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## Public Accommodations: What Is a Private Club?

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## Murphy Public Accommodations PUBLIC ACCOMMODATIONS: WHAT IS A PRIVATE CLUB?

A public accommodation is one which denies all businesses designed as public accommodations the right to exclude persons on the basis of race, religion, or national origin. It does not require a public accommodation to open its doors to *any* person. Rather, it prohibits a public accommodation from closing its doors to any person on account of his race, religion, or national origin. A person may be excluded on account of drunkenness, improper dress, lack of vacancy, or other reasonable grounds without violating a public accommodation law.<sup>1</sup> The federal government and more than two-thirds of the states have enacted such laws<sup>2</sup> to insure that discrimination because of race, religion, or national origin does not occur in places which provide facilities or services to the public.

The social need to which Congress and legislatures have responded is created by racial discrimination. Racial discrimination is a result of racial prejudice. But prejudice is a feeling and cannot be directly regulated by legislation. Discrimination, on the other hand, is an act, and it can be regulated. Proponents of public accommodation laws argue that discrimination is not only immoral and unconstitutional but also gives rise to a variety of diplomatic, economic, and social problems. Diplomacy of the United States is undermined when visitors to this country meet enmity and rejection from operators of public establishments and racial unrest tarnishes the American image abroad. From an economic viewpoint an incalculable amount of revenue is lost to business communities because of segregation.

Discrimination or segregation by establishments dealing with the interstate traveler subjects members of minority groups to hardship and inconvenience as well as humiliation, and in that way seriously decreases all forms of travel by those subject to such discrimination. The reluctance of industry to locate in areas where such discrimination occurs is another manifestation of the burden on our economy resulting from discriminatory practices. Employees do not wish to work in an environment where they will be subject to such humiliation.<sup>3</sup>

By far the most fundamental purpose of a public accommodation law is to meet the social problems of discrimination. The affronts to

<sup>1</sup>*E.g.* a race track does not violate a public accommodation law by excluding a person thought to be a bookie. *Madden v. Queens County Jockey Club*, 296 N.Y. 294, 72 N.E.2d 697 (1947) and cases there cited.

<sup>2</sup>Even though the federal government has entered the field, state and local laws retain their importance because the federal statute provides that relief under available state or local procedure must be sought before federal courts can obtain jurisdiction. 78 Stat. 244, 42 U.S.C. section 2000a-3. For a general discussion of state public accommodation laws, see CALDWELL, *State Public Accommodation Laws, Fundamental Liberties and Enforcement Programs*, 40 WASH. L. REV. 841 (1965). For a list of the state laws, see *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 259 n. 8 (1964).

<sup>3</sup>U. S. CODE CONG. & AD. NEWS 2731-2 (July, 1964).

human dignity through racial discrimination, without more, demonstrate sufficient social need for a public accommodation law.

Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment.<sup>4</sup>

Against public accommodation laws are asserted traditional rights of private property and free association. Courts have recognized that the right of association is protected by the First Amendment. The United States Supreme Court has said that freedom of association "is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. . . ."<sup>5</sup> Justice Goldberg has further defined the rights of private property and free association by pointing out that a person may be excluded from private property on the basis of racial prejudice.

Prejudice and bigotry in any form are regrettable, but it is the constitutional right of every person to close his home or club to any person or to choose his social intimates and business partners solely on the basis of personal prejudices including race.<sup>6</sup>

The right to exclude persons from private property, however, is not the same where the property is used to offer facilities or services to the public. At common law if the owner of private property devoted it to use as a public establishment, he could not refuse to deal with any member of the public because of that member's race, religion, or national origin.<sup>7</sup> It was reasoned that those who employ their private property for purposes of commercial gain by offering services or facilities to the public have the duty to offer them to the entire public. And individuals have the corresponding right to use the services or facilities. The same reasoning applies to public accommodation laws.<sup>8</sup> Only *public* establishments are denied the right to exclude on the basis of race, religion, or national origin. Private facilities are exempt from all public accommodation laws either explicitly<sup>9</sup> or by reference to public facilities only.<sup>10</sup> The typical explicit exemption is to the effect that the law does not apply to a bona fide private club or other facility which is distinctly private and not in fact open to the public. The

<sup>4</sup>*Id.* at 2370.

<sup>5</sup>*Evans v. Newton*, 382 U.S. 296, 296 (1966).

<sup>6</sup>*Bell v. Maryland*, 378 U.S. 226, 313 (1964) (concurring opinion).

<sup>7</sup>21 HALSBURY, LAWS OF ENGLAND, section 941 (3rd ed. 1958).

<sup>8</sup>*Heart of Atlanta Motel v. United States*, *supra* note 2, at 258-261. In this case the U. S. Supreme Court upheld the constitutionality of the Civil Rights Act of 1964.

<sup>9</sup>*E.g.*, REVISED CODES OF MONTANA (hereafter cited R.C.M.), 1947, section 64-302(e) and 78 State. 243, 42 U.S.C. section 2000 (e).

<sup>10</sup>*E.g.*, OHIO REV. CODE ANN. section 2901.35-2901.36.

private club exemption meets the thrust of the argument based on rights of association and private property. The problem for the courts is to determine what facilities are genuinely private.

### THE STATUTES

All public accommodation laws are similar in structure and content. The body of the act is a detailed list of the facilities considered "public accommodations," usually subdivided into groups with similar characteristics such as hotels, motels, and boarding houses or theaters, movie-houses, and sports arenas. Following this list is usually a single sentence which says little more than private clubs are not places of public accommodation.<sup>11</sup> The Montana and federal statutes are typical.

The Montana public accommodation law, enacted in 1965, defines "place of public resort, accommodation, assemblage, or amusement" to include hotels, motels, restaurants, gas stations, theaters, hospitals, places for public conveyance, educational institutions receiving public funds, and so on.<sup>12</sup> The last section of the act provides that "nothing herein contained should be construed to include, or apply to, any institute, bona fide club, or place of accommodation which is by its nature distinctly private. . . ."<sup>13</sup>

The first effective federal public accommodation law is Title II of the Civil Rights Act of 1964. It defines "public accommodation" to include: (1) any hotel or other establishment which provides lodging to transient guests, except a proprietor-occupied building of not more than five rooms; (2) any facility engaged in selling food for consumption on the premises and gas stations; (3) any theater or stadium; and (4) other establishments located within, or within which is located a covered establishment; provided their operation affects interstate commerce or they engage in discrimination or segregation supported by state law.<sup>14</sup> The private club exemption, which follows the list of public accommodations, expressly exempts

a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons within the scope of subsection (b) of this section.<sup>15</sup>

<sup>11</sup>The 1966 Kentucky Civil Rights Act is an exception. The private club exemption states that "a private club is not a place of public accommodation if its policies are determined by its members and its facilities or services are available only to its members and their bona fide guests." 1966 KENTUCKY ACTS, ch. 2, section 402 (a) (1). Although this definition may prove to be too broad since it requires only two elements (policies determined by members and club open only to members and guests), it seems much more practical to define in the statute what is meant by "private club," rather than merely state that it is not a place of public accommodation.

<sup>12</sup>R.C.M., 1947, section 64-302.

<sup>13</sup>R.C.M., 1947, section 64-302(e).

<sup>14</sup>78 Stat. 243, 42 U.S.C. section 2000a(b).

<sup>15</sup>78 Stat. 243, 42 U.S.C. section 2000a(e).

The federal act does not state a test for determining what is a private club. The only hint of a test in the language of the exemption is whether the establishment is "not in fact open to the public," but this language is merely a definition of the word "private." Similarly, under the Montana statute the only hint of a test is whether the establishment is a "bona fide club . . . which is by its nature distinctly private." What is a club distinctly private in nature? When is an establishment not in fact open to the public? How should a court deal with elements other than those based on privacy (e.g. profit, taxes, or advertising) in determining whether an establishment is a private club?

The court in any public accommodation case is faced with a delicate balance. If every establishment is determined to be a public accommodation, constitutionally protected rights of free association and private property will be violated. On the other hand, if the private club exemption is construed loosely, the purpose of the act—to rid society of discrimination in public places—will be thwarted. In determining this balance, courts are left without a statutory guideline. They must look to other cases deciding whether a purported club is genuine and rely on common sense. The purpose of this paper is to formulate a definition of "private club" by examining in detail the characteristics considered by courts in determining whether an establishment qualifies for the private club exemption.<sup>16</sup>

### CHARACTERISTICS OF A PRIVATE CLUB

The generally accepted criteria for determining whether a purported club is genuine can be divided into four groups: (1) membership; (2) reasons for formation; (3) finances; and (4) publicity. Membership, the most frequently emphasized criterion, can be further divided into: (1) admission policies; (2) use of the club by persons other than members or guests; (3) control of the members; and (4) size of the membership. The following discussion treats each of the foregoing characteristics separately.

#### *Membership: Admission Policies.*

As pointed out in the Senate debates, the purpose of the private club exemption in the federal act is to protect only "the genuine privacy of private clubs . . . whose membership is genuinely selective."<sup>17</sup> Selectivity is the cornerstone of a private club. If white persons become members by signing a membership card while Negroes are required to pay a fee and file a long application which is eventually rejected, the

<sup>16</sup> "[I]t is impossible to determine the scope of the private club exemption by listing types of facilities, for the legitimate exclusiveness of such clubs is more a function of their internal order than of the activity which they sponsor." VAN ALSTYNE, *Civil Rights: A New Public Accommodation Law for Ohio*, 22 OHIO ST. L. J. 683, 688 (1961).

purported club will not be considered genuine. In *United States v. Jack Sabin's Private Club*<sup>18</sup> the operator of a restaurant and lounge incorporated and provided in the articles of incorporation for membership cards and such membership fee as should be set by the board of directors. But qualifications for membership were not set up, nor was a membership fee ever required. White persons were never refused admission, regardless of whether they possessed a membership card; but Negroes were refused on the ground that they were not members. The court held that this lack of selectivity resulted in the "club" having "no members whatsoever,"<sup>19</sup> and the facility was in fact open to the public. In *Lackney v. Sacoolas*<sup>20</sup> a "private swim club" was held to be a public accommodation on the ground that membership was granted to all white persons without any formality other than payment of a fifty cent fee. Negroes were refused admission because they were not members, and applications filed by Negroes were rejected "in a matter of days."<sup>21</sup> The purported club in *Castle Hill Beach Club v. Arbury*<sup>22</sup> was run as a commercial enterprise until 1950 when it was converted into a membership corporation. Persons who had used the facility before that time were automatically admitted as members by paying a charge for the season. Persons who desired to become new members were required to file an application before paying the fee. In holding the beach club to be a public accommodation, the court emphasized the lack of selectivity in admitting members, saying,

. . . although it is claimed that the membership corporation was formed to enable the management to exclude undesirable persons, no effort was made to screen applicants—there was no interview, no investigation, and no sponsorship. Applicants, [if white,] were admitted as a matter of course.<sup>23</sup>

In *In re Holiday Sands*<sup>24</sup> the president of the club, which was held to be a public accommodation, was asked what criteria were used to determine membership. He answered:

Well, the main thing they have to appear like they aren't sick and like nothing is wrong with their skin. We have to kind of judge whether they are trouble makers. If we smell liquor on their breath, they don't get in. If they swear that they don't want to buy the place for the price of a membership, we don't let them in. If they just look dirty, we kind of judge our own members.<sup>25</sup>

<sup>18</sup>265 F. Supp. 90 (1967).

<sup>19</sup>*Id.* at 94.

<sup>20</sup>411 Pa. 235, 191 A.2d 395 (1963).

<sup>21</sup>*Id.* at 397.

<sup>22</sup>2 N.Y.2d 596, 142 N.E.2d 186 (1957).

<sup>23</sup>*Id.* at 189.

<sup>24</sup>9 RACE REL. L. REP. 2025 (Ohio Civ. Rights Comm., 1964).

<sup>25</sup>*Id.* at 2028. With very little discussion the court indicated that this admission standard, if it is any standard at all, could not be taken to evidence *genuine*

A Negro minister in *Nesmith v. YMCA*<sup>26</sup> was rejected as an applicant for membership in the Men's Athletic Club of the Raleigh, N. C. YMCA on the grounds that he was "insincere."<sup>27</sup> Under the constitution of the YMCA, application is available to "any person of good moral character who subscribes to the Association's purposes."<sup>28</sup> A membership committee existed, but there were no procedures governing its activities and no regularly used qualifications for membership. Of 1300 applications in one year, 99% of the white applicants were accepted while 100% of the Negroes were rejected.<sup>29</sup> The court found that the Athletic Club, "with no standards for admissibility, is simply too obviously unselective in its membership policies to be adjudicated a private club."<sup>30</sup>

In *Gardner v. Vic Tanny Compton, Inc.*,<sup>31</sup> under the public accommodations law then in effect in California,<sup>32</sup> a gymnasium was held to be a private facility not covered by the statute. The decision was based on the gym's admission policies. The general public was invited to apply, but the court found that the screening process, which included a personal interview with the gym's manager was genuine, not designed merely to exclude Negroes, but to exclude those who were not seriously concerned with improving their physical condition or who had a history of physical or mental problems.<sup>33</sup>

*Membership: Use of Club by Nonmembers.*

A genuine private club limits the use of club facilities or services to members and bona fide guests. In many cases there is evidence that white persons, at least part of the time, are admitted without even a pretense of becoming members.<sup>34</sup> In *Castle Hill Beach Club v. Arbury*, for example, the court noted that the clubhouse and swimming facilities were used by a public day camp during the summer.<sup>35</sup> And in *United States v. Jack Sabin's Private Club* white nonmembers were allowed to use the restaurant and lounge as a matter of course.<sup>36</sup> In *Gillespie v. Lake*

<sup>26</sup>397 F.2d 96 (1968).

<sup>27</sup>*Id.* at 97.

<sup>28</sup>*Id.* at 101.

<sup>29</sup>*Id.*

<sup>30</sup>*Id.* at 102.

<sup>31</sup>182 Cal. App.2d 506, 6 Cal. Rptr. 490 (1960).

<sup>32</sup>The law was revised in 1959 after the action in *Gardner* was commenced, but was not significantly changed. CALIF. CIVIL CODE sections 51 and 52.

<sup>33</sup>*Id.* at 492. The gymnasium in *Gardner* was operated for profit and new members were actively solicited. It was not a club, but a business. The statute refers to public facilities only, and does not expressly exempt a private establishment. Although solicitation of memberships and the profit motive are generally inconsistent with a truly private facility (*see text infra* at note 64), the case indicates that a business which seeks new members may be a private facility if membership is sufficiently selective.

<sup>34</sup>*See generally*, *Fletcher v. Coney Island, Inc.*, 121 N.E.2d 574 (Ohio, 1954); *In re Lanape Swin Club*, 5 RACE REL. L. REP. 475 (Pa. C.P. 1959); *Jake Brown's Barbecue Club*, 10 RACE REL. L. REP. 452 (Kan. Comm. on Civ. Rights, 1965).

<sup>35</sup>*Supra* note 22, at 191.

<sup>36</sup>*Supra* note 18.

*Shore Golf Club, Inc.*,<sup>37</sup> while Negroes were excluded entirely, white nonmembers were permitted to play golf on the course by paying a seventy-five cent fee. The court, with little discussion, decided that "it requires no citation of authority that places of public amusement cannot discriminate between members of the public seeking the right to enjoy the facilities of such places of amusement on the ground of race or color."<sup>38</sup>

#### *Membership: Control.*

Another factor which courts use to determine whether a purported club is genuine is the control of members over the operation of the club. If the policy decisions are made by a manager, owner, or nucleus of members, there is reason to suspect that there is no "club" at all.<sup>39</sup> In *United States v. Jack Sabin's Private Club* "members" participated only by using the restaurant in the same way as they would any other restaurant.<sup>40</sup> In *Castle Hill Beach Club v. Arbury* the bylaws had not been submitted to the members for approval and only six members had the right to vote.<sup>41</sup> And in *Nesmith v. YMCA* the court noted that an organization can "hardly be a private association where the members do not meet together."<sup>42</sup> But an active membership is not conclusive of private club status. In *Brackeen v. Ruhlman*,<sup>43</sup> for example, the members kept minutes and records of their meetings, had a club newspaper, sent a representative to skating championships, and held a skating revue, the proceeds of which went to charity. But the court characterized it as a business which was owned by one man and carried on county records as a place of "public amusement, recreation, and entertainment."<sup>44</sup>

#### *Membership: Size.*

Inherent in the concept of a private club is the idea that there must be some basis for intimacy of association among all the members. Where membership is unlimited, it is logical to conclude that so such basis exists. In *Castle Hill Beach Club v. Arbury* the only limitation was the size of the facility—13,000 seasonal members.<sup>45</sup> In *United States v.*

<sup>37</sup>91 N.E.2d 290 (Ohio Ct. App., 1950).

<sup>38</sup>*Id.* at 292.

<sup>39</sup>The degree of membership control is closely related to the reason for formation of the club (*see text infra* at notes 50 to 63) and whether it is operated for profit (*see text infra* at notes 64 to 67).

<sup>40</sup>*Supra* note 18. *See also, Gillespie v. Lake Shore Golf Club, supra* note 37, where a former proprietor retained effective control; and *In re Lanape Swim Club, supra* note 34, where the owner-operator did all negotiating for a corporate charter under which only five persons would have voting power.

<sup>41</sup>*Supra* note 22.

<sup>42</sup>*Supra* note 26, at 102.

<sup>43</sup>3 RACE REL. L. REP. 45 (Pa. C.P. 1957).

<sup>44</sup>*Id.* at 48.

<sup>45</sup>*Supra* note 22, at 187.

*Jack Sabin's Private Club* 12,000 membership cards had been issued and many other white persons used the facility without membership cards.<sup>46</sup> An establishment which offered swimming, boating, picnicking, and sunbathing in *Daniel v. Paul*<sup>47</sup> required payment of twenty-five cents for yearly membership. Negroes were refused admission on the ground that membership was full. In holding that the establishment was not a private club, the court noted that no membership lists were kept, that the size of the membership was unlimited, and that the operator of the facility was not certain of the number of members.<sup>48</sup> Primary emphasis was placed by the court in *Nesmith v. YMCA* on the size of the purported club. In determining the genuineness of the athletic club, the court said "the first factor is the size of the organization and the open ended character of its membership rolls."<sup>49</sup> The common bond of the 2,696 members in the YMCA was an interest in athletic activities, but since new members were continually sought and meetings were never held, the common interest was in the use of the facility rather than an intimacy of association with the people who were making such use. Although large size is not conclusive in determining whether a purported club is a public accommodation, it is a strong indication of public accommodation status because of its connection with (1) the degree to which voices of individual members are likely to be heard, (2) the associational interest of the members, and (3) the qualifications for admission.

#### *Reasons for Formation.*

The original version of the private club exemption in the Civil Rights Act of 1964 granted the exemption to a "bona fide private club."<sup>50</sup> The final version exempts "a private club or other establishment not in fact open to the public."<sup>51</sup> In the Senate debate on the private club exemption, Senator Long indicated the reason for the change.

Its purpose is to make clear that the test of whether a private club is exempt from Title II relates to whether it is, in fact, a private club, or whether it is, in fact, an establishment not open to the public. It does not relate to whatever purpose or animus the organizers may have had in mind when they originally brought the organization or establishment into existence.<sup>52</sup>

<sup>46</sup>*Supra* note 18, at 91.

<sup>47</sup>263 F. Supp. 412 (1967) *aff'd*, 395 F.2d 118 (1968). The federal district court held that the establishment was not a private club, but that it did not fall within any of four categories designated by Congress as "public accommodations" which affect commerce within the meaning of the Civil Rights Act of 1964. The circuit court agreed, but devoted nearly all its discussion to whether it was a public accommodation within the federal act. Because the question of private club status was discussed by the district court at length, citations in this paper are to the district court decision. The U.S. Supreme Court granted review of the case, but the question of private club status is not presented. 37 L.W. 3205 (December 10, 1968).

<sup>48</sup>263 F. Supp. 412, 417 (1968).

<sup>49</sup>*Supra* note 26, at 102.

<sup>50</sup>H.R. 7152, 88th Cong., 1st Sess. section 201(c) (1963).

<sup>51</sup>78 Stat. 243, 42 U.S.C. 2000a(e).

<sup>52</sup>110 Cong. Rec. 13697 (1964).

Despite the change in the exemption, some federal courts, in cases under the Civil Rights Act, have examined the state of mind of the organizers. In *United States v. Northwest Louisiana Restaurant Club*<sup>53</sup> approximately one hundred restaurants incorporated as a private, non-profit, corporation issuing non-voting memberships to individuals whom the owners wished to serve. The court found that white persons were admitted to the restaurants regardless of whether they had a membership card, and Negroes were denied admission because they were not members.<sup>54</sup> With only a cursory examination of membership practices and without considering other characteristics of a private club, the court enjoined further operation of the corporation on the ground that the sole intent in its formation was to evade the public accommodations section of the Civil Rights Act.<sup>55</sup> In *Daniel v. Paul*, although the court considered membership policies, finances, and other factors, it noted that the owner attempted to attain private club status because he feared loss of business if he served Negroes.<sup>56</sup> The United States Court of Appeals for the Fourth Circuit,<sup>57</sup> however, recently emphasized in *Nesmith v. YMCA* that the reason an organization was formed is not a consideration.<sup>58</sup> "The fact that the *modus vivendi* of the organization has been the same in past years and is not a recently devised subterfuge to circumvent the 1964 Act is irrelevant."<sup>59</sup>

Under state public accommodation laws the reason for formation of a purported club is usually a consideration.<sup>60</sup> In *Castle Hill Beach Club v. Arbury*,<sup>61</sup> *Gillespie v. Lake Shore Golf Club*,<sup>62</sup> and *Sutton v. Capital Club*<sup>63</sup> the courts considered at length the purpose of reorganizations, concluding that the reason for attempting to assume private club status was to exclude Negroes.

### *Finances.*

A principle applied consistently by the courts in determining the genuineness of a private club is to look for the profit motive, and, if one is found, to determine who derives the benefit of the profit. Operating an establishment for profit is inconsistent with small size and intimacy of association since good business judgment requires as large a patronage as possible. Moreover, the customer-proprietor relationship

<sup>53</sup>256 F. Supp. 151 (1966). See also, 62 N.W.U.L.REV. 244 (recent decision, 1967).

<sup>54</sup>256 F. Supp. 151, 153.

<sup>55</sup>*Id.* at 153-54.

<sup>56</sup>*Supra* note 48, at 417.

<sup>57</sup>Neither *Northwest* nor *Daniel v. Paul* arose in the Fourth Circuit.

<sup>58</sup>*Supra* note 26, at 101.

<sup>59</sup>*Id.* at 102.

<sup>60</sup>*E.g.*, see Montana's act at note 10, *supra*; N.Y. CIV. RIGHTS LAW, sections 40 and 41; OHIO REV. CODE ANN., sections 4112.01 to 4112.99.

<sup>61</sup>*Supra* note 22.

<sup>62</sup>*Supra* note 37.

<sup>63</sup>10 PAGE REP. L. REP. 791 (E.D. Ark., 1965).

is the kind of relationship which a public accommodation law is designed to cover, not exempt from coverage. In many cases courts have recognized that the manager or officers of a genuine club are paid a reasonable salary for their services, with any profit returned to the members or directly to their benefit.<sup>64</sup> In *United States v. Jack Sabin's Private Club* and *Jake Brown's Barbecue Club* the establishments were operated as ordinary restaurants with all profits retained by the owners.<sup>65</sup> In *Castle Hill Beach Club v. Arbury* the corporation which leased the beach club took as rent the full receipts of the club, less expenses and taxes.<sup>66</sup> And in *Gillespie v. Lake Shore Golf Club*, although the former proprietor had ostensibly subleased the golf course to the club, he received all of the income and paid all expenses.<sup>67</sup>

An unusual aspect of club finances arose in *Nesmith v. YMCA* where the organization was non-profit but financed partly by public contributions. After discussing the unselective admission policies and the lack of general meetings, the court said:

Lastly, and most revealingly, we note that more than 20 percent of the operating funds for the allegedly private athletic building is provided by the United Fund.<sup>68</sup>

Other aspects of club financing to be considered are the types of licenses held and taxes paid by the purported club. Liquor licenses and other permits are often available at lower rates for private clubs than those charged for public accommodations, and the Internal Revenue Code<sup>69</sup> provides an exemption for clubs operated for pleasure, recreation, and other non-profit purposes. In *Castle Hill Beach Club v. Arbury* the court emphasized that the purported club held a public bathing establishment license and a commercial beer license even though these licenses were available at lower rates for genuine private clubs.<sup>70</sup> Nor did the establishment take advantage of the income tax exemption allowed to private clubs.<sup>71</sup>

### *Publicity.*

A genuine private club is non-profit and membership is limited and highly selective. Advertising designed to increase patronage, there-

<sup>64</sup>*E.g.*, *Bradshaw v. Whigham*, 11 RACE REL. L. REP. 934 (S.D.Fla., 1966); *Delaney v. Central Valley Golf Club*, 28 N.Y.S.2d 932 (1941); *Sun & Splash Club v. Division Against Discrimination*, 3 RACE REL. L. REP. 726 (N.J.Super. Ct. 1957).

<sup>65</sup>*Supra* notes 18 and 34.

<sup>66</sup>*Supra* note 22, at 187.

<sup>67</sup>*Supra* note 37, at 292.

<sup>68</sup>*Supra* note 26, at 102.

<sup>69</sup>26 U.S.C. section 501(7).

<sup>70</sup>*Supra* note 22, at 191.

<sup>71</sup>*Id.* See also, Att'y Gen. of Mich., Op. No. 3041 (1957) in 2 RACE REL. L. REP. 1046 (1957) where Michigan's Attorney General considered the fact that "private" golf courses hold commercial liquor licenses to be proper and strong evidence of a public accommodation.

fore, is necessarily inconsistent with private club status. The advertising, by billboard and newspaper, in *United States v. Jack Sabin's Private Club* "clearly invited the public to dine at this establishment."<sup>72</sup> The YMCA in *Nesmith v. YMCA* solicited memberships by a brochure which invited the public to participate in activities offered by the establishment.<sup>73</sup> And the facility in *Castle Hill Beach Club v. Arbury* was listed in the telephone book under "Bathing Beaches—Public" rather than "Clubs."<sup>74</sup> The lack of advertising, however, will not be determinative of private club status. In *In re Holiday Sands, Inc.*, for example, the Ohio Civil Rights Commission noted in passing that the purported club "has not had any paid advertising; never advertised as a public beach; is not listed in the telephone book; and road signs carry only the club name."<sup>75</sup> Nevertheless, the "club" was held to be a public accommodation because it was operated for profit and had no standard membership policies.<sup>76</sup>

### CONCLUSION

Although the number of cases decided under private club exemptions to public accommodation laws is not large, it is possible to suggest some principles basic to the decisions. The starting point for determining whether a club is genuine is an examination of membership policies. If the only persons who cannot walk through the door of the club without question are Negroes, a court will have little difficulty in deciding that the club is, in fact, open to the public. Where use of the club is limited to members, the criteria for membership must be examined. If applications, membership committees, and screening procedures are used without defined standards and operate only to exclude members of a particular religious or racial group, the presumption arises that the "club" is a sham. If new members are solicited and applications are approved as a matter of course, the "club" will not qualify as distinctly private in nature. Genuine selectivity requires not only that definite standards for admission be set up and practiced, but also that the standards be based on an intimacy of association common to all members.

In order to be private, the membership of an establishment must be limited and highly selective; in order to be a club, it must be operated and controlled by the members for their own benefit. If an individual or small group of individuals make a profit at the members' expense, the members' benefit is not likely to be the primary purpose of the organization. If the members have no voice in policies or activities of the organization, it cannot be said to exist because of their interests.

<sup>72</sup>*Supra* note 18, at 93. See also, *Jake Brown's Barbecue Club*, *supra* note 34; *Fletcher v. Coney Island, Inc.*, *supra* note 34.

<sup>73</sup>*Supra* note 26, at 99.

<sup>74</sup>*Supra* note 22, at 190.

<sup>75</sup>*Supra* note 24, at 2026.

<sup>76</sup>*Id.* at 2027.

The private club cases which have come before the courts so far have not involved complex fact situations. They have not been "close" cases, and the private club label has usually been an obvious sham. For this reason, a comprehensive definition of "private club" has not been developed by any one court. In *Daniel v. Paul*, for example, the court said:

Defendants' claims of exemption as a private club will be rejected out of hand. The Court finds it unnecessary to attempt to define the term "private club" . . . because the Court is convinced that neither Lake Nixon nor Spring Lake would come within the terms of any rational definition of a private club which might be formulated in the context of an exemption from the coverage of the Act.<sup>77</sup>

Nevertheless, a definition of "private club," in terms of its characteristics, emerges when the cases concerned with a private club exemption are taken together. Therefore, the following definition is suggested: A private club is an organization (1) formed because of a common associational interest among the members; (2) which carefully screens applicants for membership and selects new members with reference to the common intimacy of association; (3) which limits the facilities or services of the organization strictly to members and bona fide guests; (4) which is controlled by the membership in general meetings; (5) which limits its membership to a number small enough to allow full membership participation and to insure that all members share the common associational bond; (6) which is non-profit and operated solely for the benefit of the members; and (7) whose publicity, if any, is directed only to members for their information.

Although one or more of the foregoing characteristics may be emphasized in any factual situation, each will become increasingly important in the future. As more cases are decided in which it is necessary to determine whether a purported club is genuine, the standards of permissible conduct will become more clearly established. And as these standards are defined, increasingly complex factual situations will arise which will require very detailed examination.

JAMES P. MURPHY, JR.



