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Article 15

Civil Rights - Class Relief Denied Although City's Acts Held Discriminatory

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In Pennsylvania the law seems to be more strict and limited than the law in other jurisdictions. It certainly is more definite in its requirements and there is apparently less room for interpretation as most cases have adhered to the statutory interpretation as set forth by the court in *Paxos v. Jarka Corp.*[24] An excellent statement of the law as existing in Pennsylvania is found in *Leed v. State Workmen's Ins. Fund.*[25]

> . . . if hospital records are admissible in evidence, three probative elements must be present: (1) They must be made contemporaneously with the acts which they purport to relate; (2) at time of making, it was impossible to anticipate reasons which might subsequently arise for making a false entry in the original record; or (3) the statements or entries must be made by one possessing knowledge of their truth; and . . . where the records of a hospital are made not by physicians admitted to practice, but by internes or students not qualified as experts, and there is no evidence that they were made at the direction of the physician in charge, it is error to admit the records.[26]

Illinois cases uniformly hold that if hospital records are admissible at all, they are admissible only on the same basis that ordinary books of account are admissible and therefore require the same manner of proof for admissibility. All persons who have made entries in the record must testify as to correctness of the entries or the record will not be admissible.[27]

All of the cases discussing the admissibility of hospital records seem to indicate a definite trend. There is, at the present time, no dispute as to the admissibility of these records under the proper circumstances. Of course, there are different statutory requirements in the various jurisdictions. The prime point, however, is that generally these records are being admitted and serious injustices are being prevented. Even where the records are by statute required to be kept and are by statute specifically made admissible as evidence, trial counsel must be attentive to the laying of a proper foundation for their admission.

CIVIL RIGHTS–CLASS RELIEF DENIED ALTHOUGH CITY'S ACTS HELD DISCRIMINATORY

Kansas City, Missouri, operates a park for the amusement and recreation of its citizens generally. Swope Park is designed to provide a well balanced program for athletic as well as social entertainment. Among the many attractions is a swimming pool. Appellant sought to be admitted to the pool but was refused admittance in accordance with the park commissioner's

[24] 314 Pa. 148, 171 Atl. 468 (1934).

[25] 128 Pa. Sup. 572, 194 Atl. 689 (1937).

[26] Ibid., at 574 and 691.

[27] Monahan v. Chicago Transit Authority, 341 Ill. App. 250, 93 N.E. 2d 169 (1950); Kimber v. Kimber, 317 Ill. 561, 148 N.E. 293 (1925); Wright v. Upson, 303 Ill. 120, 135 N.E. 209 (1922).

alleged policy of restricting the use of the pool to members of the white race. No distinction was made, however, with regard to general admission to the park and to the use of its many other facilities. Appellant brought an action individually and collectively for declaratory and injunctive relief alleging discrimination and impairment of his rights protected by the Fourteenth Amendment. City defended on the ground that a pool was provided for members of the Negro race located approximately six miles from Swope Park. The court of appeals affirmed the judgment of the district court granting individual relief and refusing to grant relief on a class basis. *Kansas City, Missouri v. Williams*, 205 F. 2d 47 (C.A. 8th, 1953).

The court of appeals concurred with the lower court in deciding that a journey of about six miles to and from a swimming pool of an obviously inferior quality served to disrupt the day of recreation which appellant had been induced to spend at Swope Park and thus the commissioner's rule was discriminatory. The court also affirmed the denial of class relief which was based upon the judicial discretion of the lower court even though it expressed some degree of dissatisfaction at the narrowness of the decision.

The question of civil rights has ripened into a bitterly contested problem in the past two decades and the instant case points up the great difficulty which the courts are experiencing in trying to resolve these racial controversies.

Class relief is a product of equity, the gist of which is to avoid impractical litigation, such as multiplicity of suits when the rights of many persons similarly situated are involved.[1] The prime requisite for class relief is a common question of law or fact.[2] The lower court in denying class relief stated that there was no evidence that any persons other than appellants ever tendered the price of admission to the pool and hence no useful purpose would be served by a decision which would be conclusive as to the group.

In *Wilson v. Board* of *Supervisors of Louisiana State University*,[3] claimant was refused admission to the University's college of law in accordance with a resolution handed down by the board. Louisiana had established a college for Negroes and shortly before the controversy arose had extended the curriculum to include law as a field of concentration. It was predicted by the school authorities that this law school would attain a stature second to none in the state. At the time of the suit, however, the college was still in an early state of development. Claimant brought a personal action and one for class relief. After reviewing the comparative

[1] Shipley v. Pittsburgh & L.E.R. Co., 70 F. Supp. 870 (W.D. Pa., 1947); Farmers' Co-op. Oil Co. v. Socony Vacuum Oil Co., 133 F. 2d 101 (C.A. 8th, 1942).

[2] Fed. Rules of Civ. Proc., 23.

[3] 92 F. Supp. 986 (E.D. La., 1950).

worth of the two institutions and finding them greatly disparate the court granted personal and class relief without evidence tending to show that other Negroes had ever been refused admission because of race.

Also in *Johnson v. Board of Trustees of Kentucky University*,[4] claimant applied for admission to the university and was offered substituted facilities in place of the facilities of the university in accord with a university policy toward Negroes. The court decreed that claimant and all others so qualified and situated were entitled to admission until equal or substantially equal facilities were provided by the school board. Here again there was no evidence tending to show that other Negroes had sought admission and were refused solely because of race or color.

It cannot be said, however, that the trial court was entirely unjustified, on a purely legal basis, that is, in by-passing a decision on the issue of class relief in this particular case.

In *Gonzales v. Sheely*[5] it was the policy of the school board to segregate all students of Spanish extraction in specially designated schools where they could not benefit by social intercourse with children of American habits. The court considered this discrimination and a denial of equal protection because it retarded these students in the mastery of American customs and habits and placed them on an inferior plane socially and intellectually. It can be seen from the facts that the rights of the class were crystallized. It had always been the declared policy of the school board to segregate the students of Spanish language and custom and there was nothing to indicate that it would ever be changed. There were other students whose position legally was identical to the claimants. It was easy here to delineate a class action. Comparing the *Gonzales* case with the instant we find that only claimant was shown to have sought admission to the pool and that the backbone of the class relief sought was conjecture based upon the park commissioners' avowed policy of exclusion.

A recent decision handed down by the Alabama district court[6] shows a similar tendency to dispose of the class question by the use of subtle legal reasoning. Claimant, a Negro, was refused registration to vote because of race and color. He brought a representative suit in behalf of all other Negroes in the county qualified to vote and possessing none of the disqualifications enumerated by the statute. The court decided that the class was too indefinite and reasoned that qualification to vote was essentially personal in character and involved many imponderables which could not be decided by one final common judgment.

This decision, as the decision in the instant case, displayed little realism

[4] 83 F. Supp. 707 (E.D. Ky., 1949).

[5] 96 F. Supp. 1004 (D.C. Ariz., 1951).

[6] Mitchell v. Wright, 62 F. Supp. 580 (E.D. Ala., 1945).

and a decided reluctance to face the problem of racial equality that is provided for under the Constitution. As the Louisiana court decided in the *Wilson* case, the Alabama court could have recognized as a class those Negroes qualified to vote and possessing no disqualifications.

The court in the instant case was faced with none of these technicalities but chose to circumvent the issue under the guise of judicial discretion. Judicial discretion is that power of the court to determine a question of fair judicial consideration with regard to what is right and equitable under law and circumstances and should be directed by reason and conscience to a just result.[7] It is submitted that substantial justice was not dispensed in the instant case. The court may have deemed it prudent to defer the class question due to the volatile nature of the issue. However practical it may have seemed under the existing conditions to dismiss the question, the affirmance of the trial court's decision seems to constitute a dereliction from that standard of equality sought to be established by the Fourteenth Amendment. Technically the decision is not subject to reversal because there must be a clear cut abuse of discretion above and beyond the scope of reason.[8]

Unless the courts cease their practice of hiding behind the veil of discretionary power and bowing to local prejudices in cases involving racial discrimination, final determination of these problems must be postponed until such time as definitive rules are prescribed either by legislation or the Supreme Court of the United States.

CONSTITUTIONAL LAW–ILLINOIS PLUMBING LICENSE LAW VOID

As citizens and taxpayers engaged in the business of selling hardware, heating, and plumbing equipment at retail, the plaintiffs commenced an action in the Circuit Court of Sangamon County against the defendants who are state officers charged with enforcement of the Illinois Plumbing License Law of 1951.[1] The plaintiffs sought to enjoin the defendants from the expenditure of public funds in the administration of such act, contending that the act was unconstitutional. The circuit court entered a decree finding the statute unconstitutional as violative of the due process clause of the state Constitution, and the due process and equal protection

[7] Schneider v. Hawkins, 179 Md. 21, 16 A. 2d 861 (1941).

[8] Hartford Empire Co. v. Obear-Nester Glass Co., 95 F. 2d 414 (C.A. 8th, 1938); Blackhawk Motor Transit Co. v. Illinois Commerce Commission, 383 Ill. 57, 48 N.E. 2d 341 (1943); In re Loeb, 315 Mass. 191, 52 N.E. 2d 37 (1943); Alford v. Alford, 190 Ga. 562, 9 S.E. 2d 895 (1940); In re Garrett's Estate, 335 Pa. 287, 6 A. 2d 858 (1939); Benedict v. Calkins, 19 Cal. App. 2d 416, 65 P. 2d 831 (1937).

[1] Ill. Rev. Stat. (1951) c. 111½, §§ 116.1–116.35.