jackson, filed by plaintiff, pointing to endeavor of a voluntary citizens' organization, prior to the execution of the lease here in question, to assure non-discriminatory operation of this eating place.

While not involving discrimination of a racial character, a 1944 Illinois decision delineates the constitutional limitations on cities in leasing publicly-owned property. An agency of the City of Chicago, the Chicago Park District, leased public property for trap shooting to a private corporation. The latter improved the property extensively and set up regulations which discriminated between members and non-members in fees and in use of the facilities. The Illinois court invalidated the lease, adopting in its opinion language of an earlier Illinois case, which stated:

> "It cannot be questioned that a lease of public premises to private individuals for private purposes is the exercise of a control over such premises by the city inconsistent with their use as public property." Lincoln Park Traps v. Chicago Park District, 323 Ill. App. 107, 55 N.E. 2d 173.

The statute, 22 Del.C. c.5, authorizes leasing by The Authority of portions of its facility. However, the legislature could not confer on this agency any right, when leasing public property, to divest itself of control to the extent that it would be powerless to preclude the lessee from

establishing conditions relative to use of the property inconsistent with use as public property or other conditions which the legislature itself is constitutionally prohibited from establishing.

The foregoing argument expounds plaintiff's view of the law that identification between lessor and lessee is such that the latter, like the former, is constitutionally precluded from racial discrimination on the public property. If this view should prevail as the correct exposition of the law, the argument advanced under Point II of defendants' Joint Brief could not impinge itself upon this situation. Irrespective of that and not merely as an abstract argument, plaintiff challenges the validity of defendants' Point II.

II

A DELAWARE INNKEEPER IS NOT RELIEVED OF HIS COMMON LAW OBLIGATION TO SERVE ALL PATRONS BY A STATUTE WHICH EITHER PURPORTS TO CONFER A RIGHT TO DISCRIMINATE ON THE GROUND OF RACE OR IS SO VAGUE AND INDEFINITE AS TO BE INOPERATIVE

At the outset, we remark that the common law relating to innkeepers is antipodal to the declaration in the very first sentence under defendants' Point II that the innkeeper at common law had the "right to refuse service to anyone for whatsoever reason." The common law is: "A public house of entertainment for all who choose to visit it, is the true definition of an inn." See Walling v. Potter, 35 Conn. 183, as illustrative of the common law. See also Atwater v. Sawyer, 76 Me. 539, 49 Am. Rep. 634.

The "publican," or innkeeper, at common law, was the keeper

of a public house who was obliged to serve all who came peaceably as patrons. Correlatively, all members of the public had a right to service, or entertainment, at an inn. State v. Whitby, 5 Har. 494, 495, (1854) states the law:

> "All persons have the right to go to an inn, as guests. . . . Coming as a guest he has a right to remain there so long as he behaves himself peaceably and properly, he paying for the entertainment."

Not only was the view just stated the law in Delaware prior to 1875 when the statute upon which defendants rely, now known as Tit. 24, Del. Code, Sec. 1501, was enacted, but that it continues to be the law is demonstrated by LeFevre v. Crossan, 3 Boyce 379, 84 A. 128 (1912) and Vansant v. Kowalewski, 5 Boyce 92, 90A. 421 (1914). Both of these cases set forth somewhat more elaborately the rule declared in State v. Whitby, supra. In the LeFevre case, Judge Woolley said:

> "A licensed inn or tavern is a public place to which the public has a right to go, and going has a right to remain as long as is consistent with the lawful purposes with which the right is employed.
>
> ". . . . Being present by invitation or permission extended to the public by reason of the character of the place for which a license is granted, a person must have done something or threatened to do something by which the invitation or permission is withdrawn. . . "

Plaintiff's position as to 24 Del. Code 1501 is two-pronged. First, if the statute, as defendants seem to imply without specifically stating, be regarded as giving carte blanche authorization to the keeper of an inn or other place of public entertainment mentioned in the section to make discriminatory regulations based on race or color alone, this would not be pri-

vate action, immune from the Fourteenth Amendment, but discriminatory state action which is barred by that Amendment. See Mangum, Legal Status of the Negro, p. 31. In other words, the discriminatory exclusion by the innkeeper emanates not from his private action but under the aegis and sanction of discriminatory legislative action. That such state action is constitutionally prohibited is elementary. Cf. Shelley v. Kraemer, 334 U.S. 1.

Secondly, the statute, being in derogation of the common right and the common law must be strictly construed. See Pound, "Common Law and Legislation" 21 Harvard L. R. 383, 401.

Since it is vague, indefinite and uncertain it cannot be given any effect. Crawford, The Construction of Statutes, Sec. 198:

> "If the statute cannot be given an intelligible meaning, because of the uncertainty, indefiniteness and vagueness of its terms, it will be wholly inoperative."

The statute gives no guidance as to when the offensiveness of a prospective patron "to the major part of his /innkeeper's/ customers" is to be ascertained. Is the ascertainment to be made by a poll of the customers at the time any suspect, would-be patron appears? Is the ascertainment to be made by a general poll of, in the language of the statute, "all who have occasion for entertainment or refreshment," irrespective of whether that occasion was prior to the appearance of the suspect, would-be patron or whether the occasion for entertainment or refreshment will be at some expected, hoped-for or indefinite future time when the suspect is not presenting himself at the inn for service? Such an analysis, we submit, demonstrates the sort of guessing game that must be resorted to in an effort to determine what, if anything, this statute means. In such employment a court will not engage. See Her-

nandez v. Frohmiller, 62 Ariz. 242, 250 P. 2d. 854, at 859.

The answers filed by the defendant do not allege that Eagle has made any ascertainment of its customers at any time, including the day and time plaintiff was refused service, that plaintiff's presence was "offensive to the major part" of Eagle's customers. Nor do the answers allege that plaintiff was thus offensive. Therefore, defendants fail to bring themselves within the purview of the statute.

In their Joint Brief, defendants seem to recognize that an issue of fact is raised on the question of offensiveness. They perhaps recognize also that summary judgment cannot be granted if there is a material issue of fact.

Apparently, in an effort to avoid this issue and, perhaps, also to rise above the fog of uncertainty created by the language of the statute, defendants implore the Court to "take judicial notice whether a member of a class of persons is offensive to a 'major part' of Eagle's customers." Since Eagle nowhere states who its customers are, or that they are day-in-and-day-out the same persons or that they have identical susceptibility to finding the plaintiff offensive, plaintiff might appropriately ask, "What customers?"

If by this entreaty to the Court to "take judicial notice " defendants seek to have the Court declare it a notorious fact that Negroes, as a class, are offensive to other people in Wilmington, Delaware, and northern New Castle County, Delaware, we respectfully suggest that the Court can not properly indulge in such fanciful speculation. In this connection, we call attention to the affidavits of Earl C. Jackson and Robert W. Andrews with

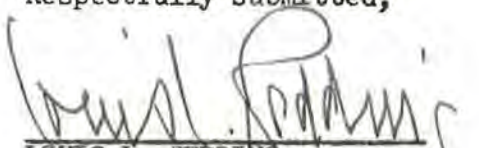
the exhibit attached to each, specifying public eating places in Wilmington, Delaware, and northern New Castle County, Delaware, which follow a policy of serving all patrons without distinction on the grounds of race or color.

Thus plaintiff urges that 24 Del. Code 1501 cannot support the refusal he complains of because of one or both of the following: (a) the statute is unconstitutional as discriminatory state action based on race or color; (b) it is so vague and uncertain as to be incapable of intelligible application. Even if the statute could be legally sustained—and plaintiff urges it cannot be—defendant Eagle has made no ascertainment, nor does it allege it has made any such ascertainment, as would entitle it to invoke the statute. On all of these grounds, the common law right recognized in the Whitby, Lefevre and Vansant cases to exist in Delaware obligated Eagle to serve the plaintiff.

CONCLUSION

For the foregoing reasons, we urge the Court to deny the motion for summary judgment and to render judgment for the plaintiff as prayed in his complaint.

Respectfully submitted,



LOUIS L. REDDING
Attorney for Plaintiff
923 Market Street
Wilmington, Delaware

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WILLIAM H. BURTON,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	CIVIL ACTION NO. 1029
	*	
	*	
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	*	
	*	
Defendants.	*	

PLAINTIFF'S REPLY BRIEF

LOUIS L. REDDING
Attorney for Plaintiff
923 Market Street
Wilmington, Delaware

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NATURE OF THE PROCEEDINGS

Plaintiff, a Negro, a citizen residing in Wilmington, Delaware, has sued Wilmington Parking Authority, which is an agency of the State of Delaware, and Eagle Coffee Shoppe, Inc., a Delaware corporation, for a declaratory judgment that he and other Negroes have a constitutional right to racially non-discriminatory service in a restaurant leased by Eagle in the public parking facility of The Authority. Plaintiff seeks to enjoin discriminatory refusal of service. Both defendants have filed answers which admit the lease, deny any control by lessor over lessee, and justify the refusal of service under a Delaware statute. On the grounds set forth in their answers, both defendants have moved for summary judgment.

STATEMENT OF THE FACTS

At this juncture in the case the pleadings show these facts as undisputed: The Authority is an agency of the State of Delaware. It was established by the City of Wilmington, in pursuance of Title 22, Delaware Code, Chapter 5, to erect and maintain a public structure for parking automobiles. (Complaint and Answers, paragraph 2) More than $1,800,000 of the cost of acquisition of land for the structure erected by The Authority was "donated" by the City of Wilmington. The cost of construction was financed by proceeds of the sale of bonds of The Authority. (Affidavit of Authority chairman) Solely to assist in the expense of maintaining this governmental facility, the statute confers on The Authority the power to lease commercially portions of the first floor of the structure. Title 22, Delaware

Code, Section 504(a). (Complaint and Answers, paragraph 4) The Authority determined it feasible to operate this public facility only if, in addition to parking fees, there was income from commercial leasing of space in the facility. (Complaint and Answers, paragraph 5; affidavit of Authority chairman) In April, 1957, The Authority leased to Eagle a portion of the facility to occupy as a restaurant and bar for a term of twenty years, with an option to renew for a further term of ten years. Eagle agreed to pay rent of more than $28,000. per year and to use the premises in accordance with all applicable laws, federal, state or municipal.

In August, 1958, plaintiff went to the restaurant and was refused service because of his race, color and ancestry. (Complaint, paragraph 7; amended answer of Eagle)

The motions for summary judgment of both defendants assert that Eagle operates the restaurant in the public facility as a private business. The Authority's motion asserts also that Eagle is independent of control by The Authority, is not its instrumentality or agent, and that the Fourteenth Amendment of the United States Constitution does not apply to this restaurant business.

Like The Authority's motion, Eagle's also states that Eagle has the right to refuse service to plaintiff under Title 24, Delaware Code, Section 1501, which is in the following language:

> "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.
>
> "As used in this section, "customers" includes all who have occasion for entertainment or refreshment."

QUESTIONS INVOLVED

I. IS A LESSEE, SUCH AS THE RESTAURANT HERE, OF SPACE IN A PUBLIC PARKING FACILITY, OWNED AND OPERATED BY A STATE AGENCY, AN INSTRUMENTALITY OF THE LESSOR AND, LIKE THE LESSOR, INHIBITED BY THE FOURTEENTH AMENDMENT FROM RACIAL DISCRIMINATION?

II. IS THE COMMON LAW DUTY OF AN INNKEEPER TO SERVE ALL PERSONS PEACEABLY REQUESTING SERVICE ABROGATED BY A STATUTE WHICH EITHER PURPORTS TO CONFER A RIGHT TO DISCRIMINATE ON THE GROUND OF RACE OR IS SO VAGUE AND INDEFINITE AS TO BE INCAPABLE OF APPLICATION?

ARGUMENT

I

THE LESSEE IS AN INSTRUMENTALITY OF PUBLIC GOVERNMENT AND AS SUCH IS RESTRICTED BY CONSTITUTIONAL PROHIBITIONS AGAINST RACIAL DISCRIMINATION, AS IS THE LESSOR

The restricted view set forth in defendants' briefs as to the scope of State action and the compass of the inhibition against racial discrimination imposed by the equal protection clause of the Fourteenth Amendment is not shared in this reply brief of the plaintiff. This lack of concurrence by plaintiff in defendants' view stems from an analysis of all the cases in this area. Among them are those which defendants cite in their brief which are adverse to defendants' position but which they seek to distinguish from the instant case. We refer to Derrington v. Plummer, 240 F. 2d 922, (5th Cir., 1956) cert. denied 77 Sup.Ct. 680 (1957) and Muir v. Louisville Park Theatrical Association, 347 U.S. 791, 74 S.Ct. 783 (1954), and shall return to them later in this brief.

That a State, in operating its facilities on a racially segregated basis, violates the constitutional guarantee of equal protection of the laws is now abundantly clear. Brown v. Board of Education of Topeka, 347 U.S. 483, 349 U.S. 294. The prohibition against racial discrimination applies to a political subdivision of a State, in either its governmental (Dawson v. Mayor and City Council, 220 F. 2d 386; aff'd. per curiam, 350 U.S. 877) 1/

1. Prohibits racial discrimination at public beaches and bath houses maintained by the City of Baltimore and the State of Maryland.

or proprietary capacity. St. Petersburg v. Alsup, 238 F. 2d 830; cert. denied, 77 S.Ct. 680 (1957).[2/] State action may not only be through agencies exercising executive, legislative or judicial authority, Mooney v. Holohan, 294 U.S. 103, 113, 55 S.Ct. 340, 342; Shelley v. Kraemer, 334 U.S. 1, but, as well, through all instrumentalities or individuals by which State purposes are accomplished. Raymond v. Chicago Union Traction Co., 207 U.S. 20, 35-36, 28 S.Ct. 7, 12.

A. Lessee an Instrumentality of the Public Lessor

That a lessee of a public lessor, in situations corresponding closely to the instant case, is the instrumentality of such lessor and engaged in state action, is the clear rationale of the decided cases. Nash v. Air Terminal Services, Inc., et al., 85 F. Supp. 545, U.S.D.Ct., E.D., Va. (1949) is expository of the view. There the plaintiff, a Negro, planning to depart by plane from Washington National Airport, geographically situate in the State of Virginia, had sought and, because of her color, was refused service in restaurants operated at the airport by the defendant, Air Terminal Services, Inc., a concessionaire of the airport owner, the United States Government. She sued the concessionaire and the airline for damages for the refusal. On a motion by the defendants to dismiss, the court held plaintiff had a cause of action for damages and declined to dismiss.

The contentions of the parties in the Nash case are identical with those here and these contentions, as well as the basis of the decision, will appear from excerpts from the opinion, here quoted:

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2. A holding similar to case in Fn. 1, relates to municipal beach and swimming pool at St. Petersburg, Florida.

> ". . . the plaintiff avers. . . that Air Terminal Services, Inc., has failed to provide its colored patrons eating accommodations substantially equal or equivalent to those offered to white patrons,* and that, therefore, in refusing to service the plaintiff in the dining room or coffee shop, Air Terminal has deprived her solely because of her race or color, of the rights and privileges guaranteed her under the Fifth and Fourteenth Amendments. . . .
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> "The contention of Air Terminal is that it was not obligated in law to serve anyone, white or colored, and that it could without cause refuse service. Consequently, it argues, that in declining to serve the plaintiff it has violated no obligation to her.
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> "Undoubtedly the position of defendant is sound under the decisional law of Virginia in respect to restaurants operated by private citizens on private property. . . . But we do not believe the same principle of law is applicable to this defendant's restaurants at the Washington National Airport. They are operated on public property in a building constructed with public funds and under a concession from the public government. In effect, the concessionaire here is conducting the facility in the place and stead of the Federal Government**. . . . We do not hold that Air Terminal was an air carrier, or engaged in air transportation; we do hold its restaurants are too close, in origin and purpose, to the functions of the public government to allow them to refuse service without a good cause. Cf. Lawrence v. Hancock, D.C.S.C. W.Va., 76 F. Supp. 1004."

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The court identified the private concessionaire with the "public government" owning the property on which the concession was operated, and declared that the concessionaire was operating in the government's place and stead and was therefore inhibited by the same constitutional restrictions against racial discrimination that preclude the government from such discrimination.

The private restaurant concessionaire in Nash was "too close, in origin and purpose, to the functions of the public government" to be free of the inhibitions placed by the constitution on government. In the instant case also, there is a close identity between private lessee and the public governmental lessor. Paragraphs 4 and 5 of the complaint and the admissions in the corresponding paragraphs of the answers filed by both defendants reveal this closeness to be such that the governmental facility can function only by virtue of its lessees. The power to lease portions of the first floor of the parking facilities admittedly is permitted to The Authority only if The Authority determines such leasing is desirable to assist in defraying the expenses of The Authority. It is further admitted that the leasing here was determined by The Authority to be necessary to make economically feasible the operation of the "parking facility as a self-sustaining governmental unit." (See also the affidavit of The Authority's chairman.) The United States Supreme Court, it is pertinent to note, in one circumstance, regarded private ownership as a mere technicality, and held that constitutional liberties will be protected even on privately owned property, if that property is being operated as a municipality. See Marsh v. Alabama, 326 U.S. 501 (1946).

Defendants seek (Joint Brief, p. 7) to distinguish Derrington v. Plummer, 240 F. 2d 922, cert. denied 77 Sup.Ct. 680. Defendants say the primary reason for the lease in the instant case is not to afford service for patrons of the parking facility but to furnish rental income to construct and maintain the facility. First, let it be noted that in the Derrington case, while the court said the cafeteria was patronized principally by persons having business at the courthouse, it also observed: "It has always been open to the general public as an eating place." Moreover, there is nothing in the opinion to indicate whether the plaintiff whose right to racially nondiscriminatory service in this cafeteria was vindicated was a person having business in the courthouse or one casually there as a member of the general public solely to avail himself of service in the cafeteria. Clearly the opinion does not restrict the right to persons having official business at the courthouse.

In any event, it seems a tenuous and strained distinction the defendants essay, and one which begs the question. They admit that The Authority is a public body and an agency of the State of Delaware. See paragraph 2(a) of the complaint and corresponding paragraph in answer of each defendant. Do defendants contend that once rental income is paid into the treasury of this public governmental agency, the public funds can be used to maintain a structure in which racial discrimination can be enforced? Such a contention is contrary to the law generally and to all the cases we have referred to above. Even the implication of Commonwealth of Pennsylvania v. Board of Directors of City Trusts, 350 U.S. 230, 77 S.Ct. 1281 (1957), cited on p. 11 of defendants brief, is strongly to the contrary, al-

though the property involved came into being as a privately established trust. That case held that public trustees, whose official position made them agents of the State of Pennsylvania, could not administer in a racially discriminatory manner even a trust created by an individual out of his own private fortune. A fortiori, it would seem, funds originating as public funds——in this instance rent paid The Authority on this public structure——could not be administered in such a manner.

Since defendants' reference to this last-cited case (commonly known as the "Girard College Case") fails to disclose its full import, a summary, explaining the state action point decided, seems appropriate. By his will, Stephen Girard, in 1831, created a trust for the education of "white male orphans." The trust was administered by the Board of City Trusts, comprised of elected officials of the City of Philadelphia and appointees of the County Court of Common Pleas. The Supreme Court of Pennsylvania held the trust, so created, a private one and the action of the Board of City Trusts in administering it not "state action." That court therefore sustained a lower court which upheld the denial of admittance of Negro boys to the college established by this testamentary trust. Reversing the Pennsylvania Supreme Court, the United States Supreme Court decided that administration by the Board of City Trusts was state action and that it was unconstitutional discrimination by the State for the trustees to exclude Negroes from the benefits of the trust.

In their treatment of the Derrington case, defendants (at p. 7 of their Joint Brief) seek to derive some comfort from the fact that, as they say, "the Court concedes" that in certain circumstances the county could

make a lease with a private person unaffected by the Fourteenth Amendment. But this dictum the court limits to "surplus" property, not needed by the governmental entity. That is not the situation here where defendants concede that the leasing with the income derived therefrom is needed to enable the governmental agency to maintain this particular public facility.

Often courts have held, as in Nash and Derrington, that ownership by a lessor city or state sufficiently identifies the lessor with the lessee to require judicial restraint of racial discrimination on the leased property. Examples of such decisions are the cases cited below.

In Culver v. City of Warren, 84 Ohio App. 373, 387, 83 N.E. 2d 82, 88-89, the court quoted from the syllabus of another state court decision in Kern v. City Commissioners, 151 Kan. 565, 100 P. 2d 709:

> ". . . the fact that the city has leased the pool to one who is operating it does not relieve the city officials from the obligation to cause the pool to be operated so that there will be no discrimination against members of the colored race."

Lawrence v. Hancock, 76 F. Supp. 1004, 1009 (S.D. W.Va., 1948):

> "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. Having set up the swimming pool by the authority of the Legislature, the City, if the pool is operated, must operate it itself, or, if leased, must see that it is operated without any such discrimination."

We turn now to the defendants' effort to distinguish Muir v. Louisville Park Theatrical Association, 347 U.S. 971, 74 S.Ct. 783, (5-24-1954) which they cite but say sheds "little light here." Unfortunately, defendants' effort results only in the sort of obfuscation which can stem only from a failure to comprehend the case they cite.

That case began in the Federal courts as Sweeney et al. v. City of Louisville et al., 102 F. Supp. 525. It had, as appears from the report, a prior history in courts of the State of Kentucky. One plaintiff, Sweeney, complained of exclusion, because of color, from golf courses in public parks of the City of Louisville. Another, Carroll, complained of deprivation for the same reason from fishing. The third plaintiff, Muir, sought to restrain his exclusion, because of color, from admittance to the Amphitheatre owned and maintained by the City of Louisville in one of its public parks. The City had leased this structure to a corporation, Louisville Park Theatrical Association, for a term of five years for staging dramatic, operatic and athletic entertainment. The contract of lease gave the Association the right to charge reasonable admission fees and to sell food and refreshments.

The Federal District Court, as to golf and fishing, in its decision in 102 F. Supp. 525, held that "it was the duty" of the Director of Parks "to provide substantially equal facilities" for Negro golfers and fishers, and so ordered. That decision on 9-14-51 preceded Brown v. Board of Education of Topeka by nearly three years and, expectedly, the District Court decided it under the separate but equal doctrine. As to Muir, in the same decision, by some contortion of that doctrine, the District Court held that there had been no discrimination because it was not alleged or proven that the plaintiff Muir or any organization to which he belonged ever sought "to secure possession of the Amphitheatre for the purpose of providing entertainment." Muir appealed, and under the title Muir v. Louisville Park Theatrical Association, 202 F. 2d 275, the Court of Appeals for the Sixth Circuit decided the following:

> "That the Louisville Park Theatrical Association, a privately operated enterprise which leased from the City of Louisville an amphitheatre in Iroquois Park, where the city did not participate either directly or indirectly in the operation of the private enterprise, was guilty of no unlawful discrimination, in violation of the Fourteenth Amendment, in refusing admission to colored persons to its operatic performances during the summertime."

This opinion, of course, brings into sharp focus the analogy of the Muir case with the instant case. Muir petitioned the United States Supreme Court for a writ of certiorari. It was granted; and on May 24, 1954, exactly one week after the Supreme Court's decision in Brown v. Board of Education of Topeka, the Court rendered a brief per curiam opinion:

> "The judgments are vacated and the cases are remanded for consideration in the light of the Segregation Cases decided May 17, 1954, Brown V. Board of Education, ante, p. 483, and conditions that now prevail.

We suggest that the discussion here contained shows why the plaintiff, contrariwise to the view in defendants' joint brief, urges that the Muir case is apposite to the instant case and furnishes a guide for its decision.

B. The Public Lessor May Not Relinquish Control So As To Enable Lessee To Discriminate

The defendants in answers, motions and in both the joint and single briefs have referred to an alleged lack of control by the lessor over the lessee. Plaintiff's view as to control differs materially. We believe the cases indicate that an agency of public government, in a situation such as the instant one, may not relinquish control over the public facility to the

extent of being unable to prevent racial discrimination. We advert again to cases cited above, e.g., specifically, the excerpts of opinions quoted from Culver v. City of Warren, supra, p. 10, and Lawrence v. Hancock, supra, p. 10, holding that the governmental agency may not, in leasing the public facility, relieve itself of the obligation to cause the public property to be operated without discrimination.

In this connection, attention is invited to that section of the affidavit of Earl C. Jackson, filed by plaintiff, pointing to endeavor of a voluntary citizens' organization, prior to the execution of the lease here in question, to assure non-discriminatory operation of this eating place.

While not involving discrimination of a racial character, a 1944 Illinois decision delineates the constitutional limitations on cities in leasing publicly-owned property. An agency of the City of Chicago, the Chicago Park District, leased public property for trap shooting to a private corporation. The latter improved the property extensively and set up regulations which discriminated between members and non-members in fees and in use of the facilities. The Illinois court invalidated the lease, adopting in its opinion language of an earlier Illinois case, which stated:

> "It cannot be questioned that a lease of public premises to private individuals for private purposes is the exercise of a control over such premises by the city inconsistent with their use as public property." Lincoln Park Traps v. Chicago Park District, 323 Ill. App. 107, 55 N.E. 2d 173.

The statute, 22 Del.C. c.5, authorizes leasing by The Authority of portions of its facility. However, the legislature could not confer on this agency any right, when leasing public property, to divest itself of control to the extent that it would be powerless to preclude the lessee from

establishing conditions relative to use of the property inconsistent with use as public property or other conditions which the legislature itself is constitutionally prohibited from establishing.

The foregoing argument expounds plaintiff's view of the law that identification between lessor and lessee is such that the latter, like the former, is constitutionally precluded from racial discrimination on the public property. If this view should prevail as the correct exposition of the law, the argument advanced under Point II of defendants' Joint Brief could not impinge itself upon this situation. Irrespective of that and not merely as an abstract argument, plaintiff challenges the validity of defendants' Point II.

II

A DELAWARE INNKEEPER IS NOT RELIEVED OF HIS COMMON LAW OBLIGATION TO SERVE ALL PATRONS BY A STATUTE WHICH EITHER PURPORTS TO CONFER A RIGHT TO DISCRIMINATE ON THE GROUND OF RACE OR IS SO VAGUE AND INDEFINITE AS TO BE INOPERATIVE

At the outset, we remark that the common law relating to innkeepers is antipodal to the declaration in the very first sentence under defendants' Point II that the innkeeper at common law had the "right to refuse service to anyone for whatsoever reason." The common law is: "A public house of entertainment for all who choose to visit it, is the true definition of an inn." See Walling v. Potter, 35 Conn. 183, as illustrative of the common law. See also Atwater v. Sawyer, 76 Me. 539, 49 Am. Rep. 634.

The "publican," or innkeeper, at common law, was the keeper

of a public house who was obliged to serve all who came peaceably as patrons. Correlatively, all members of the public had a right to service, or entertainment, at an inn. State v. Whitby, 5 Har. 494, 495, (1854) states the law:

> "All persons have the right to go to an inn, as guests. . . . Coming as a guest he has a right to remain there so long as he behaves himself peaceably and properly, he paying for the entertainment."

Not only was the view just stated the law in Delaware prior to 1875 when the statute upon which defendants rely, now known as Tit. 24, Del. Code, Sec. 1501, was enacted, but that it continues to be the law is demonstrated by LeFevre v. Crossan, 3 Boyce 379, 84 A. 128 (1912) and Vansant v. Kowalewski, 5 Boyce 92, 90A. 421 (1914). Both of these cases set forth somewhat more elaborately the rule declared in State v. Whitby, supra. In the LeFevre case, Judge Woolley said:

> "A licensed inn or tavern is a public place to which the public has a right to go, and going has a right to remain as long as is consistent with the lawful purposes with which the right is employed.
>
> ". . . . Being present by invitation or permission extended to the public by reason of the character of the place for which a license is granted, a person must have done something or threatened to do something by which the invitation or permission is withdrawn. . . "

Plaintiff's position as to 24 Del. Code 1501 is two-pronged. First, if the statute, as defendants seem to imply without specifically stating, be regarded as giving carte blanche authorization to the keeper of an inn or other place of public entertainment mentioned in the section to make discriminatory regulations based on race or color alone, this would not be pri-

vate action, immune from the Fourteenth Amendment, but discriminatory state action which is barred by that Amendment. See Mangum, Legal Status of the Negro, p. 31. In other words, the discriminatory exclusion by the innkeeper emanates not from his private action but under the aegis and sanction of discriminatory legislative action. That such state action is constitutionally prohibited is elementary. Cf. Shelley v. Kraemer, 334 U.S. 1.

Secondly, the statute, being in derogation of the common right and the common law must be strictly construed. See Pound, "Common Law and Legislation" 21 Harvard L. R. 383, 401.

Since it is vague, indefinite and uncertain it cannot be given any effect. Crawford, The Construction of Statutes, Sec. 198:

> "If the statute cannot be given an intelligible meaning, because of the uncertainty, indefiniteness and vagueness of its terms, it will be wholly inoperative."

The statute gives no guidance as to when the offensiveness of a prospective patron "to the major part of his /innkeeper's/ customers" is to be ascertained. Is the ascertainment to be made by a poll of the customers at the time any suspect, would-be patron appears? Is the ascertainment to be made by a general poll of, in the language of the statute, "all who have occasion for entertainment or refreshment," irrespective of whether that occasion was prior to the appearance of the suspect, would-be patron or whether the occasion for entertainment or refreshment will be at some expected, hoped-for or indefinite future time when the suspect is not presenting himself at the inn for service? Such an analysis, we submit, demonstrates the sort of guessing game that must be resorted to in an effort to determine what, if anything, this statute means. In such employment a court will not engage. See Her-

nandez v. Frohmiller, 62 Ariz. 242, 250 P. 2d. 854, at 859.

The answers filed by the defendant do not allege that Eagle has made any ascertainment of its customers at any time, including the day and time plaintiff was refused service, that plaintiff's presence was "offensive to the major part" of Eagle's customers. Nor do the answers allege that plaintiff was thus offensive. Therefore, defendants fail to bring themselves within the purview of the statute.

In their Joint Brief, defendants seem to recognize that an issue of fact is raised on the question of offensiveness. They perhaps recognize also that summary judgment cannot be granted if there is a material issue of fact.

Apparently, in an effort to avoid this issue and, perhaps, also to rise above the fog of uncertainty created by the language of the statute, defendants implore the Court to "take judicial notice whether a member of a class of persons is offensive to a 'major part' of Eagle's customers." Since Eagle nowhere states who its customers are, or that they are day-in-and-day-out the same persons or that they have identical susceptibility to finding the plaintiff offensive, plaintiff might appropriately ask, "What customers?"

If by this entreaty to the Court to "take judicial notice " defendants seek to have the Court declare it a notorious fact that Negroes, as a class, are offensive to other people in Wilmington, Delaware, and northern New Castle County, Delaware, we respectfully suggest that the Court can not properly indulge in such fanciful speculation. In this connection, we call attention to the affidavits of Earl C. Jackson and Robert W. Andrews with

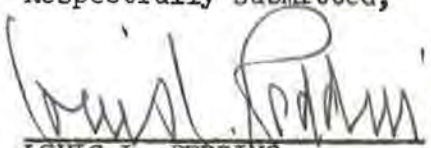
the exhibit attached to each, specifying public eating places in Wilmington, Delaware, and northern New Castle County, Delaware, which follow a policy of serving all patrons without distinction on the grounds of race or color.

Thus plaintiff urges that 24 Del. Code 1501 cannot support the refusal he complains of because of one or both of the following: (a) the statute is unconstitutional as discriminatory state action based on race or color; (b) it is so vague and uncertain as to be incapable of intelligible application. Even if the statute could be legally sustained—and plaintiff urges it cannot be—defendant Eagle has made no ascertainment, nor does it allege it has made any such ascertainment, as would entitle it to invoke the statute. On all of these grounds, the common law right recognized in the Whitby, Lefevre and Vansant cases to exist in Delaware obligated Eagle to serve the plaintiff.

CONCLUSION

For the foregoing reasons, we urge the Court to deny the motion for summary judgment and to render judgment for the plaintiff as prayed in his complaint.

Respectfully submitted,



LOUIS L. REDDING
Attorney for Plaintiff
923 Market Street
Wilmington, Delaware

INTEGRATING DELAWARE

The Reddings of Wilmington

Annette Woolard-Provine

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union and white-collar jobs and in the municipal work force as police and firefighters. And black political clout increased once again. However, even as Wilmington shared in the national prosperity of the 1960s, African Americans still suffered disproportionately from under- and unemployment, and from a shortage of adequate, affordable housing. Many anticipated that civil-rights victories would remedy the problems. Protest efforts took the form of lawsuits, sit-ins, marches, boycotts, political campaigns, and voter registration drives. When peaceful methods failed by the late 1960s, some frustrated youths resorted to violence to try to force change, most seriously in 1968 after the Reverend Martin Luther King was assassinated. The National Guard rolled into Wilmington to quell the riots and stayed, amid much controversy, for nine months, from April to the next January, the longest period of martial law in the nation.[117]

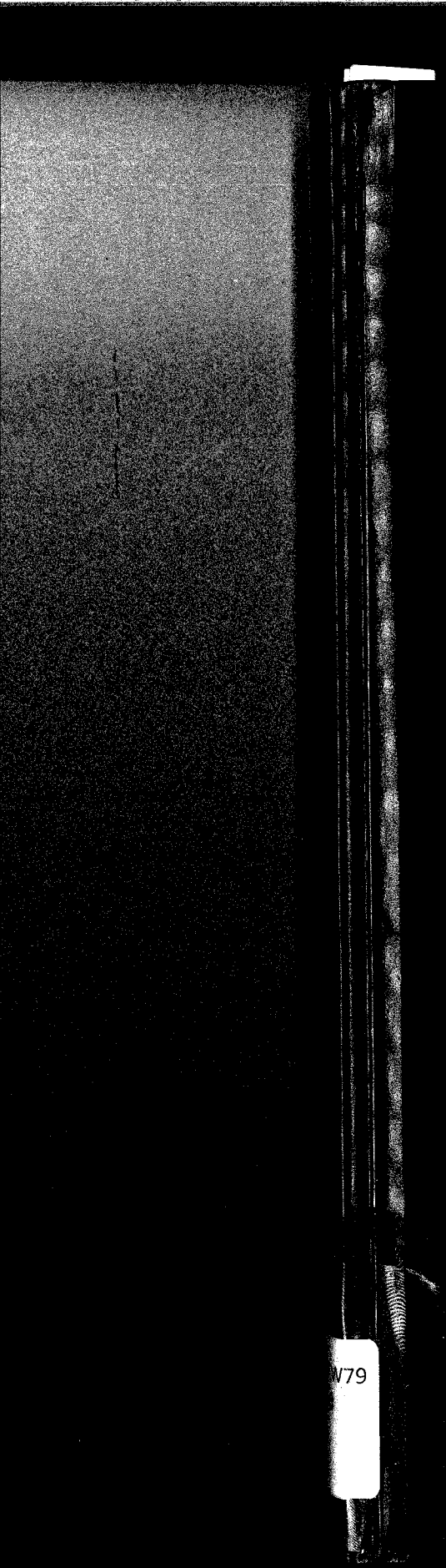
Louis maintained steadfast faith in the power of law to resolve grievances. He mounted two attacks against the old Innkeeper's Law. *Burton v. Wilmington Parking Authority* grew out of an incident in 1958 when a private restaurant located on city property refused service to William "Dutch" Burton, a black city councilman. The Delaware Supreme Court upheld the restaurant's right to refuse service at will, but in 1963, the U. S. Supreme Court dictated that no business located on public property could discriminate against any class of citizen. In the same year, in *Delaware v. Brown*, the Delaware Supreme Court upheld an establishment's right to deny service to individuals but enfeebled the Innkeeper's Law, and insured the success of civil-rights sit-ins, by rejecting an establishment's right to eject any class of customers as undesirable. Besides working to desegregate public accommodations, Louis also struggled toward a legal resolution of the housing shortage in black neighborhoods by maneuvering for an open housing law.

Opponents of change fought hard, however. In 1959, for the second time in two years, a black family tried to move into Collins Park, a white development south of Wilmington. After a series of threats and scattered but minor violence, their home was bombed, twice. Few people could bear to risk life and limb, even for decent housing. Developers slowly began to realize, however, they could make a small fortune in black housing. Several public and private developments open to African Americans eventually appeared, including East Lake, Dunleith, Eden Park, and Rosehill, to the south of the city. Only in 1969, after passage of the federal housing bill of 1968, did the state of Delaware finally outlaw race-restricted housing sales and rent covenants.[118]

While Louis devoted most of his energy to legal protest, he did participate in protest tactics outside the courthouse. With his friend Littleton Mitchell, he devised various boycott and sit-in strategies, although he rarely attended the events. He negotiated privately with businessmen and

political leaders for concessions to increase economic opportunities for African Americans. In 1963, he joined the March on Washington, during which he conferred with national civil-rights figures. But Louis always felt most comfortable with legal maneuvers. The grass-roots activism of the late 1960s, especially black nationalism with its Afrocentric philosophy and sometimes-violent overtones, discomfited Louis. He feared that competition between civil-rights groups would dilute the effect of all protest, and that the aggressive tactics and seemingly contradictory, even segregationist, goals of the most radical groups would discourage mainstream empathy. Louis's most important association remained with the NAACP. Although younger members sometimes found him out of step with the times, he continued to play a major role in local affairs, continued to affiliate with the LDEF in New York, and for a time also joined the national Board of Directors, an elective post in which he served one three-year term in the mid 1960s. And as civil rights became more mainstream, he finally attracted the positive media attention that he had not heretofore enjoyed. He also received numerous honors and awards from local and national organizations like the National Lawyers Guild, Alpha Phi Alpha, the National Education Association, the National Conference of Christians and Jews, and even the Delaware Bar Association.[119]

Louis had never earned much money from his civil-rights work, and still relied on his general law practice for an income. In 1960, he took on an associate for the first time when Georgetown Law School student Leonard Williams asked Louis to serve as his sponsor. A native of Wilmington, graduate of Howard High School, and one of the first black graduates of the University of Delaware, Williams would become the fourth black attorney in Delaware and the second black judge, appointed to Municipal Court in 1966. While Williams had considered numerous offers, he treasured his decision to work with Louis Redding; as a young attorney, Williams met luminaries such as Thurgood Marshall and participated in the Supreme-Court-bound *Burton* case. For his part, Louis relished the role of mentor. After so many years alone in the Delaware bar, he enjoyed having a friend with whom he could relate his experiences. He readily shared his expertise and his caseload; Williams took on responsibility for most of the lucrative civil suits in Louis's practice. Although Leonard Williams's friends usually called him "Lenny," it took years before the dignified Louis could refer to his young associate by the informal nickname. He never could bring himself to part with a piece of his practice and offer Williams a partnership. The two lawyers shared office space and workload, however, and Williams quietly looked after his mentor's concerns until receiving his appointment to the bench, at which time they bowed to professional propriety and separated their offices.[120]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Negroes Must Be Served

Marvel Renews Eagle Edict

The Eagle Coffee Shoppe, Inc., in the Mid-Town Parking Center must serve Negroes beginning today or face contempt of court charges.

This was assured yesterday when Vice Chancellor William Marvel reinstated his order of May 11, 1959, prohibiting the Eagle from denying service to City Councilman William H. Burton, or any other person, because of race.

THE CHANCERY Court jurist's action became possible when the Delaware Supreme Court vacated its mandate reversing Vice Chancellor Marvel's original order. The United States Supreme Court April 17 reversed the Delaware Supreme Court and in effect upheld Vice Chancellor Marvel's ruling two years ago that:

"The defendants (Eagle Coffee Shoppe), their officers, agents, members and employes are permanently enjoined from denying, by reason of color, race or ancestry, the plaintiff (Burton) or any other colored persons or Negro the right to use or enjoy, to the same extent and in the same manner as other persons, the appointments, facilities and services of the aforementioned restaurant."

IN REVERSING Vice Chancellor Marvel 14 months ago, the Delaware Supreme Court held:

"The only concern the Wilmington Parking Authority (operators of the Parking Center) has with Eagle is the receipt of the rent, without which it would be unable to afford to the public the service of off-street parking. This circumstance, we think is not sufficient to make the discriminatory act of the Eagle the act of the State of Delaware."

ATTORNEY LOUIS L. Redding, counsel for Burton, pointed out last night that although Burton's right to eat at the restaurant was declared more than two months ago, he was not at liberty to do so until after the reinstatement of Vice Chancellor Marvel's original order. This was delayed while time ran out for the losing litigants to file for a rehearing.

Now, if Eagle should refuse service to Burton, or anyone else because of race, it would be subject to punishment for contempt of the Court of Chancery, Redding indicated.

The new mandate of the State Supreme Court and the order signed by Vice Chancellor Marvel yesterday were written by Redding and approved as to form by Attys. Clair J. Killoran, counsel for the Parking Authority, and Thomas Herlihy, Jr., counsel for Eagle.

2 Men OK After Itchy Night on Isle

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"Negroes Must Be Served, Marvel Renews Eagle Edict"

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(NEW CASTLE COUNTY, DEL.)

CITY DIRECTORY

Vol. **1959** XXXIX

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Bill Frank

The famous cup of coffee case

The once very popular Executive Inn in Wilmington ignominiously passed out of existence recently with nary an old timer around to recall when it was involved in a civil rights case of national interest.

But if the history of the civil rights movement in Wilmington is ever written, the inn will have a special chapter about a time about 20 years ago when it was known as the Eagle Coffee Shoppe.

Some people say it began because the proprietor refused to serve a black man a cup of coffee.

Others say it was the surly militant attitude of the black man that prompted the snub.

In any event, the suit became a landmark case in civil rights litigation.

Some principals are gone. Others, including William H. (Dutch) Burton, who precipitated the controversy, have drifted into the background. Still active in the law is civil rights lawyer Louis L. Redding, who successfully pushed the case through Delaware's Court of Chancery, was rebuffed by the State Supreme Court and finally achieved a notable victory in the nation's highest court.

Burton was the plaintiff. Defendants were not only the Eagle Coffee Shoppe but also the Wilmington Parking Authority, which owns the building where the Eagle, later called the Executive Inn, was a tenant. The place was then operated by the Assimos brothers.

It all started in August of 1958.

Burton left his car in the authority garage and entered the Eagle with two white men, Earl H. (Reds) Henderson of Newark, United Auto Workers union official, and Alex Lux, out-of-town union organizer.

Burton then was one of three black members of Wilmington's City Council. Incidentally, he was always immaculately dressed. It is important to keep this in mind because his outward appearance couldn't possibly have been offensive to other patrons of the Eagle.

Also keep in mind that several weeks earlier, Burton and other blacks had attended a dedicatory Parking Authority banquet in the Eagle.

So Burton looked for a table and was told there was no room.

However, he spotted a vacant table and he and his white companions settled down to wait for service.

As Burton later told the story, We waited about 35 minutes and the only thing that happened was that the water, silverware and mats were removed.

Henderson then approached one of the Assimos brothers and asked if Americans were served in the Eagle.

He was told that under existing Delaware law, a restaurant proprietor had a right to refuse service to anyone who might be considered 'offensive' to other patrons.

It is true that this post-Civil War law dating to 1875, the year in Delaware as a hangover from Jim Crow laws enacted "to keep blacks in their place."

Henderson and Burton were told if they had a complaint, they should take it to the General Assembly.

Burton decided there was no use in appealing to the white-dominated General Assembly. Instead, he went to Redding, leading civil rights lawyer in Delaware, and a Chancery suit was filed attacking Delaware's dining segregation law.

Burton said, "I was looking only for a cup of coffee, not a fight."

But it became a fight that attracted considerable attention.

Not only was the Eagle a defendant but also the Wilmington Parking Authority on the basis that the authority facility at Ninth and Orange streets was public property. the argument was that such segregation was illegal and a violation of the U.S. Constitution.

The late Clair J. Killoran, lawyer for the parking authority, argued that Delaware had no laws forcing restaurants to serve blacks.

The late Thomas Herlihy Jr. represented the Eagle, not because he agreed with any segregation policy but because he was the restaurant's lawyer. The Eagle was entitled to the best possible defense. In fact, before and for years after, Herlihy was noted as an ardent civil rights champion.

Redding argued that refusing to serve a black in a restaurant on public property was contrary to Burton's rights under the 14th Amendment. He also denounced Delaware's so-called innkeepers' law of 1875, banning blacks from otherwise white patronized eating places.

In 1959, Redding won the first round. Chancellor William Marvel, then vice chancellor, ruled that Burton's rights under the federal Constitution had indeed been violated by the authority. He stated that the authority, as a tax exempt agency of the state, had the legal obligation to require tenants — including Eagle — to respect its customers' constitutional rights. Marvel avoided ruling on the state innkeepers law.

But neither the authority nor the Eagle proprietors were satisfied with the decision. An appeal went to the State Supreme Court.

The State Supreme Court overruled Chancery, with the opinion written by the late Daniel F. Wolcott, then an associate justice. His position was that the authority had no control over how a tenant-restaurant operated its business. As for state law giving innkeepers and such the right to refuse service to certain people, Wolcott said the courts were "not the keepers of the morals of the public." He added, "We apply the law, whether or not that law follows the current fashion of social philosophy."

This obviously was not suitable to Redding or his client. They appealed to the U.S. Supreme Court.

By this time the case, "No. 164 Burton vs Wilmington Parking Authority and the Eagle Coffee Shoppe," had national attention, chiefly because it involved a restaurant, leasing public property, that denied service to a black.

It should be borne in mind that in the late 1950s, a number of restaurants, hotels and theaters in Delaware already served blacks and whites together. An early 1960 News-Journal editorial observed that this had not been accompanied by "any loss of patronage."

Argument before the Supreme Court was heard in February of 1961. Public attention was increased as the U.S. Department of Justice entered the case as a friend of the court with U.S. Solicitor Archibald Cox saying "discrimination in any restaurant on any public property is illegal, even if the restaurant merely leases space from the state."

The Supreme Court handed down a 6-3 decision in April of 1961, with the majority opinion rendered by Justice Tom C. Clark.

As it turned out, the parking authority was chastised. Justice Clark said the parking authority should have written a requirement in its lease binding the Eagle proprietors to refrain from practicing any kind of discrimination.

"By its inaction," Clark added, "the parking authority and through it, the state of Delaware has not only made itself a party to refusal of service but has elected to place its power and prestige behind the admitted discrimination."

The Supreme Court had classified the Wilmington Parking Authority as a state agency because it had been created by the General Assembly.

The issue involving the 1875 Delaware innkeepers' law died later when the General Assembly enacted its public accommodations law, killing the post-Civil War racial discrimination law.

However, Justice Potter Stewart, agreeing with Clark, did go further in denouncing the innkeepers' law.

Three other justices, Frankfurter, Whittaker and Harlan, decided that Justice Wolcott's opinion was too muddled. They voted to send the case back to the state Supreme Court for clarification.

In any event, William H. (Dutch) Burton, with Louis L. Redding's help, won his "cup of coffee" case.

A writer for the Washington Post later observed that the U.S. Supreme Court had up until then, never before "gone this far in striking down racial discrimination and the decision (as of 1961) will certainly be a guideline on discrimination in all facilities on property owned by the federal, state and local governments."

This particularly applied to restaurants, so located on public property in the South at the time.

Not long after the 1961 decision, the Assimos brothers changed the name of their restaurant to the Executive Inn. It became known as a friendly eating and drinking place and on many occasions was the site of open meetings devoted to highly controversial issues.

The late James Assimos, who had been president of the Eagle Coffee Shoppe and who certainly could not be characterized as a racist, was the one who determined to fight the Burton case to the end. He once said to a reporter:

"I fought it all the way and I'd do it again. It wasn't the color that disturbed me. It was the way those men behaved at the time that disturbed me."

Assimos always felt he had been "a pigeon, a setup."

James Assimos died in June of 1977 and among his survivors were three brothers, Charles, George and Andrew, all active in the family company.

Two years ago, the announcement was made of the sale of the Executive Inn by the Assimos family to Peter M. Hassler who recently gave up in the face of financial difficulties. The place was closed last November and its contents sold at auction four days before Christmas.

"The Famous Cup of Coffee Case"

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