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Discretionary Action of Park Board in Excluding Negro Golfers Not Subject to Mandamus - Board of Park Commissioners of Baltimore City v. Murphy

DISCRETIONARY ACTION OF PARK BOARD IN EXCLUDING NEGRO GOLFERS NOT SUBJECT TO MANDAMUS

Board of Park Commissioners of Baltimore City v. Murphy[1]

The City of Baltimore maintained four golf courses, three of which were used by white persons and a fourth which was reserved for Negro golfers. Negroes had always been restricted to the use of a particular course, except during a short period in 1942 when this restriction was removed and Negro and white players were admitted indiscriminately to all courses. This period of trial resulted in the Park Board's rescinding its order for Negro players' unrestricted use of all the City's golf courses, the reason assigned by the Board for such action being that the very limited number of Negro golfers making use of the four courses indicated that the facilities of the Carroll Park course, allotted exclusively to Negro players, were ample for their needs. After restrictions were again in effect, petitioner presented himself at one of the courses reserved for white golfers and was refused admission in accordance with the Park Board's order. He then filed a petition for a writ of mandamus, complaining that the course reserved for Negroes was inferior to courses open to white golfers. He maintained that the Park Board was not authorized by law to segregate players of his race, and that exclusion from golf courses of the City solely because of his color was a deprivation of equal protection of the laws guaranteed him by the Fourteenth Amendment of the United States Constitution.

Petitioner in his writ prayed that respondents be required and directed to sell greens fee tickets *at each and every* golf course owned by the Mayor and City Council of Baltimore to all those who applied for such greens fee tickets, irrespective of race, creed, or color. Upon verdict of a jury, the lower Court ordered the writ to be passed as prayed. This order was reversed by the Court of Appeals on the ground that there were lacking the necessary elements to maintain mandamus, a clear legal right to performance of the act demanded and an imperative duty on the part of the respondent to do the act required.[2]

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[1] 29 A. (2d) 253 (Md., 1942).

[2] HIGH, EXTRAORDINARY LEGAL REMEDIES (3rd Ed., 1896) Sec. 24.

In dealing with the assertion by the petitioner of the right to be admitted to every golf course owned by the City, the Court considered segregation of the white and Negro races as treatment so firmly established as constitutional that it called for no protracted discussion. They cited the case of *Plessy v. Ferguson*,[3] wherein the Supreme Court upheld a Louisiana statute requiring separate railway accommodations for colored and white passengers. In that case the Supreme Court had said: "The distinction between laws interfering with political equality of the Negro and those requiring the separation of the two races in schools, theatres, and railway carriages has been frequently drawn by this Court."[4]

While insisting on the constitutionality of segregation, the Court did not fail to recognize the limitation on this treatment by ruling that complete exclusion from every golf course in the City or relegation to an inferior course would be a deprivation of the equal protection of the laws guaranteed by the Fourteenth Amendment. This recognition was presaged by the Court's holding in the *Murray* case[5] where mandamus was recognized as the proper remedy to compel admittance of Negro citizens to the law school of the State University on the ground that no equal facilities for legal education of Negroes were provided elsewhere within the State.

The limitation on this right of segregation pointed by the Maryland Court was recently emphasized by the United States Supreme Court in the *Mitchell* case,[6] where a colored passenger holding a first class ticket had been compelled to ride in a second class car and was thus denied standard conveniences available to first class passengers. The Court held: "If facilities are provided, substantial equality of persons travelling under like conditions cannot be refused."[7]

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[3] 163 U. S. 537, 545 (1886).

[4] *Ibid.*

[5] University of Maryland v. Murray, 169 Md. 478, 483-84, 182 A. 590 (1935); Hart v. State, 100 Md. 595, 601, 60 A. 457 (1905).

[6] 313 U. S. 80, 97 (1940).

[7] The defense of the Railroad in this case had been that the number of colored passengers wishing first class accommodations did not warrant furnishing a first class car for them. The Court dismissed this argument as without merit, saying, "Comparable volume of traffic cannot justify denial of a fundamental right of equality of treatment." Is the statement of the Maryland Court in the instant case that "nine holes for the small number of players might, for instance, be found upon inquiry to be adequate for them" at variance with this particular part of the ruling in the Mitchell case?

It was the absence of the second element necessary to the remedy, the imperative duty on the part of the respondent, which the Court stressed in arriving at the decision that the writ would not issue. Referring to the City Charter[8] as authority for the Park Board's delegated powers, the Court pointed out that the Board had discretion in making rules and regulations for the government and preservation of order in the City parks, and that segregation of the races being normal treatment in this State[9] the Board needed no additional ordinance to authorize it to apply this treatment, implied as an incident of its Charter-given powers. It was the administrative board which had been chosen to exercise its discretion as to the size and number of courses necessary to satisfy the needs of the golf playing public, and as to whether a separation of white and colored players would promote order and an enjoyment of golfing facilities by both. "So far as the Board has discretion, the writ of mandamus cannot issue to control their action", said the Court.[10]

This recognition that mandamus will not lie to enforce a discretionary power is universal. There are innumerable cases in which this doctrine is expressed in varying statements. Courts repeatedly say the writ cannot perform the function of a writ of error; or that it cannot issue to revise judicial action, but can only compel the performance of ministerial functions. The rule, then, is plain, but in its application there is obscurity and confusion. No clear-cut line exists between discretionary and ministerial function. The cases make it evident that the courts have had great difficulty in drawing the distinction in individual cases.

In the case of *Kendall v. United States,*[11] where Congress had directed the Postmaster to make credit entries in an account found to be just by the Solicitor of the Treasury, the Court held this act was precise and definite, and the duty ministerial, with no discretionary quality, hence it required the Postmaster to make the entries.

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[8] Balt. City Charter (1938) Sec. 119.

[9] Williams v. Zimmerman, 172 Md. 563, 567, 192 A. 353 (1937).

[10] The same rule was applied in Maryland State Funeral Directors' Association v. State Board of Undertakers, 150 Md. 294, 133 A. 62 (1926). Earlier Maryland cases supporting the doctrine of administrative finality are: Green v. Purnell, 12 Md. 329, 336 (1858); Devine v. Belt, 70 Md. 352, 354, 17 A. 375 (1889); Madison v. Harbor Board, 76 Md. 395, 25 A. 337 (1893); Wailes v. Smith, Comptroller, 76 Md. 469, 477, 25 A. 922 (1893).

[11] 12 Pet. 524 (U. S., 1838).

Compare this decision with that of Chief Justice Taney in the case of *United States v. Seaman*[12] where relator, a printer of the United States Senate, applied for mandamus to compel the Superintendent of Public Printing to deliver to him certain documents for printing, printing of which he claimed to be entitled by act of Congress. The Chief Justice refused the writ on the ground of the officer's discretionary power, basing such classification on the fact that the officer had first to ascertain in which house the order to print was issued and then the usage of Congress in printing the document in one or more parts. This obliged him to form a judgment before he acted, said the Chief Justice, and hence the case was not one for mandamus.

Again, we find the Iowa Court[13] holding mandamus will issue to compel public officers to perform the ministerial duty of returning money illegally extracted, under a statute later declared unconstitutional; while the Maryland Court[14] refused to issue mandamus for the return of a tax on oyster commission merchants, which tax had been held unconstitutional by the United States Supreme Court as a burden on interstate commerce. The requirement of an official approval for payment of money collected under an unconstitutional tax was not a requirement for certification of an amount due, but was a discretionary power placed in the officer to safeguard the state treasury, the Maryland Court ruled.

In reaching its conclusion the Court defined, at length, ministerial and discretionary duties, quoting the earlier case of *Wailes v. Smith*[15] where the Court had said: "While this distinction (of ministerial and discretionary powers) will be found to run through all the cases there is, it must be admitted, some conflict of opinion in this country, at least, as to what constitutes, strictly speaking a ministerial duty as distinguished from a discretionary duty within the meaning of the rule and it may not be easy to reconcile the principles which are supposed to govern these decisions."

Mr. Spelling, in his work on *Extraordinary Relief*,[16] likewise recognizes the difficulty of drawing the distinc-

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[12] 17 How. 225 (U. S., 1854).
[13] Commercial National Bank v. Pottawattamie County, 168 Iowa 501, 504, 150 N. W. 708 (1915).
[14] Foote v. Harrington, 129 Md. 123, 98 A. 289 (1916).
[15] 76 Md. 469, 477, 25 A. 922 (1893).
[16] SPELLING, EXTRAORDINARY RELIEF (1893) Sec. 1396.

tion, stating that the dividing line between these duties is not sufficiently agreed upon by the authorities to admit of the statement of a definite rule on the subject.

While courts recognize the difficulty of distinguishing discretionary and ministerial powers, a survey of the cases, very briefly indicated by the preceding illustrations, does not show any trend toward development of clearer classification schemes which would promote more uniform rulings. In considering the classification necessary before the Court issues or denies the writ, it cannot but be noted how impossible it is to separate the clear legal right to the act demanded from the necessity for a duty of mandatory nature, emphasized by each court by insistence on the ministerial duty before the writ will issue.

In many instances in determining whether the duty sought to be enforced is one involving discretion or one of a purely ministerial character, courts have stressed the nature of the office of the respondent rather than the nature of the act sought to be done. This may be traced to the famous case of *Marbury v. Madison*.[17] There, the relators had applied to the United States Supreme Court for a rule against the Secretary of State to show cause why mandamus should not issue commanding him to deliver to the relators their commissions as Justices of the Peace of the District of Columbia. The Court refused to interfere, upon the ground that its original jurisdiction was limited by the Constitution. While the question of jurisdiction was the sole one which the Court was called upon to decide, the case is cited to this day as the leading authority in support of the jurisdiction by mandamus over ministerial officers, because of the careful analysis of the distinctions between ministerial and discretionary duties. In this case the contention was that mandamus to the Secretary of State was mandamus to the President and so could not issue. Clearly separating the powers of the office and the act of its officer which the writ sought to command, Chief Justice Marshall pointed out the dual capacity of the officer, as agent of the President, wherein his powers were discretionary, and as a keeper of seals, recorder of deeds, or of commissions, in the performance of which *acts* he was a ministerial officer of the people of the United States. A ministerial officer having public duties to perform is compellable by law to do his duty, the Court held. "It is not by the office of the person to whom the writ is directed

[17] 1 Cranch 137, 170-71 (U. S., 1803).

but by the nature of the act to be done that the propriety or impropriety of issuing mandamus is to be determined", was the Court's ruling. Would a stricter adherence to such a rule result in a more consistent policy in the issuance of the writ?

Whatever the answer, in any case where the act demanded involves constitutional rights, emphasis on the act demanded of the officer is obviously what a petitioner is likely to insist on, rather than on the nature of the office which the respondent holds. In the instant case, obviously, the petitioner did rely heavily on the nature of the act he demanded, rather than on the nature of powers conferred on the Park Board by the City Charter. It hardly needed stating by the Court that the Park Board had discretion as to the number and types of golf courses adequate for the golf playing public, and that it was within the Board's sound judgment to determine the choice of their location and the persons who could play on them. The choice of an administrative body to exercise its judgment on matters involving particular knowledge and skill is so uniformly recognized and the finality of these administrative determinations is so clearly upheld by the Maryland Court and the United States Supreme Court,[18] that the petitioner's case of mandamus would be surprising in the face of the doctrine of administrative finality, except for a reliance on the point that the act of admitting Negroes to all golf courses is one which no officer could refuse.

Again, let us refer to contentions in *Marbury v. Madison*,[19] where the Court, in replying to argument that Madison was an agent of the President and, as such, his acts must be discretionary, stated: "Where he is directed by law to do a certain act affecting the absolute rights of individuals . . . the performance of which the President cannot lawfully forbid . . . it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department." This statement is a recognition that public officers, whatever the nature of their office, or from whatever source they derive their authority, are entrusted with the performance of

[18] State v. Latrobe, 81 Md. 222, 31 A. 788 (1895); U. S., ex rel. Chicago Gt. Western R. R. Co. v. I. C. C., 294 U. S. 50, 59 (1935). See also cases cited *supra*, n. 10.

[19] See *supra*, n. 17.

certain duties concerning which they are vested with no discretionary powers, and which are positively imposed on them by virtue of express law. Such duties, by whatever law they may be required, being unattended with any degree of official discretion, were regarded by the Court as ministerial in their nature, and the officers at whose hands their performance was required, *as to such duties,* were ministerial officers.

Petitioner chose mandamus in the face of recognized distinctions between ministerial and discretionary powers. Was he, in effect, saying the act he demanded was ministerial because the respondent had no discretion to violate the Fourteenth Amendment, and as to the act of admitting Negroes to all golf courses he was a *ministerial* officer, whose acts a Court could command? Such a contention would justify the choice of mandamus in the fact of the doctrine of administrative finality, but it again illustrates the inseparable quality of the petitioner's right and the respondent's duty. To establish the clear ministerial quality of the act which petitioner demanded, he had first to establish the clear unconstitutionality of segregation as a State policy. This burden he could not meet.

Plessy v. Ferguson[20] stands squarely in the path of a mandatory duty on the part of the respondent to admit the petitioner to all golf courses of the City. The Court's citation of this case, coupled with its earlier ruling in the *Murray* case[21] that complete exclusion from facilities open to white persons is a denial of equal protection, places the Maryland Court's rulings on sound constitutional grounds.

On principles of administrative law, the Court's refusal to substitute its discretion for that of the administrative body chosen for that purpose is well supported by holdings of the presently constituted Supreme Court, which goes far in its reiteration that where discretion is reposed in an administrative agency and this discretion has been exercised, Courts are powerless by mandamus to compel a different conclusion.[22]

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[20] See *supra*, n. 3.

[21] See *supra*, n. 5.

[22] U. S., ex rel. Chicago Gt. Western R. R. Co. v. I. C. C., 294 U. S. 50, 59 (1935) ; Rochester Telephone Co. v. U. S., 307 U. S. 125, 146 (1939).