A CLARIFICATION OF THE ADEQUATE STATE GROUND DOCTRINE?

Evans v. Abney, 396 U.S. 435 (1970)

In 1911, Senator A. O. Bacon devised certain property to the city of Macon in trust for the creation of a park for the exclusive use of the city's white citizens.[1] The city maintained the property as a park named Baconsfield according to the terms of the trust, until desegregation was thought necessary to comply with the constitutional standards of the thirteenth and fourteenth amendments. Upon desegregation, six heirs of Senator Bacon contended that the trust had failed and should revert to the estate of Senator Bacon. In order to prevent this result, the city resigned as trustee and in its place a private trustee continued the policy of racial segregation. In 1966 the Supreme Court, in *Evans v. Newton*,[2] held that Baconsfield could not continue to be operated on a segregated basis, since the park, being a municipal function, had taken on a public character and continued racial discrimination would be unconstitutional state action prohibited by the fourteenth amendment.

Upon remand the Georgia trial court declared that as a result of the decision in *Newton* the trust had failed and the trust property would revert to the six living heirs of Senator Bacon.[3] The Georgia Supreme Court affirmed, refusing to use the doctrine of *cy pres* to save the charitable trust.[4] The United States Supreme Court, in affirming the decision,[5] two justices dissenting, *held*: "the action of the Georgia Supreme Court declaring the Baconsfield trust terminated presents no violation of constitutionally protected rights. . . ."[6]

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1. The language of the will was as follows: ". . . for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and children of the City of Macon," Evans v. Abney, 396 U.S. 435, 441 (1970).

2. 382 U.S. 296 (1966).

3. In remanding the case to the trial court, the Georgia Supreme Court also expressed the belief that the sole purpose of the trust had failed. 211 Ga. 870, 148 S.E.2d 329 (1966).

4. There are three generally recognized requirements for the use of the *cy pres* doctrine (1) a valid charitable trust; (2) it must be impossible, illegal, or impractical to carry out the exact terms of the trust; (3) there must be a general charitable intent. The language used by Bacon in his will was held by the Georgia courts to have failed to convey the requisite intent. Thus the state *cy pres* statutes, GA. CODE ANN. 108-202 (1967) and 113-815 (1967), were inapplicable. A resulting trust was created in favor of the settlor's heirs by statute, GA. CODE ANN. 108-106(4) (1967).

5. 396 U.S. 435 (1970).

6. *Id.* at 444. *Newton* was reconciled by pointing out that in that decision the court held the park

This narrow holding is based primarily upon the rationale that elimination of a public park injures all citizens equally; rather than enforcing private discrimination, the state courts have "eliminated all discrimination . . . by eliminating the park itself."[7] While affirming the traditional right of the state to apply its trust laws as it deems proper,[8] the Court suggested that so long as the state court treated this trust as it would any other charitable trust, there could be no complaint.[9] The Court thereby answered the petitioners' arguments based on the state trust laws.

Implicit within this result is the holding that the state court's decision rested on an adequate state ground and therefore the Court is precluded from looking behind the decision for a possible violation of federal constitutional rights. As will be seen below, the Court's approach to the state law question may indicate a shift in the Court's traditional treatment of the adequate state ground rule.

The doctrine, as first enunciated by the Court in *Murdock v. Memphis,*[10] dictated that the Supreme Court will not review a decision of the highest court of a state if that decision rests on an adequate and independent state ground. Thus if a case was decided exclusively on an adequate state ground, the Supreme Court will not review the decision even though a federal question was contained in the case.[11]

The problem that has concerned the Court since *Murdock* is the definition of "adequate". The Court has developed a series of guiding principles which serve as a foundation from which to examine the facts of each particular case. If the decision of the state court is without any fair or substantial support, it will be inadequate.[12] If a new rule has been invented by the state court to deprive a petitioner of federal

could not continue to be operated on a racially discriminatory basis. The decision in *Abney* eliminates the park, thereby eliminating the unconstitutional discrimination.

7. 396 U.S. at 445.

8. *Id.* at 447. In his dissenting opinion, Justice Douglas contended that Bacon's purpose in creating the trust was to dedicate the land to a municipal use. That desire could be better served by continuing the use of the property as a desegregated public park, than by allowing it to revert to the heirs. 396 U.S. at 448-50. In a separate dissent, Justice Brennan found unconstitutional state action in the closing of the park. 396 U.S. at 450-59.

9. *Id.* at 446.

10. 87 U.S. (20 Wall.) 590 (1875).

11. Justice Jackson, in an oft-quoted statement, has declared the principle as follows: "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

12. NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

constitutional rights, the Court will consider the state ground inadequate.[13] Implicit in this principle is the examination of state precedent to determine if the contested decision is consistent with the case law.[14]

In *Fay v. Noia,*[15] a case dealing with habeas corpus jurisdiction in the federal district courts, the Court made explicit a distinction that had been suggested earlier between state substantive and state procedural grounds. "While it [the Court] has deferred to state substantive grounds so long as they are not patently evasive of or discriminatory against federal rights, it has sometimes refused to defer to state procedural grounds only because they made burdensome the vindication of federal rights."[16]

Two years later in *Henry v. Mississippi,*[17] the Court, while ostensibly applying "settled principles", seemed to have devised a new rule of construction when using the adequate state ground doctrine. It stated that federal rights will not be thwarted by a state's insistence upon compliance with a procedural rule unless that rule "serves a legitimate state interest."[18] Since the decision in *Henry*, there has been much discussion as to its effect on the rule, in particular, whether the Court was merely using new language to state what it has traditionally said or whether *Henry* was a departure from precedent and an entirely new rule.[19] No firm answers have emerged and many questions remained at the time the Court decided *Abney*. Though apparently intended to pertain only to state procedural grounds, did *Henry* have validity as a

13. NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Staub v. Baxley, 355 U.S. 313 (1958).

14. Barr v. Columbia, 378 U.S. 146 (1964); NAACP v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964); Wolfe v. North Carolina, 364 U.S. 177 (1960); *see generally* Sandalow, *Henry v. Mississippi and The Adequate State Ground: Proposals for a Revised Doctrine,* 1965 SUP. CT. REV. 187, 220-26.

15. 372 U.S. 391 (1963).

16. *Id.* at 432. Most of the cases involving state substantive grounds have arisen in connection with various aspects of contract law; *see* Natural Gas Co. v. Beeler, 315 U.S. 649 (1942) (scope and nature of contract); Fox Film Corp. v. Muller, 296 U.S. 207 (1935) (severability of contract clauses); Jefferson Branch Bank v. Skelley, 66 U.S. (1 Black) 436 (1862) (impairment of contractual obligation). The Court has traditionally deferred to the state court upon such state law questions, unless the decision is "manifestly wrong" [Hale v. State Bd. of Assessment and Review, 302 U.S. 95 (1937)]; or "palpably erroneous" [Phelps v. Board of Educ., 300 U.S. 319 (1937)].

17. 379 U.S. 443 (1965).

18. *Id.* at 447.

19. *See* Hill, *The Inadequate State Ground,* 65 COL. L. REV. 943 (1965); Sandalow, *Henry v. Mississippi and the Adequate State Ground: Proposals for a Revised Doctrine,* 1965 SUP. CT. REV. 187.

standard for judging state substantive grounds? If not, then did the standard developed in *Fay* still control the Court's determination of an adequate state substantive ground?

While the petitioners' main allegation raised a federal question based on *Shelley v. Kraemer,*[20] an ancillary issue was whether application of the state trust laws by the Georgia Supreme Court to the Baconsfield trust was inadequate and discriminatory. Thus the adequacy of the state ground was squarely in issue. Justice Black apparently expressed the standard he would use in deciding the issue in these words: ". . . [T]he constitution imposes no requirement upon the Georgia court to approach Bacon's will any differently than it would approach any will creating any charitable trust of any kind."[21] Having stated the test, Justice Black seems to ignore its implicit mandate that the Court undertake an independent examination of Georgia precedent to determine if the state courts have treated this trust as they would any other. The Court accepted the state court's finding that Bacon lacked a general charitable intention and that *cy pres* was thus inapplicable. Yet an examination of the opinion of both the U.S. Supreme Court and the Georgia Supreme Court fails to reveal convincing case law to support these conclusions.[22]

An examination of Georgia cases indicates that the state ground relied on by the Court is at least questionable under the guidelines set out by Justice Black as well as under the principles developed in past cases.[23] Although the doctrine of *cy pres* has been seldom used in Georgia, charitable trusts have enjoyed a favored status in that state since at least

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20. 334 U.S. 1 (1948).

21. 396 U.S. at 446.

22. *Id.* Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938) is cited by the Court as stating the generally recognized purpose of a state *cy pres* statute. Yerbey v. Chandler, 194 Ga. 263, 21 S.E.2d 636 (1942), used as support for a general rule of construction, does not deal with *cy pres*. The Court cites two cases as supporting the refusal to use *cy pres*: in one of them, Ford v. Thomas, 111 Ga. 493, 36 S.E. 841 (1900), the issue was not whether *cy pres* would be used, but whether the particular application of the doctrine was required by the factual situation; the second case, Adams v. Bass, 18 Ga. 130 (1855) is of doubtful relevance since it was decided eight years before the first *cy pres* statute was enacted.

23. A distinction might be drawn between a sympathetic attitude toward charitable trusts and the use of *cy pres* to redesign a purpose incapable of execution. Older Georgia cases were unsympathetic to *cy pres*. *See* American Colonization Soc'y v. Gartell, 23 Ga. 448 (1857); Adams v. Bass, 18 Ga. 130 (1855); Hunter v. Bass, 18 Ga. 127 (1855).

The state *cy pres* statute enacted after these cases demonstrates an attempt to counteract this judicial attitude, GA. CODE ANN. § 108-202 (1967); "*cy pres* — 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 a way as will as nearly as possible effectuate his intention." *See also* GA. CODE ANN. § 113-815 (1967).

1848.[24] A necessary but implicit consequence of this stated policy is that the courts will do everything possible to prevent reversion of the trust *res* to the heirs of the settlor.

Despite some commentary to the contrary,[25] most state courts have not hesitated to use their equitable powers of construction to save many different kinds of charitable trusts.[26] In Georgia, state courts have consistently upheld charitable trusts against claims that the beneficiaries were too indefinite,[27] the purpose of the trust was impossible to carry out,[28] or the trust should fail for want of a trustee.[29]

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24. In that year, the Georgia Supreme Court stated in Beall v. Fox, 4 Ga. 404 (1848), that it was the policy of the state to favor charitable trusts. In Beckwith v. Recor, 69 Ga. 564 (1882), the court went further; "Courts look with favor upon such trusts and take special care to enforce them, to guard them from assault and protect them from abuse." *Id.* at 569-570. This policy has continued to the present day; *e.g.*, Simpson v. Anderson, 220 Ga. 155, 137 S.E.2d 638 (1964); Hardage v. Hardage, 211 Ga. 80, 84 S.E.2d 54 (1954); Moss v. Youngblood, 187 Ga. 188, 200 S.E. 689 (1938); King v. Horton, 149 Ga. 361, 100 S.E. 103 (1919).

25. *See* note, *Reversion of a Public Park in Lieu of Integration: A Disadvantage of the Freedom of Testation*, 24 Sw. L.J. 717, 721 (1970).

26. *See* Dunbar v. Board of Trustees of George W. Clayton College, 461 P.2d 28 (Colo. 1969); Bank of Delaware v. Buckson, 255 A.2d 710 (Del. Ch. 1969); Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969); Coffee v. William Marsh Rich University, 408 S.W.2d 269 (Tex. Civ. App. 1966). *Contra*, LaFond v. Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959); Moore v. Denver, 133 Colo. 190, 292 P.2d 986 (1956). *See also* Commonwealth v. Brown, 392 F.2d 120 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968); Sweet Briar Institute v. Button, 280 F. Supp. 312 (W.D. Va. 1967); Dagget v. Children's Center, 28 Conn. Supp. 468, 266 A.2d 72 (Super. Ct. 1970) (religious restriction stricken by use of *cy pres*); In Re Hawley's Estate, 32 Misc.2d 624, 223 N.Y.S.2d 803 (Sup. Ct. 1961)(court used *cy pres* to remove religious restriction).

Many modern authorities have also argued for the expanded use of the courts' equitable powers to save charitable trusts. *See* A. SCOTT, TRUSTS § 399.3 at 3111 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS § 399, Comment B (1959). *See generally* G. BOGART, TRUST AND TRUSTEES 436 at 424 (2d ed. 1964); E. FISCH, THE CY PRES DOCTRINE IN THE UNITED STATES 153-159 (1950); FISCH, *Changing Concepts of Cy Pres*, 44 CORNELL L. Q. 382 (1959); Parker, *Evans v. Newton and the Racially Restricted Charitable Trust*, 13 HOW. L. J. 223 (1967); Power, *The Racially Discriminatory Charitable Trust: A Suggested Treatment*, 9 ST. LOUIS L. REV. 478 (1965); Note, *Mandatory Cy Pres and the Racially Restrictive Charitable Trust*, 69 COLUM. L. REV. 1478 (1969)(author advocates mandatory *cy pres* in cases like *Abney*).

27. *See* Strother v. Kennedy, 218 Ga. 180, 127 S.E.2d 19 (1962) (trust for use in establishing and maintaining a home for indigent colored people 60 years of age or older residing in Augusta); Houston v. Mills Memorial Home, 202 Ga. 540, 43 S.E.2d 680 (1947); Perkins v. Citizens and Southern Nat'l Bank, 190 Ga. 29, 8 S.E.2d 28 (1940); Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938); King v. Horton, 149 Ga. 361, 100 S.E. 103 (1919); Hills v. Atlanta Art Assoc., 145 Ga. 856, 89 S.E. 1084 (1916).

28. *See* Simpson v. Anderson, 220 Ga. 155, 137 S.E.2d 638 (1964); Goree v. Georgia Indus. Home, 187 Ga. 368, 200 S.E. 684 (1938); Huger v. Protestant Episcopal Church, 137 Ga. 205, 73 S.E. 385 (1911).

29. Creech v. Scottish Rite Hosp., 211 Ga. 195, 84 S.E.2d 563 (1954); Huger v. Protestant Episcopal Church, 137 Ga. 205, 73 S.E. 385 (1911); Ford v. Thomas, 111 Ga. 493, 36 S.E. 841 (1900).

As noted above,[30] the court must find the settlor had a general charitable intention before *cy pres* can be used to re-write the trust purpose in approximate conformity with the settlor's intent. In *Abney*, the Georgia Supreme Court found that Bacon's intent was not general, but specifically directed toward the white citizens of Macon; therefore, the trust purpose was impossible to accomplish to any degree.[31] In the past, Georgia courts have gone to great lengths to save established charitable trusts which might have reverted to the heirs of the settlor years after their creation. In the recent case of *Harris v. Georgia Military Academy*,[32] the heirs of the grantor attempted to have property on which the Academy stands revert to them, because proposed changes in the school charter were in conflict with the grantor's wishes. The school proposed to change the name, admit girls as students and abolish military training for its students. The charter of the Academy stated the gift was "for a charitable and educational institution as hereinafter set out."[33] The charter then goes on to explicitly detail the creation of a military school for boys. In saving the trust and upholding the proposed changes, the Georgia Supreme Court chose to find a general charitable intention in the charter. The purpose of the grantor to create a "charitable and educational institution" could still be carried out, thus the express reversion clause in the grantor's will would not take effect.[34] The result in *Harris* is an indication of how far the court will go to prevent reversion of an established trust.[35]

Against these two aspects of established public policy in Georgia—favoring of charitable trusts and dislike of reversions to heirs—stands the decision in *Abney*. The fact that the Georgia courts

30. Note 4 *supra*.

31. *See* Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160, 166 (1968).

32. 221 Ga. 721, 146 S.E.2d 913 (1966).

33. *Id.* at 915.

34. In noting that conditions subsequent are not favored in Georgia, the court approved the following language: ". . . no provision will be interpreted to create such a condition if the language will bear any other reasonable interpretation, or unless the language used equivocally indicates an intention upon the part of the grantor or devisor to that effect and plainly admits of such construction." 146 S.E.2d at 915. *See also* Hollomon v. Board of Educ., 168 Ga. 359, 147 S.E. 882 (1927); Thomson v. Hart, 133 Ga. 542, 66 S.E. 270 (1909); Tift v. Savannah, F.W. Ry., 102 Ga. 809, 30 S.E. 266 (1898).

35. *See* Saunders v. Flanigan, 180 Ga. 79, 178 S.E. 283 (1935). The court refused to grant a citizen taxpayer's motion for injunctive relief to stop the school district from operating a school building because the method of electing the managers of the school was at variance with the terms of the trust establishing the school. The court noted that if the original trustees, named in the trust to govern the school, had sued, ". . . it may be necessary to resort to the *cy pres* doctrine in order to prevent the trust from failing." *Id.* at 284. *See also* Bolick v. Cox, 145 Ga. 888, 90 S.E. 54 (1916).

have seldom reached a result which simultaneously goes against both of these public policies may indicate that even the strict test set out in *Fay*[36] would have been satisfied had the Court examined the state law.

The failure to examine this underlying state law reveals a paradox between the Court's words and its actions. The standard set out by Justice Black—that all charitable trusts must be treated the same—implies the necessity to examine prior state decisions to determine whether discriminatory application of state law has occurred.[37] In reality, the Court is exercising its customary deference to the decision of a state court on a substantive state law issue. It does so even though a convincing argument can be made that the substantive ground relied on in *Abney* is inconsistent with precedent and represents a "novel rule" created to deprive petitioners of federal constitutional rights.[38]

The approach taken by the Court in *Abney* may indicate that the Court is moving toward a new test when dealing with state substantive law problems. Under this test the state court judgment would be upheld so long as there are substantive state law principles which, regardless of the frequency of past application, can reasonably be applied to the case. More probably, the Court is affirming the strict test announced in *Fay* and thus rejecting the test announced in *Henry* when dealing with state substantive law.

Since Justice Black failed to discuss adequate state grounds and counsel for the petitioner failed to argue discriminatory application of state law, it is difficult to predict with certainty whether *Abney* will significantly affect the adequate state grounds doctrine. Because of the Court's failure to discuss this issue the case could be easily distinguished in any future problem concerning adequate state grounds; but following the reasoning of this comment, a substantial limitation of the Court's power to review decisions based upon substantive state grounds may be in the process of formulation.

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36. *See* note 15 *supra* and accompanying text.

37. *See* note 21 *supra* and accompanying text.

38. If the Court had held the state ground in *Abney* inadequate, it could have followed one of two courses, both of which have been used by the Court when faced with the problem. After finding the state ground inadequate, the Court could have reversed the judgment, holding that the treatment by the Georgia Supreme Court of this trust was discriminatory and thus unconstitutional state action in violation of the 14th amendment equal protection clause. If the Court had chosen not to follow this approach, it could have remanded the case to the Georgia court, which would have been faced squarely with a Shelley v. Kraemer type of case. The state court would have been unable to enforce Bacon's private discrimination with the result that Baconsfield would have remained open on a desegregated basis.