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judicial interpretation of what constitutes sufficient "circumstances which show that the author has no intention to donate his work to the public." Alternatively, it may be that the *Goodis* case will be cited for the proposition that authority for a publisher to obtain copyright on behalf of an author will be implied from the mere act of selling the right of first publication. Such a proposition would indeed be attractive to authors, but it is not supported by the present or past copyright laws.

The court's analysis of existing case law appears to be correct, especially as to the development of the rather vague doctrine of indivisibility. But the court failed to establish any criteria for determining when the circumstances are sufficient to show that an author does not intend to donate his work to the public. The court's failure to discuss the facts and apply them to its holding is untenable, because the case was tried in the district court upon a stipulation of facts. It may be that the court was so intent on limiting the indivisibility doctrine that it failed to carefully weigh its holding against the facts. Or perhaps the court realized that the facts would furnish only bare support for its holding, but that a firm holding would be required to accomplish the purpose of limiting the doctrine. In either event, this failure to establish criteria appears as a glaring omission.[50]

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Reversion of a Public Park in Lieu of Integration: A Disadvantage of the Freedom of Testation

In 1911, United States Senator A. O. Bacon executed a will which conveyed property in trust to the city of Macon, Georgia, to be used as a park for white persons only.[1] The will provided for a Board of Managers to control the park. The city eventually integrated the park on the basis that it was a public facility which could not be operated in a segregated manner. Individual members of the Board of Managers brought suit in a state court, seeking removal of the city as trustee and the appointment of private trustees who would operate the park on a segregated basis. Negro citizens of Macon intervened, requesting that the court refuse to appoint new trustees. The city resigned as trustee and private trustees were appointed by the court. On appeal by the Negro intervenors, the United States Supreme Court reversed the appointment of private trustees, holding that the park had acquired the character of a public facility and that the substitution of trustees did not convert it into a private one.[2] The

[50] It should be specifically recognized that the court expressly decided that the copyright was validly obtained in behalf of Goodis. The case was remanded only on the contract issue. *See* note 3 *supra.*

[1] The Senator stated that while he had only the kindest feeling for Negroes, he was of the opinion that "in their social relations the two races should be forever separate." Evans v. Newton, 382 U.S. 296, 297 (1966).

[2] Evans v. Newton, 382 U.S. 296 (1966).

case was remanded for disposition of a motion by the heirs of Senator Bacon that the trust had failed. The Georgia trial court then held that the trust had become unenforceable and that under Georgia law, the cy pres doctrine could not be applied. The park reverted to the heirs of Senator Bacon. The Supreme Court of Georgia affirmed,[3] and the United States Supreme Court granted certiorari.[4] *Held, affirmed*: There was no state action violative of the equal protection clause of the fourteenth amendment, since the reversion was accomplished through the application of settled principles of state law and the resulting loss of the park was shared equally by whites and Negroes. *Evans v. Abney*, 396 U.S. 435 (1970).

I. Violation of the Fourteenth Amendment Through State Action

State Action Generally. The fundamental purpose of the fourteenth amendment is to guarantee equality in the enjoyment of basic civil and political rights.[5] State action, which is the exertion of the power of the state for the purpose of denying these rights,[6] is prohibited by the equal protection clause of this amendment.[7]

Affirmative state action constituting discrimination has been found in a wide range of situations. The lunch counter "sit-in" cases illustrate that a municipal ordinance,[8] administrative agency ruling,[9] or city official[10] cannot require segregation of a public facility. A state is also obligated to ensure constitutional use of its property when that property is used for public purposes.[11] Thus, the exclusion of Negroes from a restaurant operated by a private corporation, but located in a building financed by public funds and owned by a state parking authority, was found to be state action violative of the equal protection clause.[12]

State action has also been found in situations in which the state failed to prevent discrimination or merely acquiesced in it. The breach of the affirmative duty of the state to protect persons[13] or prisoners[14] from mob violence has been found to be a denial of equal protection. An Oklahoma law permitting railroads to provide separate sleeping, eating, and chair

[3] Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968).
[4] Evans v. Abney, 394 U.S. 1012 (1969).
[5] Shelley v. Kraemer, 334 U.S. 1, 23 (1948).
[6] *Id.* at 20.
[7] The first section of the fourteenth amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Although universal in its application, the equal protection clause has most frequently been invoked to prevent discrimination against Negroes based solely upon race.
[8] Gober v. City of Birmingham, 373 U.S. 374 (1963); Peterson v. City of Greenville, 373 U.S. 244 (1963).
[9] Robinson v. Florida, 378 U.S. 153 (1964).
[10] Lombard v. Louisiana, 373 U.S. 267 (1963).
[11] Evans v. Newton, 382 U.S. 296, 301-02 (1966).
[12] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).
[13] Catlette v. United States, 132 F.2d 902 (4th Cir. 1943).
[14] Lynch v. United States, 189 F.2d 476 (5th Cir.), *cert. denied*, 342 U.S. 831 (1951).

cars for Negroes constituted state action,[15] as did a Louisiana practice of disclosing the race of candidates on ballots.[16] A leading case on acquiescence as state action is *Terry v. Adams*.[17] In *Terry* a club, consisting of all the white voters of a Texas county, selected candidates for county offices to run for nomination in the official primary. Negroes were thus excluded from state primaries on racial grounds. The practice continued unchallenged by the state for more than sixty years. Although the state was only passively involved, a majority of the Court felt that this failure to act constituted state action within the meaning of the fourteenth amendment.

Reitman v. Mulkey[18] illustrates that a state law, constitutional on its face, may involve the state in discrimination. An amendment to the California constitution, approved by the voters of California, provided that the state and any of its agencies could not deny the right of any person to decline to sell residential property to anyone. This did no more than codify the long-standing principle that discriminatory acts between private persons are constitutionally permissible.[19] The California supreme court assessed the ultimate impact of the amendment and concluded that it would significantly involve the state in private racial discrimination in violation of the fourteenth amendment. The state's action in enacting the amendment was viewed as making private discrimination legally possible and the state "at least a partner in the . . . act of discrimination . . . ."[20] The United States Supreme Court affirmed the unconstitutionality of the amendment, characterizing it as passive encouragement of discrimination by making discrimination "one of the basic policies of the state."[21]

Judicial Action as State Action. The actions of state judicial officers in their official capacities have long been recognized as state action within the meaning of the equal protection clause.[22] Whether constitutionally permissible private discrimination could be judicially enforced was an issue slow to reach the United States Supreme Court.[23] This issue was finally

[15] McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151 (1914). The Court assigned as error the lower court's holding that the Oklahoma Separate Coach Law did not deprive Negroes of equal protection. The Court then affirmed dismissal of the complaint on the grounds that: (1) the allegations of the complaint were vague and indefinite; (2) none of the complainants had been personally affected by the law; and (3) there was the appearance of an adequate remedy at law should the complainants be affected by the law.

[16] Anderson v. Martin, 375 U.S. 399 (1964).

[17] 345 U.S. 461 (1953).

[18] 387 U.S. 369 (1967).

[19] Civil Rights Cases, 109 U.S. 3 (1883).

[20] 387 U.S. at 375.

[21] *Id.* at 381.

[22] "It is doubtless true that a State may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." Virginia v. Rives, 100 U.S. 313, 318 (1880).

[23] A 1926 suit to enjoin the conveyance of real estate in violation of an agreement not to sell to Negroes was dismissed for lack of jurisdiction. Corrigan v. Buckley, 271 U.S. 323 (1926). In Hansberry v. Lee, 311 U.S. 32 (1940), the Court again failed to reach the judicial enforcement issue. A denial of due process was found, in that petitioners had been prevented by a lower court from challenging the validity of the restrictive agreement on the basis that a previous action had been a class action. An early circuit court decision, Gandolfo v. Hartman, 49 F. 181 (C.C.S.D. Cal. 1892), was apparently ahead of its time in holding that a covenant not to sell or lease land

decided in the landmark case of *Shelley v. Kraemer*.[24] Shelley, a Negro, had purchased land which, unknown to him, was subject to a racially restrictive agreement signed by most of the surrounding white landowners. The white landowners sued to enforce the agreement. The Court held that enforcement of privately-initiated restrictive covenants by state courts and judicial officers constitutes state action because it denies persons of the excluded race the equal protection of the laws. The prohibition against state action was extended to "exertions of state power in all forms."[25] Judicial action was characterized as uniquely making available "the full coercive power of government" to deny rights solely on the basis of race to parties otherwise willing to deal with each other.[26]

II. Post-Shelley Charitable Trust Cases

Shelley has been a controlling force in cases involving charitable trusts containing racially restrictive provisions. The first involved the extensive litigation relating to Girard College. Stephen Girard died in 1831, leaving a substantial sum of money to the city of Philadelphia for the establishment of a school for "poor male white orphan children."[27] Both the city and the state had been continually and intimately involved in the operation of the school since that time.[28] In 1954, two Negroes applied for admission and were refused solely because of their race. Their suit reached the United States Supreme Court, which held that the board which operated the school was an agency of the state, and that its denying admission to the Negroes on racial grounds violated the equal protection clause.[29] The case was remanded to state courts for appropriate action. The Pennsylvania orphans' court then ousted the city as trustee of the school and appointed private trustees, who were to continue to operate the school in accordance with Girard's will.[30] The Pennsylvania supreme court affirmed, viewing the action of the orphans' court as not inconsistent with the Supreme Court mandate, the fourteenth amendment, or Girard's will.[31] The Supreme Court denied certiorari.[32] The Negro children then instituted a similar suit in a federal court and obtained a favorable judgment.[33] The court of appeals affirmed, holding the substitution of trustees in order to carry out racial exclusion unconstitutional.[34] The Supreme Court again denied certiorari.[35]

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to a Chinese was a violation of the fourteenth amendment. However, this holding is somewhat diluted by the court's concomitant reliance on an 1880 treaty between the United States and China, which guaranteed constitutional rights to immigrant Chinese.

[24] 334 U.S. 1 (1948).

[25] *Id.* at 20.

[26] *Id.* at 19.

[27] *In re* Girard's Estate, 386 Pa. 548, 551, 127 A.2d 287, 296 (1956).

[28] The involvement took the form of tax incentives, favorable statutes and ordinances, exemptions from tort liability, and service of appointed officials. Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968).

[29] Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957) (*per curiam*).

[30] Girard's Estate, 7 Pa. Fiduc. R. 555 (1957).

[31] *In re* Girard College Trusteeship, 391 Pa. 434, 138 A.2d 844 (1958).

[32] Pennsylvania v. Board of Directors of City Trusts, 357 U.S. 570 (1958).

[33] Pennsylvania v. Brown, 270 F. Supp. 782 (E.D. Pa. 1967).

[34] Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968).

[35] Pennsylvania v. Brown, 391 U.S. 921 (1968).

Evans v. Newton[36] brought before the Court a fact situation quite similar to *Girard*. As in *Girard*, prviate trustees had been appointed, ostensibly to change a public institution into a private one. At this point, the Court granted certiorari in *Newton*,[37] and emphasized the "momentum"[38] the park had acquired as a public facility and the impossibility of dissipating that momentum by the simple expedient of appointing private trustees. The foundation of *Newton* is that the "public character" of the park and the "municipal" nature of its services to the community required that it be treated as a public institution subject to the fourteenth amendment prohibition against state-enforced discrimination.[39] The holding in *Newton* is carefully limited: (1) it deals only with the continued operation of the park; there is no holding with respect to possible reversion, and (2) it only states that substitution of trustees will not divest the park of its public character. The majority expressly declined to address itself to the issue of state action.[40]

III. Evans v. Abney

In *Abney* a majority of the Court concludes that there was no state action violative of the equal protection clause of the fourteenth amendment. The Court indicates that Georgia courts did no more than apply settled principles of Georgia law in refusing to save the trust through the application of the cy pres doctrine.[41] The majority views the decision of the Georgia courts as eliminating discrimination, rather than fostering it, by eliminating the park and thus placing the burden of its loss equally upon whites and Negroes. *Shelley* is distinguished as having involved the

[36] 382 U.S. 296 (1966).

[37] Evans v. Newton, 380 U.S. 971 (1965). It was at this stage that the Court denied certiorari in the *Girard* case. Considering the similarity of the fact situations, the denial of certiorari in *Girard* is not readily explainable. A discussion of this anomaly is contained in Pennsylvania v. Brown, 392 F.2d 120 (3d Cir. 1968). The court of appeals emphasizes that no inference should be made from the grant or denial of certiorari, and that the state litigation picture did not bring into focus the maneuver which had "completely circumvented" the Supreme Court's directive. *Id.* at 123. A more satisfactory explanation lies in the distinction between a provision for a reversion purely private in origin and a provision for reversion in which the state has become involved. *See* Charlotte Park & Rec. Comm'n v. Barringer, 242 N.C. 311, 88 S.E.2d 114 (1955), *cert. denied*, 350 U.S. 983 (1956) (provision for reversion of trust due to violation of racial restriction held valid if restrictive provision originates solely with settlor and no intermediate parties are involved); Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir.), *cert. denied*, 371 U.S. 911 (1962) (city's sale of golf courses to private individuals with discriminatory contractual clause and provision for reversion involved the state and constituted a violation of the fourteenth amendment).

[38] 382 U.S. at 301.

[39] *Id.* at 302.

[40] *Id.* at 300 n.3.

[41] The cy pres doctrine applies only to charitable, testamentary trusts. Its purpose is to prevent the failure of such a trust by allowing a court to modify or eliminate provisions of the trust which have become illegal, impossible, or impractical to enforce. The trust is then carried out in a manner as near as possible to the intention of the settlor. The Georgia courts' refusal to apply the cy pres doctrine in *Abney* can be supported by Georgia case law. Georgia has not subscribed to the modern liberalization of cy pres, with the result that trusts with racially restrictive provisions have invariably been found definite and specific. Such a finding precludes the application of the doctrine. *See* Strother v. Kennedy, 218 Ga. 180, 127 S.E.2d 19 (1962); Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938); Ford v. Thomas, 111 Ga. 493, 36 S.E. 841 (1900); Beckwith v. Rector, Wardens and Vestrymen of St. Phillip's Church, 69 Ga. 564 (1882); Adams v. Bass, 18 Ga. 130 (1855).

favoring of one race over the other through enforcement of discrimination against Negroes. The testamentary origin of the park is seen as distinguishing it from a park held by the city in fee simple. This latent defect of testamentary origin, combined with the accompanying discriminatory provision for the use of the park and the possibility of reversion, is considered to provide sufficient justification for the forfeiture of the park in lieu of its integration. The majority states:

> Surely the fourteenth amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and non-discriminatory state trust laws, effectively denies everyone, whites as well as Negroes, the benefits of the trust.[42]

A resourceful dissent by Justice Brennan[43] raises the issue of state action under several standards. The reversion of the park is indicated to be state action under the "arms length" interpretation of *Shelley*, in that Negro and white citizens of Macon who were willing to deal with each other in the operation of the park on an integrated basis have now been prevented from doing so.[44] State action is also found under the principles of *Reitman*. Section 69-504 of the Georgia Code permits an individual to discriminate in giving land for a public park,[45] and section 69-505 permits the state to accept such a gift and enforce the discriminatory provision.[46] These laws are viewed as fostering or encouraging discrimination, even though the state does not participate in the discriminatory act. The dissent states that the discriminatory provision in Senator Bacon's will would not have been possible without these laws, citing the concurring opinion

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[42] Evans v. Abney, 396 U.S. 435, 446 (1970).

[43] Justice Douglas also dissented.

[44] *See* text accompanying note 26 *supra*.

[45] Section 69-504 provides:

> Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

GA. CODE ANN. § 69-504 (1967).

[46] Section 69-505 provides:

> Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment, with the right to the municipality or trustee to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive use and enjoyment thereof.

GA. CODE ANN. § 69-505 (1967).

in *Newton*, which had raised serious questions concerning the validity of a racially restrictive trust at common law.[47]

The failure to find state action in *Abney* must be considered to rest equally upon two foundations: (1) the elimination of discrimination through equal sharing of the loss of the park by Negroes and whites, and (2) the status of the park as a trust, with the attendant possibility of reversion through normal operation of state law. Two hypothetical situations illustrate that these elements cannot be separated. First, the city of Macon could not have avoided integration of the park by closing it but not allowing it to revert. Elimination of the element of reversion would essentially negate the status of the park as a trust. It would change the reason for the closing of the park from one of resolving a trust which had failed to one of closing the park for the sole purpose of avoiding integration. Such a closing is state action proscribed by the equal protection clause, whether the burden of such closing falls equally upon both races or not.[48] Second, the loss of a public facility may be considered to fall equally upon both races even though Negroes have never been granted access to the facility. *Abney* affirms the conclusion of the Georgia courts that Senator Bacon would have rather had the whole trust fail than have Baconsfield integrated.[49] If such intent can be fairly implied from a will, and if a failure of the trust results from application of existing principles of state law, then the facility will be lost to the public, regardless of the status of efforts to desegregate it.

Given these distinctions, the mandate of *Newton*, that a state is obligated to ensure the constitutional use of its property when that property is used for public purposes, is not applicable to the facts in *Abney*. The park does not belong to the city; it is held in trust. Similarly, the finding in *Newton* that the park had acquired the status of a public facility[50] must be related to the attempted appointment of private trustees in an effort to make the park private. In *Abney* the city's status as trustee indicates that some degree of private control is exercised, and thus the park is not totally "public." The weakness of this reasoning is that no clear line is drawn as to when a facility, held in trust by a municipality, attains irrevocable public status for constitutional purposes. Over a period of years, a state may become so legally and financially involved in the administration of a trust that the trust may lose its private character.[51] *Abney* suggests that this is never the case as long as there is a possibility of reversion.

The majority's characterization of Georgia trust law as "neutral and

[47] 382 U.S. at 310.

[48] The language of the Court relating to the closing of the Prince Edward County, Virginia, schools is applicable. "Whatever nonracial grounds might support a State's allowing a county to abandon its public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." Griffin v. County School Bd., 377 U.S. 218, 231 (1964).

[49] 396 U.S. at 443.

[50] 382 U.S. at 301-02.

[51] "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. The action of a city in serving as trustee of property under a private will serving the segregated cause is an obvious example." *Id.* at 299.

non-discriminatory" is incorrect. The least that can be said of sections 69-504 and 69-505 is that they encourage and foster discrimination by making it "one of the basic policies of the state." However, the nexus of the decision in *Abney* is that there is no state action because the *corpus* of state action—the resulting discrimination—does not exist. The mistaken characterization of Georgia trust law is therefore of little significance, since it is not a basis of the decision. Similarly, the absence of state action under *Shelley* must be considered in the light of the conclusion that discrimination does not exist.

IV. Conclusion

The failure of the *Abney* majority to find state action is best resolved as an affirmance of the prerogative of a state to construct wills and decide the application of cy pres. It is also an affirmance of the right of a testator to devise his property as he chooses, even when making a gift in trust to a municipal authority with a racially restrictive provision. "[T]he loss of charitable trusts . . . is part of the price we pay for permitting deceased persons to exercise continuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has its advantages and disadvantages."[52] Under the particular circumstances of *Abney*, beneficiaries of charitable trusts will have to pay the price of this freedom of testation.

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[52] Evans v. Abney, 396 U.S. 435, 447 (1970).