COMMENTS

CONSTITUTIONALITY OF "SEGREGATION BY INDIRECTION" THROUGH SALE OR LEASE OF PUBLIC RECREATIONAL FACILITIES

The unconstitutionality of racial segregation in governmentally owned parks and recreational facilities has been clearly enunciated by the Supreme Court in recent decisions.

In *Holmes v. City of Atlanta,*[1] the Supreme Court reversed the decision of the United States Court of Appeals for the Fifth Circuit and, in effect, held that the City of Atlanta could not deny the use of municipal golf courses to citizens on the basis of race or color.

By a *Per Curiam* order in *Mayor and City Council of Baltimore City v. Dawson*[2] the Supreme Court affirmed on appeal a decision of the United States Court of Appeals for the Fourth Circuit which had held that the *Equal Protection Clause* of the Fourteenth Amendment to the Federal Constitution prevented the State of Maryland from invoking its police power to enforce segregation of races on public beaches and in public bath houses.

The opinions handed down in the aforementioned cases have extended the scope of the doctrine of the controversial *School Segregation Cases.* They, in effect, sound the death knell for the *Separate-But-Equal Doctrine* in the field of public recreation. At the date of this writing, this new approach in the field of public recreation has been followed by the Supreme Court of Kansas,[3] the Kentucky Court of Appeals,[4] and United States Districts Courts in Texas,[5] Virginia,[6]

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1. 350 U.S. 879, 76 S.Ct. 14, 100 L.Ed. 776 (1955).
2. 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 775 (1955).
3. Morton v. City Commissioners of Parsons, 178 Kan. 282, 285 P.2d 774 (1955). (A Negro brought a proceeding for a writ of mandamus seeking to compel the City of Parsons to desist from denying him admittance to a municipal swimming pool solely on the ground of his race. The Supreme Court of Kansas issued the writ.)
4. Moorman v. Morgan, 285 S.W.2d 146 (Ky. Ct. of App. 1955) (Moorman sought a declaratory judgment and injunctive relief against the enforcement of rules providing for racially segregated park facilities. From an adverse judgment in the lower court, he appealed to the Court of Appeals of Kentucky which reversed the decision and granted the relief prayed for by the petitioner.)
5. Frayson v. Beard, 134 F. Supp. 379 (E.D. Texas 1955). (Negroes in Beaumont, Texas brought suit against city officials, alleging discrimination on the basis of race and color in the use of city parks. The court granted the relief sought.)
6. Tate v. Department of Conservation and Development, 133 F.Supp. 53 (E.D. Va. 1955).

Tennessee,[7] and Florida.[8]

As a means of resolving the dilemma occasioned by fear of race friction in non-segregated public recreational facilities, many governmental units are considering the feasibility of maintaining racial segregation in such facilities by leasing governmentally owned parks, swimming pools, golf courses and other recreational facilities to private non-profit organizations which would enforce segregation as a rule of management.

The purpose of this comment is to analyze the legal efficacy of such proposed leases.

As a general rule property held by a municipality for governmental or public uses cannot be sold without express legislative authority but must be devoted to the use and purpose for which it was intended. The rule is otherwise as to property held by a municipality in its proprietary or private capacity, where not devoted to any specific public use.[9]

In *Kirkland v. Johnson*[10] several taxpayers sought injunctive relief to prevent the City of Manchester from selling real estate which had formerly been used for school purposes. The court called attention to the rule that a municipality may not sell property held for governmental purposes without express legislative authority, but that property held for proprietary uses may be disposed of at will. Asserting that when property held for governmental or public use is abandoned as to such use, that it may be disposed of without approval of the legislature; the court denied relief to the petitioners.

The right to lease property is governed by the above stated rules as to sale of property. Ordinarily, a municipality cannot, by lease or license permit its property acquired or held for public use, to be wholly or partly diverted to a possession or use exclusively private, without specific legislative authority.[11]

In *Norton v. City of Gainesville*[12] the court stated "the weight of authority is that a municipal park is a public utility and a portion thereof cannot be leased for a period of years for purpose of gain."

7. Hayes v. Crutcher, 137 F.Supp. 853 (M.D. Tenn. 1956). (Negroes in Nashville, Tennessee, brought an action to enjoin officials of the City of Nashville from refusing Negroes the use of public golf courses solely on the basis of race and color. The injunction was issued.)
8. Augustus v. City of Pensacola, Civ. No. 724, (N.D. Fla. 1956). (The court required the city to put into effect reasonable regulations for the non-discriminatory use of city recreational facilities.)
9. Kirkland v. Johnson, 209 Ga. 824, 76 S.E.2d 386 (1953); 10 McQUILLIAN, MUNICIPAL CORP. § 28.37 (3rd ed. 1950).
10. 209 Ga. 824, 76 S.E.2d 399 (1953).
11. 10 McQUILLIN, MUNICIPAL CORP. § 2842 (3rd ed. 1950).
12. 211 Ga. 387, 290, 86 S.E.2d 234, 237 (1955).

Here there was an absence of legislative authority.

It is submitted that the above mentioned cases are indicative of the law on the subject of the sale or lease of public property devoted to a public use. Thus with the approval of the legislature a governing body may lease or sell its recreational facilities. Since the purpose of Act Number 20 of the 1956 Session of the General Assembly of Georgia[13] was to vest power of abandonment and disposal in the respective governmental units, a governing body in Georgia now possesses the necessary authority to lease its public recreational facilities restricted only by the limitations of the above mentioned act.

The important question involved in this analysis is whether such sale or lease of recreational facilities can be construed as a violation of the 14th Amendment to the U. S. Constitution in the light of the recent Supreme Court decisions interpreting this section and particularly in the light of recent federal court decisions striking down segregation in regard to public recreational facilities.

In *Sweeney v. City of Louisville* certain Negro citizens of the City of Louisville brought a class action in the United States District Court of Kentucky, against the city seeking a declaratory judgment of the rights of Negroes to use the recreational facilities of the city parks, including golf courses, swimming pools, athletic facilities, and an amphitheater which was leased to a theatrical association for certain performances. The district court held that the plaintiffs were entitled to the use of recreational facilities equal to those provided by the city for white persons, and, on the basis of *Plessy v. Ferguson*,[14] such facilities might be separate. The court further found that certain of the facilities were not, in fact, substantially equal to those provided for white citizens.[15] On appeal by one of the defendants the Court of Appeals, Sixth Circuit, affirmed, stating in part "*** but . . . the Louisville Park Theatrical Association, a privately owned enterprise which leased from the City of Louisville an amphitheater in Iroquois Park, where the city did not participate either directly or indirectly in the operation of the private enterprise, was guilty of no unlawful discrimination, in violation of the Fourteenth Amendment, in refusing admission to colored persons to its operatic performances during the

13. Ga. Laws 1956, p. 22, as amended, GA. CODE ANN. §§ 69-613-16 (1956 Supp). Act No. 20, as amended, provided for the sale, lease or other disposal of public recreational facilities which have been dedicated to a public use without regard to whether the public use has been previously abandoned, or that said property has become unsuitable or inadequate for the purpose for which it was originally dedicated.)

14. 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

15. Sweeney v. City of Louisville, 102 F.Supp. 525 (Ky. 1951).

summertime. . . ."[16] On petition for writ of certiorari the Supreme Court granted the writ, vacated the judgment and remanded the case for consideration in the light of the School Segregation Cases.[17]

In *Lawrence v. Hancock*,[18] the municipality leased the public swimming pool and the lessee denied access to members of the negro race. The city retained all rights of inspection and compelled the private group to use all profits for improvement of the property. Pointing out that an act of the legislature cannot lighten the burden imposed on municipal governments by the 14th amendment to the Federal Constitution, the court held that the power to lease is not power to discriminate and that the city has a duty where property is built at public expense to make certain that it is available to all the public. The court further held that such a lease contains an implied provision protecting such constitutional rights as were denied to Negroes here.

The latest federal decision involving leasing of governmental facilities is *Tate v. Department of Conservation and Development*.[19] In this case a group of Negroes brought an action for a declaratory judgment and for injunctive relief alleging denial of access to state parks based on race. The prayer for relief requested a permanent injunction against the defendants, their "lessees", agents and successors in office. The state department attempting to lease the park was acting by virtue of an act of the legislature similar to the present Georgia act allowing the leasing of park facilities. During the hearing, the Director of the Virginia State Parks admitted that the park in question was the most profitable of the state parks and that since it could not be operated if integration were ordered by the court, the state was trying to salvage some of the revenue by a "negotiated lease." The court held that the proposed lease effectively vests in the hands of a small group the power to accomplish by indirection exactly what all courts have said cannot be done. Great weight was given to the action of the Supreme Court in remanding the *Louisville Park Theatrical Association* case. In discussing that case which involved a lease agreement the court said: "In light of the remand of this case by the United States Supreme Court, it may be reasoned that the Court was of the opinion, the rights of the colored persons had been violated."[20] The *Hancock* case was also persuasive upon the court, especially in regard

16. *Sub Nom.*, Muir v. Louisville Park Theatrical Association, 202 F.2d 275 (6th Cir. 1954).
17. *Sub. Nom.*, Muir v. Louisville Park Theatrical Association, 347 U.S. 971, 74 S.Ct. 783, 98 L.Ed. 112 (1954).
18. 76 F. Supp. 1004 (S.D. W.Va. 1948).
19. 133 F.Supp. 53 (E.D. Va. 1955) *aff'd* 231 F.2d 615 (4th Cir. 1956).
20. *Id.* at 58.

to the defense raised by the State of Virginia that the lessee had complete and full control of the premises. It should be noted that the lease here gave complete control to the lessee and did not contain any provisions, conditions, restrictions or reservations that could be construed as restricting the use of the park to members of the white race. In analyzing the effect of *Lawrence v. Hancock* the court noted that the City of Montgomery lease involved therein was likewise silent as to the use of the pool by members of any race. The following statement of Judge Moore in the *Hancock* case was cited as approaching the question with firmness: "It is not conceivable that a city can provide the ways and means for a private individual or corporation to discriminate against its own citizens. Having set up the swimming pool by authority of the Legislature, the City, if the pool is operated, must operate it itself, or, if leased, must see that it is operated without any such discrimination."[21] In granting the injunction against a lease which directly or indirectly operates to discriminate against the members of any race, the court did not pass upon the right to sell or lease the facility in "absolute good faith" by giving due notice of its intentions in such a manner that interested parties, regardless of race, may avail themselves of the equal opportunity afforded to submit bids with respect to same. However, the court maintained that any such proposed sale or lease should contain specific provisions as to all terms and conditions, and further attested that any attempt to "negotiate" a sale or lease would be carefully scrutinized by the court. The court concluded by summing up the problem thusly: "In short, the power to sell or lease must not include the power to discriminate against members of any race."[22]

Since the federal court in the *Tate* case gave such weight to certain state court opinions, these decisions will now be discussed in relation to the problem which prompted this comment.

In *Kern v. City Com'rs. of City of Newton,*[23] the court emphasized that the fact that the city had leased its public swimming pool to an individual operator did not relieve city officials from the obligation to cause the pool to be operated so that there would be no discrimination against members of the Negro race.

The Court of Appeals of the State of Ohio reached the same results in *Culver v. City of Warren.*[24] Here the city, after attempts to obtain cooperative segregation failed, leased the swimming pool to a non-

21. 76 F.Supp. at 1009.
22. 133 F.Supp. at 61.
23. 151 Kan. 565, 100 P.2d 709 (1940).
24. 84 Ohio App. 373, 83 N.E.2d 82 (1948).

profit veterans' organization. The practical effect of the lease was to bar Negroes from the pool. The city maintained that the loss of profit prompted the lease which was therefore valid. The petitioners (officials of N.A.A.C.P.) maintained that the question involved was whether the city by lease of pool facilities could relieve itself of the constitutional obligation to afford Negroes equal rights with those of white citizens in use of public recreational facilities. The court here regarded the veterans organzation as a mere agent of the city and held that a city's power to lease the municipal pool, does not include power to discriminate against members of a minority race in the exercise of their constitutional rights under the Federal Constitution. The court further held that the city's loss from permitting Negroes to use the pool is immaterial in enforcing constitutional rights against discrimination, as operation of recreational facilities is not ordinarily viewed as a source of profit.

The foregoing decisions force the conclusion that any lease of public recreational facilities with the direct intent and effect of excluding Negroes from the use of such facilities, will be construed by the federal courts as a "colorable" lease with the intent of evading municipal obligations to protect the constitutional rights of its Negro citizens. It would appear under recent decisions that citizens have the right to the use of public recreational facilities without discrimination on the ground of race. And it further appears that this right may not be abridged by the leasing of such facilities with ownership remaining in the municipality.

However, such facilities may be closed to both races and sold without danger of interference by the federal courts; for the governmental unit is under no legal obligation to provide recreational facilities. Act No. 20 vests authority in the governing body of Georgia governmental levels to abandon public recreational facilities thus ending any public interest therein. That such abandoned public property may be sold is undisputed.

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THE UNIQUE STATUS OF PUERTO RICO IN RELATION TO THE FEDERAL GOVERNMENT

In 1950 the Congress of the United States passed Public Law 600[1] to provide for the organization of a constitutional government by the people of Puerto Rico. A constitutional convention was authorized and

1. 64 STAT. 319 (1950), 48 U.S.C. §§ 731 *et. seq.* (1952).