Supreme Court of the United States

October [redacted] TERM, 1969

In the Matter of:

E. S. EVANS, ET AL.,

Petitioners,

vs.

GUYTON G. ABNEY, ET AL.,

Respondents.

Docket No. 60

Pt. 2

Place Washington, D. C.

Date November 13, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

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C O N T E N T S

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No. 60

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The above-entitled matter came on for argument at 10:12 o'clock a.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: You may proceed whenever you are ready.

ORAL ARGUMENT BY FRANK C. JONES, ESQ. (Continued)

ON BEHALF OF RESPONDENTS

MR. JONES: Thank you, sir.

Mr. Chief Justice, and may it please the Court: Before attempting to reply in detail to the arguments of Counsel for the Petitioners and the Assistant Solicitor General I'd like to address myself briefly for the record; particularly because when this case was here before, there was no factual record before the Court.

It seems to us, first of all, that the exact language of our Item 9 of Senator Bacon's will is of great importance to every question which is presented in this litigation. After first directing that this property -- something over 100 acres originally -- be held in trust for the benefit of his wife and daughter during their lifetime, Senator Bacon then provided following the death of the last of them for the creation of this charitable trust, using the following language and with the Court's indulgence, I quote:

"in trust for the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon, to be by them forever used and enjoyed as a park and pleasure ground, subject

to the restrictions, government, management, rules and control of the Board of Managers herinafter provided for; the said property under no circumstances, or by any authority whatsoever, or at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorized.

He further stated: "I take the occasion to say that in limiting the use and enjoyment of the property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Nigras, or colored people. I am, however, without hesitation in the opinion that in their social relations the two races, white and Nigra should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

And finally, in explaining the motivation for this bequest, Senator Bacon stated first of all that it was in appreciation for the citizens of Macon for the public honor that had been bestowed upon him, but especially it was a memorial to his two deceased sons. Using the language, I should, at the same time, link their memories with the pleasures and enjoyments of the women and children and girls and boys of their own race in the community in which they once formed a happy part.

Now, we submit that Senator Bacon's purpose and intent was stated as clearly as possible in the English language.

There are no conflicts or inconsistencies in his language. He spelled out one purpose and one purpose only, and that was the operation of a park on a racially-restricted basis for the sole and exclusive benefit of the white citizens or segment of them, of the City of Macon.

Q What was the provision in the will as it respects the use of the park by white adults?

A It was provided, Your Honor, that with the permission of the Board of Managers, which I will speak about in just a moment, that white men of the community would be permitted to use the park. That was a discretionary use in the discretion of the Board of Managers.

Q Does the record show how that provision was administered?

A Yes, sir, I think a fair statement in the record states that white men were permitted over the years to use the park freely without restriction.

It seems to us that the argument that there were two purposes, a permanent park on the one hand and a park only for white persons only on the other, simply cannot be supported by any fair reading of the language of the will itself.

Next, I'd like to direct the attention of the Court briefly to the matter of the city control of the park. It seems to us that opposing counsel have attempted to create the impression that the City of Macon somehow wound up with what

amounted to fee simple ownership of this property. We say the record not only fails to support this conclusion, but clearly shows the contrary was true.

To begin with, although Senator Bacon in the will named the City of Macon as the trustee and authorized it to appoint the first Board of Managers, he gave the city no power whatever with respect to the operation of the park. Instead he provided that the seven-member Board of Managers, which would be a self-perpetuating body, subject only to the right of the City to confirm any successor appointment to that Board. "Shall at all times have complete and unrestricted control and management of the said property, with power to make all meaningful regulations for the preservation and improvement of the same and rule to the use and enjoyment thereof; with power to exclude at any time any person or persons of either sex who may be deemed objectionable or whose conduct or character may by said Board be adjudged or considered objectionable; for such is to render for any reason in the judgment of said board, their presence in said grounds inconsistent with or prejudicial to the proper and most successful use and enjoyment of the same, for the purposes herein contemplated."

Again, it seems to us, by the clearest possible language Senator Bacon vested total control of the operation of the park, not on the City of Macon, but in this independent group of private citizens. He authorized the Board furthermore,

to use a portion of the property lying to the east of the street now known as North Avenue, "in any manner they may deem best," for producing income to defray expenses connected with the operation, management and preservation of the property." And in various other ways gave it total and absolute control

The Board of Managers was not made answerable in any way to the City and the City had no authority to remove any member of the board or otherwise exercise supervision over it in any way.

The record further shows that the Board of Managers did, in fact, exercise completelmanagement and control exactly as contemplated by Senator Bacon. The record includes detailed minutes of many meetings of the board over a period of 30 years in which the most minute matters were carefully considered and decided.

The record shows the City did nothing without the authorization and approval of the board. The City's conduct and interest in Baconsfield was at all times completely consistent with its limited status as holder of the naked legal title. At no time did the City treat the property as being "Public property," as has been referred to in the brief of opposing counsel.

The City did not treat this property in the same way at all that the City treated the 40 or 50 other city parks which were owned in fee simple by the City. I think an

excellent example of this is the way in which the swimming pool that's been referred to in this case before, was handled.

The land on which this pool was constructed was not in the park proper, but in the income-producing area lying to the east of what is now known as North Avenue. The pool was constructed in 1948; it was constructed on property that was leased by the Board of Managers to the City of Macon. A copy of the lease is in the record. I think reference to it clearly demonstrates that it is a standard lease similar to the other types of leases of property in the income-producing area. The lease carefully recites that the premises pool to be constructed by the City shall be used and operated in accordance with Item 9 of Senator Bacon's will. And in accordance with the rules and regulations of the Board of Managers. And it was provided with the Board to terminate the agreement in the event of a breach not corrected within five days after this notice.

I think it is self-evident that if the City of Macon had ever at any time regarded this as being public property in the sense in which that expression has been used in the brief of opposing counsel, there would never have been any such lease arrangement as was worked out with respect to the swimming pool.

Counsel have suggested in this case that there is some significance of a special nature to the 1920 deed that's been referred to. I think as we pointed out completely inour brief that that had absolutely no effect upon the nature of the

interest of the City. It was provided, as I pointed out, that the charitable trust would not come into being until after the death of the survival of Senator Bacon's widow and two children. And the sole purpose, as the record clearly shows of the 1920 deed was to make it possible for the vesting of possession in the City as trustee, to commence in 1920, rather than being postponed until the death of the survival of those three members of Senator Bacon's family.

Mr. Chief Justice, and may it please the Court: When this case was here before there was no factual record of any kind before the Court. There was nothing specifically to show the extent of the city involvement at that time. Consequently the assumption is recorded in the Majority Opinion that it was there was a continuation of city involvement in the operation of the park.

The record now before the Court is a fully-developed record. It shows clearly and without contradiction that since 1964 when the City of Macon resigned as trustee and its resignation was accepted by the trial court the city has had no involvement of any kind or character with Baconsfield Park. No funds have been provided; no city employees have assisted in maintenance or preservation; there has been absolutely nothing in the way of involvement or connection by the city of Macon with the operation ormaintenance of this park.

The Board of Managers, since 1964 has provided all of

the funds for the operation and maintenance of the park, using the income produced from the leasers of property in the income-producing area for that purpose.

In 1968 to complete the record on that point receivers were appointed by the Trial Court and are continuing to operate the park just as the Board of Managers had done prior to that time, pending the final outcome of this litigation.

Q How many acres of land in this park?

A Your Honor, we now estimate it is about 50 to 60 acres. A substantial portion of the acreage was taken by a condemnation for an interstate highway. That 50 to 60 acres we believe, includes not only the park proper, but also the income-producing area of some five to ten acres lying to the east of North Avenue.

Q Who got the money for the condemnation -- condemned property?

A That money was received by the Board of Managers and is presently being held by the receiver as appointed by the Trial Court, pending the disposition of this litigation.

Q You say the City has never treated this property as public property?

A Yes, sir.

Q Did it treat it as public property in dealing with the United States?

A Your Honor, that is perhaps the sole exception

to the statement that I made. It is correct, as Mr. Nabrit and Mr. Claiborne have pointed out, that certain representations were made in documents furnished by the City of Macon in connection with the WPA financing. As to why that happened or the circumstances surrounding it, the record is silent. There is nothing in the record to show that the Board of Managers in any way authorized or consented to those representations by the City.

And save, and except that sole dealing with the Federal Government, I know of no instance inthis record in which the City has treated this as public property. Certainly, as far as the relations between the city and the Board of Managers is concerned, every action of the City has been consistent with its limited status as trustee and with the recognition of the park by the Board of Managers.

Q But they have been in charge of the improvements placed on this property, haven't they?

A No, sir. The Board of Managers has been in charge of the improvements. It is correct, as the record shows, that city employees had assisted in the operation and preservation of the park and city funds, obviously, to that extent were involved.

At the same time, the Board of Managers, as I was about to point out in connection with pre-1964 involvement, have utilized perhaps $100,000 or a figure right in the neighborhood

of money made available upon the income-producing property also for the preservation and maintenance of the park.

Q Well, what proportion of the maintenance costs were paid by city funds?

A Mr. Justice Brennan, that's very difficult to determine precisely from the record, but I was about to make the statement that it appears that at least 50 percent of the total cost of the operation and maintenance found its source under income produced from the income-producing property left by Senator Bacon. And that perhaps 50 percent or less of the total cost of operation and maintenance is attributable to city funds, directly or indirectly.

The record as complete as it is, is simply impossible mathematically to determine the exact percentage of support from the city and the Board of Managers.

In our view the evidence as to pre-1964 involvement by the City is largely immaterial to the issues that were presented in the present posture of this case. Now, I mention these facts solely because in our judgment, with due respect to opposing counsel, they greatly overemphasized the nature and extent of that involvement.

It is true, as I already pointed out, that WPA funds were made available in 1935 in connection with the development of the park, and city labor was made available thereafter for a period of perhaps 30 years in connection with the operation of

the park. But I will ask the Court to keep in mind, as the record shows that this property consists largely of grass and shrubbery and trees. Well over 50 percent of it, or at least 50 percent is in trees. The only structure of any kind on the property, other than in the income-producing area to the east of North Avenue, is the clubhouse that has been referred to by counsel in the argument yesterday.

As I mentioned just a moment ago, during this same period perhaps $100,000 of income attributable to Senator Bacon's own request, has also been used in the operation and maintenance of the park.

We would also direct the Court's attention to the fact that the record shows that in 1920 when the early vesting of possession in the city was agreed upon. At that same time $13,000 in bonds and interest that had been left by Senator Bacon for this purpose, were turned over to the city. And the city agreed to make a 5 percent annual payment on that $13,000 or $650. I think this is of significance in the whole picture. I would calculate that the amount of the principal and interest of the bonds that were turned over to the city in 1920, plus the five percent payments it was obligated to make would, over the years, have amounted to about $43,000.

So that to that extent, that part of the city involvement is attributable directly to funds left by Senator Bacon himself for use in connection with the development of the

property. That, in addition to the about $100,000 that came from the income on the income-producing property to the east.

Finally, with respect to that evidence, again I make the statement that the record never shows in any way that the city sought to exercise control in its dealing with the Board of Managers. But instead, everything that it did in those dealings, which is highly consistent with its limited status as holder only of the naked legal title, recognizing complete control in the Board of Managers.

This case, may it please the Court, has been before the Supreme Court of Georgia on three occasions; twice since the decision of this Court in Evans versus Newton. Shortly after Evans versus Newton was handed down in March of 1966, the Supreme Court of Georgia held that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated. This being based upon the decision of this Court in Evans versus Newton that it was impossible for Senator Bacon's trust to be carried out in accordance with racial restrictions.

It was further pointed out in the Supreme Court that the resulting trust under a Georgia statute was implied for the benefit of the heirs of the testator.

Incidentally, I have checked on that statute since yesterday and I have found that it's been in the Georgia law at least since the Code of 1863 which was the earliest available

code for my inspection. So far as I know, it's purely declaratory to the common law and has been in the Georgia Code since the first code was declared.

This case was amended by the Supreme Court of Georgia to the Trial Court for determination as to who were the heirs of Senator Bacon.

In the third and final appearance of this case before the State Supreme Court in December 1968, the decision with respect to which the writ was granted, the Supreme Court reiterated its holding with the trust it terminated from the state law, noting that Petitioners had sought no review of that holding by this Court.

It held further that the cy pres doctrine could not be applied under Georgia law and rejected various other contentions of Petitioners, including all of those urged before the the Court yesterday and today.

It held that, in short, applying state law, a trust created under a Georgia will and relating to Georgia property had failed. And, again under state law, the property had reverted tothe heirs of the testator.

Q I'd like to ask you a question, Mr. Jones. Perhaps the Petitioner will also answer it. Is there any contention in this case that in dealing with the cy pres statute the Georgia cy pres statute, the Georgia Court departed from the course of its decisions and that doctrine developed under

Georgia law?

In other words, is there any contention in this case that there has been a discriminatory application of the cy pres statute by the Georgia Court down there?

Your Honor, as I understand their position, they claim only it is discriminatory in its effect.

Q Yes, but that's not my question.

A I do not understand their contention to be that there has been any discriminatory application of the doctrine itself.

Q More concretely, if one looked at all of the Georgia cy pres petitions could you discern in those decisions something that indicates a different result than has been reached in this instance?

A Absolutely not. Your Honor, I think, as we have developed fully in our brief, the holding of the Georgia Supreme Court with respect to cy pres is completely consistent with the body of law that's been developed in the state. And the State Supreme Court applied the cy pres doctrine, as we read the decision and as I understand,what they did, totally without regard to the racial limitation being a feature in this instance. It was simply an application of state law to a will drawn by a Georgia testator.

Q Mr. Jones, -- exclusively to serve tuberbular patients and as time goes on there aren't enough people with

tuberculosis and the patients run out. I suppose there are scores of tuberculosis hospitals around the country that have been cy presed and who are serving other purposes, even though the testators have clearly indicated that they wanted the hospitals limited to tubercular patients.

Now, I wonder what the calculated significance of the Georgia Supreme Court decision of no cy pres. Clearly, just like the tubercular case it specified that the park must be limited to whites but that's only the beginning of the question -- the argument.

MR. JONES: Yes, I could answer that in two ways: first of all, the Supreme Court of Georgia construed the will, particularly the language which I quoted at the outset of my argument as saying that not just a purpose, but the sole and exclusive purpose of the will was to provide for --

Q I would suggest, then, that there are a lot of wills in gifts of tuberculosis hospitals and they have said the so purpose was so and so, and they have been cy presed.

A Your Honor,--

Q Well, go ahead. They said the sole purpose and therefore what?

A They said the sole purpose was the operation of the park for white citizens on a racially-restricted basis and furthermore, that under Georgia law, which I think is also general law, but at least the state law, that the cy pres

doctrine can never be applied in a way to defeat the intention of the will.

Q Yes, yes; but you say that the cy pres doctrine in Georgia has never been applied to cy pres into a different use in a situation where the testator said for a sole use; a sole use -- now, is that the end of the argument?

A Your Honor, I don't think that the Georgia Supreme Court decision was based simply on the language of the sole purpose.

Q Well, then, go ahead; what else?

A In addition to saying the sole purpose, it was further stated to be used exclusively by them and so forth and then the spelling out of Senator Bacon's personal social philosophy, that he was fundamentally opposed to the mixing of the races, and finally, the underscoring of this entire motivation with reference to his two deceased sons and the use and enjoyment of members of their race only of this park. I'm not seeking to justify that philosophy, but the Supreme Court of Georgia construed all of that language together under several principles of state law in manifesting a sole and indivisible purpose.

Q Do you think they meant this to ask what would Senator Bacon have done is he had known that a restricted park was unconstitutional?

A Are you asking me, sir, if the Supreme Court --

Q I just wondered if that's the approach they took?

A I don't think they took that approach at all.

Q Well, how would they say what his intention was if they didn't?

A Under the state law, Your Honor, by listening to the language of the will itself.

Q Well, I know, but what question are they answering? What would he have done if he had known that a restricted park was unconstitutional?

A No, sir; I don't think that's the approach.

Q Then you aren't talking about his intention, are you?

A I think it divides into two branches, Mr. Justice White. First of all, I think that the inquiry of the State Supreme Court was " what was the purpose of the trust as expressed by the creator himself?"

And secondly, having ascertained what that purpose was, could cy pres be applied? They concluded, first of all, that the sole purpose was, as I have stated, and secondly, that under the Georgia Cy Pres Statute, Cy pres applies only, first of all, where there is a general charitable intent and where simply is stated the mode of carrying that intent into effect. And secondly, cy pres has never applied where it would defeat the purpose of the intention of the testator.

Q Well, I would suggest that in Georgia the cy pres is applied all the time to defeat the purpose of the trust, because you suddenly find a trust serving a different purpose that it was; don't you?

A I don't believe -- obviously I can't speak with authority with respect to the cy pres law of any other state, but I don't interpret the holding of the State Supreme Court as being what you just suggested --

Q Any time it is suggested that a trust serve a different purpose than it did and the suggestion is refused.

A No, sir; I suppose, in all candor, it would be a questionof degree. That if there is a slight inability to carry out the terms of the trust, that would be one matter. But, the Georgia Supreme Court felt that from the language that was used there precisely and fully by Senator Bacon, that there simply was a total failure of carrying out his thoughts because of the decision of this Court in Evans versus Newton. That is, it was impossible to operate a racially-restricted park and that that was the sole and exclusive purpose of the creator of the trust.

I don't think they at all directed the inquiry as to what Senator Bacon's thoughts may have been 50 years later if he had been aware of the change of social philosphy and the change of the legal rulings, as well.

Q May I ask you one question about --

A Yes, sir.

Q -- judgment that the Supreme Court of Georgia rendered after the case went back -- the first judgment. Did you say that those who are contesting this now did not appear in that case?

A No, sir; they did appear in that case. They have appeared on both cases and since the case went back from this Court.

Q And what position did they take in that case?

A Your Honor, there was no oral argument before the Court and briefs were submitted or memoranda were submitted by the parties in response to a request from the Supreme Court of Georgia. I'm a little uncertain as to the exact position that was taken by Counsel for Petitioners at that time. Perhaps Mr. Nabrit can respond to that.

Q I assume that wouldn't change the -- to the legal questions --

A No, sir; not in the slightest, to my judgment.

Dealing with the questions one by one, very briefly: we submit, first of all that all of the Petitioners in this case ignore the distinction that must be made between the Federal question of the manner in which the park will have to be operated if it continued in existence as a park. And the state law questions involving the construction of Senator Bacon's will. As we see it, the Federal interest of Petitioners

is simply that if Baconsfield were continued in operation as a park, it would have to be operated on a non-discriminatory basis by whoever serves as trustee, in obedience to Evans versus Newton.

There is no basis in Evans versus Newton, as we read it, on the other hand, or any other decision of this Court, where Petitioner's argument that there is an additional Federal requirement that the State Courts must construe Senator Bacon's will in a manner that will result in Baconsfield continuing as a park, when such a construction would be very likely contrary to the clear expression of the testator himself.

As we understand the prior decisions of this Court the construction of a will and determination of amount of reversion are state law questions to be examined by State Courts.

It was pointed out by Mr. Justice Black in the dissenting opinion in Evans versus Newton, "so far as I have been able to find, the power of the state to decide such a question, that of diversion has been taken for granted in every prior opinion this Court has ever written touching the subject."

We ask that the Court keep in mind that this was in its inception, Senator Bacon's private property. It never became "public property." It was left in trust for the exclusive benefit of a limited class of persons. The racial limitation was the product exclusively of Senator Bacon's social philosophy and not that of the city or state.

As we see it when this case was amended to the Supreme Court of Georgia by this Court in Evans versus Newton, the Supreme Court had before it two facts that were controlling upon it.

First of all, this Court had held that Baconsfield could not be operated in accordance with the racial restrictions contained in Senator Bacon's will by anyone as trustee.

And secondly, the will itself is clear that he wanted a park operated only in accordance with the racial restrictions and not otherwise. That was further found as a matter of interpretation of the will by the Supreme Court of Georgia.

Q Is there any dispute on that -- as to that position?

A No, sir; I understood Mr. Nabrit to say to the Court yesterday that he conceded that the sole purpose of Senator Bacon was the operation of the park on a racially restricted basis; that he had sought to develop a thesis that two purposes can be found: one, a permanent park and secondly, a racially-restricted park.

Q Oh, but isn't his argument that certainly his purpose was tohave a park for whites, and you can still have a park for whites and that the revision defeats the purpose to have a park for whites.

A Your Honor, I understand his argument to be that, yes, but based on the --

Q Q But there was a purpose to have a park for whites, wasn't there?

A There was a purpose to have a park for whites only.

Q And in my view it was also that he didn't want a park for Negroes and whites together?

A No, sir; if I may respectfully disagree, the Supreme Court of Georgia and we interprete the will not as saying two things, but as saying one thing, and that is: the operation of the park only for white persons and not for the mixing of the races. Not to have two purposes: one to have a park for whites and secondly, a purpose that there not be any mixing of the races in the park, but a single indivisible purpose, and that was the construction and interpretation of the will placed upon it under state law by the Supreme Court of Georgia.

Faced, as we see it, with the impossibility of reconciling those three facts, the Supreme Court of Georgia then held that under state law the trust had failed and the property had reverted.

It seems to us that the State Supreme Court decision had nothing to do with racial discrimination as such, because that issue was eliminated by this Court in Evans versus Newton, holding the park could no longer be operated in accordance with racial limitations.

We disagree very strongly with a statement in their brief and I believe Mr. Nabrit repeated this in oral argument, that the Georgia decision might be cited: "For the proposition that State Courts may generally decree reversion of property for breach of a racial condition." It seems to us that by that argument they forget that this did not involve property purchased subject to a racial condition; nor does it involve property that was originally public; nor does it involve property that became public property, in the broad sense of that term. It was, in its inception, Senator Bacon's property. And it is fundamental, as we understand the law, that a person who creates a charitable trust may condition the use of the property.

We do not argue that a testator can require that the property be used in a manner contrary to law, but on the other hand we do say that the property may not be used in a manner violative of the express conditions imposed upon the use of the property, that under those circumstances there would be a failure of the trust and the property would go according to whatever the applicable laws of the state might be.

It seems to us further that the contention that Nigras might be discouraged by the decision of the Georgia Supreme Court from asserting their rights is a hollow argument. This was not, again, public property in the usual sense of that term. It was trust property, the use of which was subject to

conditions set forth in Senator Bacon's will. And as a practical matter, furthermore, it seems to us unlikely that there is a similar situation in existence anywhere in the country. And moreover, the Georgia decisions that heartily encourage similar testimentary trust because Evans versus Newton is now the law of the land establishing that first of all, a person cannot effectively devise or convey his property to a municipal corporation in trust with a racial condition. And secondly, a municipality cannot accept such a trust as trustee.

So, we don't see how the decision of the Georgia Court, which is in obedience to that mandate of this Court, could be said in any respect to encourage similar racially-oriented testimentary trust.

As we understand the effect of the arguments that are being made by Petitioners, they say that the Supreme Court of Georgia erred, not in applying Federal Law, but in its determination and application of state law. I'd like to comment specifically on that in more detail in just a moment, in replying to the argument of Mr. Claiborne for the United States.

Finally, with this branch of our argument, it seems to us that the mere recognition by the State Supreme Court that the trust has failed does not, in and of itself, constitute impermissible state action. The fact that the Georgia Court rendered a decision which is not in accord with the contention

of the Petitioners, doesn't mean in and of itself that the State has denied them any constitutional protective rights.

As we see it, one must have a right before it can be denied. And neither the Nigra citizens or the white citizens of the City of Macon had the right under Federal or State Law to require that Bacon's property be used as an integrated park in direct violation of the trust terms of his will.

We don't believe that persons belonging to a particular class or group or religion may create rights simply by asserting claims in a State Court and having them denied. And as we see it, that is the effect of the position of the Petitioners in the present case.

Q Well, what would you suppose would have happened in what we view the law, if the simply had simply opened the park to Negroes and whites alike?

A Rather than resigning as trustee?

Q Yes. Then the heirs of Senator Bacon sued.

A Your Honor, I think the posture of the case would still be the same when it got back to the Supreme Court, following Evans versus Newton, since the Trial Court had originally seen fit to remove the City as Trustee involuntarily. If the Trial Court had removed the City involuntarily in this case and it had come to the Court as it did in Evans versus Newton, the same result would have taken place. That is, the holding that the park could not operated as a racially-

restricted park.

I don't believe the Court suggested in Evans versus Newton that the City should be compelled to serve as trustee against its wishes.

Q You mean the State is entitled to use its courts to enforce a private discriminatory decision?

A No --

Q Contrary to the desires of those presently in possession?

A We do not take that position and don't feel that the is what has been done in this case. We feel --

Q Do youfeel that it would have been done in the case I pose?

A I think in view of the holding in Evans versus Newton that that would have been the effect of it; yes, because this Court has now established as the law of this case that the park cannot be operated either by the city or by private trustees, according to the racial restrictions. And that being so, I think the involuntary removal of the City as trustee would have been held by this Court to have been impermissible state action.

We are not seeing this as involving state action at all in what took place following Evans versus Newton, because it was purely and simply a question of whether or not the trust had failed and --

Q Well, if the City hadn't resigned and had merely opened the park to whites and blacks alike, and if then the State could not have enforced the kind of restriction in its courts, should this case be any different just because the City resigned?

A In the final analysis I don't think the fact that the resignation was voluntary, makes any difference on the questions that are now presented to the Court, because I think ultimately the questions -- the same questions would have arisen if, first of all, the purpose of the trust had failed and secondly, if so, what would happen to the property under state law?

With reference to the cy pres doctrine itself, again, I've largely set forth my thoughts in response to questions about it, but again I would make the point that the only concern of the State Supreme Court was whether the use of the park by Nigras would violate Bacon's restrictions? As a matter of his personal social philosophy he expressed the purpose set forth in this trust.

As we see it, the argument of cy pres is directly contrary to state law and it has been so held by the State Supreme Court, based upon two propositions I mentioned: first of all, cy pres is applied only where there is a general charitable intent and a failure of the mode of execution of it.

And secondly, under state law is never applied where

it would be directly contrary to the intent of the testator.

Q Mr. Jones, in that connection and I'll come back to the earlier question put to you by Mr. Justice Harlan: as I read the Petitioner's brief they claim that this was a new application, basically, of the cy pres law of Georgia. Now, this is on Page 57 of their brief: It is the application of Adams against Bass, and we remember what that case was.

"No Georgia case has been found in which a trust was allowed to fail, when beneficiaries and trustee were still in being, and when the intended benefit could still be received, merely because the trust could not be carried out in the manner directed by the settlor, or because its benefits were extended to a larger class, without in any way diminishing the enjoyment of the intended beneficiaries." And then a footnote to your position that: "Respondents speak of the case at bar as having been decided under 'well-settled principles of Georgia law,' that point out, but cite no cases anywhere to back this up."

A Your Honor, I will answer that this way: that the well-settled principles of state law are two code sections, which obviously set forth the law of the state as clearly as possible.

Secondly, we know of no case factually that is at all similar to this under the law of Georgia. But I take it that the best authority would be what the highest Court of the State held itself with respect to these very very --

Q To this case.

A I would assume that to be the most respectable possible authority that we could cite to this Court.

Q But I gather, and I think the claim is made that this case is a novel application or failure to apply the cy pras doctrine.

A Yes, sir. We disagree with that most strongly if it suggests novelty as far as the law is concerned. I think it's novel only in the factual situation that was presented to the Court.

Q Well, you have distinguished, as I follow your argument, Mr. Jones, between the situation in which the cy pres doctrine could be applied as to have a result which was in reason, consistent with the original, and one which is diametrically opposed. And you say, as I understand it, that there is no purpose to which they can put this park as a park, which would not be diametrically opposed to the expressed intents. Is that your argument?

A Yes, sir; that is my argument exactly. And I think that argument is well founded, first of all, in the language of the will itself, and secondly, the will has been so interpreted under Rules of Construction, by the State Supreme Court, that there was a single, sole, indivisible exclusive purpose and that it would not be possible now to operate the park without doing so directly in violation of the terms of

Senator Bacon's will and that that, and that alone, is the reason the trust failed under State Law.

Q And you think it makes no difference to those terms or term which no longer constitutionally permissible?

A Your Honor, obviously that made a difference in Evans versus Newton. I don't think it makes a difference in applying the Rules of State laws that were applied on remand to the Georgia Supreme Court. I don't think you can ignore any part of the will, even though it may have become constitutionally impermissible because of the decisions of this Court.

Still, under settled rules of construction it becomes the burden of the State Court to determine, first of all, the purpose of the creator, and secondly, if that purpose has failed as specified, whether or not cy pres can be applied. And they resolved both of those questions unfavorably to the Petitioner in this case.

Q On that theory, if I follow your argument, on that point, constitutional factors come into play only as to the use of the park; not as to the reversion?

A Yes, sir. As Mr. Justice Black stated in his dissenting Opinion so far as he had found at that time there has been no prior decision of this Court questioning the fact that the matterof reversion is a state law question.

We have cited in our briefs, other cases to the same effect, such as the holding of this Court in March versus

Alabama, where the point was made in the footnote very effectively that dedication has always been regarded as a state law question, that is: whether there was a dedication, and if so, the extent of that dedication.

It is our position, in answer to that question, that those are state law questions.

My time is about up, sir, and if I could take the last remaining moment to reply briefly to the contentions of Mr. Claiborne.

We received that memorandum only this past Saturday and I would respectfully request leave to make a brief written response to it. We have had no opportunity to do so prior to the hearing of yesterday and today.

MR. CHIEF JUSTICE BURGER: That will be granted.

MR. JONES: Secondly, as we see it, the entire of burden of the memorandum filed by the Solicitor General is that this Court should not accept the judgment of a State Supreme Court as to what is state law, but instead, should make its own independent determination as to what is state law.

As we see that would be, and ultimately, if followed to its logical conclusion, destructive of state judicial systems. As we see it all of the prior decisions of this Court have recognized that on state law questions the decision of the highest court of the state will be accepted by this Court.

Thank you, sir.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jones.

Mr. Nabrit, you have about five minutes left.

REBUTTAL ARGUMENT BY JAMES M. NABRIT, III, ESQ.

ON BEHALF OF PETITIONERS

MR. NABRIT: Thank you, Mr. Chief Justice, and may it please the Court:

It seems to me that Mr. Claiborne yesterday posed the question that I suggest must be confronted. Isn't it really true, as he said, that a state statute which provided in terms for what has actually been done in this case would be pretty obviously unconstitutional.

That hypothetical law would say something like this: that even if the testator expressed no intent on the issue of reversion and even if there were no difficulties in administering the park nonracially; and if the name beneficiaries could still get benefits and their benefit was not diminished, that a charitable trust with a racial limitation fails, if Federal Law prevents that racial limitation from being enforced.

And while you were urged yesterday, I don't think it really can make a difference if the rule I have just now stated is now Georgia's common law and not a statute law, really, the essence of the case, I think, is simply that Georgia, acting through its courts, has chosen to give special emphasis to the racial rule and to destroy a public park and give it away rather than to have it integrated.

By this decision the State has chosen to regard the racial rule as the essential and to reject the idea that a perpetual park is the purpose. A park for the benefit of white people does not become impossible or illegal, and this is clear, I think, if one accepts the simple proposition that the park still benefits white people even if Negroes are admitted at the same time to the park/.

And today it may be supposed that the Alexander School Number 3, a public school right across the street from the park is using that playground, and white and Negro children at that school are playing in the park today. If the judgment stands this will be destroyed.

Mr. Justice Harlan asked yesterday, if our position would be different if the testator provided for a racial reverter; and I said no. I think I should add to my answer that the definitive article on this subject was written by Professor Elias Clark in the Yale Law Review in 1957. And that article, I think, contains all the arguments that charitable trusts are really totally involved in state action, but the case relied on by the heirs, the North Carolina - Barringer case, I think shows the difference between that kind of case and the present.

In that case, which is discussed at Pages 47 and 48 of our brief, the North Carolina Court had two deeds before it and one deed had an express racial reverter and the Court gave

effect to it and we think that was wrong for the reasons I set yesterday.

But the other deed in that case didn't have -- it had a racial limitation but didn't provide a condition. The North Carolina Court said it wouldn't step in and make the racial choice. That's what -- and it's that -- something comparable to that second deed in the North Carolina case that we have here. The Judge of the Court had stepped in and made the choice that today no park is to be preferred to an integrated park. Bacon really didn't make that choice.

Q Which is that case?

A That's -- that case is the citation at the bottom of Page 47 of our brief. It is called the "Charlotte Park and Recreation Commission against Barringer, a decision of the North Carolina Supreme Court.

Q Thank you.

Q Mr. Nabrit, you have just said that Senator Bacon did not make that choice. The Georgia Courts said, if I read their opinion correctly, that he did make that choice. Do you agree that that's the predicate of the Georgia Supreme Court holding?

A No, I think not. I think they -- I don't read them to interpret Bacon's will to mean that this is anything other than what we contend: that he wanted a park and he wanted it for white people and he didn't want Negroes in it; that's the

purpose of the park. Now, there is no -- their decision was that when Negroes had to be admitted to the park somehow it would be impossible to have a park. It did become impossible to have an all-white park.

I am not -- to be sure there is a kind of equality created by destroying the park for everyone, since before only Negroes were excluded and now everyone is excluded, but that kind of superficial equality doesn't, for me, fulfill the state's obligation to afford Negroes the equal protection of the law, but what we object to is the forfeiture itself, and the message of that kind of forfeiture decreed by state law, it seems to me, is pretty plain.

It says something like this to Negroes: It says that the law honors a will leaving land to a city for whites only more than it honors your right to come on city property. And it says that your presence, even though lawful, so changes the character of a public park that the law prefers no park than a park open to you.

MR. CHIEF JUSTICE BURGER: I think your time is up, Mr. Nabrit.

I think I may have interrupted someone on this side of the bench to ask a question.

Q I had two questions I'd like to ask: What is your view as to whether or not this holding as to the state cy pres doctrine represented or did not represent a deviation

from prior Georgia law?

A My view is that there were no Georgia cases --

Q There were none?

A -- which clearly determined that the statute the two statutes Mr. Jones has referred to, set out on Page 55 of our brief, are what the Georgia Court was using. And that those statutes only have any meaning when the testator's intent can't be found. That's the only time that you use these statutes.

The first one: "When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor or founder, a Court of Equity will carry it into effect in such as way as will as nearly as possible effectuate his intentions."

Obviously Bacon's will couldn't be carried out exactly as he intended.

Q As I understand the Georgia Court's Opinion it said that the cy pres statute didn't come into play at all, because under Georgia Law, given the provisions that Mr. Bacon -- Senator Bacon's will is lacking the general charitable purpose.

And my question is:does that holding represent a deviation from prior Georgia Law?

A And my answer is the same, I'd say. We don't contend -- we have never found any case like this.

Q I just have one other question: Supposing this had been an entirely city-owned property and run on a desegregated basis, of course. Could the city have abandoned that park? For

A Well, for -- I think that where the city makes a present political judgment, prudential judgment, that it wants to abandon a public facility that that may be done. However, I think that that kind of decision is subject to examination by proper authorities as to whether or not its a subterfuge, as to whether or not they are really doing this as a method of thwarting desegregation, for example.

Q Now, there would be no Federal right in that would there, in the City making that abandonment?

A I think the qualification -- for practical purposes the qualification I made is the important thing. Because here the purpose is admitted. There is no doubt at all.

Q Where do you find that discriminatory motive which, in answer to my hypothetical you say would have given rise to a Federal right.

A I find that the discriminatory motive in this case, from the start to the finish, really; from the 1905 statute which would start it all off -- from the action of the Georgia Courts in running it as a white only park all these years using the taxpayer's money -- and the city running it all those years using the taxpayers' money; from the action of the

Georgia Courts in trying to evade the admission of Negroes by removing the city as trustee and now in the present decision, to close the park rather than have Negroes in it. So, I think that the state acted in the case from start to finish.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Nabrit, the case is submitted. And thank you, Mr. Jones, Mr. Na[illegible], and Mr. Claiborne for your submissions.

(Whereupon, at 11:05 o'clock a.m. the argument in the above-entitled matter was concluded)