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Supreme Court of the United States

October TERM, 1969

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In the Matter of:

Docket No. 60

E. S. EVANS, ET AL.,

Petitioners

vs.

GUYTON G. ABNEY, ET AL.,

Respondents

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Place Washington, D. C.

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ENHAM

1 IN THE SUPREME COURT OF THE UNITED STATES

2 October TERM 1969

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4 E. S. EVANS, ET AL.,	)	
5 Petitioners	)	
6 vs-	)	No. 60
7 GUYTON G. ABNEY, ET AL.,	)	
8 Respondents	)	

9 - - - - - - - - - - - - - - - - -

10 The above-entitled matter came on for hearing at

11 1:50 o'clock p.m. , on November 12,

12 BEFORE:

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

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Number 60. Evans and others against Abney and others.

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

ORAL ARGUMENT OF JAMES M. NABRIT, III, ESQ.

ON BEHALF OF PETITIONERS

MR. NABRIT: Mr. Chief Justice, and may it please the Court: This case is here on certiorari to review a judgment of the Supreme Court of Georgia. It is the sequel to Evans versus Newton, decided here in January 1966. The issue then was whether the Georgia Courts could substitute private trustees for the City of Macon in order to permit a municipal park given to the city in a will probated in 1914 to continued to be operated only for white people as the testator directed. That part of the controversy was settled by this Court's decision, which is now the law of the case, but the park is subject to the 14th Amendment prohibition of racial discrimination. The issue now is different and I think radically different. It is whether the decision of this Court can be practically frustrated and subverted by the holding law here, the holding ofthe Georgia courts that a municipal park is forfeited and ereverts to the heirs of the long-dead testator, merely because the Constitution in this Court's decision requires that the City admit Negroes to the park along with whites.

The Petitioners are Negro citizens of Macon, who

argue that Baconsfield Park must be operated as a public park without racial discrimination and we contend, for several reasons that the Georgia Court's ruling that the public must forfeit this park to the testator's estate, violates the Federal Constitution. Specifically, the Supremacy Clause of Article 6 and the Equal Protection Clause of the 14th Amendment.

Now, the factual record in this case is also radically different in that it is much more complete than the record in Evans against Newton. Let me briefly describe the background of the case.

Augustus Octavius Bacon died in 1914. He had been elected for four terms in the United States Senate and he was also a distinguished lawyer, who, it is relevant to note, had published the Disgest of the Opinions of the Georgia Supreme Court in 1872.

He wrote his own 32-page will in his own hand in 1911, and that will left Bacon's farm in trust with his wife and surviving daughter during their lives and after their deaths, in trust for: "The sole perpetual and unending use benefitting enjoyment of the white women, white girls, white boys and white children of the City of Macon."

The will made no provision for any reversion of the property; it was not a conditional gift. Rather, Bacon conveyed to the City and again I quote: "All right, title and interest in and to said property hereinbefore described and

bounded, both legal and equitable, including all remainders and reversions in every estate in the same with whatsoever kind."

Bacon's will provided that the land should be forever used and enjoyed as a park and pleasure grounds. And he said that under no circumstances should it be sold or alienated, or dedicated to any other use.

The will mentioned that he wanted the park a memorial for his two dead sons and that he had no descendants bearing the name of Bacon and he stipulated that the park should forever be known as Baconsfield. Now, as my adversaries emphasize, Bacon quite plainly stated that he did not want Negroes to use this park, and this was not, he said, because of any unkindness or want of consideration for Negroes, but because he thought that the two races should be separate in social relations and should not occupy the same recreation grounds.

So, we charitably concede that it violates Bacon's solemn intent for Negroes to use his park. But we also want it to be clear that it equally violates Bacon's intent to destroy the park and to revert it to the heirs. Now, he never contemplated this situation.

His will contains nothing to indicate that Bacon preferred that his park be destroyed and revert to his heirs, rather than to have Negroes use it. His intent on this question cannot be known; it's unknowable; and that's conceded in

1 the Opinion below and the brief in our petition for certiorari.

2 The City acquired Baconsfield, actually, in 1920 by

3 buying the heirs' interest during the life of Bacon's surviving

4 daughter, through an annuity of $1,665 yearly and the City

5 paid that to the heirs for 25 years. And it ultimately cost

6 the City over $41,000. Incidentally, that 1920 deed indicates

7 that the total land involved was 117.7 acres in 1917 -- 1920.

8 Since 1920 --

9 Q The reason for that was simply to accelerate

10 the transfer of the property to the City; am I correct in that?

11 A That's right. Bacon's surviving daughter

12 didn't die until 1944, and the City would not have had this

13 park until 1944, if Bacon's will had been followed literally.

14 But they got the park in 1920 and since then there's

15 been an accumulation of 50 years since then. There has been a

16 vast and direct investment of public funds. Of course, the

17 property has been tax-exempt for these nearly 50 years, and

18 that represents a large subsidy, but beyond this, the basic

19 development and landscaping of this park was done by the WPA,

20 the Works Progress Administration, an agency of the United

21 States.

22 The City Park Superintendent testified that until the

23 time he went out there with the WPA workers -- the Mayor sent

24 him out, he said -- Baconsfield was a wilderness, to use his

25 words. This was in 1935 -- it was just a wilderness and the

1 and the WPA under his supervision worked for a year or more
2 than a year cutting down the underbrush, laying out the
3 paths, digging the ponds, building benches and transforming
4 Baconsfield from a wilderness into a usable park.

5 Q Do you know of any reason, Mr. Nabrit, why the
6 -- assuming a reversion would be otherwise valid -- which, of
7 course, we haven't come to yet; do you know of any reason why
8 the reversion couldn't be subjected to the lien of all these
9 costs?

10 A I have not -- I have no knowledge as to what
11 the United States policy is on that. There are specific
12 statutory rights that the United States might have, which I am
13 going to come to, particularly with regard to the clubhouse
14 building that the WPA built, the major building on the property.
15 And in that case the Mayor of the City and the Treasurer of the
16 City, made specific assurances to the United States that this
17 property would not be released by the City during the useful
18 life of the improvements and further, amazingly, that there
19 would be no discrimination in this park. The City solemnly
20 swore hthat this property was for the public at large in 1939.
21 Their conception of the public didn't include Negroes,
22 apparently.

23 I didn't mean to evade your question about the land,
24 but --

25 Q I can well assume too, as to the litigation

matter, I can see why the clients you represent would not undertake to raise that question here.

A My clients' contribution has been the contribution of taxpayers generally to this park: city taxpayers and federal taxpayers; and in all these capacities they have an investment in this park.

The roads through the park were built by the city. The swimming pool out there that cost the city $100,000, the bathhouse which cost $40,000 in 1948, $17,000 worth of improvements added to that in subsequent years. All this was taxpayers' money invested in this property and all of this has been reverted if the judgment below stands.

The -- when we inspected this clubhouse building I mentioned a moment ago, with the Superior Court's permission, my colleague, William Alexander, found the WPA plaque -- all these WPA buildings have a plaque, you know. My colleague found this WPA plaque only with some difficulty in that women's clubhouse, because someone had hung a mirror over it during a redecoration so that --

Another plaque quoting a racial limitation in Bacon's will was rather prominently displayed. So, I think there is no little irony in that considering the solemn assurances of nondiscrimination that the city officials signed.

Now, all the maintenance in this park until 1964 was done by the City Park Department. They treated this just like

1 any other park and the man who had been superintendent since
2 1915 testified that he treated Baconsfield like all the rest
3 of his parks. The only exception was that some of the trust
4 income was used to add and beautify Baconsfield, in addition
5 to the city funds.

6 The trust property I quickly want to mention. It
7 reverted also, including the shopping center across the street
8 from this park that furnishes $5,000 or $7,000 a year annually
9 as income for the trust. It also includes $131,000 or more in
10 cash or bonds in the bank that they got when the highway con-
11 demned part of the property.

12 But this case involves more than who gets this money;
13 whether it's the people of the heirs; it involves a principle.
14 It involves whether or not the law is going to perpetuate this
15 kind of racism.

16 When Negroes began using Baconsfield in 1963 the
17 City concluded that it could not exclude them from the park
18 and that was obviously correct, since this Court had ruled as
19 early as 1955 that park segregation was unconstitutional; and
20 it ruled in 1957 that a municipal trust couldn't be discrimina-
21 tory in the Girard College case, Pennsylvania against the
22 Board of City Trusts. And the City's

23 And the City's answer in this case in the Superior
24 Court, stating that they couldn't discriminate, was filed, it
25 happens the day the District Court decided Wright against

1 Georgia where the Court invalidated Savannah's effort to keep
2 Negroes out of a city park.
3 When the Georgia Courts approved the City's resig-
4 nation to attempt to continue the park as an all-white
5 facility this Court reversed, no now, in response, the Georgia
6 Courts have ruled that the trust failed and accordingly we turn
7 toour arguments.
8 Q What did you say the Georgia Supreme Court has
9 now ruled?
10 A That the trust has failed and I am now about to
11 argue why I think that decision of Georgia Law violates the
12 command of the Federal Constitution.
13 Q With what consequence do they say the trust has
14 failed?
15 A They say that the trust has failed and accord-
16 ingly the land and the other assets revert to the donor's
17 estate as a resulting trust and that, therefore, it is to be
18 distributed as part of his estate in accordance with the will
19 provisions for the individual estate.
20 Now, I think each of the four arguments we make is
21 sufficient to justify a reversal. Let me identify the four
22 arguments, each in a sentence or two before beginning to develop
23 the first one.
24 The first point is that the decision below which
25 forfeits public property, applies a sanction against the

1 Federal interest and violates doctrines of national supremacy
2 running all the way back to McCulloch against Maryland. The
3 forfeiture is effected in a way it happens which also dis-
4 courages desegregation and it is done without any justification.
5 The second point we will make is that --
6 Q Could I ask you a question: would you be
7 making that argument if there had been a specific prövisionary
8 clause in the will?
9 A Well, Mr. Justice Harlan, I think that the
10 -- that I would argue if I had to face that more difficult
11 question --that our legal system, that our courts can't be used
12 by dead men to perpetuate their bigotry in the law and that
13 racism has to die with the bigot and that the legal system can't
14 give it perpetuity.
15 So, I don't believe if I had the case here, that I
16 would concede -- I believe that I would argue that a racist's
17 trusts can't be enforced, but I don't think
18 Q Well, you haven't got that case here, then?
19 Q Suppose, since we have you stopped for a moment,
20 suppose you had a case where the donor in 1925 to '30 had given
21 land for use as an airport and for no other purpose, either
22 with a private diversionary clause in the gift or subject to a
23 state reversion by law, and then time passed and the city grew
24 and the airplanes got bigger and needed longer runways and by
25 rezoning it became infeasible to run an airport on this land,

1 so that you have a comfortable posture: illegal to use it for
2 the original use? Would you see any parallel there or is that
3 a totally different kind of problem?

4 A The way we analyze this case, Mr. Chief
5 Justice, and this has to do with the second argument I was
6 going to summarize, is that hasn't quite happened here. We
7 don't think the use -- the purpose of the trust has become
8 illegal in our case. The park is still there for the white
9 women and children and boys of Macon to play in. Nothing has
10 happened which keeps them -- the beneficiaries from getting the
11 benefit of the trust. Now, something has happend which keeps
12 them from getting the sole use and Bacon ordered them to have the
13 sole use, to be sure, but --

14 Q The purpose described in the limiation is
15 illegal now, isn't it?

16 A No, I think not. The purpose of providing a
17 park for the white women and children can still be fulfilled.
18 They cannot have sole use of it; Negroes have to be admitted,
19 too. But the part is that Negro use in this kind of a situa-
20 tion, at least, where you have a vast parkland -- Negro use
21 doesn't diminish the white use. It's not a case -- as for
22 example, where you have a trust fund and if led to one group
23 would have to be divided with another group, the amount left
24 for the first group would be diminished. That kind of trust,
25 if a trust for whites only had been declared -- a scholarship

1 fund had been declared unconstitutional in Evans against
2 Newton, it would be plain. But the whites would have less if
3 they had to share it with the blacks. But that's not true in
4 a public park. There is nothing that has happened -- the white
5 children of Macon today are, in fact, using Baconsfield park,
6 although a stay is in effect and that the park is there open
7 to the public, right today.

8 So, I think it's not like an airport where the run-
9 ways are too short for the planes. The park is big enough for
10 everybody.

11 Now, the third argument, and -- well, let me make an
12 overall point. I think there is nothing special about trust
13 laws that exempts them from the commands of the Equal Protec-
14 tion clause, nor does the fact that the law involved is the
15 common law, and not statute law, place it outside the reach of
16 the constitution.

17 We make this point as amply established by the
18 decision last term in Presbyterian Church against the Hull
19 Church where the Court unanimously concluded that Georgia
20 Courts deciding a common law trust law must do so in conformity
21 with the First Amendment guarantee made applicable to the
22 states by the 14th Amendment. And numerous cases in different
23 contexts make the point about common law judgment a law being
24 subject to the 14th Amendment.

25 New York Times against Sullivan makes that point in

1 very plain language, that the state's libel law has to march to
2 the 14th Amendment. In Edwards against South Carolina, in-
3 volving a common-law crime, illustrates the same idea in
4 another context.

5 Of course, trust law is normally a matter for state
6 determination; of course Georgia has the last word in deciding
7 its common-law trust as a general pattern; but that's only
8 opens the question, we submit, of whether the law as served
9 by Georgia conforms to the command of the constitution. And
10 it's to that question that I addressed myself with these four
11 arguments.

12 A fifth argument, as I indicated, is rendered in the
13 fundamental proposition announced in McCulloch against Maryland
14 in 1819. The states have no power to take action hostile to a
15 national interest; that even as then, when using the basic
16 taxing power, may they penalize the Federal interest. And we
17 think the decision below violates the command of Federal
18 supremacy, not because this Court's mandate has been directly
19 flouted, but rather because the state has decreed that valuable
20 city property has to be forfeited entirely on the grounds that
21 the constitution and the decision of this Court require that
22 the City admit Negroes to Baconsfield.

23 We complain not that there would still be segregation,
24 we can't know how the heirs will use the land, we complain
25 about the fact of the forfeiture itself and this valuable

1 facility which is valuable to the taxpayers in part because of
2 the -- value and part because the taxpayers have added to it in
3 multiple ways. It is being taken away solely to prevent
4 Negroes from using this park.

5 This is a direct, drastic sanction against compliance
6 with what the constitution compels and this Court's decision
7 compels.

8 Now, here the sanction as the added characteristic
9 and the added impact of discouraging desegregation, just as in
10 the Prince Edward County school closing case. The closing of
11 the park conveys to Negroes unmistakably the plain message
12 that if you assert your 14th Amendment rights it won't get you
13 anything. All you will do is spoil the parks for everyone and
14 that, obviously discourages compliance with the constitution.

15 The only possible justification that might offered
16 from such a forfeiture would be a clear direction by testators.
17 Bacon made no such choice; the Georgia Courts made this choice.

18 Now, Respondents argue that the trust failed auto-
19 matically on January 17, 1966 the day, the moment this Court
20 announced its decision. That's a groundless and artificial
21 argument. They never adopted until more than a month later.
22 The minutes of their board meeting at page 346 of the Appendix
23 show that the Board of Managers of Baconsfield discussing this
24 decision, didn't conclude that it reverted. It was only after
25 the Georgia Supreme Court in March said it that it reverted to

1 this position became announced.

2 What then do you get? The only solid jurisprudential

3 view is that the Georgia Law comes from human decision and this

4 is the premise on which such basic law as in Erie against

5 Tompkins stands.

6 I've talked a little bit about our second argument.

7 The fact that nothing's happened which prevents white women

8 and children from using the park, and the point we make in our

9 brief is that the only manner in which the state court could

10 have logically reached its conclusion in the uses of the trust

11 had failed is by the legal premise, an implicit legal premise

12 that Negro use as a matter of law, diminishes the white use

13 because Negroes are, per se, offensive and obnoxious. Such a

14 ground, we say, imposes a badge of inferiority on blacks which

15 the 14th Amendment prohibits.

16 We do not contend that this was consciously the

17 theory adopted; they never said anything like that. What we

18 contend is that's the only logical foundation on which it can

19 rest.

20 This case might be more difficult if the Court below

21 had no alternative under its law, but there are no Georgia

22 decisions, no one has come up with any set of Georgia case law

23 that forced this result. The Cy Pres statute offers a plain

24 alternative and the only case that's ever been cited --

25 Respondents don't cite it here, but they do in the Court below,

1 is the Adams against Bass case. In 1855 Georgia refused a
2 to apply Cy Pres to resettle slaves in certain states on the
3 grounds that the particular states would not receive them and
4 that's the only case it's found before the Civil War Amend-
5 ments, and in any event, it had to be written along with
6 Georgia law which made it illegal to free the slaves.

7 A third argument, which I will not have time to
8 argue, because I would like to reserve some of my time. But I
9 will state it /It follows the reasoning in Mr. Justice White's
10 concurring Opinion in Evans against Newton. We would add to
11 that only that this Georgia Law in 1905/which provided for racially-
12 oriented parks -- it facilitated testators making grants of
13 this kind. But beyond that we think that the law plainly
14 encouraged racial discrimination and, as Mr. Justice White's
15 Opinion in 1966 stated, we think, incurably taints the racial
16 condition in the trust and we think that tainted provision
17 should not be given any effect; should not even be given effect
18 in effecting the reverting.

19 Q Mr. Nabrit, would it have been illegal for him
20 to -- for the testator to have left the park for joint use of
21 whites and Negroes?

22 A I think as to joint use of while women and
23 children and Negro women and children I think there is plainly
24 no authorization for it.

25 Q As a matter of trust law or --

A Well, I'm talking about 69504.

Q Was there a law against whites and Negroes using public parks together?

A I am -- I have not found a law making it a crime statewide. There were certainly local laws of that kind. There was one in the Holmes case. I know of none applying to Macon in 1914 -- 1920.

Well, let me amend that. Section 69505 which is the companion to 69504, made it the obligation of the city to use its police powers to enforce the racial provision in Bacon's trust. So, as soon as -- as the city interpreted Bacon's trust, Bacon's commendment of racism did become the law of Macon, and for that reason, additionally we urge that case ought to be treated like an invalid city code.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Claiborne.

ORAL ARGUMENT BY LOUIS F. CLAIBORNE,

DEPUTY SOLICITOR GENERAL AS AMICUS CURIAE

MR. CLAIBORNE: Mr. Chief Justice and may it please the Court: It seems to us relevant that this case is both a wills case and a parks case; either one alone, but both together. And yet it's not a case about how to construe a will nor is it even a case about which restrictions in wills should be enforced or even which racial restrictions are bad, and which should be ignored. We are dealing with a racial

1 restriction made some years ago -- a half century ago and the
2 question is: what effect, if any, can be given to it now,
3 half a century later in light of the constitutional rule which
4 has become clearer in that span of time.

5 But importantly also, we are dealing with the
6 provision in the will that affects not any sort of property,
7 but public property, a public rfacility of some substance here
8 in the City of Macon. And in that sense we're concerned with
9 the question of whether a public facility shall be closed be-
10 cause the rule of nondiscrimination has been held to apply to
11 it, which this Court held two terms ago.

12 We're not saying simply that state courts can never
13 enforce a restrictive covenant or restrictive provision in a
14 will. We're saying, rather, that a provision which has been held
15 unenforceable -- no question about that at this point -- this is
16 not Shelley and Kraemer. The Court has held that this restric-
17 tive covenant with respect to this park cannot be enforced.

18 So, the question is rather, whether indirect effect
19 can be given to that provision by decreeing a reversion, the
20 effect of which is withdraw a public facility from the munici-
21 pality which otherwise enjoyed it, from all the people in it,
22 and it did so with the inevitable impact and effect of dis-
23 couraging those, who in similar circumstances would sue to gain
24 entry as they have a constitutional right to do with they are
25 dealing with this sort of public facilities.

We might rest on the proposition that when these factors coincide the state court cannot effectuate a racial covenant by decreeing a reversion even if the testator had provided specifically that that should be the result in the event that segregation were no longer possible in his public facility.

It seems to us, however, that this case is a good deal easier, because here, clearly the state court had alternatives. We're not faced with Senator Bacon's clear intent that in these circumstances there shall be a reversion. Nor are we faced with a state law that does not provide for such accommodation when the exact intention of the testator is impossible. We're not faced with of those few states where Cy Pres is the law.

Here we have a Georgia law which on its face seems to permit carrying out the dominant purpose of the testator, and varying some of his incidental provisions when they become impossible of performance, as here the racial provision has become impossible of performance.

The case is easier, both because it seems more obvious that the Georgia Courts had options and because, having options and having seemed to strain, the injury is all the greater to those who -- because of whose threatened presence in the park the gate is closed. Whenever the state is seen to have strained on the fact of it in order to prevent the rule

1 of desegregation from going into effect, obviously the
2 injuries to those excluded is all the greater and the dis-
3 couragement in like circumstances is clear.

4 Q What would you think, Mr. Claiborne, about the
5 hypothetical case I suggested to Mr. Nabrit. The illegality
6 which is used to trigger a reversion was a rezoning which had
7 made the use of the land no longer feasibly permissible as an
8 airport.

9 A I would think there were two answers Mr. Chief
10 Justice: the one Mr. Nabrit gave, which is that in that circum-
11 stance there would be no way of approximating the purpose of
12 the testator in providing funds for an airport.

13 Q Well, now are you talking about some form of
14 cy pres?

15 A In that circumstance cy pres would not seem to
16 offer an obvious alternative. But, more importantly, from the
17 point of view of this Court, there would seem to me to be no
18 Federal Constitutional question there because there is no denial
19 of Equal Protection in those circumstances. Here we are
20 dealing with the withdrawal fromthe public of a public facility
21 which injures everybody. We are dealing with a withdrawal of
22 a public facility on account of race, which in both concrete
23 and other ways, injures a particular class of citizens.

24 Q But it injures them all equally, does it not
25 here?

A I think in several respects it does not injure them all equally, Mr. Chief Justice.

First, it is, I think, plain that the least advantaged members of the community have the greater need for the park and therefore, suffer more by its closure. But that is a small part of our argument.

It does favor discrimination and discourage challenges to discrimination in comparable circumstances when challenging the exclusionary policy of any public facility which is subject to this sort of provision. And when the result is that the facility is closed and you gain nothing by it, obviously there has been a discouragement to the exercise of the constitutional rights to seek entry on a nondiscriminatory basis to public facilities.

And finally, there is always the injury which results when the state puts its power, its prestige, its official declaration on the side of discrimination, and says, in effect, "The entry of these Negroes to this park would be so obnoxious that we presume Senator Bacon would have closed his park rather than to have allowed them in."

Q Supposing Senator Bacon -- supposing the day after he died this Court had handed down an Opinion and said the park could not be run as he directed it be run and his heirs had, two days later, raised the question on it and challenged it, would you make the same argument you are making now?

1 A I think --

2 Q Not so dedicated to the public that it couldn't

3 be withdrawn?

4 A I think that argument might be available, Mr.

5 Justice Black. I think this case is far stronger, because the

6 park has operated a half a century as a public facility, which

7 not only increases the injury which results in its closure,

8 the implications involved in that closure on account of race,

9 but also in the traditional terms of the cy pres doctrine the

10 effort to continue a rule which has taken effect, which has

11 been in existence for some time, it recognized as being much

12 stronger than the event --

13 Q You mean constitutionally stronger? What pro-

14 vision of the constitution would make it stronger after the

15 years?

16 A There, I think it's only in terms of the injury

17 Mr. Justice Black. But also in terms of the options available

18 to the state. After all, Constitutional Law is some venture of

19 or question of possibilities and alternatives. When the al-

20 ternatives are evenly balanced it may be that the constitution

21 views the act as neutral. When withdrawing a public facility

22 after half a century, is done for the sole purpose of avoiding

23 the mixing of the races in that public area, it seems all the

24 more a reflection of an official policy against desegregation

25 and that is constitutionally wrong.

1 This case, it seems to us in the end, when we talk
2 about the Georgia Court having preferred one option to another,
3 we don't, of course, include the individual judges the state
4 of Georgia Courts involve. The case would be perfectly clear,
5 I suggest, if the Georgia Courts had been applying a state
6 statute which provided in these terms "whenever a racial
7 restriction is included in a rule which establishes a public
8 facility, notwithstanding any indication as to the testator's
9 intent as to what should happen when that racial restriction
10 can no longer be enforced, there shall be a reversion." That
11 would be the clearest indication of the State's singling out
12 this condition as critical as distinguished from all the other
13 circumstances and cy pres would be applied.
14 That is really this case. For these reasons we
15 suggest that the judgment below should be reversed.
16 MR. CHIEF JUSTICE BURGER: Mr. Jones, you have only
17 about three minutes. Do you wish to outline a few preliminary
18 matters for us?
19 MR. JONES: Yes, I'll take advantage of that oppor-
20 tunity.
21 ORAL ARGUMENT BY FRANK C. JONES, ESQ.
22 ON BEHALF OF RESPONDENTS
23 MR. JONES: Mr. Chief Justice, and may it please the
24 Court: The case for the Respondents can be stated very simply,
25 I believe.

1 Senator Bacon devised his property in trust for the
2 sole and exclusive benefit of the white women and children of
3 the City of Macon. This Court decided in Evans versus Newton
4 that Baconsfield cannot be operated in accordance with that
5 racial restriction, even by the City of Macon as Trustee, or
6 by private trustees, excepting in acting in accordance with
7 that decision, the Supreme Court of Georgia then held that
8 under State Law the sole purpose for which this trust was
9 created, applying several rules of construction under state law
10 had failed. That the trust terminated for that reason without
11 regard to the racial limitation in the slightest. And because
12 of the state statute providing that whenever a trust fails for
13 any reason, a resulting trust is implied for the benefit of the
14 donor or testator or his heirs because of that statute, again,
15 having nothing to do with race or discrimination in any respect
16 this property reverts under state law back to the heirs.
17 Q How long has that atatute been passed?
18 A Your Honor, it's a statute of long vintagé.
19 It's predated to 1911 when this will was made. And for -- as
20 far as I know, it has been a majority law for a hundred years
21 or more. I càn get the exact date if the Court would like to
22 have it, but it's a statute of long standing.
23 So, our position is, may it please the Court, that
24 the decision of the Georgia Supreme Court involved nothing more
25 than the application of state law to a state will and is

completely consistent with the holding in this Court in Evans versus Newton. We say that no constitutional rights of the Petitioners in this case have been denied and respectfully ask that the Supreme Court of Georgia's decision should be upheld.

I'll complete my argument tomorrow.

(Whereupon, at 2:30 o'clock p.m. the argument in the above-entitled matter was recessed, to resume on Thursday, November 13, 1969 at 10:00 o'clock a.m.)