Supreme Court of the United States

OCTOBER TERM, 1969

In the Matter of:

PAUL E. SULLIVAN, et al.,

Petitioners;

vs.

LITTLE HUNTING PARK, INC., et al.

Respondents.

T. R. FREEMAN, JR., et al.

Petitioners;

vs.

LITTLE HUNTING PARK, INC., et al.

Docket No. 33

Place Washington, D. C.

Date October 13, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

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Washington, D. C.
October 13, 1969

The above-entitled matter came on for argument at 1:00 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Sullivan against Little Hunting Park, Inc.

Mr. Brown, you may proceed whenever you are ready.

ARGUMENT OF ALLISON W. BROWN, JR., ESQ.

ON BEHALF OF PETITIONERS

MR. BROWN: Mr. Chief Justice, and may it please the Court:

This case is before the Court for the second time, having been here previously on order of this Court granting a petition for a writ of certiorari, at the same time the Court vacated the judgment of the Virginia Supreme Court of Appeals and remanded the proceeding to the Virginia Supreme Court of Appeals for further consideration in light of the case of Jones against Alfred H. Mayer Company. That was in the 1967 term of the Court.

Last year the Virginia Supreme Court of Appeals, after receipt of this Court's mandate, refused to accept the remand and to reconsider the case in light of the Mayer case, and issued an opinion indicating that it would not take the case back for the same reason that it had refused to entertain the appeals on the first occasion, the reasons stated being petitioners' alleged failure to comply with a certain procedural rule of the Virginia Supreme Court of Appeals.

The Court indicated that it had not had jurisdiction

over the proceeding in the first instance, and that it did, therefore, not have jurisdiction to accept the remand.

We petitioned for certiorari, and the case is now here again on the Court's granting of this second petition.

By granting the first petition for certiorari, the Court impliedly held that the non-Federal ground upon which the State Court decided the case was inadequate to support the judgment and that the Federal question should, therefore, be examined.

The State Court, by failing to accept the remand, by failing to comply with this Court's mandate, we submit, has failed to observe its responsibilities under the supremacy clause of the Constitution.

We are now before the Court on the merits.

The principal issues in the case concern the matter of whether a community recreation association may engage in racially discriminatory policies and practices under the proscriptions contained in the Civil Rights Act of 1866, which this Court construed in Jones against Alfred Mayer Company; and whether, also, those racially discriminatory practices are banned or prohibited by the due process clause of the Fourteenth Amendment.

The second question, major question, that is, is whether a third party who is a member of this local recreation association and dissents from its policies may, consonant with the protections afforded by the 1866 law and the Constitution, be expelled for his dissent.

Briefly, the facts are that Little Hunting Park, Inc. is a non-stock corporation organized under the Virginia law for the purpose of providing a community recreation facility. It has a swimming pool, tennis courts, and a park and picnic area. The by-laws provide that its facilities are available, membership is available, to anyone living within a prescribed neighborhood, a prescribed geographic area consisting of four real estate subdivisions, plus such adjacent areas or additional areas as the Board of Directors might decide.

The membership in the association is obtained by the purchase or assignment of shares. Shares may be purchased for a sum of money, and they may also be obtained upon assignment from landlord to tenant. These are provisions of the by-laws.

There is a limit of 600 shares in the association, and the record shows that in the history of this association's existence, namely, from 1965 to 1966, when the trial was held, assignment and transfer of shares had been uniformly permitted by the Board of Directors of the association, all such assignment and purchase of shares being subject to approval, the only occasion for a refusal to permit an assignment having occurred at the time of the incidents which are alleged herein to have been the basis for this action, namely, the refusal to permit the assignment from one Paul Sullivan to Dr. Theodore Freeman because of the latter's race, Dr. Freeman being a Negro.

The situation involving these two parties came about

as follows: Mr. Sullivan, a white man, had owned property in the neighborhood covered by the by-laws of the association, and in 1955 or 1954, when the association had been formed, had purchased a share which he used so long as he lived in a house on Quander Road in Fairfax County, Virginia.

He, after 11 years, moved to another house, and as part of the purchase price of the second house, purchased a second share in the association. In the meantime, he continued to rent the first property, and as part of the lease, made the practice of assigning the share in the association that he had purchased to accompany the first piece of property, or the first house.

So Mr. Sullivan owned two shares. He owned two houses. The first house he rented out.

In 1965 he rented the first house to Dr. Freeman, and as part of the lease provided for the assignment of the share in the association that went along with that property.

Q Was this the first time he had rented that house?

A No, this was not. He had had three prior tenants and he had made a practice of assigning the association membership share, and at least the record shows that the assignments had always been approved by the Board of Directors.

Q With respect to three previous tenants.

A Yes.

What happened here was that when Mr. Sullivan submitted

the application for assignment of his share to the Board of Directors, the Board of Directors of the Association disapproved it for the reason that Dr. Freeman and his family were Negroes.

Q Is there any remaining issue as to the question of the motivation for disapproval? Is there any claim, now, that there is any reason other than the fact that the applicant was a Negro.

A So far as I know, there is no such claim, sir. There was a suggestion of this raised in the opposition to the first petition for certiorari, or maybe it was the second petition, and we filed a response to that pointing out the places in the record showing conclusively that race was the reason for the disapproval of the membership assignment and the issue has not been raised now in respondent's brief.

As a result of Mr. Sullivan's disappointment with the failure of the association's Board of Directors to approve the assignment to Dr. Freeman, Mr. Sullivan sought to find out why the assignment had not been approved, and he sought to, within the association, work out means, and within the neighborhood where this occurred he sought to bring about a reversal of what he thought to be the discriminatory refusal to approve this assignment.

As a result of his activities, both within the association and among persons in the neighborhood, such as leadesr in the church and other community leaders, the association's Board

of Directors expelled Mr. Sullivan.

The two actions here seek (1) relief for Mr. Sullivan, we seek his reinstatement in the association, and damages for the injury that he has suffered as a result of the expulsion; and secondly, we seek damages for Dr. Freeman. Dr. Freeman is no longer in the country, is no longer in the neighborhood, no longer lives in the neighborhood served by the association. Although an injunctive remedy may be of future value to him, it is of no immediate value because he doesn't live there, and we seek damages on his behalf for the discrimination that he suffered.

We think there is little doubt but what the 1866 Civil Rights Act which this Court construed in Jones against Mayer applies to the facts of this case. The provisions of law are contained presently in 42 U.S.C., Sections 1981 and 1982. Sections 1981 grants Negroes the same rights as white persons to make and enforce contracts. Section 1982 grants Negroes the same right as white persons to inherit, purchase and lease real and personal property.

The record shows that both of these provisions of law are relevant here. There was a contract between Mr. Sullivan and Dr. Freeman which provided for the assignment of the share involved, and the Board of Directors of the association refused to permit the consummation or the performance of that contract because of the race of Dr. Freeman, so that would make Section

1981 applicable on its face.

Section 1982, 42 U.S.C., we believe is applicable by virtue of the fact that the membership share here is personal property and the membership in the association constitutes an incident of the real property and, indeed, it was a part of the leasehold interest that Dr. Freeman obtained from Mr. Sullivan.

Q Mr. Brown, would this situation fall under the Civil Rights Act of 1968?

A No, I don't believe so, Your Honor.

Q I mean apart from the effective date of that Act.

A I am not certain of that. I just don't know the answer, sir.

When we started this action, because this Court had not yet construed the Civil Rights Act of 1866, we pressed, in addition, a constitutional basis for our case. Under this Court's decision in Evans versus Newton, we felt that this association performed the same function as Bakersfield Park, which was at issue in the Evans against Newton case, namely, that it was a public facility which provided public recreation and that it had all of the attributes of a public facility of the sort that were at issue in Evans against Newton.

We continue to press this as an alternative ground for a decision.

As far as Dr. Freeman is concerned, we think that both the 1866 law and the constitutional provisions warrant his

obtaining relief.

As far as Mr. Sullivan is concerned, the record shows that he was expelled from this association essentially for dissenting from its racially discriminatory policy. He, under the law, was required to deal with Dr. Freeman on a nondiscriminatory basis. When he sought to do so, his action was frustrated, was thwarted, and when he sought to reverse the action of the Board of Directors and engaged in legitimate means of dissent and legitimate means to try to reverse the Board of Director's action, he was expelled.

He was punished. The action was retaliatory. It was by way of reprisal, and we feel that this action may not be permitted to stand under relevant authorities.

The case that is most analogous is that of Barrows versus Jackson, which is discussed in our brief and in the amicus brief of the United States. There you will recall that a party who had failed to comply with a discriminatory racial covenant was sued for damages and this Court held that he could defend by relying on the constitutional right of the Negro who was involved, that the law protected him in those circumstances. We think that the circumstances here are certainly analogous.

We have reviewed in our brief the various charges that were brought against Mr. Sullivan as the alleged basis for his expulsion. We have demonstrated, I believe, that in his expulsion there were a whole series of charges that were brought

against him that were in the nature of exaggerations, and in some instances outright falsehoods, all of which served as a pretext to mask the hostility and resentment that the directors of this association felt against him first for creating this controversy by attempting to assign his membership to a Negro, and then by not accepting the decision which they had made to deny the Negro the assignment.

An important aspect of the case which I would not care to overlook, and I would like to deal with for a moment, if I may, concerns the matter of damages.

In the supplemental brief that we filed, we attempted to respond to a point which the Government had made in its amicus curiae brief, namely, that the plaintiffs here may not be entitled to punitive damages because the acts involved occurred before this Court had construed the 1866 law in Jones against Mayer.

We, I think, have responded to that in a sense of showing that punitive damages are not foreclosed merely because the acts took place before the resurrection of the 1866 law.

But the point I would like to make is this, and I did not cover this in our brief because, frankly, what I am about to say had not quite jelled in my mind at the time I wrote the supplemental brief, and that is that we feel that there is a right established on this record by both parties to compensatory damages for the injuries they have suffered.

We think also that they are both entitled to punitive damages and we think that this is an important part of the case, primarily in the case of Dr. Freeman, because he is not in this country any longer. He is now with the United States Embassy in Tokyo.

The question of punitive damages, I think, as far as Mr. Sullivan is concerned, is quite well explored in our brief and we have shown it on the record. His expulsion from the association was motivated by attitudes of hostility, resentment, a desire to act by way of reprisal against him because of what he had done. These are the elements that constitute malice and which are a basis for assessing punitive damages as far as Mr. Sullivan is concerned.

Q In Jones against Mayer, as I remember it, we did not even decide that compensatory damages were available; isn't that correct?

A That is correct, sir.

Q Didn't we leave that question undecided explicitly?

A You left that question undecided, sir, and I must say, with all due respect, there is a footnote in that case that is a little hard to understand in which it is suggested that the parties may not have, on those pleadings, made out a case warranting punitive damages.

One, we have asked for compensatory and punitive damages all the way along here. The thing I want to indicate

here is that in the case of Dr. Freeman, there are no facts that might appear from the record which would warrant punitive damages, but I would submit that he was the victim of racial discrimination, and that racial discrimination, as a matter of law, warrants the imposition of punitive damages. Race discrimination is unjustified. Race discriminations cannot be rationalized in law. Race discrimination is based on hatred, prejudice, bias. It has no justification. It becomes a matter of implying malice. There is malice in law. There is implied malice.

These are recognized in other fields of the law and we submit that when a person is the victim of racial discrimination there is implied malice and that punitive damages are warranted.

We feel it particularly important here in this respect: that is, to achieve the full effectiveness of this 1866 Act, the Court would be well warranted in giving meaning to this concept of punitive damages.

In Bell against Hood, the Court said that their severally protected rights have been invaded. It has been the rule from the beginning that the courts will be alert to adjust their remedies so as to grant the necessary relief.

This case is probably one of the last for perhaps some time that will come before the Court involving this 1866 Act. In order to give full effect to this law, we submit that

punitive damages should be awarded and should be recognized as a valid remedy.

The 1964 Civil Rights Act, the public accommodation provisions of it, have no damage remedy attached. There is only injunctive relief that is allowed.

If damages are allowed at all here, it seems to me that it would be appropriate for the Court to spell out both the right of a party to obtain both compensatory and punitive damages. As I say, where discrimination against a Negro occurs for no other reason than his race or color, it is an inherently malicious act -- inherently malicious -- and punitive damages should be awarded.

Here it is particularly appropriate, you note, because the Board of Directors of this association refused repeatedly to ever meet Dr. Freeman. Dr. Freeman was an eminently qualified individual. He has a Ph.D. degree from the University of Wisconsin. He is an agricultural economist. He is a Captain in the District of Columbia National Guard. He had eminent qualifications. They never met him. They didn't want to meet him. They knew that he was black, and that was enough.

That is malice in law, and warrants punitive damages.

Thank you.

Q Do you know whether the 1968 Act provides for damages?

A The Fair Housing Act of 1968 does provide for

damages.

Q Does.

A Yes.

Q Expressly?

A Yes. There are two provisions by which judicial relief can be obtained, and one or the other, as I recall, provides for damages.

Q Only compensatory damages, or does it include punitive damages?

A I am not certain, sir.

Q I don't know the answer, either.

MR. CHIEF JUSTICE BURGER: Mr. Harris?

ARGUMENT OF JOHN CHARLES HARRIS, ESQ.

ON BEHALF OF RESPONDENTS

MR. HARRIS: May it please the Court, the rules of procedure in the Virginia Supreme Court of Appeals require that counsel must serve notice on the opposing counsel as to the tendering of the transcript and give him a reasonable opportunity to examine it.

On the basis of the failure in this particular case for counsel to serve me with adequate notice, the Supreme Court of Appeals of Virginia refused to hear this appeal.

They based it on the case of Snead versus Commonwealth which was a criminal case in 1959. Snead's counsel presented the transcript to the counsel 30 minutes before he submitted it

to the Judge for certification, and on the basis of this, the Virginia Court said that 30 minutes was not reasonable, and therefore, since it was not reasonable, and the requirement was jurisdictional, therefore, they would not hear Mr. Snead's appeal. Mr. Snead served his five years in the penitentiary.

In the particular case that we have here, the opposing counsel, myself, received notice three days after it was tendered. One week later --

Q You don't deny that you had actual notification.

A I don't deny that I had it. I received a telephone call.

Q Or an opportunity to go over the record?

Petitioner says that you had the record for five days, or something of that kind, and the trial judge postponed for eight days the entry of the order until you had a chance to look at the record. Do you deny those facts?

A I received a telephone call saying that the transcript would be tendered on a Friday.

Q When did you receive this call?

A On a Friday, a telephone call.

Q June 9th, wasn't it?

A June 9th. On the 12th, as of that Friday afternoon sometime during that Friday afternoon, I understand it was dropped at the Judge's secretary's desk.

Q You were also told that your adversary would

submit motions for correction of the record for hearing on June 16th, weren't you?

A That is right, when I received the transcript.

Of course, the Virginia Court construes this procedure as jurisdictional; that it isn't up to me in cases --

Q No, but the question was whether you, in fact, had notice, whether you, in fact, examined this transcript before the Judge signed the settlement order. You did, didn't you?

A Before the Judge signed -- yes, the Judge signed it, I believe, sometime on the 16th.

Q So this all comes down to whether the construction of the rule that you hadn't had these opportunities before they were given to the Judge's secretary, or at least before the following Monday.

A Right. The Virginia State Court has construed this as not my responsibility, as the responsibility of the other counsel.

Q But the question for us is whether that is an adequate State ground under all the circumstances here.

Q I take it that the Virginia requirement is construed by the Virginia Court as double-barreled -- adequate notice of the time and place of tendering, and an adequate opportunity to examine. I don't suppose you would deny you had an adequate opportunity to examine this record. It was there

in the Judge's office for a week. You could have examined it and you had the week end to examine it.

A I did examine it, subsequently. I had it one week end. In fact, I think I had it for nine working hours to examine it.

Q Well, you didn't complain that you couldn't make an adequate examination in that time, did you?

A Yes. It was a very --

Q You did? Where does that appear in the record?

A It is not in the record, nor is it in the record that I had it for nine hours. But nine hours -- it is a very extensive transcript.

Q Did you object to the trial judge about all this?

A Yes, I did.

Q Where is that in the record?

A Again, looking at the Virginia law, I didn't think it was necessary for me to put each one of these items in the record. In fact, the trial judge said, "You don't have to worry. I am going to note everything on the record, and that is all you have to do," and this is what he did. He said, "I am going to note on the record exactly when I received it," and in the record there is a notification --

Q But did you also note that you objected to all of this, and if so, where?

A No, there is no record that I objected. I did

object but there is no record that I objected.

Q Do you now say you were prejudiced at all by all of this? Did this interfere with your preparation of defense, and how?

A Because I was waiting for service to be made on me. I was waiting for the transcript.

Q How did that hurt you?

A It hurt me because I didn't have the record.

Q But you did. The record does show that you did have the record. The judge says you had the record. You could see it in his office. That is what he said, didn't he?

A In the Judge's Chambers.

Q Yes.

A On the 16th. I believe it was the 16th. I got it on a Friday afternoon to return it on Monday.

Q Is that on Friday afternoon until Monday?

A Friday afternoon, to return on Monday.

Q Is this the whole record?

A No, this is just a portion of it.

Q Did you ask for more time?

A I am certain I did. I raised the same question there; that I didn't have sufficient time to read this extensive record, and at that particular time Mr. Brown said that he wanted it back by Monday, and I used his copy and had his copy back on Monday, to him.

Q Why didn't you keep it?

A Because I was ordered to give it back to him on Monday.

Q Oh, you just did it because he told you to do it. The truth of the matter is that you thought you had this real, good technicality and you didn't have to do any more.

A No, very frankly I didn't. I wasn't cognizant of this requirement at that time. It wasn't until afterwards.

Q So then you weren't hurt, then, were you?

A I was hurt insofar as I didn't have the time to prepare my case.

Q You had plenty of time. But I mean, how were you hurt by not seeing the record except over a week end? Is there anything in this record that is wrong?

A The purpose of us getting together to correct the record was to correct mistakes, and I think in the record there is a statement there that it was very poorly taken, and it needed substantial corrections, and this I didn't have the opportunity to correct.

Q What in there hurt your case?that wasn't corrected?

A It is so extensive, I don't know.

Q It is so extensive you can't point to one instance?

A Again, my argument here is not whether I have been hurt or not, but whether the Court of Appeals of Virginia is

right in saying that notice must be given and it is jurisdictional; that notice must be given beforehand. Whether I have been hurt or not, I think this is not -- the Virginia Court is not concerned whether I am hurt or not.

Q But you were given notice.

A Granted that if I were given sufficient time, it is a question as to whether Virginia has the right to say that notice must be given in advance.

Q You had notice, didn't you, but it wasn't in writing?

A I got a phone call sometime on the last day.

Q You had a notice but it wasn't in writing, isn't that right?

A I did get notice.

Q The only thing is that you claim it was not in writing.

A As I remember, I got a telephone call saying, "I am going to get that over to the Judge's Chambers."

Q Do you have any objection to that notice except that it was not in writing?

Q In short, that it didn't comply with the notice.

A I expected a notice; I will put it that way. I didn't do anything, because I expected a notice. I expected the law to be fulfilled.

Q Suppose we were to reverse the court down in

Virginia. Could you still try your case on its merits?

A In Virginia?

Q Yes.

A I would have to.

Q You could, couldn't you?

A I would have to.

Q And the only objection you have is that they didn't give you a written notice.

A Which the law requires, which the Virginia Court considers jurisdictional. In the case of Mr. Snead, the Court considered it jurisdictional with him, and in other cases the Court considered it jurisdictional. This is the reaction of the Court --

Q What about the Bohlen case? It didn't seem to consider it jurisdictional there.

A It goes back to the code section prior to the rule.

Q I appreciate that, but the requirement that it must be in writing which, of necessity, is the case here, and that it was jurisdictional, doesn't seem to have been jurisdictional in every case in which they have considered the rule, has it?

A Every case that I have seen where this question has been raised, the Court has ruled it is jurisdictional.

Q How about Cook and Holsum, in 207 Virginia. That

is another '67 case. They don't seem to consider it jurisdictional under all circumstances.

A In these particular cases, notice was given, but the question was --

Q Not written notice.

A -- the sufficiency of the notice.

Q Yes. It wasn't written in either of those cases.

A I don't know. I presume it was written. It doesn't say in here.

Q Not if I read the opinions correctly.

A Going on to the 1866 Title 1982, I consider this all part of Title 42, and I think that if we are going to look at Section 1982 of Title 42, we must look under the doctrine of pari materia, or construing all statutes on the same subject together, we must look at the rest of Title 42, including that section which is known as the public accommodations law.

This provides that all persons shall be entitled to the use of facilities, provided those facilities are in interstate commerce, the segregation in those facilities is enforced by the State, State action, and also it excludes from the operation of the public accommodations law any establishment which is not, in fact, open to the public. Also, it excludes clubs.

In the transcript there is rather extensive coverage of the security that was available at this particular establishment to keep people out, and the thing was not, in fact, open

to the public. There was no support of segregation by the State. In fact, the defendants or respondents in this case are very reluctantly before this Court. They were brought into court. They didn't ask the State to enforce segregation.

In addition, we contend that Little Hunting Park is a club. Now, if we are contending it is a club, we have to know what a club is. Webster defines a club as "as association of persons for some common object, especially one jointly supported and meeting periodically."

Now, I refer to Black, maybe for a legal definition, and Black says "The word club has no very definite meaning. Clubs are formed for all sorts of purposes and there is no uniformity in their constitution and rules. It is well known that clubs exist which limit the number of their members and select them with great care, which own considerable property in common, and in which the furnishing of food and drink to the members, for money, is not but one of the many conveniences which the members enjoy."

Little Hunting Park started out as a group of people buying land and putting out tennis courts and building a swimming pool for their own purpose and those that they elected to join them. They provided in their by-laws -- they set up a secured charter from the State of Virginia, and in this charter they used the word "community," and this is the basis of the petitioners' case, the fact that they used the word "community."

Looking at Webster's definition of "community", community as we think now of the community meaning the public, that was the second definition. The community is a community of interest. At the same time, they drafted by-laws, and the by-laws say that they are operating only for their members. If they are operating only for their members, it cannot be open to the public, or it cannot be a community organization.

Q Did not this club at some subsequent time permit the shares to be treated at least as an incident of a leasehold?

A No. The provision in the by-laws is this: that an owner -- and I presume this is because of the many military in the area who are transferred -- the owner may assign temporarily, subject to the approval of the Board of Directors, his privileges, not his membership but his privileges. He may allow the facilities to be used by his tenant, subject to the approval of the Board of Directors.

This is what happened in the particular case here. We have the fact that Mr. Sullivan owned a membership in the particular club, he moved, and when he moved to the other house, he bought another membership and assigned the privileges of his membership to his tenant, or attempted to assign the privileges of membership to his tenant in his first house.

Q He had done that three times before, had he not?

A Yes, but the record will show that in only one

of the two times before, I understand, did he transfer the privileges, and again, he went through the procedure of applying to the Board of Directors and asking the Board of Directors, "Will you approve my tenant for the use of the facilities of this membership?" and they did. They allowed him to assign his membership.

Q Mr. Harris, why did they deny him?

A It is in the record. It is something that -- we say it isn't race.

Q Could I say it is just color?

A No, but we can't very well say this because if we did not have prejudice among us today, we wouldn't have any need for these civil rights acts, and in this particular case these people who find -- and again, this is in the record -- they find that their membership is dropping. As their membership drops, they must increase the dues. As they increase the dues, the membership drops further.

Q So you need more members.

A But right or wrong, they figured with a Negro in the club, they would lose members. Right or wrong, that was their conclusion.

Q Well, that is the reason. He is a Negro.

A If they brought him in, they would feel --

Q It is because he is a Negro.

A That is right. That is what I say.

Q That is all I wanted to hear. Then I want to say, what right do they have to do that? What right do they have to deny the man privileges as the result of connection with real property on the basis of race alone. I really don't need "alone" but we have got it.

A I would say this: I think that if we are talking about a club, if it is a club, and we can tie this idea of --

Q I thought that you said Webster or somebody you gave me a minute ago said a club means a whole lot of things.

A That is right.

Q There is no magic in the word "club", is there?

A No, there is no definition other than what Webster says, as far as I am concerned.

Q This is a place where everybody else who does the exact same thing that Dr. Freeman does, gets into this recreation center. Is that true?

A He applied for membership in the club.

Q Everybody else gets in.

A No. No. This is not so.

Q Who else got out?

A I understand that they didn't keep records of anyone who was declined, and they had no record of anyone being declined, but the secretary does testify in here that she remembers a declination. Now, whether he was white, or any other color, I don't know.

Q One? Your record shows that possibly once before it happened.

A Possibly once before it happened. Now, whether he was a Negro or not, I don't know.

Q Do you admit this right is connected with property?

A In this particular case, if it is connected with property, would it be connected under the Fourteenth Amendment? If it is connected under the Fourteenth Amendment, Shelley versus Kraemer says that the Fourteenth Amendment, any restrictions on property is between the parties, but the court cannot enforce it. So if it is connected with property --

Q Could I get an answer? Is it or isn't it connected with property?

A I would say no, in my opinion.

Q How would he get it other than that?

A How would he get the right to go into the club? Again, my argument is not morals, because I am not a moralist. My argument is law, and I think that I may feel that it is perfectly wrong to exclude this man, but if they have a legal right to do so --

Q Where did they get the legal right?

A Because there is no law prohibiting it. A club has always had the right to select their members, those who they feel compatible with.

Q Let's take it this way: Suppose the whole community out there were labeled a "club". Would you say a Negro couldn't buy in it?

A No. I would say in that particular case it would be a definite restraint on the purchase of property.

Q It is called a club. Your position is that anything that is labeled a club can discriminate against people because of race solely because they call it a club.

A Very definitely not.

Q How do you limit this?

A I think a club is what we know as a club. In this particular community here, 85 percent of the people did not belong to this particular club. Only 15 percent of this particular community did belong to the club. I could go down and actually apply for membership, but whether we would be accepted for membership, I don't know.

Q Who was ever rejected? One.

A I don't know. I can only go by the records.

Q Two. I forgot Dr. Freeman. That was two.

A If I may, Mr. Justice --

Q Go right ahead.

A In June, I believe it was May or June, if I may quote you, you say Negro Americans have just as many beautiful people in mind and body, as well as in skin, as any other group, and we have just as many stinkers as any other group, and I

could agree with that perfectly.

Q Do you think Dr. Freeman is a stinker?

A No.

Q Well, what do you cite that for?

A Suppose that we do have a stinker who happens to be a Negro. Do we have to accept him?

Q I think you would have to show he was a stinker, to use your words, now.

A Would it be sufficient for us to determine Dr. Freeman is a stinker on our evidence and turn him out of the club?

Q All of this, I am sorry, is extraneous. He was refused -- you admitted a minute ago that he was refused solely because he was a Negro. You said that. Am I right?

A He was refused because of an economic concern by the Board of Directors for the good of their corporation.

Q And if he had been white, he would have been accepted.

A Probably. I don't know. I wasn't a member of the Board and I have never been, so I don't know what they would have determined.

Q All I am asking is a little frankness.

Q Where is this club?

A It is in Fairfax County, in an area known as Buckneil Manor, which is just south of Alexandria.

Q Why do you say it is a club? I haven't quite gotten that.

A It is a club insofar as these people did get together and build a clubhouse, a swimming pool, tennis courts, they have members. They delegated to the Board of Directors the right to select members after they got the initial members in.

Q Ordinarily a membership is not bought by a house.

A This is something where it is very unique. It isn't --

Q You usually pay dues to belong to a club.

A There is no buying of membership with a house. I think, again, the record will show that this was not a standard procedure where a man would sell his membership to his tenant. But what they did, in starting off, again I think --

Q Did they organize a corporation with the understanding that they wouldn't sell any houses to colored people?

A No, no. They had nothing to do with houses. The only thing that is different between this and --

Q Didn't the corporation own the houses?

A No, they don't own any houses.

Q Who owns the houses?

A Nobody owns any houses, except for the individual owners.

Q Do they live in them?

A Members of the club live in the houses in the community.

Q They are living in the houses because they are members of the club; is that right?

A No. In this particular community, only 15 percent of the people belong to the club. The rest do not belong to the club. They may belong to the other club, which is the Belle Haven Country Club, or they may belong to Woodlawn Country Club, but in this particular case it is 15 percent of the people who live in this community.

The only thing that makes this different from the average club is that when you join a club, a country club, for swimming, golf, whatever it is, you pay an initiation fee. In this particular case, and this is unusual --

Q You have to buy a house for your initiation fee, don't you?

A No house is involved. You can be in an apartment.

Q I don't quite get it. I thought you said each one of them got a house.

A No. I imagine there may be some people living in apartments who belong to this club.

Q In the community.

A There are no apartments in the community that I know of.

Q Who built the houses?

A I don't know. I believe the builder was Gosnell.

Q I am not talking about who actually put them up. Who owned them when they were built?

A It is a rather large area. I imagine 20 or 30 builders.

Q I am asking who owned the houses when they were built?

A I really don't know. As I say, the land was originally owned by Bucknell University, who sold off land to builders and builders came in and built houses.

Q Somebody came in and built the houses?

A Yes, it is a regular community.

Q Who did they build them for?

A Anybody who would buy them.

Q Anybody who would buy the houses. So that they do own the houses, individuals, you say.

A Yes, the individual members would own houses. They may be living in an apartment. But the houses have nothing to do with the club.

Q Are you telling us that on this record there is no connection between the ownership of a house and membership in the club?

A Positively not, other than the fact that the privileges of membership they would allow an owner -- and the

purpose of this was if an owner was transferred overseas he could transfer his privileges to his tenant while he was gone. This is the only thing. This is the procedure that they are operating on.

Q Has that crucial issue been tried?

A Yes, this has been tried in the County Court and the County Court ruled that it is a club.

Q What about the Appellate Court?

A The Appellate Court hasn't heard it because of the procedure involved.

Q Suppose we were to decide that the Appellate Court was wrong. Would you still get that issue tried out?

A Certainly.

Q You could still try out the issue of dispute there; is that right?

A Yes.

Q Are you asking for that privilege, if we reverse it on the procedural grounds?

A I would prefer that, because I think it is the correct thing to do.

Q I didn't see it in your brief.

A No, it is not in the brief, but I think it would be the correct thing to do, in my opinion.

Q If we reversed on the procedural grounds suggested by my brother Black, there would be no alternative. You

would be back in the Supreme Court of Virginia, would you not?

A That is right; we would. I guess Virginia would with a mandate, and a reason why it was remanded to them. The other time they just said that the other case was a case involving the sale of a house and they threw the case out before on the basis of procedure.

There is one thing as far as the mootness of this question. Mr Freeman is not looking for any admission to this club. He is looking for damages, and if he is not entitled to damages, then the question is moot and this Court should not consider moot questions, so I understand.

In my opinion, the only way he can get damages is under 1982, and if 1982, as Jones versus Mayer tells us, does not allow damages, then the question is moot as far as Freeman is concerned. He is in Pakistan now and he is not asking for --

Q Jones versus Mayer doesn't say that.

A It says it does not.

Q It just reserves the question.

A All right. It contains no provision, although it can be enforced by injunction, expressly authorizing a Federal Court to order the payment of damages.

Q Doesn't the Federal statute say an action either in law or in equity? Doesn't it say that?

A I really am not familiar with --

Q There have been cases involving other civil

rights where damages have been awarded by this Court. Smith and Alright was one.

A Under the public accommodations section, which is Title 42, which includes 1982, in there -- and Mr. Brown, of course, just admitted that there is no damages under the public accommodations law; it is strictly conciliatory and there is a provision for a referral to a mediation service. But there is no damages under the public accommodations law except for the granting of counsel fees.

Also, it says in there that this shall not preclude the assertion of any other Federal and State law not inconsistent and if we look at the Sherrod versus Pink Hat Cafe, we will see that in that particular case it was an assault where they ruled that there was no damages under the public accommodations law but in the case of an assault in connection with discrimination you could sue for damages on assault.

So in my opinion there is no provision for damages under 1982 or under the public accommodations sections of the Civil Rights Act. This is what they are talking about. They are not really talking about land, because if they are talking about the Fourteenth Amendment and the unlawful restriction on land, then we did not enlist the aid of the State Court to enforce a restrictive covenant. They are suing us. Does this mean that all you have to do to bring the Fourteenth Amendment down to individuals is to file suit against that individual?

In the Barrows versus Jackson case it was a question of the court coming in, calling on the court to assist and to take damages against somebody who violated a restrictive covenant.

Q May I ask you a question about the eligibility rules of this club?

Would I, as a resident of the District of Columbia, who has never owned property in Fairfax County, or lived in Fairfax County, would I be eligible to join this club now?

A Yes, you would.

Q I would?

A There are people living in Alexandria, and I am not sure but I believe there is one now living in Washington, D.C. Again, it would be rather impractical because the club must be in an area close to its members. As far as going to Spokane to play bridge, this would be a little silly. You would have to have your bridge club here.

The reason why we don't have more people in the District of Columbia, or even in Arlington, is because of the fact that it is further away. It is too far to travel. But probably if you lived in the District of Columbia and you would like to apply, I think you would have a good chance of becoming a member. The same thing would apply to Justice Marshall.

Q The petitioners' brief, if I may just follow Justice Harlan's question, the petitioner's brief seems to say, and I am looking at page 6, that the corporation's by-laws

provide that shares may be purchased by adult persons who "reside in or who own or who have owned housing units in one of the specified subdivisions." It doesn't, to be sure, explicitly say that shares are limited only to those people, but the implication that I got from that brief was that they were limited only to residents of the neighborhood or people who had been tenants or residents in that neighborhood.

A There is a geographical limit. It is a rather wide area. There was a geographical limit that was originally put in there but again, the record will show that it hasn't ever actually been adhered to.

Again, there is one thing that is left off there. It must also be approved by the Board of Directors as a requirement.

Q Yes. We both agree about that.

MR. CHIEF JUSTICE BURGER: Mr. Brown, you have seven minutes left.

REBUTTAL ARGUMENT OF ALLISON W. BROWN, JR., ESQ.

ON BEHALF OF PETITIONERS

MR. BROWN: I would simply like to say that with respect to the question of the attributes here that suggest that membership in this association may be an incident of land or real property, I would point out that there are several factors.

For example, the by-laws provide that shares may only

be purchased by residents of specified areas.

Q But the by-laws don't say that being a resident in the area is the only qualification for membership.

A No, they do not.

Q And the Board of Directors still has to pass on applications for membership, although applications, according to the by-laws, are limited to residents.

A That is correct; yes, sir. I am just pointing out that it has some of the incidents of running with the land.

Q Is there something in the record that indicates that residents of these specified areas are automatically qualified for membership?

A No, they do not automatically; they are always subject to the condition of approval by the Board. Is that what you mean?

Q Yes, also; but is there something in the record that indicates that the Board automatically gave approval to residents? Perhaps the Board had the right to approve them, but does the record show that, just as an automatic matter, residents of these specified areas qualified for membership without more?

A Except that we pointed out on page 7 of our brief that there had been 1183 membership shares issued in this corporation.

Q Is that in the record?

A Yes, sir. Pages 125 to 126, I believe. It is on page 7 of the brief, the record citation.

Q Have there ever been any rejections?

A The record only suggests, as Mr. Harris indicated, that there was one possible rejection at one time, but there is no indication in the record as to why that rejection occurred.

Q Do you agree with him that people who are not residents of these specified areas may apply for membership?

A There is some evidence in the record, yes, that people who are not residents of those areas may apply, because there is this clause which provides that the area is sort of elastic. It can be extended by the Board of Directors.

But I would point out that these considerations are not really controlling, that is, the elasticity of the boundaries. I mean, under Section 1981 and 1982 of 14 U.S.C. the question is, do we have the incidence of a contract precedent in this case, do we have the incident of either personal and/or real property? The fact that it may or may not be an incident of real property alone is not the controlling question.

I would like to mention two or three other things. For one thing, Mr. Harris suggested that if damages are not allowed Dr. Freeman, the case becomes moot because he is not entitled to injunctive relief. We do not believe that is so.

Dr. Freeman, for example, is in the Foreign Service

of the United States. He can return to this area at any time and he should be entitled to injunctive relief to prevent future recurrence of the discrimination if he should move back into the house, for example, where he lived before or some other house in the neighborhood subdivision served by this association.

Q May I ask you a question that hasn't anything to do with the merits, but how far is this club from Hunting Towers?

A It is about four miles south of there, sir, near Fort Hunt Road. It is about halfway between Hunting Towers and Mt. Vernon, off Fort Hunt Road, and it is in an area surrounded by residential areas except on one side where it is contiguous to a school yard, the Bucknell Elementary School. A public school is contiguous on one side of this property.

Q Is that the name of the locality, Buck Hill?

A No. Bucknell.

Q Bucknell. Oh, yes.

A That is correct, Bucknell.

Q Before we get away from that procedural point, could you tell me this: What is the scope of our review of the action of a State Court in interpreting its own jurisdiction? Do we, for example, reverse if we simply disagree with it, would have arrived at a different decision, or is there a higher standard that must be met?

A The question, I think, as I would read the

decisions, is whether the State Court denied the appeals in this case on arbitrary grounds, if it acted arbitrarily and unreasonably, not jus did it misinterpret its own rule.

I may be wrong on this, but as I understand it, the court will inquire into the reasonableness of the interpretation the State Court has given to State procedure.

Q Yes, but the consequence is that if we do not agree with the State Court, what we would say is that this is not an adequate State ground and we would get to the merits here.

A Correct.

Q We wouldn't remand it to the State.

A That is correct, absolutely. You would decide the case on the merits here. There are a number of cases that we have cited in our brief on this issue.

The one thing that we feel is particularly important is that the case not be remanded to the Virginia Supreme Court of Appeals, because they have already ruled that they do not have jurisdiction in the case, and we have pointed out, for example, the case of Naim versus Naim, in our brief, which involved a test of the Virginia antimicegenation laws where the Virginia Supreme Court, under circumstances quite comparable to this, refused to accept the remand and completely frustrated this Court's mandate by failing to provide the kind of relief that the Court had directed it to provide.

So we submit that this case should be treated as one being on a writ of certiorari to the Circuit Court of Fairfax County, and it should be returned to the Circuit Court of Fairfax County for entry of a decree as ordered by this Court and for the assessment of damages, that that is the only issue and that it should go directly back to the Circuit Court of Fairfax County.

Q If you have a decree, I understood from your adversary that the court hadn't passed on the merits of the case. Is that right or not?

A The Virginia Supreme Court of Appeals refused to accept the appeals and, therefore, it is no different from a situation where a highest court, in the exercise of its discretionary jurisdiction, decides that it won't review the case, and that is what the court did here, in effect.

There are no further matters for the Virginia Supreme Court of Appeals to decide, once this Court has answered the Federal issues involved, resolved the Federal issues involved. If that is so, then it should be remanded to the Circuit Court of Fairfax County.

Q But the Supreme Court of Appeals of Virginia has never touched the merits. Let's assume hypothetically that it was remanded there and they heard the case and decided with you on the merits. You would have all you wanted, wouldn't you?

A Sir, you have already tried to do that once,

with all due respect. You tried that once. You told the Virginia Supreme Court of Appeals to take the case back, reconsider it on the merits in light of Jones versus Alfred H. Mayer Company, and that court refused to comply with this Court's mandate.

There are cases in this Court reported that would suggest that an appropriate remedy in such an instance would have been for us to apply for a writ of mandamus against the Virginia Supreme Court of Appeals. We did not do that. We chose this method of seeking review on a writ of certiorari in this Court and have urged in our brief that this Court decide the case on the merits. We think that is way and above the appropriate thing to do now.

The Virginia Supreme Court of Appeals has already violated its responsibilities under the supremacy clause of the Constitution.

Q Can I ask you how many other swimming pools there are in these subdivisions listed in the by-laws?

A There are none to my knowledge in the subdivisions listed in these by-laws.

Q Private or public, either one.

A Private or public, either.

MR. CHIEF JUSTICE BURGER: Thank you. The case is submitted.

(Whereupon, at 2:05 p.m. the argument in the above-entitled matter was concluded.)