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Evans v. Newton: An Uncertain Line

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EVANS V. NEWTON–AN UNCERTAIN LINE

INTRODUCTION

With the implementation of the Civil Rights Act of 1964 and pending Congressional action on additional Civil Rights legislation, one of the last remaining bulwarks of segregation will come under increased scrutiny. This is the area of charitable trusts created by segregation-minded testators who bequeath real property for the sole use of members of the white race. *Evans v. Newton*,[1] decided on January 17, 1966, provides the latest guidelines of the United States Supreme Court on this subject. Two fundamental principles were considered in this case: (1) The right of the individual to dispose of his property as he sees fit, and (2) the constitutional ban in the Equal Protection clause[2] of the Fourteenth Amendment against state-sponsored racial inequality.

A review of the factual situation in *Evans v. Newton*[3] is necessary for an understanding of the state of the law as it is today. In the *Evans* case, the 1911 will of United States Senator Augustus Octavius Bacon of Georgia, granted title[4] to certain real property, known as "Baconsfield" to the City of Macon, Georgia, for the exclusive use of white persons.[5] Administration of this 100-acre tract, to be used as a park, was vested in a Board of Managers,[6] with the city as trustee. In order to provide for the maintenance of the park, income from described real property and bonds was to be expended by the Board of Managers. The city kept the park segregated for many years, but around 1963 started letting Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis. On May 4, 1963, individual members of the Board of Managers, including Charles E. Newton, brought this suit in the Superior Court of Bibb County, Georgia, against the City of Macon in its capacity as trustee of "Baconsfield." The Board of Managers

1. 86 S.Ct. 486 (1966).

2. U.S. CONST. amend. XIV, § 1.

3. *Supra* note 1.

4. Item IX of the will of O. A. Bacon, dated March 28, 1911. ". . . all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable . . . shall vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust . . . ."

5. *Id.* Actually white men and white non-residents of Macon were excluded because the will specified ". . . white women, white girls, white boys and white children of Macon."

6. *Supra* note 4.

asked that the city be removed as trustee and this court appoint new trustees to whom title to the park would be transferred. The obvious purpose of this plan was to have the new trustees reinstate the policy of segregation at the park, in accordance with Senator Bacon's will.

On May 20, the City of Macon filed its answer asserting that it could not legally enforce racial segregation, and was therefore unable to comply with the specific intention of Senator Bacon with regard to the racial exclusion provision. The city asked that the court enter a decree setting forth the duties and obligations of the city in the premises. On June 18, Reverend E. S. Evans and others, Negro residents of Macon, filed an intervention in the cause and asserted that the racial restriction violated the public policy[7] of the United States and the laws of the State of Georgia. They further asserted that the court as an agency of the State of Georgia could not, consistently with the Equal Protection clause of the Fourteenth Amendment to the U. S. Constitution and the equivalent provisions of the Constitution of the State of Georgia, enter an order appointing private citizens as trustees for the manifest purpose of operating public policy in a racially discriminatory manner.[8] The intervenors asked the court to refuse to appoint private persons as trustees. The City of Macon, now hopelessly in the middle, filed an amendment to its answer, praying that the court accept its resignation as trustee. On March 5, 1964, the Negro intervenors filed an amendment in which they asserted the Equal Protection clause prohibits the court from accepting the resignation of the City of Macon as trustee.

On May 10, the Superior Court of Bibb County, finding it unnecessary to discuss all the other significant issues raised in the year-long litigation, solved its problem by accepting the resignation of the city as trustee and appointing three private individuals as new trustees. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed,[9] holding that Senator Bacon had the right to give and bequeath his property to a limited class, and that the Superior Court accept the

7. Intervenors' Petition, filed June 18, 1963, in the Superior Court of Bibb County, defined public policy as "The public policy of the United States and of the State of Georgia being that no citizen is to be deprived of the use, benefit and enjoyment of any publicly owned or supported facility solely because of his race, national origin, creed, or religion."

8. See, Shelley v. Kraemer, 334 U.S. 1 (1948) and Pennsylvania v. Board of Trusts, 353 U.S. 230 (1957).

9. Evans v. Newton, 220 Ga. 280, 138 S.E.2d 573 (1964).

resignation of the city when the city was unable to comply with the terms of the testamentary trust.

The Negro intervenors and the United States as amicus curiae petitioned the United States Supreme Court arguing that even after the resignation of the City as trustee and the appointment of private trustees, there is still sufficient state involvement to bring the discriminatory action of the new trustees within the bar of the Fourteenth Amendment. The members of the Board of Managers responded that the trust was now independent of governmental control, even though it performed functions also performed by the State.

On April 26, 1965, the United States Supreme Court granted certiorari. The problem had now resolved itself into two closely related issues. First, could a charitable trust contain a racially discriminatory provision if no governmental control of the trust was involved and, second, where is the dividing line between "private" and "state" action, the latter being required before the Fourteenth Amendment would apply? Affirmance of the decision of the Supreme Court of Georgia would draw a line, permitting state judicial enforcement of at least some charitable trusts that include racially discriminatory provisions. Reversal would leave the final line still undrawn, but would serve notice at least that where recreational facilities are made available by charitable trust, they cannot be opened to all members of the public except Negroes.[10]

On January 17, 1966, the U. S. Supreme Court reversed[11] the decision, holding that the State through its courts had aided private parties to perform the public function of maintaining a park on a segregated basis and therefore had *implicated* the State in the type of conduct proscribed by the Fourteenth Amendment.

The discussion in this article centers on the two main issues, charitable trusts with racially discriminatory provisions and state action.

Charitable Trusts with Racially Discriminatory Provisions

At the time the will of Senator Bacon was probated and "Baconsfield" passed to the City of Macon, the law of the land and of the State

10. Professor Robert B. McKay, *Evans v. Newton,* Association of American Law Schools, Committee on Supreme Court Decisions, November 29, 1965.

11. Evans v. Newton, 86 S.Ct. 486 (1966).

of Georgia as expressed in the case of *Plessy v. Ferguson*,[12] permitted a racially restrictive condition in a public charitable trust to be enforced by the courts of the state wherein the trust was located. Georgia law specifically provided, and still does,[13] for the language used in the Bacon will. It is interesting to note that two years before *Evans*, the Georgia Supreme Court had sustained a testamentary trust establishing and maintaining "a home for indigent colored people 60 years of age or older residing in Augusta, Georgia." [14]

Although the Code provision[15] did not require the testator to provide a reason for including racial restrictions, Senator Bacon apparently felt some explanation was desirable because he went to great lengths to point out in his will that he had nothing against Negroes, even felt sincere affection for some, but was definitely certain that the white and Negro races should never enjoy recreational facilities together.[16] It is not surprising in view of this typical attitude, combined with conformity to the Georgia Code,[17] and prior decisions of the court,[18] that the Georgia court held[19] that Senator Bacon had an absolute right to give and bequeath property to the city in trust for white persons only.

The United States Supreme Court was not as direct on the point as

12. 163 U.S. 537 (1896). This decision sustained an 1890 Louisiana statute providing for equal but separate accommodations for white and Negro railway passengers. The majority opinion contained the following: "The object of the Fourteenth Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based on color . . . or a commingling of the two races upon terms unsatisfactory to either."

13. GA. CODE ANN. § 69-504 (1957). This provision was adopted in 1905, six years before Senator Bacon's will was executed.

14. Strother v. Kennedy, 218 Ga. 180, 127 S.E.2d 19 (1962).

15. *Supra* note 13.

16. Item IX of the will of A. O. Bacon, dated March 28, 1911. "I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection. I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common. I am moved to make this bequest of said property for the use, benefit and enjoyment of the white people of the City of Macon from whom through a long lifetime I have received so much of personal kindness and so much public honor; and especially as a memorial to my ever lamented and only sons . . ."

17. *Supra* note 13.

18. Strother v. Kennedy, *supra* note 14, and Houston v. Mills Memorial Home, 202 Ga. 540, 43 S.E.2d 680 (1947) (Permitting trust for home for Negro aged)

19. Evans v. Newton, *supra* note 9.

the Georgia court had been. Although the Supreme Court reversed the decision,[20] it did so on state action grounds, touching only briefly on the racially restrictive language of the trust itself, implying that in the absence of state action racial restrictions would be constitutional. "If a testator wanted to leave a school or center for the use of one race only and in no way implicated the State in the supervision, control or management of that facility, *we assume arguendo* that no constitutional difficulty would be encountered." [21] Mr. Justice Harlan, dissenting on other grounds, stated: "So far as the Fourteenth Amendment is concerned, the curtailing of private discriminatory acts, to the extent they may be forbidden at all, is a matter that is left to the States acting within the permissible range of their police power." [22] The Supreme Court had concluded in *Shelley v. Kraemer*[23] that

> . . . restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioner by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, *it would appear* clear that there has been no action by the State and the provisions of the Amendment have not been violated.[24]

It appears from *Shelley v. Kraemer* and *Evans,* that racially restrictive provisions, absent state action, are constitutional. Any lingering doubts are based on the implications arising out of the use of such terms as *it would appear*[25] and *we assume arguendo*[26]—perhaps the Supreme Court has been leaving itself an emergency exit against the possibility it might have to decide in the future that such provisions are unconstitutional.

State Action

The crux of all racial segregation cases seeking to invoke the equal protection clause of the Fourteenth Amendment is the extent of state

20. Evans v. Newton, *supra* note 1.

21. *Id.* at 489.

22. *Id.* at 497.

23. 334 U.S. 1 (1948). Shelley v. Kraemer is, of course, more often cited as authority for the proposition that it is unconstitutional for a state court to enforce racial restrictions in private real estate agreements. The case also stands for the proposition, however, that the equal protection clause erects no shield against merely private conduct.

24. *Id.* at 13.

25. *Ibid.*

26. Evans v. Newton, *supra* note 21.

involvement. In fact, the inhibition against denial of the equal protection of the laws has exclusive reference to State action.[27] The definition of "state" includes its legislative, executive, and judicial branches;[28] therefore the equal protection clause not only prohibits discriminating legislation, but also has reference to the way the law is administered and interpreted.

Most of the current and anticipated litigation on segregation has to do with judicial enforcement. *Shelley v. Kraemer*[29] contains a statement by Mr. Chief Justice Vinson emphasizing the importance of judicial power in discrimination cases:

> These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discrimination as they see fit. Rather, these are cases in which the states have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment on an equal footing.[30]

Nine years after *Shelley*, the Supreme Court considered the *Girard College Case, Pennsylvania v. Board of Trusts.*[31] The will of Stephen Girard, probated in 1831, set up Girard College for "poor white male orphans," with the City of Philadelphia as trustee. The case arose when Negro petitioners were denied admission to the school. The

27. U.S. CONST. amend. XIV, § 1. "No *state* shall make or enforce any law . . . nor deny to any person . . . the equal protection of the laws." The trend is towards finding "state" action in many heretofore "private" areas. See, *e.g.*, Robinson v. Florida, 378 U.S. 153 (1964) (State health regulation requiring separate toilet facilities for white and Negro is "State" action); Griffin v. Maryland, 378 U.S. 130 (1964) ("State" action includes the order of a private park guard acting under color of his authority as a deputy sheriff); Marsh v. Alabama, 326 U.S. 501 (1946) ("State" action includes suppression of freedom of speech in a company-owned town); Smith v. Allwright, 321 U.S. 649 (1944) ("State" action found where Negroes denied right to vote in primary election, even though political party that determined voter qualifications was a voluntary association).

28. Virginia v. Rives, 100 U.S. 313, 318 (1880).

29. *Supra* note 23.

30. *Id.* at 19.

31. 353 U.S. 230 (1957).

United States Supreme Court, in reversing[32] a state court refusal to order admission, pointed out the Board of Directors was an agency of the State of Pennsylvania by legislative act, and that the refusal to admit Negroes to the College was therefore discrimination by the State. The state courts then removed the Board of Directors and substituted therefore thirteen private citizens, none of whom held any public office or otherwise exercised any governmental power under the Commonwealth of Pennsylvania. The Supreme Court of the United States denied certiorari.[33]

Recalling the statement of Chief Justice Vinson in *Shelley*,[34] wouldn't the decisions, per se, of the state courts in the *Girard College Case* constitute "state" action? In denying certiorari the effect was to allow the state courts to deny rights available to other members of the community, the same rationale as in *Shelley*. Eight years after the *Girard College Case*, the Supreme Court in *Evans* held that state courts that aid private parties to perform a public function on a segregated basis implicate the state in conduct proscribed by the Fourteenth Amendment.[35] The *Evans* rule seems to support the earlier *Shelley* rule, more than the rule (or lack of it) developed in the *Girard College Case*. It is significant that in *Evans* the court devoted relatively little consideration to the actions of the state courts, preferring to base their holding primarily on the grounds of the tradition of municipal control of "Baconsfield."[36] In summarizing the trend from *Shelley* to *Evans*, it appears that the decision of a state court, per se, is not sufficient "state" action to invoke the Fourteenth Amendment. Some additional form of "state" action must be found.

Another form of "state" action was found in *Evans*. The court in effect extended the definition of "state" action to include "private" action, if the services performed by the private individuals are of a municipal nature and had formerly been performed by the municipality. This new concept makes the *Evans* case significant. The Negro petitioners and the United States as amicus curiae successfully argued that even after the resignation of the city as trustee and designation

32. *Ibid.*

33. *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844, *cert. denied* 357 U.S. 570 (1958).

34. *Supra* note 23 at 19.

35. Evans v. Newton, *supra* note 20 at 490.

36. *Id.* at 489.

by the court of private trustees there was in the totality of the circumstances sufficient state involvement to bring discriminatory action of the trustees within the bar of the Fourteenth Amendment. The Supreme Court held[37] that the momentum "Baconsfield" acquired as a public facility was not dissipated ipso facto by the appointment of "private" trustees. In supporting this conclusion the Court emphasized the tradition of municipal control, the nature of the service rendered by a park and the public interest inherent in mass recreation.[38]

CONCLUSION

The *Evans* case lends authority to the proposition that it is still constitutional to include racially discriminatory provisions in private agreements, wills and trusts. They are of little permanent value, of course, unless they can be enforced in the courts. Apparently, and this line is uncertain, mere action by the state courts will not be sufficient "state" action to raise a Fourteenth Amendment question. However, as in *Evans*, state court action may be cited as supporting the overall conclusion that "state" action has occurred.

To the previous definition of "state" action, *Evans* adds the proposition that a municipality cannot preserve segregation in a municipal park by subsequently transferring title to private individuals—the public nature of the park remains. Although this appears to be a definite dividing line, the court made it uncertain by implying that there might be a different result if the public characteristics dissipated in time. "If the municipality remains entwined in the management or control of the park, it *remains* subject to the restraints of the Fourteenth Amend-

37. *Id.* at 486.

38. *Id.* at 489. ". . . where the tradition of municipal control had become firmly established we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector . . . This conclusion is buttressed by the nature of the service rendered the community by the park. The service rendered even by a private park of this character is municipal in nature. It is open to every white person, there being no selective element other than race . . . A park is more like a fire department or police department that traditionally serves the community. Mass recreation through the use of parks is plainly in the public domain . . . [t]he predominant character and purpose of this park is municipal. . . Under the circumstances of this case, we cannot but conclude that the public character of this park requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law. We may fairly assume that had the Georgia courts been of the view that even in private hands the park may not be operated for the public on a segregated basis, the resignation would not have been approved and private trustees appointed."

ment." [39] In the final analysis then, *Evans* provides a new definition of "state" action, but leaves it possible to subsequently erase the dividing line between "state" and "private" action on the basis of changes in the factual situation—if the public characteristics dissipate in time, then there remains only private action, insufficient to invoke the Fourteenth Amendment. Such a dividing line can only be characterized as —an uncertain line.

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39. *Ibid.*