12-1-1970

Constitutional Law -- State Action -- You Can't Take the City Out of the Park, But You Can Take the Park Out of the City

George S. King Jr.

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation


Available at: http://scholarship.law.unc.edu/nclr/vol49/iss1/16
the court would permit a verdict to stand and adopted what it considered to be the majority rule. This latter rule allows the plaintiff to recover "an amount which the court considers reasonable." Although the court's attention in that case was directed at achieving finality at trial, it would seem incongruous—and certainly more confusing—to adopt one standard for trial and another for appeal. In any event, the difficulty in fitting an exact dollar amount to the standard adopted will be magnified since the appellate court is one step further removed from the interplay of facts which give rise to certainty at the trial level.

Assuming that we are safe in attributing to the judiciary a degree of objectivity, insight and forbearance, then the Wisconsin rule may prove to be a valuable procedural tool. While not completely foreclosing appellate review to the remitting party, its limitation of applicability to cross-appeals tends to discourage frivolous appeals by defendants. In this respect, it could work to bring finality to more trial court decisions. Its inherent fairness leaves little room for criticism. Indeed its only defect—if it may properly be called such—is an underlying faith in the ability of appellate courts to pass upon damages. With a recognition of their own weaknesses in this area, however, appellate courts could easily avoid this problem through a degree of judicial restraint.

William W. Maywhort

Constitutional Law—State Action—You Can't Take the City Out of the Park, But You Can Take the Park Out of the City

In 1966 the Supreme Court ruled that Baconsfield Park in Macon, Georgia, had acquired such "momentum" as a public facility that the mere changing from trustees who were public officials acting in their official capacity to private trustees would not dissipate the unconstitutional state action sufficiently to permit the park to be operated on a segregated basis. By 1970 that momentum seemed to have run out. In Evans v. Abney the Court ruled that the decision of the Georgia courts that the park must revert to the heirs of the testator did not involve sufficient state action to violate the fourteenth amendment.

44 Id. at 90, 102 N.W.2d at 400.
45 Id.
In 1911 Augustus O. Bacon had executed a will that devised to the Mayor and Council of the City of Macon a tract of land in trust for the use of the white women and children of Macon as a park and pleasure ground. Eventually the trustees, realizing that they could not legally operate a segregated park, permitted Negroes to use the park facilities. Members of the board of managers, set up under the will to control the park, brought an action in the Georgia courts to remove and replace the trustees for breach of trust. Several Negro citizens then intervened seeking to insure the integration of the park. The case, Evans v. Newton, eventually reached the Supreme Court of the United States which held that the park could not be operated on a segregated basis by the trustees designated under the will or any other newly appointed private trustees. Following this decision the Supreme Court of Georgia ruled that the trust had failed and remanded the case to the trial court to determine the disposition of the property. There the Negro intervenors and the Attorney General of Georgia urged that the court apply the doctrine of cy pres and excise the discriminatory language. The trial court however

---

8 See Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957) (per curiam) (agent of state violates fourteenth amendment when, acting as trustee, it discriminates on basis of race).

4 The will provided:

[A]ll right, title and interest in and to said property . . . shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, . . . and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control of the Board of Managers hereinafter provided for. . . . The members of this Board shall . . . be selected and appointed by the Mayor and Council of the City of Macon . . . .


6 Certain heirs of Bacon also intervened asking for a reversion of the trust should the prayer for removal of the trustees be denied but the trial court did not find it necessary to rule on the reversion since new trustees had been appointed. Newton v. City of Macon, 9 RACE REL. L. REP. 309, 310 (Ga. Super. Ct. 1964).

8 By statute the Attorney General or solicitor general of the situs of the trust represents the interests of the beneficiaries in all legal matters pertaining to the administration and disposition of charitable trusts. GA. CODE ANN. § 108-212 (1969).

9 GA. CODE ANN. § 113-815 (1959) provides:

When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention.

GA. CODE ANN. § 108-202 (1959) provides:
held that the will lacked the general charitable intent necessary to the application of *cy pres*;\(^\text{10}\) that the racial discrimination was an essential and inseparable part of the testator's plan; and that, since the will did not provide for an alternate disposition of the property in the event of the failure of the trust, it reverted to the heirs of the testator.\(^\text{11}\) The Supreme Court of Georgia affirmed, rejecting the contention that to do so would be judicial enforcement of racial discrimination amounting to a denial of equal protection in violation of the fourteenth amendment.\(^\text{12}\) On certiorari the Supreme Court of the United States affirmed the Georgia decision because the Court did not find sufficient state action to attribute the discrimination to the state.\(^\text{13}\)

The Court's holding is somewhat surprising in view of its recent willingness to find discriminatory state action in civil rights cases\(^\text{14}\) and in view of *Shelley v. Kraemer*,\(^\text{15}\) which, at first glance, would seem to dictate a reversal.

*Shelley* concerned the use of state courts to enforce racial restrictive covenants involving residential housing. The covenants were being used

---

\(^{\text{10}}\) A devise or bequest to a charitable use will be sustained and carried out in this state; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a court of chancery may, by approximation, effectuate the purpose in a manner most similar to that indicated by the testator.

\(^{\text{11}}\) In some cases . . . it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment. In such a case the *cy pres* doctrine is not applicable.

\(^{\text{12}}\) 4 A. SCOTT, LAW OF TRUSTS § 399, at 3085 (3d ed. 1967).

\(^{\text{13}}\) GA. CODE ANN. § 108-106(4) (1959) provides:

> Where a trust is expressly created, but no uses are declared, or extend only to a part of the estate, or fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs.

\(^{\text{14}}\) See, e.g., Local 590, Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (state delegating power to owners of shopping center by permitting them to use trespass laws to prohibit exercise of first amendment rights); Reitman v. Mulkey, 387 U.S. 369 (1967) (amendment to state constitution giving racial discrimination in housing a preferred position in the law); Robinson v. Florida, 378 U.S. 153 (1964) (existence of a manual of the state board of health embodying state policy of putting burdens on restaurants serving both blacks and whites sufficient to preclude conviction of sit-in demonstrators for trespass); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (discrimination by lessee of state property attributed to state's failure to require nondiscrimination, making state significantly involved in the discrimination).

\(^{\text{15}}\) 334 U.S. 1 (1948).
by private citizens to effect a sort of racial zoning that was so widespread non-Caucasians were effectively being denied the opportunity to buy or rent most of the desirable residential property in the country.\textsuperscript{16} Since it had been decided\textsuperscript{17} that states could not use racial zoning without infringing the fourteenth amendment and the Civil Rights Act of 1866,\textsuperscript{18} and because the Civil Rights Cases\textsuperscript{19} had established that the fourteenth amendment proscribed only state action and did not speak to private acts, the Court in Shelley was faced with a real dilemma. It was the power of the states operating through their judiciaries that made the discrimination work; yet the discriminatory motivation came from private citizens. The Court's solution was to combine the two earlier rulings into a holding that, because they were between private parties, the racially restrictive covenants themselves were constitutionally permissible but "that in granting judicial enforcement of the restrictive agreements in these cases, the states [had] denied [the] petitioners the equal protection of the laws."\textsuperscript{20}

Five years later the Court expanded that ruling by holding in Barrows v. Jackson\textsuperscript{21} that one who breached a racial covenant could not be required to answer in damages to his co-covenantor for the breach because it would amount to using the coercive power of the state to compel, indirectly, compliance with a covenant that was unenforceable directly.

Taken together Shelley and Barrows could be read to support the proposition that any time an individual uses the power of the state courts to effect a discriminatory purpose the fourteenth amendment has been violated;\textsuperscript{22} however the cases themselves had not gone that far, and it was unclear how far they might be expanded. Nor has any direct answer been received because the Court has not since Barrows relied substantially on Shelley.\textsuperscript{23} This has not been due to any lack of cases presenting prob-

\textsuperscript{16} See C. Vose, CAUCASIANS ONLY (1959).

\textsuperscript{17} Buchanan v. Warley, 245 U.S. 60 (1917).

\textsuperscript{18} Act of Apr. 9, 1866, ch. 31, § 1, 14 Stat. 27 now embodied in 42 U.S.C. § 1982 (1964).

\textsuperscript{19} Ex parte Virginia, 100 U.S. 339, 347 (1879).

\textsuperscript{20} That judicial action was state action capable of infringing the fourteenth amendment had been decided in Ex parte Virginia, 100 U.S. 339, 347 (1879). Shelley was novel because the discrimination originated with the private litigants but was attributed to the court.

\textsuperscript{21} 334 U.S. 1, 20 (1948). That judicial action was state action capable of infringing the fourteenth amendment had been decided in Ex parte Virginia, 100 U.S. 339, 347 (1879). Shelley was novel because the discrimination originated with the private litigants but was attributed to the court.

\textsuperscript{22} One early commentator felt Shelley alone established that "no determination [by a state court] of a relationship which may vary with the race of the persons involved will satisfy [the] requirements [of the fourteenth amendment]." Ming, Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases, 16 U. CHI. L. REV. 203, 234 (1949).

\textsuperscript{23} Shelley has been cited by the Court with some frequency to support minor
lems susceptible to being resolved on the basis of Shelley but because the Court has either denied certiorari or handled the cases it has heard in such a way that the scope of Shelley has become more uncertain.

One year after Barrows the Court split evenly over the constitutionality of a state court's action permitting a cemetery company to rely on a Caucasians-only clause of a contract as a defense in an action for breach of contract. The cemetery had refused to inter the remains of the plaintiff's husband because he was an American Indian. The following term the Court held, without mentioning Shelley, that a state court decision that membership in the Communist Party constituted just cause for discharge under an employment contract did not raise a federal question; three members of the Court felt Shelley compelled a reversal.

The Court's failure to clarify the scope of Shelley provoked various proposals by commentators as to its real meaning. Professor Pollak submitted that the underlying principle was that the state may not assist "a private person in seeing to it that others behave in a fashion which the state itself could not have ordained." Others suggested Shelley be confined to cases in which the impact of the discrimination is so broad as to take on the aspects of a governmental function using the rationale of Marsh v. Alabama and the white primary decisions. Another com-

E.g., Cooper v. Aaron, 358 U.S. 1, 17 (1958) (citing Shelley for the proposition that fourteenth amendment applies to action of state judiciary). But see Kreshik v. Saint Nicholas Cathedral, 363 U.S. 190 (1960) (per curiam) (involving power of state court to determine rights of competing factions of religious group).

E.g., Gordon v. Gordon, 332 Mass. 197, 124 N.E.2d 228 (1955), cert. denied, 349 U.S. 947 (1955) (judicial enforcement of will provision revoking gift to child for marrying person not born to Jewish faith not violative of the fourteenth amendment) ; Charlotte Park & Rec. Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), cert. denied, 350 U.S. 983 (1956) (holding Shelley did not prevent reversion of property donated to city for use as park for whites only, because reversion would occur without the aid of the court if Negroes were permitted to use the facility).


Rice v. Sioux City Memorial Park Cemetery, Inc., 348 U.S. 70 (1954). The Court reheard the case the next term but dismissed the writ of certiorari as improvidently granted noting that a recent act of the state legislature would preclude a further occurrence in that jurisdiction. 349 U.S. 70 (1955).


Id. at 302.


326 U.S. 501 (1946) (owner of company town acting so much like agency of
mentator argued that it be viewed as a general prohibition of state enforcement of private discrimination that the state itself could not require, but that exceptions should be made where the discriminator has a competing claim of basic rights which outweighs the victim's claim to equal protection.\textsuperscript{33}

In the early sixties the advent of the civil rights sit-in demonstration with its subsequent arrests and convictions for violation of trespass statutes seemed to provide the ideal vehicle for clarifying \textit{Shelley}. The Court however chose to avoid the \textit{Shelley} question and decide the cases on other grounds.\textsuperscript{34} The thoroughness with which the issue was avoided is indicated by the fact that \textit{Shelley} was not once mentioned in a majority opinion though it appears in both dissenting\textsuperscript{35} and concurring\textsuperscript{36} opinions as well as briefs of counsel.\textsuperscript{37} This prompted one writer\textsuperscript{38} to announce that Professor Wechsler had been right when he characterized \textit{Shelley} as

\begin{quote}
the state that it may not use force of state trespass laws to abridge first amendment rights in manner forbidden to state).
\textsuperscript{33} E.g., Smith v. Allwright, 321 U.S. 649 (1944) (exclusion of Negroes by Democratic Party prevented them from participating in primary and violated fifteenth amendment because primary was part of machinery for choosing elected officials); Terry v. Adams, 345 U.S. 461 (1953) (unofficial private primary which excluded Negroes and effectively determined who officeholders would be violated fifteenth amendment).
\textsuperscript{34} An illustration of this position would be where a homeowner has a trespasser prosecuted and concedes that his only reason for doing so was the race of the trespasser.
\textsuperscript{35} Even when one excludes on the basis of race, the state which helps give effect to the exclusion is implementing a general, basic, proprietary right, reaching far back into and behind the common law; the enforcement of discrimination is incidental. The victim of such discrimination, on the other hand, suffers a minor limitation and a limited and unpunitive indignity.
\end{quote}


\textsuperscript{36} See, \textit{e.g.}, Bouie v. City of Columbia, 378 U.S. 347 (1964) (trespass statute did not give fair notice that refusing to leave after being requested to do so was prohibited); Bell v. Maryland, 378 U.S. 226 (1964) (reversed and remanded so state court could determine whether state law required dismissal of the charge because legislation enacted subsequently made defendants' conduct lawful); Peterson v. City of Greenville, 373 U.S. 244 (1963) (discriminatory action attributed to state because local ordinance compelled segregation in eating facilities); Lombard v. Louisiana, 373 U.S. 267 (1963) (discriminatory action attributed to state because statements by local officials that sit-ins would not be tolerated was form of compulsion).

\textsuperscript{37} Bell v. Maryland, 378 U.S. 226, 328 (1964) (Black, J., dissenting).


\textsuperscript{39} E.g., Petitioner's Brief for Certiorari at 8, Bell v. Maryland, 378 U.S. 226 (1964).

\textsuperscript{40} Paulsen, \textit{The Sit-in Cases of 1964: "But Answer Came There None"}, 1964 SUPE. CT. REV. 137, 151.
an ad hoc decision "yielding no neutral principles for [its] extension or support." 39

Evans v. Abney provided the Court with yet another opportunity to update the status of Shelley since the strongest arguments for preventing the reversion were based on Shelley. 40 Mr. Justice Brennan in his dissenting opinion in Abney stated that Shelley "stands at least for the proposition that where parties of different races are willing to deal with one another a state court cannot keep them from doing so by enforcing a privately authored racial restriction." 41 This is very close to Professor Pollak's interpretation of Shelley 42 and can be easily applied to the facts in Abney. The testator was the sole author of the racial restrictions, not the state. The litigation was commenced because the trustees under the will had allowed non-whites to use the park. 43 Thus it is apparent that the trustees were prepared to deal with those discriminated against by the terms of the will, and it is clear from the intervention of the local Negroes that they wished to use the park. Although the attempt to enforce specifically the racial provisions of the will was defeated by Evans v. Newton, 44 Abney enforces them indirectly. The title and right to use the property turns on the color of the prospective users and yields a more extreme result than the normal restrictive covenant case because here, those who are clearly entitled to use the property under the terms of the will are divested of that right. This divestiture in effect punishes Macon for not enforcing the discriminatory provisions of the will and encourages others similarly situated to enforce such restrictions for as long as possible; 45 thus the

40 Two other major arguments were thought by Justice Brennan to require reversal. One was based on the inability of a state to accept a gift with unconstitutional restrictions, and the other was based on the idea that if a state gives racial discrimination a preferred status in its laws the fourteenth amendment is violated. 396 U.S. 435, 455-59 (1970).
41 Id. at 456.
43 Even though the trustees under the will had resigned and had been replaced it is apparent that they did so not out of hostility to the admission of non-whites but out of fear the property would revert to the heirs if it were not operated on a segregated basis. 396 U.S. at 456.
45 That such a result is not entirely conjectural is illustrated by litigation involving Tanglewood Park near Winston-Salem, N.C. There a testator had devised his sizeable home and grounds to private trustees to be used as a public park for whites only. Since the park included various facilities of public accommodation, the trustees brought an action for declaratory judgment in a state court to deter-
coercive power of the state is used to compel and encourage parties of
different races not to deal with each other in good faith.

In *Bell v. Maryland* Mr. Justice Black, in his dissenting opinion,
sought to show that a crucial element in *Shelley* was the existence of a
federally protected right to own property in addition to the equal protec-
tion demands of the Constitution. This interpretation would seem to
apply to *Abney* in which enforcement of the restriction would interfere
with a federally protected right of access to public facilities. Nor is it
very convincing to say that in this case there is a competing basic right—
the right of a donor to place conditions on charitable gifts—which out-
weighs the equal protection claims of the petitioners, since it is clear that
such conditions can be, and are frequently, subject to numerous restric-
tions.

However Justice Black, writing for the majority in *Abney*, says that
*Shelley* is easily distinguishable because it prohibited judicial action
affirmatively enforcing a private scheme of discrimination against Negros
whereas here the discrimination against Negros is eliminated by elimin-
ating the park. This distinction would be more meaningful had not
*Shelley* been supplemented by *Barrows* in which the Court prohibited
indirect enforcement of restrictive covenants by penalizing the party who
failed to comply with the covenant. The Court answers that argument,
though without specifically referring to *Barrows*, by saying "that the
will of Senator Bacon and Georgia law provide all the justification neces-
mine whether, in light of the public accommodations provisions of the Civil Rights
Act of 1964, 42 U.S.C. § 2000a (1964), they could permit Negros to use the
facilities. The state court held that the intent of the testator was to exclude Negros
and to admit them would cause the property to vest in alternate beneficiaries of the
will; therefore, the court ordered the trustees to take whatever steps necessary to
operate the park on a segregated basis for as long as possible. Lybrook v. City of
Winston-Salem, Forsyth County Super. Ct. (Nov. 5, 1964). The trustees there-
upon closed various facilities at the park to keep it beyond the reach of the statute
until May 3, 1968 when an action was brought by the United States to compel the
integration of the park. The court found that the park was covered by the statute
and enjoined the trustees from continuing to operate it on a segregated basis. United States v. The William & Kate B. Reynolds Memorial Park, Inc., Civil No.
C-62-WS-68 (M.D.N.C. Mar. 11, 1970). The state court then held that the in-
ability of the trustees to comply with the terms of the trust had caused the alternate
dispositons to take effect. However the court approved an arrangement by the
trustees and alternate beneficiary to lease the park to a non-profit corporation that
would operate it on an integrated basis. Lybrook v. Winston-Salem, Forsyth


See, e.g., 4 A. Scott, LAW OF TRUSTS § 410, at 3174 (3d ed. 1967).
sary for imposing such a 'penalty'."]49 A similar statement could have also been made in *Barrows* but there the Court, looking beyond the contractual relationship of the parties, realized that the effect of allowing the penalty would be to undermine the effectiveness of *Shelley*. In *Abney* the Court does not appear to be concerned about the ultimate effect of the penalty, probably because the greatest distinction between *Shelley* and the problem here is one of size or degree. There is little reason to believe that permitting the reversion in this case will result in the widespread deprivation of federally protected civil rights that would have resulted from the opposite decision in *Shelley*.50 This being so, Professor Lewis' view of *Shelley* as really being a problem of delegation of the authority of the state51 can be more easily reconciled with *Abney* than can most others. The result is that *Shelley* in all probability can no longer be used to support the proposition that state action, violative of the fourteenth amendment, results whenever state courts are used by private parties to discriminate against others in ways the state could not itself have used.52 As Justice Black said:

Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and non-discriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.53

It seems that the Court has long felt uneasy with *Shelley* to the extent that it attributes to the courts the motivations of the litigants and this case appears to move away from that position, or at least declines to

50 C. Vose, *supra* note 16.
51 Lewis, *The Meaning of State Action*, 60 *Columbia L. Rev.* 1083, 1115-20 (1960). As Professor Lewis noted the opinion of the Court did not approach *Shelley* in this manner. This approach moreover is so substantially different from that of the Court that its acceptance destroys *Shelley* as it has been traditionally viewed.
52 If viewed as being a means to an end *Shelley* is no longer necessary on its own facts since the discovery by the Court that 42 U.S.C. § 1982 (1964) applies to individual as well as state action. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). 42 U.S.C. § 1982 (1964) provides:

All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by the white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
extend it. It is significant that, from the many arguments presented by the petitioners, the Court chose to reply to three relatively minor arguments that related to the racial neutrality of the courts because the replies underscore the Court's distaste for attributing the racial prejudices of the testator to the courts responsible for supervising the disposition of his property. This may be indicative of a changing attitude of the Court which will tend to give the equal protection clause a rest while relying more on legislation to eliminate racial discrimination. Recent civil rights legislation certainly makes this feasible.

**George S. King, Jr.**

**Insurance—Judicial Construction of the Lender's Policy of Title Insurance**

The recent trend of judicial interpretation of standard insurance policies has been to construe policies liberally in order to provide more comprehensive coverage for the insured. Although the courts have depended upon various principles of contract interpretation to accomplish this end, the import of adjudication in this field reveals a sound propensity of the courts to protect the consumer. The brunt of the criticisms of insurance practices has recently fallen upon the underwriters of liability insurance. However, a recent case, *Paramount Property Co. v. Transamerica Title Insurance Co.*, expands the criticisms of liability insurance policies to encompass the provisions of the standard lender's policy of title.