

## MITCHELL v. DEISCH.

Opinion delivered June 17, 1929.

1. HOSPITALS—LOCATION OF NEGRO TUBERCULOSIS SANATORIUM.—Acts 1923, c. 113, § 4, authorizing the board of trustees to select a suitable site for the establishment of a tuberculosis sanatorium for negroes "at such point in the State as shall appear to them to be more nearly in the center of the negro population of said State," is directory merely and leaves the board of trustees discretion to select a suitable site.
2. HOSPITALS—RATIFICATION OF LOCATION BY LEGISLATURE.—Acts 1927, c. 277, appropriating money for erection of buildings on land acquired for erection of the necessary buildings and improvements "on the lands heretofore acquired for the purpose of a negro tuberculosis sanatorium," constituted an approval by the Legislature of the site selected for a sanatorium by the board of trustees and a ratification thereof.
3. CONSTITUTIONAL LAW—POLICY OF LEGISLATION.—In determining the validity of the selection of a site for a negro sanatorium by the board of trustees under Acts 1923, c. 113, § 4, the court is not concerned with the question whether the establishment of the sanatorium in a county having a small negro population and inhabited almost entirely by white people was a departure from the State's policy of segregating the races, as the policy and expediency of legislation are questions peculiarly within the province of the Legislature.
4. NUISANCE—TUBERCULOSIS SANATORIUM.—A tuberculosis sanatorium is a beneficent institution, which cannot be regarded as a nuisance *per se*.
5. NUISANCE—TUBERCULOSIS SANATORIUM.—In a suit to enjoin the establishment of a tuberculosis sanatorium adjacent to plaintiff's land, evidence held to show that such establishment would not permanently injure the market value of such land, and not to furnish grounds for equitable relief.

Appeal from Saline Chancery Court; *William R. Duffie*, Chancellor; affirmed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a decree refusing to enjoin the board of trustees of the Arkansas Negro Tuberculosis Sanatorium from proceeding with the construction of a sanatorium on a site in Saline County, Arkansas, adjoining lands owned and occupied by one of appellants, Miss Frances Mitchell, and within a short

distance of lands owned by the other appellants, but distant from a quarter to one-third of a mile from any residence.

It was alleged that the selection by the board of the site in Saline County for a sanatorium was arbitrarily made and without authority of law, in disregard of the act of the Legislature providing therefor, § 4 of act 113 of the Acts of 1923 being set out as follows: "As soon after the organization of said board as practicable, said board shall select a suitable site for the establishment of a tuberculosis sanatorium for negroes, and in selecting said site they shall place institution at such point in the State as shall appear to them to be more nearly in the center of the negro population of said State." That great and irreparable damage would result to appellants from the construction of such sanatorium, for which there was no adequate remedy at law, and that such irreparable damage and injury would result, not only to appellants and to their lands, but to numerous other property owners and taxpayers in that county.

The answer denied that the selection of the site was arbitrarily made and not in accordance with the authority given, averred that it was the best site the board could find, and appeared to them to be more nearly in the center of the negro population, accessibility and suitability being considered; that the location was excellent in every way, and that after the site had been selected the General Assembly of the State, by act 277 of 1927, approved such location by making an appropriation for the erection of buildings "on the land heretofore acquired for the purpose of a negro tuberculosis sanatorium."

The board, according to the testimony of Hon. Peter Deisch, chairman, only examined proposed sites in Pulaski and Saline counties before making the selection, regarding the accessibility of the central location to all the negro population, inhabiting chiefly the eastern, southern and southwestern parts of the State, as a prin-

cipal factor in determining its suitability as a site for the establishment of the sanatorium, rather than the location of the sanatorium in fact at or near the geographical center of the negro population of the State. The other factors determining the selection were an adequate supply of good water, the location of the gas mains carrying natural gas from the fields in Union County through the lands, the high tension electric power lines over them, and good railroad facilities hard by.

The mayor of Alexander, a small town about a mile from the site selected, was consulted by a member of the board before its selection, and thought there would be no objection to its location there. There is a petition in the transcript containing the names of about 100 citizens in the neighborhood requesting the board to build on the site selected. There are two white families and about seven negro families in the immediate vicinity of the site, according to Dr. Ward, who, with five other witnesses residing at or near Alexander, testified that the location of the sanatorium would enhance the value of property.

The testimony on behalf of the appellants tended to show that the value of their lands would be reduced and damaged to the extent of 50 per cent. by the construction of the sanatorium. It also reflected the opinion of the witnesses relative to the menace and danger to the inhabitants of the adjoining lands from the location and treatment of tubercular patients in the sanatorium, and the fear entertained by all inhabitants for the health of the community on account of it.

Dr. John Stewart testified that he had been superintendent of the Arkansas Tuberculosis Sanatorium at Booneville for 15 years; had had 21 years' experience in such sanatoriums, and that the value of the property around the institution there had increased since its location. The farmers have been benefited because they regard it a health center, and are taught how to live, and supply the institution with the produce of their

farms. Booneville gave a bonus to get the institution there; "that it is utterly impossible for people on farms around the hospital to contract tuberculosis from the patients; that the patients are not permitted to roam the woods, but, even if they should do so, it would be of no effect, because tuberculosis is a house disease; that sunlight and air kill germs, and, even if patients should expectorate in the woods and the leaves should wash into the creek, it would have no effect upon the cows that drank the water; that in all his experience in the treatment of tuberculosis he had never known a physician or a nurse or attendant to contract the disease from a patient." Witness said that Dr. Kenneth of New York, an international authority on tuberculosis, made a survey to ascertain, several years ago, how many people had contracted tuberculosis from working in well regulated sanatoriums, and found no single case reported, even among janitors or nurses or any one that worked with the patients. Witness was superintendent of a sanatorium at Mt. Vernon, Missouri, for three and one-half years, a town of 1,500 inhabitants. The institution was located about a quarter of a mile from the town. He did not know of any one leaving town on account of it, but knew of people coming there. Had been connected with Mt. St. Rose Sanatorium in St. Louis, right in the city. Had been connected with sanatoriums where they cared for negro patients, and the same rules applied to negroes as to whites. There is no more danger of contracting the disease from a negro patient than a white patient. Had heard the testimony of witnesses for appellants, and from his 21 years' experience could not see how the sanatorium would endanger or be a menace to any one living around or about the sanatorium, and believed it would be a benefit to the land values. Discussed the method of sewage disposal by septic tanks at Booneville, from which it runs into the nearby branches, and said the water had had no effect on cows drinking it. Described the three sources of contracting tuberculosis, and did not think any of the three ways in

which it could be contracted would in any way affect the health of persons living near the location of the sanatorium, as did the appellants. Said "it would be impossible to contract tuberculosis out-of-doors."

Dr. J. A. Price, superintendent of the Oakville Sanatorium, owned by Memphis and Shelby County, Tennessee, testified he had been connected with that institution for seven years, and prior to that time with a sanatorium at Fort Wayne, Indiana. The Memphis institution is for both whites and negroes, situated in a little suburb of Memphis. Nice homes are around the sanatorium property, and since its location values have increased, in some instances have trebled. While there was some objection to its location at first, no one moved away on account of it, and the people are now satisfied, and would object to its being moved. "I have heard the witnesses testify regarding the proposed location of the hospital here," he said, "and from my experience the health of the people on this other property would not be endangered by the location of the sanatorium." He did not think there would be anything connected with the institution that would diminish the value of Miss Mitchell's property.

Dr. M. Z. Bair, sanitary engineer for the State Board of Health, testified that he had been in the business for 19 years, and he advised with the board in regard to the selection of the site for the sanatorium. One of the principal considerations was the availability of water, the other drainage, and the disposition of sewage. He found the topographic conditions were such that adequate drainage could be provided with facilities for building a plant of such character "as to unquestionably protect the watercourse against any contamination; \* \* \* that after the sewage has been treated the water in the creek will not be polluted."

Miss Erle Chambers, a member of the board and executive secretary of the Arkansas Tuberculosis Association, testified that she had visited many tuberculosis sanatoriums during the last 12 years in New York,

Minnesota, Tennessee, Alabama, and recently in Europe, to find out how they were located and to obtain all possible information regarding the buildings and management. Many of the institutions were located in the cities. Pulaski County has a negro tuberculosis ward in the county hospital, distant from which witness lives only about five blocks. Stated, in addition to the other considerations mentioned before by the chairman of the board, that there were good negro hospitals in Little Rock, from which they could procure qualified nurses for the patients, and also mentioned the easy accessibility of the site to all the colored population of the State. She read several letters of managers and superintendents of sanatoriums in Virginia, Atlanta, Georgia, for whites and negroes, Mississippi, Nashville, Tennessee, and in North Carolina, stating generally that there had been no evidence of depreciation of the values of property adjacent to the institutions. That, although there might have been objection to the establishment of these institutions at first, it readily disappeared. That in fact property values were found to increase instead of decrease in proximity to the institutions.

Dr. McBrayer, managing director, Southern Pines, N. C., said: "It is not only our experience, but it is the experience of everybody connected with sanatoriums, that property values increase around the sanatorium. \* \* \* With a properly conducted sanatorium there is no danger or inconvenience to any one, and this is well recognized at this time."

The chancellor held that the lands selected are not near the center of the negro population of the State, and that in making said selection the board did not conform to the requirements of the act authorizing it, but exceeded the discretion conferred upon them thereby. He held, however, that the Legislature had, by its appropriation for the buildings, under act 277 of 1927, approved the selection of the site made by the board, and denied the injunction, and dismissed the complaint for want of equity.

*Cockrill & Armistead, W. A. Utley and Shields M. Goodwin*, for appellant.

*Hal L. Norwood*, Attorney General, for appellee.

KIRBY, J., (after stating the facts). Under § 4 of act 113 of 1923 the board was given authority and had the discretion to select a suitable site for the establishment of a tuberculosis sanatorium for negroes, and were directed in making such selection to locate the institution at such point in the State "as shall appear to them" to be more nearly in the center of the negro population of the State. They made this selection for the site of lands in Saline County that they regarded most suitable as a site for the establishment of the sanatorium, regarding it as a compliance with the statute because of its accessibility. There is no intimation that the site is not most suitable for the location of such sanatorium, as the evidence shows it to be, nor any suggestion made that one more suitable could be found elsewhere in the State, but only an insistence that the statute was violated by the board in not selecting lands for the site more nearly in the actual geographical center of the negro population of the State.

The statute is only directory in its terms; leaving the board the discretion to place the institution at such point in the State "as shall appear to them," etc. There is not a scintilla of testimony indicating bad faith on the part of the board in the selection of the site as made, and the General Assembly, under act 277 of 1927, knowing of the selection under the authority given the board for the purpose, made an appropriation of moneys for the erection of the necessary buildings and improvements "on the lands heretofore acquired for the purpose of a negro tuberculosis sanatorium." This was an approval by the Legislature of the selection of the site for the sanatorium by the authorized agency of the State, amounting to a ratification thereof, even if any such ratification had been necessary, and the chancellor did not err in so holding.

The argument is without force therefore—the Legislature having decided that question—that the establishment of a negro tuberculosis sanatorium in a county containing so small a negro population and inhabited almost entirely by white people is a departure from the State's policy of the segregation of the races, since that is a matter with which the court is not concerned, the policy of legislation and its expediency being questions peculiarly within the province of the lawmaking power. *Scalles v. State*, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768; *State v. Bain*, 172 Ark. 480, 289 S. W. 384; *Cone v. Garner*, 175 Ark. 860, 3 S. W. (2d) 1.

In modern times a sanatorium is not only considered a beneficent institution, but a public necessity, and certainly its establishment cannot be regarded a nuisance *per se*. The chancellor did not find that its establishment and operation would cause irreparable injury to the appellants, and, at best, the testimony conduced to show that any injury to the market value of the land would be only temporary, and not irreparable, not furnishing sufficient grounds for equitable relief. *Gus Blass Co. v. Reinman*, 102 Ark. 294, 143 S. W. 1087; 2 Story's Eq. Juris., 926; Joyce on Nuisances, 427; Wood on Nuisances, 778; *McDaniel v. Forest Park Cemetery Assn.*, 156 Ark. 571, 246 S. W. 874. For cases in other jurisdictions denying injunctive relief against the maintenance of hospitals see *Jardine v. Pasadena*, 190 Cal. 64, 248 Pac. 225, 48 A. L. R. 509; *San Diego Tuberculosis Assn. v. East San Diego*, 186 Cal. 252, 200 Pac. 393, 17 A. L. R. 513; *Tompson v. Evangelical Hospital Assn.*, 111 Neb. 191, 196 N. W. 117, 32 A. L. R. 721; *Cook v. Fall River*, 239 Mass. 90, 131 N. E. 346, 18 A. L. R. 119; *Northfield v. Board of Chosen Freeholders of Atlantic County*, 85 N. J. Eq. 47, 95 Atl. 743; *Board of Health v. North American Home*, 77 N. J. Eq., 78 Atl. 677; *LeBourgeoise v. New Orleans*, 145 La. 274, 82 So. 268.

We find no error in the record, and the decree is affirmed.

MEHAFFY, J., (dissenting). I do not agree with the opinion of the majority in its construction of the statute involved. Section 4 of the act is as follows:

“As soon after the organization of said board as practicable said board shall select a suitable site for the establishment of a tuberculosis sanatorium for negroes, and in selecting said site they shall place institution at such point in the State as shall appear to them to be more nearly in the center of the negro population of said State.”

The majority opinion says that this institution was placed in Saline County by the board because it was a site that they regarded as the most suitable and that they regarded as in compliance with the statute because of its accessibility. It is true that the testimony of the board showed they thought they had a right to locate it there, but the testimony conclusively shows that the board ignored that part of the section which says “they shall place institution at such point in the State as shall appear to them to be more nearly in the center of the negro population.” Nobody claims that it appears to them to be anywhere about the center of the negro population, but the undisputed proof shows that it is not in the center of the negro population, and the board did not think that it was.

The chancery court found from the evidence “that said lands are not in or near the center of the negro population of said State, and that said board, in selecting said lands as a site for said sanatorium, did not conform to the requirements of § 4 of said act No. 113 of 1923, but exceeded the discretion conferred upon said board by said act.”

The chancery court, however, denied the injunction and dismissed the complaint because it held that the act of 1927 ratified and approved the selection by the board, and, in effect, held that in passing the act for the appropriation for the negro sanatorium the Legislature repealed the provision in the act of 1923 requiring the

board to place the institution in the center of the negro population.

The title of the act of 1927 is as follows: "An act to make available funds for the construction and maintenance of the tuberculosis sanatorium for negroes as authorized by act No. 113 of the Acts of the General Assembly of 1923."

The title states fully the purpose of the act. It was simply an appropriation bill, passed as such, and doubtless the members of the Legislature paid no attention to it, except to ascertain that it was an appropriation for a tuberculosis sanatorium for negroes. If the section means what the majority held it meant, then there was no reason at all for the latter part of § 4. The first part of the section requires said board to select a suitable site, and, giving effect to every clause of the act, as we must, the act required the board to select it in or near the center of the negro population. The Legislature meant something when it put this provision in the law, but the majority held that it is directory only. We cannot agree to this interpretation of the statute. I agree with the majority that the policy of legislation and its expediency are questions peculiarly within the province of the law-making power. I think that the policy of the State is clearly manifested in providing separate schools, separate churches and separate coach laws for the races. This has been the policy of the State of Arkansas consistently, and the passage of the act in question containing the clause referred to is in line with the policy adopted by the Legislature and the people of the State of Arkansas. The policy has been and is to separate the races, providing separate but equal accommodations for each race, and the decision of the majority has abrogated that part of the section that directed the board to locate the institution in the center of the negro population.

The proper construction of the statute is a question for the court, and it must confine itself to the construction of the law as it is, and not undertake to supply defective legislation under the guise of construction. It is the

duty of the court to carry out the intention and policy of the Legislature. The intention of the Legislature means the intention as expressed in the statute, and where the meaning of the language used is plain it must be given effect by the courts, or that would be assuming legislative authority. 36 Cyc. page 1103.

I believe the Legislature meant what it said, and I believe that the statute is mandatory. Where the provisions of a statute relating to public officers, tribunals or bodies are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory, but mandatory. It is not necessary that a statute should in direct terms declare the duty of an officer in order to make it an imperative one. 25 R. C. L., page 770.

I believe that the Legislature intended that the tuberculosis sanatorium for negroes should not be located among the whites, and I think that the Legislature would refuse to locate a tuberculosis sanatorium for white people among the negroes. One would be as bad as the other, and each, in my judgment, would be in violation of the policy of the State. I think in the passage of the law the Legislature recognized and knew it would be unwise to locate the negro institution in a white settlement or to locate a white institution in a negro settlement, and I think therefore that the selection by the board of the place in Saline County was a violation of the statute, and that a restraining order should have been granted.

Chief Justice HART and Mr. Justice HUMPHREYS agree with me in these conclusions.